Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20 (15 May 2008)

Last Updated: 21 November 2008

HIGH COURT OF AUSTRALIA

GLEESON CJ

GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

ALAN GRIFFITHS ON BEHALF OF THE

NGALIWURRU AND NUNGALI PEOPLES

AND ANOR APPELLANTS

AND

MINISTER FOR LANDS, PLANNING

AND ENVIRONMENT AND ANOR RESPONDENTS

Griffiths v Minister for Lands, Planning and Environment

[2008] HCA 20

15 May 2008

D8/2007

ORDER

1. Appeal dismissed.

2. Appellants to pay the costs of the first respondent.

On appeal from the Supreme Court of the Northern Territory

Representation

S J Gageler SC with S A Glacken for the appellants instructed by (Northern Land Council)

D F Jackson QC with R J Webb QC for the first respondent (instructed by Solicitor for the Northern Territory)

Interveners

R G Orr QC with M A Perry QC intervening on behalf of the Attorney-General for the Commonwealth of Australia (instructed by Australian Government Solicitor)

R J Meadows QC Solicitor-General for the State of Western Australia with G J Ranson intervening on behalf of the Attorney-General for the State of Western Australia (instructed by State Solicitor for Western Australia)

M G Sexton SC Solicitor-General for the State of New South Wales with S B Lloyd intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW)

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

CATCHWORDS

Griffiths v Minister for Lands, Planning and Environment

Real property - Compulsory acquisition - Section 43(1) of *Lands Acquisition Act* (NT) ("LAA") empowered Minister, subject to LAA, to compulsorily acquire land "for any purpose whatsoever" - Whether s 43(1) of LAA conferred power on Minister to acquire land solely to enable it to be sold or leased for private use.

Aborigines - Native title - Compulsory acquisition of native title rights and interests - Section 11(1) of *Native Title Act 1993* (Cth) ("NTA") provided that native title could not be extinguished contrary to NTA - At time of notification of compulsory acquisition appellants had commenced proceedings for determination of native title to lots - Lots otherwise consisted of vacant Crown land - Whether s 24MD(2) of NTA permitted extinguishment of native title by compulsory acquisition when no non-native title rights and interests subsisted.

Statutes - Construction - Compulsory acquisition of native title interests - Whether s 43(1) of LAA conferred power on Minister to acquire interests including native title interests - Whether statute so providing is subject to interpretive principle that acquisition of native title interests must be stated in clear and plain terms - Whether distinction drawn between acquisitions for governmental and non-governmental purposes.

Aborigines - Native Title - Compulsory acquisition of native title rights and interests - Nature of such native title interests in Australian law - Whether such interests do or may include special features arising from spiritual, cultural or social connection between native title owners and their land - Communal character of native title - History of denial and later recognition of native title rights and interests in land in Australia - Whether such special characteristics of native title rights and interests import requirement for express provisions in legislation for compulsory acquisition of such rights and interests - Whether the LAA sufficiently or

at all provides for acquisition of native title rights or interests in circumstances of the present case.

Words and phrases - "compulsory acquisition", "native title".

Lands Acquisition Act (NT), ss 5A, 43(1).

Native Title Act 1993 (Cth), ss 11(1), 24MD(2), 223.

1. GLEESON CJ. I agree with the orders proposed by Gummow, Hayne and Heydon JJ, and with their reasons ("the joint reasons") for those orders. I would make the following additional observations about the second issue dealt with in those reasons, that is, the construction of s 24MD(2)(b) of the *Native Title Act 1993* (Cth).
2. Section 24MD(2) provides for the extinguishment of native title on just terms as to compensation if: "(a) the act is the compulsory acquisition of the whole or part of any native title rights and interests under a law of the Commonwealth, a State or a Territory that permits both: (i) the compulsory acquisition by the Commonwealth, the State or the Territory of native title rights and interests; and (ii) the compulsory acquisition by the Commonwealth, the State or the Territory of non-native title rights and interests in relation to land or waters; and (b) the whole, or the equivalent part, of all non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests; and (ba) the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired[.]"
3. The evident concern of these three conditions of the operation of the substantive provisions of s 24MD(2) relating to extinguishment of native title rights and interests, and compensation, is to avoid racial

discrimination. Paragraphs (a), (b) and (ba) address potential kinds or sources of discrimination.

4. The argument for the appellants fastens upon the word "all" in par (b). The appellants submit that the condition expressed in par (b) can only be satisfied where there are some non-native title rights and interests in the subject land, and they also are acquired. Textually, the argument is inconclusive. There are many contexts, including legislative contexts, in which the word "all" means "any and all". To say, for example, that a company may qualify for a certain order relating to the administration of its affairs only if it has paid all its debts does not disqualify a company that has never traded and therefore never had any debts. Context and purpose will determine whether satisfaction of a condition that all non-native title rights and interests also be acquired is rendered impossible by the circumstance that there are no such rights and interests to acquire.
5. Such a circumstance, if it exists, would appear to be fortuitous, and unrelated to any discernible legislative object. There is, no doubt, a great deal of land in the Northern Territory in which there are no interests other than native title interests. The same is probably true of Western Australia. How would it advance a legislative purpose against discrimination to distinguish between such land and land where there is a single, perhaps relatively unimportant, non-native title right or interest? Why should the existence of, say, a short-term unregistered lease mean that, during the subsistence of the lease, par (b) could be satisfied, but, upon expiry of the lease, par (b) could not be satisfied? The legislative purpose is against discrimination and discriminatory acquisition. To make the presence or absence of a non-native title right or interest of any kind determinative of the application of s 24MD(2) does not advance that purpose.
6. It may be added that whether or not any non-native title right or interest exists at any particular time could be a matter of uncertainty. Such rights and interests may not be known at the time of acquisition. It is difficult to accept that there was a legislative acceptance of a possibility with such obvious adverse consequences for reasonable certainty and predictability in land management.
7. The construction for which the appellants contend appears to produce a curious, in fact inexplicable, new form of discrimination between different kinds of native title rights and interests: those that

