

ARTICLES

MINING LEASES IN QUEENSLAND AND THEIR IMPACT ON NATIVE TITLE

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Introduction

In Queensland, mining legislation has been a tool for facilitating mineral development by successive governments in Queensland. At an early stage of the development of Queensland, legislation to regulate mining was introduced to consolidate and refine a large body of statutory provisions relating to mining on State land.¹ The recognition of native title by the High Court in *Mabo v Queensland [No. 2]*² (hereinafter referred to as *Mabo [No. 2]*), and subsequent debate during the development of the *Native Title Act 1993* (Cth),³ raise significant issues in relation to the validity of mining tenements issued under mining legislation and the effect of those tenements on pre-existing native title rights and interests.

This paper will examine and assess the validity, operation and impact of mining leases under the mining legislation of Queensland on pre-existing native title rights and interests. The Queensland mining legislation examined includes the *Mining Act 1898* (Qld), the *Mining Act 1968* (Qld) and the *Mineral Resources Act 1989* (Qld). The paper will consider the extinguishment of native title by mining leases, the effect of the *Racial Discrimination Act 1975* (Cth) on the capacity for mining leases to extinguish native title and the impact of the *Native Title Act 1993* (Cth) on the relationship between mining leases and native title. Although, as is noted below, mining tenements have been issued under legislation which

1 For example, see the *Gold Fields Act 1874* (Qld) which by s 3 repealed the *Gold Fields Act 1857* (NSW). For a valuable overview of the history of mining legislation in Australia, see Forbes J and Lang A *Australian Mining and Petroleum Laws* (2nd ed) Sydney: Butterworths (1987) Ch 1.

2 (1992) 175 CLR 1.

3 References to the *Native Title Act 1993* (Cth) in this paper also contemplate the provisions of complementary State and Territory legislation with similar operation to the provisions of the *Native Title Act 1993* (Cth) (eg the validation provisions of State and Territory legislation).

precedes the *Mining Act 1898* (Qld), similar principles to those discussed here should apply to those tenements when determining their impact upon pre-existing native title rights and interests.

Native Title and Leases

Native title at common law

The decision in *Mabo [No 2]* recognised that Aboriginal people and Torres Strait Islanders in Australia possess rights over land that arise from their traditional connection with the land. The majority in that case defined native title in the following way:

*The term 'native title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.*⁴

The nature and content of native title depends on the traditions and customs of a particular group.⁵ Native title is inalienable⁶ except within a particular group in accordance with the customs and traditions of that group.⁷ Native title is lost where the observance of traditional law and custom ceases.⁸ It may be extinguished by a surrender to the Crown either voluntarily or on purchase.⁹ Traditional laws and customs are capable of evolution and change and native title rights will change accordingly.¹⁰ Native title has been described as unique or *sui generis*.¹¹ It is apparent from *Mabo [No 2]* that the power to extinguish rights and interests in land flows from the sovereign power of the Crown.¹² In Australia, this power must be exercised in accordance with the municipal law.¹³ The grant of an interest in land by the Crown is binding on the Crown and its successors and cannot be extinguished in the absence of statutory authority.¹⁴ The power to extinguish native title, which is not dependent on Crown grant, is not so limited although a clear a plain intention must be demonstrated before the exercise of power by the Crown can be considered to extinguish native

4 *Mabo [No 2]* at 57 per Brennan J with whom Mason C and McHugh J agreed at 15.

5 *Ibid* at 58 per Brennan J.

6 *Ibid* at 59 per Brennan J.

7 *Ibid* at 60 per Brennan J.

8 *Ibid*.

9 *Ibid*.

10 *Ibid* at 61 per Brennan J.

11 *Ibid* at 89 per Deane and Gaudron J and at 187 per Toohey J.

12 *Ibid* at 63 per Brennan J.

13 *Ibid*.