co-exist with non-native title rights and interests, and those that do not. The former, according to the appellants, are subject to extinguishment by s 24MD(2), whereas the latter are not. Discrimination is judged by making comparisons. The comparisons required by pars (a), (b) and (ba) respectively are different, but all are directed to the same ultimate question: whether, in the compulsory acquisition of native title rights and interests, there is equality of treatment between native title and non-native title rights and interests. That question is capable of being answered by postulating the existence of non-native title rights and interests and asking how they would be affected. It does not require the identification of actual rights or interests and demonstration of how they are affected.

8. The aim of the legislation is not to ensure that every time some native title rights and interests (regardless of their nature and extent) are acquired there will also be some non-native title rights and interests (regardless of their nature and extent) that also must be acquired. That would be a crude form of equality, but not one that advanced any rational objective. The construction contended for by the first respondent and the interveners better fits the statutory context, the history (as explained in the joint reasons) and the legislative purpose.

9. GUMMOW, HAYNE AND HEYDON JJ. This appeal from the Northern Territory Court of Appeal[1] (Martin CJ, Mildren and Riley JJ) concerns land at the Town of Timber Creek which is situated at the junction of the Victoria River and Timber Creek in the north-west of the Territory. The Town largely comprises unalienated "Crown land" within the meaning of that term in the *Crown Lands Act* (NT) ("the CLA"). The Crown land is unaffected by any interest or tenure which might be called "ordinary title", but this appeal was conducted on the footing that there exists with respect to that Crown land "native title" within the meaning given to that expression by s 223 of the *Native Title Act 1993* (Cth) ("the NTA").

10. The term "Crown lands" is defined in s 3 of the CLA as meaning: "all lands of the Territory, including the bed of the sea within the territorial limits of the Northern Territory, and including an estate in fee simple that is registered in the name of the Territory, but does not include reserved or dedicated lands". Section 4 imposes a general bar upon the alienation of "Crown lands" otherwise than in pursuance of

that statute; this reflects for the Territory the general position in Australia that the authority of the executive to dispose of Crown lands must be derived from statute[2]. Section 9 empowers the Minister (the first respondent) in the name of the Territory, but subject to the CLA, by instrument in the appropriate form to grant an estate in fee simple in or lease of vacant Crown land. The vacant Crown land in the Town of Timber Creek in which there exists native title includes certain Lots ("the Lots") in respect of which the Minister proposes to acquire compulsorily that native title. The purpose of doing so is to enable the Lots then to be alienated by the Territory by sale or lease for private use in the manner described later in these reasons.

11. To bring about the acquisition the Minister relies upon provisions of the *Lands Acquisition Act* (NT) ("the LAA"). Section 43(1) of the LAA empowers the Minister, subject to that statute, to acquire compulsorily land "for any purpose whatsoever" by causing to be published in the *Gazette* a notice declaring the land to be acquired. That power is conditioned upon compliance with applicable pre-acquisition procedures specified in Pts IV (ss 31B-41) and IVA (ss 42-42D) of the LAA. The term "land" is defined in s 4 as including an "interest" in land which in turn is defined as including "native title" rights and interests within the meaning of s 223 of the NTA. Upon publication in the *Gazette* of a notice of acquisition, "the land" described therein vests in the Territory freed and discharged from all interests and restrictions of any kind (s 46(1)).

12. Section 5A(1) provides that the LAA applies in relation to an acquisition of an interest in land comprising native title rights and interests, being an acquisition which is an "act" to which there apply the consequences set out in sub-ss (6A) or (6B) of s 24MD of the NTA. It will be necessary to refer further to the NTA but it should be indicated here that the appeal in this Court turns upon the interaction between the NTA and the LAA, one a law of the Commonwealth and the other a law of the Territory. This is foreshadowed by the above provisions which link acquisitions under the LAA to s 24MD of the NTA.

13. Section 24MD(6A) gives to native title holders the same procedural rights in relation to a compulsory acquisition under Territory law as they would have as holders of ordinary title to the land in question

and to any adjoining land. Section 24MD(6B) assumes that the purpose of that compulsory acquisition may be the conferral in relation to the land concerned of rights and interests upon persons other than the Territory; in such cases, special provision is made for the determination of objections by an "independent body", but compliance by the Territory with that recommendation is not mandated in all circumstances.

14. Pursuant to the pre-acquisition procedures provided in Pt IV of the LAA, in 2000 the Minister notified the appellants (Alan Griffiths and William Gulwin on behalf of the Ngaliwurru and Nungali Peoples) of proposals to acquire all interests including native title rights and interests (if any) in the Lots. Thereafter some of the Lots were to be dealt with by granting Crown leases to Warren Pty Ltd for agricultural purposes of a commercial nature, including cattle husbandry and goat breeding, and other Lots were to be offered at public auction for the grant of Crown leases and use for "commercial/tourism development". That purpose appears to have engaged s 24MD(6) of the NTA.
15. Conformably with the NTA, s 34 of the LAA (which is in Pt IV) provides for the making of objections to proposed acquisitions. The objections by the appellants were heard by the Lands and Mining Tribunal ("the Tribunal")[3] and on 22 March 2002 the Tribunal recommended in favour of the compulsory acquisition of the native title but subject to conditions designed: "to ensure that in due course in the event that native title is indeed determined by the Federal Court to have existed (but for the acquisition and consequent extinction of native title) the Northern Territory is possessed of an amount which at least hopefully will be equal to or a major contribution towards any compensation which would fall to be paid by the Northern Territory Government as a consequence of such determination".
16. In the meantime, the appellants had commenced on 10 December 1999 proceedings in the Federal Court under s 13 of the NTA for a determination of native title to vacant Crown land situated within the Town. A determination was made on 28 August 2006[4]. The Full Court of the Federal Court varied the determination in the appellants' favour on 22 November 2007[5].
17. On 1 June 2002 the Minister accepted the recommendations of the

Tribunal. The appellants then commenced proceedings in the Supreme Court of the Northern Territory to set aside the recommendations of the Tribunal and the decision of the Minister to act on those recommendations. On 31 July 2003 the primary judge (Angel J) made orders setting aside the recommendations and decision[6].

18. However, an appeal by the Minister to the Court of Appeal was successful. On 10 May 2004, the orders of Angel J were set aside and the Supreme Court proceedings dismissed. The appeal to this Court is brought by special leave from that decision of the Court of Appeal. Counsel for the Attorneys-General of the Commonwealth, Western Australia and New South Wales were heard in support of the first respondent, the Minister. The issues
19. The appellants seek reinstatement of the orders made by Angel J. They put forward two grounds for doing so. The first concerns the construction of the compulsory acquisition provisions of the LAA. In particular, the appellants focus upon s 43(1)(b) of the LAA which states: "Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever - (aa) ... (a) ... (b) if the pre-acquisition procedures in Parts IV and IVA as applicable have been complied with - by compulsory acquisition by causing a notice declaring land to be acquired to be published in the *Gazette*." The appellants submit that notwithstanding the phrase "any purpose whatsoever", the section does not confer power upon the Minister to acquire land from one person solely to enable it to be sold or leased by the Territory for private use to another person.
20. The second issue flows from the circumstance that the Lots are unalienated Crown land in which the only outstanding interests therein are native title. The appellants appear to concede that the contrary would have been the case under the NTA were there subsisting interests or tenures of others derived from the Crown, but they refer to the statement in s 11(1) of the NTA that native title is not to be extinguished contrary to that statute and then submit that the NTA contains no provision permitting the acquisition proposed under the Territory law.
21. For the reasons which follow neither submission should be accepted and the appeal should be dismissed.
22. It is convenient to turn first to the construction of s 43 of the LAA.

"For any purpose whatsoever"

23. In considering the restriction which the appellants would by a process of construction place upon those words in s 43 of the LAA, it is appropriate first to look to the provenance of that section. This course was taken by Martin CJ in the Court of Appeal[7].

24. The *Northern Territory (Self-Government) Act 1978* (Cth) ("the Self-Government Act") came fully into operation on 1 July 1978 (s 2). Before the commencement of the Self-Government Act the acquisition of land in the Northern Territory was controlled by federal legislation, the *Lands Acquisition Act 1955* (Cth) ("the 1955 federal law"). Section 6 thereof empowered the Commonwealth to acquire land "for a public purpose", and that term was so defined in s 5(1) as to apply to a purpose in respect of which the Parliament of the Commonwealth had power to make laws and, in relation to land in the Northern Territory, any purpose in relation to that Territory. The term "for public purposes" had appeared in s 13 of the earlier statute, the *Lands Acquisition Act 1906* (Cth), and had been similarly defined in s 5.

25. The identification in the federal legislation of "public purpose" with heads of legislative power reflected the terms of s 51(xxxi) of the Constitution. But it also was consistent with what appeared in a line of English authority beginning in the 19th century. This treated as "public purposes" those required and created by the government of the country, being purposes of the administration of that government[8].

26. Following the commencement of the Self-Government Act, the LAA was enacted and included s 43 in the following form: "Subject to this Act, the Minister may acquire land *for public purposes* by causing a notice declaring that land to be acquired to be published in the *Gazette*." (emphasis added) Further, the expression "public purpose" was defined in s 4 of the LAA as meaning a purpose in relation to the Territory and as including a purpose related to the carrying out of a function by a statutory corporation.

27. In 1982[9] s 43 was amended so that it then simply read "Subject to this Act, the Minister may, under this Act, acquire land". Following the amendments made to the NTA by the *Native Title Amendment Act 1998* (Cth) ("the 1998 NTA Amendment"), the LAA was extensively amended[10]. In particular, s 43 was repealed and s 43

substantially in its present form was introduced.

28. What had supervened was not only the 1998 NTA Amendment, but the decision of this Court in *Clunies-Ross v The Commonwealth*[11]. That litigation concerned the power conferred by s 6 of the 1955 federal law to "acquire land for a public purpose". The Court construed that expression as limited to an acquisition of land needed, or proposed for use, application or preservation for the advancement or achievement of a public purpose. The power did not extend to purposes "quite unconnected with any need for or future use of the land"[12], and did not extend to the taking of land merely in order to deprive the owner of the land and thereby advance or achieve some purpose in respect of which the Parliament had power to make laws.

29. Against that background, the absence from s 43 in its post-1998 form of any reference to "public purpose" and the presence of the expression "for any purpose whatsoever" may readily be understood as a removal by the Territory legislature of any ground for the limitation of the statutory power by reference to considerations which had prevailed in *Clunies-Ross*.