14 *Ibid* at 63-4 per Brennan J.

title.¹⁵ The grant of an interest in land which is inconsistent with the continued existence of native title will extinguish native title.¹⁶

The treatment of leases, and their effect on pre-existing native title, varied between the judgments in the *Mabo [No 2]* decision. The judgment of Brennan J, with whom Mason CJ and McHugh J agreed, held that the grant of a leasehold interest is inconsistent with the continued existence of native title.¹⁷ In their joint judgment, Deane and Gaudron JJ referred to the extinguishment of native title by the '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'.¹⁸ The judgments of Dawson J, who did not accept that native title survived the acquisition of sovereignty,¹⁹ and Toohey J, who expressed no view about the capacity for the grant of a leasehold interest to extinguish native title,²⁰ give no greater insight into the effect of the grant of a lease on pre-existing native title. Some doubt remains about the impact of leases containing conditions or reservations for continued access to land by the holders of pre-existing native title. The special lease for the construction of a sardine factory discussed in *Mabo [No. 2]* contained such a reservation. While Brennan J considered that any pre-existing native title would have been extinguished by the grant of a lease with a reservation for access by Torres Strait Islanders,²¹ Deane and Gaudron JJ thought that such a lease 'neither extinguished nor had any continuing adverse affect upon' native title.²² Subsequent decisions of the National Native Title Tribunal and the Federal Court have examined this issue.²³

What is a lease?

While it is clear from the principles enunciated in *Mabo [No 2]* that leases are capable of extinguishing native title, it remains to be determined what dealings in land amount to leases that are capable of extinguishing native title. The test for whether an instrument creates a leasehold interest is stated in the decision of the High Court in *Radaich v Smith*.²⁴ In that case, the question for the court was whether an instrument purporting to confer an exclusive licence in fact operated to confer a leasehold interest. The case concerned the 'licence' granted under a deed by the respondents to the appellant for the use of a 'lock-up milk bar' subject to certain conditions.

15 *Ibid* at 64 per Brennan J. See also *Western Australia v Commonwealth* (1995) 128 ALR 1 at 12 per Mason C, Brennan, Deane, Toohey, Gaudron and McHugh J (hereinafter Mason C *et al*) in relation to the requirement of a clear and plain intention to extinguish native title as an act of State during the acquisition of sovereignty.

16 *Ibid* at 68 per Brennan J.

17 *Ibid* at 68 and 69 per Brennan J.

18 *Ibid* at 110 per Deane and Gaudron JJ.

19 *Ibid* at 159-160 per Dawson J.

20 *Ibid* at 197 per Toohey J.

21 *Ibid* at 73 per Brennan J.

22 *Ibid* at 110 per Deane and Gaudron JJ.

23 See below.

24 (1959) 101 CLR 209.

The High Court held that the use of the term 'licence' in the deed was not conclusive of the legal effect of the deed.²⁵ The test to be applied to determine if a leasehold interest had been granted was whether a right to exclusive possession had been given.²⁶ Having regard to the nature of the business and the premises, the High Court concluded that the deed in fact created a leasehold interest.²⁷

Windeyer J considered that the reservation to a landlord, by contract or statute, of a limited right of entry, such as to view or repair, is not inconsistent with a grant of exclusive possession. Subject to such reservations, a tenant is entitled to exclude his landlord or strangers from the demised premises.²⁸ Windeyer J also raised the probably unanticipated consequences of construing the deed as creating only a licence when he said:

*I imagine all concerned would have been astounded if they had been told that the appellant had no right to exclude persons from her shop; that the respondent might, if he wished, license other people to carry on any activity there other than the sale of refreshments, provided their presence did not prevent her selling refreshments or conducting the milk bar; and that, although she might lock up the shop at night and on holidays, the respondents could not only enter it themselves whenever they wished but could admit as many persons as they chose, provide them with keys and license them to use the premises in the absence of the appellant for any purpose of pleasure or business they liked, provided that they did not sell refreshments.*²⁹

The test of what is a lease in *Radaich v Smith* is relevant to the consideration of the impact of the grant of mining leases over land subject to pre-existing native title. It is apparent from *Radaich v Smith* that every document that purports to be a lease should be considered individually in its factual, as well as legislative, context to assess whether it operates to confer exclusive possession and therefore is a lease. The general provisions of the *Mining Act 1968* (Qld), and the form of the mining lease prescribed under the *Mining Regulations 1971* (Qld), will be examined in this paper. However, since this assessment cannot preclude the possibility that a particular mining lease, in light of its specific provisions, operates as a

25 *Ibid* at 214 per McTiernan J, at 219 per Taylor J and at 222 per Windeyer J.

26 *Ibid* at 214-5 per McTiernan J, at 217 per Taylor J and at 222 per Windeyer J.

27 *Ibid* at 215 per McTiernan J, at 217 per Taylor J, at 220-1 per Menzies J and at 225 per Windeyer J.

28 *Ibid*. A special lease for dredging purposes, despite extensive reservations, operated to confer exclusive possession given the many provisions of the instrument of leasing which were consistent with a grant of exclusive possession (eg a covenant to yield up possession at the expiration of the lease) see *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 212-213 per Mason J.