30. It is unnecessary in this case to determine what nevertheless may be the limits to the scope of the power conferred by the broad words of s 43. This is because the expression "for any purpose whatsoever" as it appears in s 43(1) must at least include for the purpose of enabling the exercise of powers conferred upon the executive by another statute of the Territory. Those purposes include the exercise of the power conferred by s 9 of the CLA. This provides that subject to that statute the Minister may in the name of the Territory and by instrument in the appropriate form grant an estate in fee simple or lease of Crown land. Further and more detailed provisions respecting the alienation of Crown land are found in the balance of Pt 3, Div 1 (ss 9-18) of the CLA.

31. Further, it is pertinent, though not critical, to note that as Mildren J observed in the Court of Appeal[13]: "it is difficult to see why, in the circumstances of this case, the acquisitions could not be for what might be regarded as a legitimate Territory purpose, and there can be no doubt that such a purpose falls within the ambit of [s 43(1)(b)]. It is very much the business of government to promote industry in or around towns by providing land for the use of industry, whether the industry be manufacturing, tourist businesses or goat farming."

32. Further, the Territory is established by s 5 of the Self-Government Act as a body politic, and subject to the requirement of just terms imposed by s 50, the Legislative Assembly is empowered by s 6 to make laws for the peace, order and good government of the Territory. This constitutional position of the Territory differentiates it from the situation of local government bodies whose powers fell for consideration in such cases as *Werribee Council v Kerr*[14]. The statement in that case by Higgins J, with reference to the powers of the appellant conferred by the *Local Government Act 1915* (Vic), that municipal councils had not been empowered to interfere with the private title of A for the private benefit of B[15] is inapt to describe in the Territory the interrelation between the powers conferred by the LAA and the CLA.
33. Nor, given that statutory structure, has any case been presented which would bring this case within the situation considered in *Samrein Pty Ltd v Metropolitan Water Sewerage & Drainage Board*[16]. This Court indicated in *Samrein* that if it had appeared on the evidence that the Board had been seeking to acquire the land in question for an ulterior purpose there would have been an ostensible but not a real exercise of the power granted by its statute[17].
34. For these reasons the appellants fail in their attack upon the conclusions reached by the Court of Appeal respecting the construction of s 43 of the LAA. Native title
35. Here also the issue which arises is best understood by first making some reference to the background in the case law and statute law.
36. In *Mabo v Queensland [No 2]*[18] Deane and Gaudron JJ remarked: "The personal rights conferred by common law native title do not constitute an estate or interest in the land itself. They are extinguished by an unqualified grant of an inconsistent estate in the land by the Crown, such as a grant in fee or a lease conferring the right to exclusive possession. They can also be terminated by other inconsistent dealings with the land by the Crown, *such as appropriation, dedication or reservation for an inconsistent public purpose or use*, in circumstances giving rise to third party rights or assumed acquiescence." (emphasis added) Their Honours added[19]:"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) [of the Constitution]."

37. Against that background and as enacted in 1993, the NTA made specific provision, among "permissible future acts"[20], for compulsory acquisition. Section 23(3) stated: "If the act is the acquisition, under a Compulsory Acquisition Act, of *the whole or part of any native title rights and interests*: (a) the non-extinguishment principle applies to the acquisition; and (b) nothing in this Act prevents any act that is done in giving effect to the purpose of the acquisition from extinguishing the native title rights and interests; and (c) if the Compulsory Acquisition Act does not provide for compensation on just terms to the native title holders for the acquisition, they are entitled to compensation for the acquisition in accordance with Division 5." (emphasis added) In relation to the Territory, the term "Compulsory Acquisition Act" was defined in s 253 as a law of the Territory permitting the compulsory acquisition by the Territory of native title rights and interests and of other interests in relation to land and waters, and providing for compensation for the acquisition of any native title rights and interests and containing provisions to the same effect as s 79 of the NTA. Section 79 dealt with requests for non-monetary compensation.

38. It may be accepted that the LAA was a Compulsory Acquisition Act within the definition in s 253 of the NTA. The result was that where all that could be acquired in respect of particular unalienated Crown land were native title rights, s 23(3) of the NTA would apply to the extinguishment of that native title.

39. With the decision in 1996 of this Court in *Wik Peoples v Queensland*[21], it became apparent that grants of interests under legislation using such terms as "pastoral lease" would not necessarily extinguish all incidents of native title in respect of the relevant areas. In such a situation, a compulsory acquisition might now be made of the native title rights, but not of the concurrent pastoral lease. Were that to be permitted by the NTA, this would be likely to offend the *Racial Discrimination Act 1975* (Cth) ("the RDA") as it has been interpreted by this Court[22].

40. Section 23(3) appeared in Div 3 (ss 21-44) of Pt 2 of the NTA. The

Division was headed "Future acts and native title". That Division was repealed by Sched 1, Item 9 of the 1998 NTA Amendment. What then was introduced into the NTA by the 1998 statute[23] was a new Div 3, with the same chapeau but extending from s 24AA to s 44G and divided into Subdivs A-Q.

41. Subdivision M (s 24MA-s 24MD) dealt with future compulsory acquisition. In Ch 15 of the Explanatory Memorandum to the Native Title Amendment Bill 1997 there appeared the following: "15.
42. ***Subdivison M of Division 3***, inserted by ***Item 9 of Schedule 1***, is based on sections 23 and 235 of the current NTA, which are repealed by these amendments. In brief, this Subdivision means that legislation will be valid to the extent it relates to an onshore place if it affects native title areas in the same way as, or no less beneficially than, it affects freehold areas. It also means that a non-legislative act can be done validly over native title areas if that act could be done validly over freehold areas or if [it] is the creation or variation of a right to mine for opals or gems. 15.
43. The non-extinguishment principle will apply unless the act is the compulsory acquisition, under a non-discriminatory law, of native title and non-native title rights are also acquired (ie the acquisition power is exercised in a non-discriminatory way). Generally, the native title holders would be entitled to compensation for the act in the same way that freeholders would be. For compulsory acquisitions, native title holders will either be entitled to just terms compensation under the relevant compulsory acquisition laws or entitled to compensation under Division 5 of Part 3 of the NTA. Native title holders will also have the same procedural rights for the act as freeholders would have for that act."
44.
45. A Supplementary Explanatory Memorandum of amendments to be moved in the Senate on behalf of the government included the following with respect to an amendment proposed to cl 24MD(2): "This amendment to proposed subsection 24MD(2) makes it clear that when native title rights are subject to a non-discriminatory compulsory acquisition process, the non-native title rights in the area concerned, if any, must be acquired, but that this acquisition can be through a compulsory acquisition or by surrender, cancellation, resumption, or otherwise. The purpose of the amendment is to ensure

that the methods under which non-native title rights are acquired are sufficiently broad to cover the whole range of circumstances under which State and Territories in fact acquire those rights."

46. What is apparent from these Parliamentary materials is a legislative proposal to proceed on the basis provided by the previous s 23, permitting future compulsory acquisition of native title rights, but also to ensure that where, as it now appeared to be feasible, native title rights subsisted concurrently with non-native title rights, any power of acquisition was exercised in a non-discriminatory fashion by acquiring and extinguishing both species of rights.

47. However, the appellants submit that this proposal miscarried and was not fully translated into s 24MD(2). This is said to be so because unlike the repealed s 23, the new legislation does not meet the case where all that is present are native title rights and there are no subsisting non-native title rights which might also be acquired and extinguished.

48. If Subdiv M applies to a future act then, subject to the provisions in Subdiv P dealing with the right to negotiate, that act is valid. This follows from s 24MD(1). The critical provision is s 24MD(2). This provides (par (c)) that a compulsory acquisition will extinguish the whole or part of the relevant native title rights and interests if three conditions are satisfied. These are contained in pars (a), (b) and (ba). First, the act must be the compulsory acquisition of the whole or part of any native title rights and interests under a law (in the present case of the Territory) that permits both the compulsory acquisition by the Territory of native title rights and interests and the compulsory acquisition of non-native title rights and interests in relation to land or waters (par (a)). The LAA is such a statute. Secondly, the practices and procedures adopted in acquiring the native title rights and interests must not be such as to cause the native title holders a disadvantage which is greater than that caused to the holders of non-native title rights and interests when their rights and interests are acquired (par (ba)).

49. The critical condition for the operation of the extinguishment permitted by s 24MD(2) is that found in par (b). This condition is in the following terms: "the whole, or the equivalent part, of *all* non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily

acquired relate, is also acquired (whether compulsorily or by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests". (emphasis added)

50. The appellants fix upon the word "all" as requiring the presence of at least some non-native title rights. However, the word "all" has various meanings and shades of meaning. It may be used in the sense of "any whatever", as in the phrases "denial of all responsibility" and "beyond all reasonable doubt". It may be used in the sense of "such number as proves to be the case".

51. Observations by Lord Bingham of Cornhill in *R (Quintavalle) v Secretary of State for Health*[24] are pertinent here: "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment." Thus, in par (b) of s 24MD(2) the phrase "all non-native title rights" must be read against the legislative history detailed above in these reasons.

52. With that in mind, it would be an odd construction which read par (b) of s 24MD(2) as denying, contrary to what had been the case under the previous s 23(3), the possibility of compulsory acquisition where all that existed for that acquisition were native title rights and interests. The better construction of the paragraph treats "all" as identifying such non-native title rights and interests as may exist in relation to the land or waters in question. Put shortly, "all" may be read as "any".

53. Counsel for the Commonwealth Attorney-General pointed to an example of the mischief to which par (b) is addressed; a situation that after *Wik* could have arisen under the previous s 23(3). This was the compulsory acquisition in land the subject of a pastoral lease of the native title interests only, leaving the pastoral lessee to enjoy that interest without any concurrently existing native title interests. To take par (b) further by insisting that before native title might be acquired there had to be other subsisting interests would be to reverse the effect of the NTA as previously it operated and would do so where there was no discriminatory operation of the compulsory acquisition law which conflicted with the scheme of the RDA and

the NTA.

54. It follows that the appeal respecting the construction of s 24MD(2) fails. Orders

55. The appeal should be dismissed with an order for costs in favour of the first respondent.

56. KIRBY J. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of the Northern Territory[25]. That Court's orders allowed an appeal from orders made in the Supreme Court, at first instance, by Angel J[26].

57. The primary judge had held that the notices of proposal and notices of proposed compulsory acquisition, purportedly issued by the Minister for Lands, Planning and Environment of the Northern Territory ("the Minister") with respect to the land in issue in the proceedings, were invalid and of no effect. The primary judge reached this conclusion on the basis of his analysis of the *Lands Acquisition Act* (NT) ("the LAA").

58. There followed an appeal to the Court of Appeal. The Court of Appeal allowed the appeal, ordering that the challenge to the decision of the Minister compulsorily to acquire the subject land be wholly dismissed. Unless reversed by this Court, the appellants' challenge to the acquisition of their native title interest in the land will therefore fail. It was to contest such an outcome that the appellants sought, and obtained, special leave to appeal to this Court.

59. A majority of this Court[27] upholds the orders of the Court of Appeal. Accordingly, by inference, the acquisitions will now go ahead. I accept that, as the other reasons in this Court demonstrate, if a purely literal approach is taken to the language of the material provisions of the LAA, read against the statutory history of those provisions and together with provisions of the *Crown Lands Act* (NT) ("the CLA") and the *Native Title Act 1993* (Cth) ("the NTA"), a conclusion favourable to the Minister can be persuasively explained.