29 *Ibid* at 224-5 per Windeyer J.

licence under the test in *Radaich v Smith*, it will provide a general indication of the likely operation of those mining leases.

Recent native title decisions in relation to leases

The impact of the grant of a lease over unalienated land where native title survives has been considered on a number of occasions since *Mabo [No 2]*.

These decisions give some indication of the possible treatment of mining leases where they are granted over pre-existing native title rights and interests.

Re Waanyi People's Application

In the decision in *Re Waanyi People's Application*,³⁰ French J applied the principles of *Mabo [No 2]* to various pastoral leases. This administrative decision related to the function of French J under s 63 of the *Native Title Act 1993* (Cth) as a presidential member considering an application that had not been accepted by the National Native Title Registrar.³¹ French J was required to decide whether or not a *prima facie* claim could be made out by the application.³²

French J examined the tenure history of the parcel of land subject to the Waanyi People's application (hereinafter referred to as the 'parcel'). The tenure history disclosed a licence issued over the parcel in 1881 and a pastoral lease granted over the parcel in 1883, both under the *Pastoral Leases Act 1869* (Qld), and a pastoral lease over the parcel in 1904 under the *Land Act 1902* (Qld). Concluding that the licence of 1881 did not extinguish native title, given the absence of a clear and plain intention to do so,³³ French J decided that a reservation in favour of Aboriginal people would operate to preserve native title.³⁴ French J also decided that the lease of 1883 had extinguished any native title over the parcel because, having found that a lease did in fact issue in 1883, there was no basis for inferring any reservation in favour of Aboriginal people in the 1883 lease which may have preserved the existence of native title.³⁵ He also decided that, in the absence of the 1883 lease, the lease of 1904 would have extinguished any native title.³⁶

30 (1995) 129 ALR 118.

31 *Native Title Act 1993* (Cth) s 63(2)&(3) requires the Native Title Registrar to register an application unless he or she is of the opinion that an application is frivolous or vexatious or that *prima facie* the claim cannot be made out, in which case the Registrar must refer the application to a presidential member.

32 *Ibid* s 63(3).

33 *Re Waanyi People's Application* (1995) 129 ALR 118 at 155.

34 *Ibid* at 137-8.

35 *Ibid* at 161 citing the tests for implication of conditions in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 and *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

36 *Ibid* at 164.

In considering the effect of leases with reservations in favour of Aboriginal people, consistent with the continued existence of some or all native title rights and interests, and in considering the conflicting views of Brennan J³⁷ and Deane and Gaudron JJ³⁸ of the effect of a special lease on native title, French J stated:

*In my respectful opinion, their Honours can be read and should be read as allowing that a qualification, in favour of indigenous people, on the right of exclusive possession may negative the intention to extinguish native title that might otherwise be imputed to the grant.*³⁹

After referring to certain comments in relation to leases in *Pareroultja v Tickner*,⁴⁰ French J expressed the view that native title was extinguished by the grant of a lease conferring exclusive possession but that the short term of a lease or wide rights of general public access may controvert that contention.⁴¹

Re Wadi Wadi People's Application

In his decision in *Re Wadi Wadi People's Application*,⁴² French J considered the impact of a special lease under the *Crown Lands Consolidation Act 1913* (NSW) on pre-existing native title. French J restated, in virtually identical terms, the views expressed in *Re Waanyi People's Application* in relation to the non-extinguishment of native title by short term leases and leases with reservations.⁴³ He concluded that the special lease under consideration, the conditions of the lease and the regulations under which it was granted 'were all indicative of a grant of

37 *Mabo [No 2]* at 72-3 where Brennan J suggested that, if valid, the sardine factory lease would extinguish native title despite conditions in the lease for Murray Islanders to continue to use the area for gardening and for the purpose of fishing. Brennan J stated: 'If the lease of Dauar and Waier were validly granted, the limited reservations in the special conditions are not sufficient to avoid the consequence that the traditional rights and interests of the Meriam people were extinguished. By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs'.

38 *Ibid* at 117 where, in respect of the sardine factory lease, Deane and Gaudron J said: 'This lease recognised and protected usufructuary rights of the Murray Islanders and was subsequently forfeited. It would seem likely that, if it was valid, it neither extinguished nor had any continuing adverse effect upon any rights of Murray Islanders under common law native title'.

39 *Re Waanyi People's Application* (1995) 129 ALR 118 at 137.