60. However, another conclusion is open and in my view it is the preferable view of the legislation. In deciding the appeal, on the issue that is critical for my conclusion and orders, I am affected by considerations of legal authority, legal principle and legal policy that I will identify. These demand respect for the legal rights to property of private individuals in Australia generally, and in particular the

legal rights of Aboriginal Australians to what has become known (perhaps unfortunately) as "native title" to their land. Subject to a constitutional question, which was not argued but which it will be necessary to mention[28], the legislature of the Northern Territory might, by express language, overcome the ambiguity in the LAA that is crucial to my determination. However, having failed to enact specific and unambiguous provisions in the LAA, authorising the "private to private" acquisitions purportedly effected in this case, the general language of the LAA relied on by the Northern Territory Minister does not support the acquisitions envisaged in the notices issued by the Minister.

61. It follows that the notices of proposal and notices of proposed compulsory acquisition were invalid. The primary judge was correct to set them aside. This Court should restore the primary judge's orders. It should do so to uphold, in case of ambiguity and uncertainty, the well-established principles of the common law that are here invoked by the appellants on behalf of the Aboriginal native title holders. The facts and legislation

62. *The facts*: The background facts are set out in the joint reasons of Gummow, Hayne and Heydon JJ ("the joint reasons")[29]. However, it is desirable to add some more detail.

63. The appellants, Alan Griffiths and William Gulwin, brought the present proceedings on behalf of the Ngaliwurru and Nungali peoples. The Ngaliwurru and Nungali peoples are a community of Aboriginal Australians who derive from a part of the north-west of the Northern Territory of Australia surrounding Timber Creek. That town was described in the Court of Appeal by Mildren J[30]:
"Timber Creek is a small town in the Northern Territory located on the Victoria Highway 285 km west of Katherine and 193 km east of the Western Australian and Northern Territory border. Although the town has existed for well over a century, it was not until June 1975 that Timber Creek was gazetted as a town under the provisions of the former *Crown Lands Ordinance*, and it has remained proclaimed as a town ever since. The boundaries of the town straddle Victoria Highway. In addition to a number of quite small allotments there are a number of larger allotments within the boundaries of the town."

64. As was recognised by the Full Court of the Federal Court of Australia in related proceedings[31], the Ngaliwurru and Nungali

peoples had maintained their long-standing connection with the Timber Creek district in spite of early violent contact with European settlers and, later, their involvement in the cattle station economy that developed in the vicinity[32]. The history of legal dealings in one of the lots concerned (Lot 109) is in some ways similar to that of the traditional lands of the Wik and Thayorre peoples, the Aboriginal communities described in *Wik Peoples v Queensland*[33]. In the case of the Ngaliwurru and Nungali peoples, there had been pastoral leases over the land. However, there was an important difference. In the case of the Wik and Thayorre, the land in question was still subject to a pastoral lease, granted under Queensland legislation. In the case of the Ngaliwurru and Nungali people's land, the pastoral leases in respect of Lot 109 near Timber Creek had lapsed. The only legal interests in the lots of land, the subject of the impugned notices, were those of "the Crown", represented by the Government of the Northern Territory, and such interests as still belonged to the Ngaliwurru and Nungali peoples.

65. Before the decision of this Court in *Mabo v Queensland [No 2]*[34], the interests of the Ngaliwurru and Nungali peoples were not treated by Australian law as legal interests at all. However, following the decisions of this Court in *Mabo*, reaffirmed in *Wik*, Australian law belatedly recognised the potential of interests in land, such as those of the Ngaliwurru and Nungali peoples, to qualify as legal interests that might be upheld in the nation's courts. Because the land in question in this appeal was unalienated Crown land, with no inconsistent interest granted to others, the situation of the land at Timber Creek presents (subject to proof) the classic circumstance in which Australian law gives recognition to an established Aboriginal native title. It does so without legal discrimination occasioned by the Aboriginal race of the traditional owners. It does so in accordance with the common law as modified by the provisions of the NTA, as enacted by the Federal Parliament in 1993 with later amendments, including in 1998, following the *Wik* decision[35].

66. At the time of the proceedings before the primary judge and also before the Court of Appeal, the claim by the Ngaliwurru and Nungali peoples to native title over the vacant Crown land situated within the town of Timber Creek was undetermined. In fact, no claim to such title had been made before the first notice of proposed acquisition

was published. The events concerning one lot, Lot 109, are described in the reasons of Mildren J in the Court of Appeal[36]: "From 1981 to 1997 grazing licences over [Lot 109] were held under the [CLA] by one Lloyd Fogarty, either in his own right or in the right of a company in which he has a significant interest, namely Warren Pty Ltd. [Together "Fogarty"] ... During this time, Fogarty developed this land through fencing facilities for branding, horning, spraying, pest treatment, weaning onto improved pasture and tailing. Fogarty estimated that the cost of improvements made to the land were worth $50,000. On 25 September 1997 Fogarty applied under the [CLA] to purchase the lot. The application was favourably received by the Minister and on 2 February 2000 a notice of proposed acquisition of all interests in Lot 109 including native title interests, if any, in the lot was published. On 11 May 2000 a native title claim was filed together with a notice of objection to the acquisition by the present [appellants]."

67. The Fogarty interests also applied to purchase Lot 47, which was likewise the subject of a notice of proposed acquisition, published on 30 August 2000, and a notice of proposal, dated 4 September 2000. The appellants had filed a native title claim in respect of that Lot on 10 December 1999[37]. Subsequently, following requests received for the release of land for commercial and/or tourism-related purposes, certain other lots in the town (Lots 97, 98, 99, 100 and 114) were the subject of a notice of proposed acquisition, published on 24 January 2000, and a notice of proposal dated 2 February 2000. On 11 May 2000, the appellants filed a native title claim in respect of those lots.

68. The inference is inescapable that the Ngaliwurru and Nungali peoples, living in and near Timber Creek, would have continued to use the land in harmony with the activities of the Fogarty interests, at least for a time, had the purchase applications not been made by Fogarty (and had the desire to purchase land in the town not been expressed by other interests), resulting in the Minister's move to acquire *all* interests, notably the native title interests, in the specified lots. It was those moves that propelled the Ngaliwurru and Nungali peoples to invoke the protection of their interests by the Australian courts.

69. To secure such protection, the Ngaliwurru and Nungali peoples

initiated a two-pronged endeavour. The first was an urgent move to object to the Minister's proposed acquisitions of the identified lots under the LAA. The second was a dependent move involving a substantive application to the Federal Court of Australia for a determination, under the NTA s 13, that the Ngaliwurru and Nungali peoples held native title in the subject (and other) land in the town of Timber Creek.

70. A determination under the NTA was essential to any entitlement of the Aboriginal claimants to "compensation on just terms to the native title holders" for any acquisition of their native title interests that might be found to have lawfully occurred[38]. More fundamentally, establishment of such native title interests would, at once: . identify the standing of the Ngaliwurru and Nungali peoples, in law, to object to the compulsory acquisitions proposed by the Minister; . establish the nature and extent of the Aboriginal claimants' interests in the subject land; and . help to explain the significance for those peoples of the propounded operation of the LAA upon their interests in this particular case. It is only by appreciating these features of the factual background, in which the LAA was said to apply, that the arguments of the Ngaliwurru and Nungali peoples in this Court will be understood.

71. A determination in favour of the Ngaliwurru and Nungali peoples' claim to native title to vacant Crown land within Timber Creek, and to Timber Creek itself, was made by the Federal Court of Australia in August 2006[39]. In November 2007, after the hearing of the present appeal by this Court, the Full Court of the Federal Court confirmed that determination, whilst varying some of its detail[40]. The present appeal fails to be decided on that footing.

72. *The legislation*: The respective rights at law of the Ngaliwurru and Nungali peoples (represented by the appellants) and of the Minister attempting compulsory acquisition under the LAA are not to be decided at a level of broad generality. Instead, they are to be resolved by a close consideration of the language and application of the LAA, determined against the background of the CLA, the NTA and other material statutory provisions.

73. The last-mentioned provisions include the federal laws governing compulsory acquisition of interests in land in the Northern Territory before self-government[41] and the provisions of the *Northern*

Territory (Self-Government) Act 1978 (Cth)[42] itself. The federal legislation, previously applicable to Territory acquisitions, included (in an important respect) a limitation upon compulsory acquisitions by requiring that they be "for a public purpose" - a phrase conventional in Australian legislation for such acquisitions and partly reflecting the language of the power afforded to the Federal Parliament by s 51(xxxi) of the Constitution 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".

74. After self-government was granted to the Northern Territory in 1982, the LAA was amended by the Territory legislature to provide, subject to the Act, that the Minister might "under this Act acquire land"[43]. Further amendments were enacted in 1998[44], introducing the broad language upon which the Minister placed chief reliance in these proceedings, relevantly[45]: "Subject to this Act, the Minister may acquire land under this Act *for any purpose whatsoever* - (aa) ... (a) ... (b) if the pre-acquisition procedures in Parts IV and IVA as applicable have been complied with - by compulsory acquisition by causing a notice declaring the land to be acquired to be published in the *Gazette*".

75. The approach to interpreting the legislation adopted by the Minister, pointing not only to the text of the legislation but also to the context and extrinsic documents (including those explaining the process of legislative history), reflects the greater emphasis placed in recent times on giving effect to the purpose of legislation in determining its meaning[46].

76. The arguments in this appeal have concerned, primarily, the suggested limitations which the Ngaliwurru and Nungali peoples urged were to be implied into the grant of power to the Minister to acquire land under the LAA "for any purpose whatsoever". However, the appellants secondly argued that each of the proposed acquisitions, if otherwise within the power conferred by the LAA, s 43(1)(b), would produce a result repugnant to the provisions of the federal NTA, s 24MD. They would thus involve a direct collision between the substantive operation respectively of the applicable Territory and federal law. Upon this hypothesis, the appellants submitted that the federal law would prevail. The Territory law

would be invalid to the extent of the inconsistency[47]. The issues

77. *Two statutory issues*: In resolving the arguments advanced for the Ngaliwurru and Nungali peoples, two statutory issues arise for the decision of this Court. Those issues are explained in the joint reasons. They are, in brief: (1) The ambit of compulsory acquisition issue[48]; and (2) The requirement of outstanding interests issue[49].
78. These issues are presented in the alternative. For the appellants to succeed in this appeal, and to secure the restoration of the orders of the primary judge, it would be sufficient for them to prevail on either of the foregoing issues. In my view, the appellants succeed on the first.
79. I acknowledge the force of the construction argument offered by Gleeson CJ[50] and the joint reasons[51] against the interpretation of the NTA urged for the appellants on the second statutory issue. I am not inclined to disagree with the resolution of that issue favoured by their Honours. However, the larger considerations that are presented by the determination of the first issue are not involved in deciding the second issue.
80. I will therefore confine my reasons to the first issue. It is sufficient to do so because, in my opinion, the Ngaliwurru and Nungali peoples succeed on that issue. Specificity and high particularity are required for the Northern Territory LAA to permit the Minister to acquire the appellants' native title interests compulsorily for the private benefit of the Fogarty interests and other private interests. Such specificity and particularity are absent from the LAA. That Act, and the apparently large grant of powers to the Minister to acquire land "for any purpose whatsoever", must be read accordingly. That conclusion is fatal to the Minister's notices and to his proposed acquisitions of the appellants' native title rights and interests in the subject land.
81. *Two constitutional questions*: Before showing why this is so, I must mention two constitutional questions.
82. As I have shown, in the second statutory issue, an express constitutional question was raised by the Ngaliwurru and Nungali peoples, founded on the suggested intersection of the federal NTA and the Northern Territory LAA. Pursuant to s 78B of the *Judiciary Act 1903* (Cth), the appellants gave notice of constitutional questions in September 2007, shortly before the argument of the appeal in this Court. On the return of the appeal, counsel appeared on behalf of the