40 (1994) 117 ALR 206 at 214 where Lockhart J, with whom O'Loughlin and Whitlam J agreed, stated: '[T]he extent to which native title over land may co-exist with leasehold tenure is not a question fully explored in *Mabo [No 2]*. Much may depend on the nature and extent of the leasehold estate (eg a monthly tenancy or lease for 99 years) and inconsistency, if any, between native title and the lessor's reversionary interest'.

41 *Re Waanyi People's Application* (1995) 129 ALR 188 at 138.

42 (1995) 129 ALR 167.

43 *Ibid* at 188-9.

exclusive possession'.⁴⁴ Consequently, the lease was inconsistent with the continued existence of native title rights and interests 'albeit the lease was only for a term initially of nine years'.⁴⁵

Re North Ganalanja Aboriginal Corporation v State of Queensland

In pursuance of s 169(2) of the *Native Title Act 1993* (Cth), the applicants for the Waanyi People lodged an appeal to a Full Court of the Federal Court from the decision of French J in *Re Waanyi People's Application*. The decision of a Full Court of the Federal Court in *North Ganalanja Aboriginal Corporation v State of Queensland*⁴⁶ was made up of the judgments of two majority judges, Jenkinson and Hill JJ and a dissenting judge, Lee J. The majority held that French J's conclusion that the 1883 lease operated to extinguish native title was inappropriate during a consideration under the *Native Title Act 1993* (Cth) s 63(3) and that, if that had been the sole issue for consideration, the application should have been accepted and time allowed for a search for the possible existence of the lease instrument.⁴⁷

However, given the existence of the 1904 lease, the majority concluded that the lease, although issued in 1907 was operative from 1904 and therefore operated to extinguish native title over the area claimed.⁴⁸ The appeal was dismissed for this reason. The majority held that short term leases may lack the requisite clear and plain intention, but expressed this in significantly less strong terms than French J.⁴⁹ While one member of the court was prepared to accept the view that reservations in a lease for the benefit of Aboriginal people operate to preserve native title⁵⁰, a differently constituted majority held that the possible existence of a reservation and its operation to preserve native title should have been presumed in the applicant's favour at the acceptance stage.⁵¹

Re North Ganalanja Aboriginal Corporation v State of Queensland (High Court)

The judgment of the High Court in *North Ganalanja Aboriginal Corporation v State of Queensland*⁵² was the result of an appeal from the decision of a Full Court of the Federal Court. The High Court held that the native title determination application made on behalf of the Waanyi people should have been accepted by the Native Title Registrar, that the decisions of French J, when he agreed with the registrar when the application was referred to him, should be set aside and the registrar be directed to accept the application. None of the judgments considered the impact on native title

44 *Ibid* at 189.

45 *Ibid*.

46 (1996) 132 ALR 565.

47 *Ibid* at 604 and 607 per Hill J with whom Jenkinson J agreed at 577.

48 *Ibid* at 617 per Hill J with whom Jenkinson J agreed at 577.

49 *Ibid*.

50 *Ibid* at 576 per Jenkinson J.

51 *Ibid* at 607 per Hill J with whom Lee J agreed at 581 on this point.

52 (1996) 135 ALR 225.

of leases with reservations or conditions allowing continued access by Aboriginal people or Torres Strait Islanders. For this reason, the decisions of the National Native Title Tribunal and the Federal Court on this matter are not authoritative statements of the law. They can be expected to have significant influence, however, when the legal effect of these leases is ultimately decided.

While it is true that the impact of every lease upon pre-existing native title must be assessed according to its particular circumstances, the judgments in *Re Waanyi People's Application*, *Re Wadi Wadi People's Application* and *North Galanja Aboriginal Corporation v State of Queensland* give some indication of the views of the President of the National Native Title Tribunal and the Federal Court in relation to the extinguishment of native title by leases. From these judgments (which, it must be noted, are not authoritative) it appears that, except where a lease contains a reservation ensuring continued access to land by Aboriginal people or the term of a lease is particularly short,⁵³ a lease which confers exclusive possession will operate to extinguish native title (although only before the commencement of the *Racial Discrimination Act 1975* (Cth)⁵⁴).

Mining Leases and Native Title

Is a mining lease a lease?