Attorneys-General of the Commonwealth and of New South Wales and Western Australia, effectively to support submissions advanced by the Northern Territory Minister. In view of the approach that I will adopt to the second statutory issue, it is unnecessary for me to address this first constitutional question.

83. However, another constitutional question lurks in the background. It was not addressed in written or oral arguments of any party or of the interveners. It was a question raised in, but not finally decided by, the decision of this Court in *Newcrest Mining (WA) Ltd v The Commonwealth*[52]. The question is: how does the grant of legislative power to the Federal Parliament to make laws "for" the government of any Territory of the Commonwealth, pursuant to s 122 of the Constitution, interact with the limitation on the power of that Parliament where the "just terms" provisions apply, pursuant to s 51(xxxi)?

84. In *Newcrest*, Gaudron J[53] and Gummow J[54] favoured the view that s 51 and s 122 "should be read together". As Gummow J remarked in that decision: "Section 122 is not to be torn from the constitutional fabric."[55] This was also my view[56]. I shall never cease to protest against attempts to treat the territories of the Commonwealth as somehow disjoined from the Commonwealth[57].

85. Nevertheless, in *Newcrest*, Toohey J, who otherwise agreed with Gaudron J, Gummow J and me, disagreed that the contrary authority of *Teori Tau v The Commonwealth*[58] "should no longer be treated as authority denying the operation of the constitutional guarantee in s 51(xxxi) of the Constitution in respect of laws passed in reliance upon the power conferred by s 122 of the Constitution"[59]. While noting the force of criticisms made by other members of the Court of the decision in *Teori Tau*, Toohey J held back from what he described as the "serious step to overrule a decision which has stood for nearly thirty years and which reflects an approach which may have been relied on in earlier years"[60].

86. It follows that, to this day, *Teori Tau* has not been formally overruled. Nevertheless, as a matter of constitutional principle, like Toohey J, Gaudron J and Gummow J in *Newcrest*, I regard the contrary conclusion on the operation of the Constitution as preferable. *Teori Tau* should have been overruled. All compulsory

acquisitions of property in and for the Northern Territory under s 122 of the Constitution are subject to the limiting requirements of s 51(xxxi) of the Constitution. So much follows from the obligation to read the Constitution as a single legal document, giving appropriate effect to all of its provisions.[61]

87. The public purpose of all compulsory acquisitions under federal or Territory law has a constitutional origin. Unlike the Australian States[62], it would not be open to the legislature of the Northern Territory (or to the Federal Parliament pursuant to a grant of self-government to that Territory) to circumvent the dual requirements for compulsory acquisition of property provided for in s 51(xxxi) of the Constitution. That is, it would not be open to the LAA, as a Northern Territory law, to provide for the acquisition of property otherwise than "on just terms" where such acquisition was from "any State or person". Moreover, any such acquisition of property would have to be "for any purpose in respect of which the Parliament has power to make laws". This would include the power (consistent with s 51(xxxi)) granted by s 122 in respect of laws "for the government of any territory".

88. Having mentioned this second constitutional question, as a potential issue in the proceedings, I will pursue it no further. First, it was not expressly relied on by the Ngaliwurru and Nungali peoples. They had other legal fish to fry. Secondly, I would infer that it was not the subject of the notice given under the s 78B requirement. Thirdly, and in any case, I can resolve the present appeal in a way favourable to the appellants without invoking the "public purpose" requirements of the Constitution, so far as they are explicit or implicit in the language of s 51(xxxi).

89. In leaving this question, however, I would point out that it would not be specially surprising if the legislative power of the Northern Territory, being part of the Commonwealth, a federal territory provided for in the federal Constitution, were subject to the equitable and public obligations imposed by the Constitution upon federal acquisitions of property. If that were so, the legislature of the Northern Territory might say that a Minister could acquire land "for any purpose whatsoever". However such a provision would be read down to conform to the *equitable* ("just terms") and *public* ("purpose in respect of which the Parliament has power to make laws")

preconditions stated in s 51(xxxi) of the Constitution. Upon this approach, a compulsory acquisition for private purposes, so as to advance private interests, could fall outside the legislative power of the Northern Territory legislature. However, while the Ngaliwurru and Nungali peoples saw the acquisition of their native title interest in their traditional land to be outside the power of the Minister, they sought to reach that conclusion by a statutory rather than a constitutional route. The compulsory acquisitions provisions issue

90. *Belated recognition of native title*: I return to the first statutory issue which is, in my opinion, determinative of the outcome of this appeal.

Within a statutory provision purporting to permit the Minister to "acquire land ... for any purpose whatsoever"[63], and against the background of the amendments to the legislation for compulsory acquisition of interests in land in the Northern Territory[64]