A number of early judgements -characterise a 'lease of mines' or a 'lease of minerals' as being a sale of a portion of land at a price payable by instalments, that is, by way of rent or royalty.⁵⁵ For example, in *Gowan v Christie*⁵⁶ a lease 'of the freestone and minerals, and all materials and substances of what nature soever lying in and under certain lands' was granted to Gowan for a period of 21 years. One of the judges, Lord Cairns, characterised a mining lease in the following way:

[A]lthough we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out

53 See *Re Waanyi People's Application* (1995) 129 ALR 118 at 138 per French J, *Re Wadi Wadi People's Application* (1995) 129 ALR 167 at 188-9 per French J and *North Galanja Aboriginal Corporation v State of Queensland* (1996) 132 ALR 565 at 617 per Hill J with whom Jenkinson J agreed at 577.

54 See discussion of the operation of the *Racial Discrimination Act 1975* (Cth) above.

55 See 26 *Halsb* (3rd ed) 429 and Forbes J and Lang A *Australian Mining and Petroleum Laws* (2nd ed) Sydney: Butterworths (1987) 184 and the authorities cited in those references.

56 (1873) LR 2 Sc & Div 273 at 283.

*and out of a portion of the land. It is liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil.*⁵⁷

It was the view of Lord Cairns that a 'lease of minerals' or a 'lease of mines' was, in law, a sale of a portion of land on certain terms. A similar view was expressed by the Court of Appeal in *In re Aldam's Settled Estate*⁵⁸ which concerned the 'lease of the Barnsley Thick Seam of coal' for a period of 60 years.⁵⁹

Australian authorities have also considered this matter. In *Railway Commissioners of NSW v Perpetual Trustee Company Ltd*,⁶⁰ Griffith CJ, delivering the judgment of the High Court, treated a mining lease as if it were a sale of minerals to the lessee⁶¹ and, on this basis, the lessor of the minerals retained a beneficial interest in the coal which was the subject matter of the lease equal to the amount of royalty payable on that coal. The beneficial interest of the lessor was compensable.⁶² Heron ACJ and Manning J, in *Ex parte Henry; Re Commissioner of Stamp Duties*⁶³ considered that a licence, created by a deed, to enter land and take coal was not a mining lease within the contemplation of the cases referred to above, but was rather a *profit à prendre*. Brereton J, who agreed with the majority in characterising the licence as a *profit à prendre*, made the following observations about the statement of Lord Cairns in *Gowan v Christie* above:

*This passage has been relied on in later cases to which I shall refer; but it may be noticed here that it contains nothing to suggest that the lease passes the property in minerals, that they do not remain the property of the lessor (subject to the lease) until severed, or that such as remain unsevered do not revert to the lessor on the determination of the lease. The words 'sale out and out' must be read subject to this gloss. For the purposes of the decision all that was vital was that under a mining lease the lessee takes a part of the realty and not, as in the case of an agricultural lease, its fruit.*⁶⁴

It was the view of Brereton J that, under a mining lease, property in minerals did not pass until severance and a mining lease only gave the lessee the right to make minerals his or her property by severance.⁶⁵ Brereton J's interpretation of *Gowan v Christie*,⁶⁶ *In re Aldam's Settled*

57 *Ibid* at 283-4 per Lord Cairns.

58 (1902) 2 Ch 46.

59 *Ibid* at 56 per Collins MR and at 58 per Sterling L.

60 (1906) 3 CLR 27.

61 *Ibid* at 35 and 39.

62 *Ibid* at 35.

63 (1963) SR(NSW) 298 at 303.

64 *Ibid* at 311 per Brereton J.

65 *Ibid* at 312 per Brereton J.

66 (1873) LR 2 Sc & Div 273.

Estate,⁶⁷ and *Railway Commissioners of NSW v Perpetual Trustee Company Ltd*⁶⁸ in *Ex parte Henry*; *Re Commissioner of Stamp Duties*⁶⁹ demonstrates that the statement of Lord Cairns that a mining lease is really a sale 'out and out' of minerals should be construed as meaning that a mining lease authorises a mining lessee to sever minerals from the leased land and for property in those minerals to pass accordingly. It would be surprising if a mining lease operated to pass property in minerals before severance⁷⁰ or did not confer exclusive possession upon the lessee,⁷¹ subject to any right of entry of the lessor.⁷² Accordingly, there would appear to be no legal principle of general application which operates to prevent a mining lease at common law conveying exclusive possession upon a lessee. Therefore, the assessment of whether a mining lease confers exclusive possession should be determined according to general legal principles such as the test in *Radaich v Smith*.⁷³

Mining leases in Queensland

In Queensland, ss 30 and 40 of the *Constitution Act 1867* (Qld) operate to prevent the disposition of interests in land except in accordance with legislation.⁷⁴ It follows that a mining lease cannot be granted by prerogative but, rather, only in accordance with appropriate legislation such as the *Mining Act 1898* (Qld), the *Mining Act 1968* (Qld) and the *Mineral Resources Act 1989* (Qld).

In considering the distinctions between a common law lease and one granted in accordance with a legislative provision, it is important to consider the rule of construction that legislation is presumed not to alter common law principles except by clear and plain words.⁷⁵ Regard must be had to the scope, purpose and operation of the specific legislation under which a lease is granted.⁷⁶ Once an instrument made under legislation is taken to be a

67 (1902) 2 Ch 46.

68 (1906) 3 CLR 27.

69 (1963) SR(NSW) 298.

70 See, for example, *Mills v Stockman* (1967) 116 CLR 61 at 71 per Barwick CJ with whom Taylor J agreed and 77 per Kitto J which demonstrates the impossibility of dealing with a heap of slate forming part of the realty of land as a chattel interest.

71 This is the case particularly when considering the interests of safety and security. See generally French J in *Re Waanyi People's Application* (1995) 128 ALR 118 at 161 where the implication of terms and conditions in leases is discussed with reference to *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

72 The reservation of a right of re-entry for non-payment of rent and a covenant allowing entry for inspection by the lessor are typical provisions in mining leases at common law: 26 *Halsb* (3rd ed) 430-431.

73 (1959) 101 CLR 209.

74 See *Cudgen Rutile (No 2) v Chalk* (1975) 49 ALJR 22 at 24-5 per Lord Wilberforce who delivered the judgement of the Judicial Committee of the Privy Council.

75 Pearce D, *Statutory Interpretation in Australia* (2nd ed) Sydney Butterworths (1984) 87-90.

76 See *R v Toohey*; *ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 344 per Mason J, with

lease, the fact that it is granted under statute does not deprive the lease of the incidents of a lease at common law.⁷⁷ Various statutes have authorised the executive to grant mining leases.⁷⁸ Leases may include certain conditions specified either in the instrument of lease or imposed by legislation.⁷⁹

It is useful to consider an example of the operation of mining legislation in respect of the grant and operation of mining leases. For this purpose, the *Mining Act 1968* (Qld) in its form on 1 January 1972 (the date of commencement⁸⁰) will be considered. The *Mining Act 1968* (Qld) was a comprehensive scheme for the exploration and exploitation of minerals. Under the *Mining Act 1968* (Qld), mining leases were granted over 'Crown land' by the Governor in Council.⁸¹ The process for making an application for a mining lease was provided in the *Mining Regulations 1971* (Qld). The term 'Crown land' was defined in s 7 of the *Mining Act 1968* (Qld)⁸² to mean:

Land other than land-

- (a) *which has been alienated by the Crown in fee-simple;*
- (b) *in respect of which a right to a grant by the Crown in fee-simple-*
 - (i) *has accrued to any person; or*
 - (ii) *will accrue to any person upon the performance by him of a developmental or improvement condition;*
- (c) *an estate in fee-simple in which is being purchased from the Crown;*
- (d) *which is a reserve.*

It is apparent from the definition of 'Crown land' that most

whom Gibbs C at 322 and Brennan J at 364 agreed on the point, where Mason J considered the scope, purpose and operation of the *Crown Lands Act 1931* (NT) in determining that a grazing licence under that Act did not operate to convey an estate or interest in land.

77 *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687 at 698 per Kirby P, with whom Meagher JA agreed, where it was said: '[T]he first duty of the court is to examine the statute to see whether consistently with its terms, other rights and obligations that would apply by the general law attach to the statutory entitlements and duties of the parties. In the case of an interest called a 'lease', long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute. On the face of things, the general law, so far as it is not inconsistent with the statute, will continue to operate'.

78 See *Gold Fields Act 1857* (NSW) s 6 (lease for mining purposes of auriferous lands); *Gold Fields Act 1874* (Qld) s 10 (gold mining lease); *Mineral Lands Act 1882* (Qld) s 12 (mineral lease); *Mining Act 1898* (Qld) ss 24 (gold mining lease) and 30 (mineral lease); *Mining Act 1968* (Qld) s 21 (mining lease); and *Mineral Resources Act 1989* (Qld) s 234 (mining lease).

79 *Mining Act 1898* (Qld) ss 28, 28, 33 and 34; *Mining Act 1968* (Qld) s 28; *Mineral Resources Act 1989* (Qld) s 276.

80 'Proclamation' in *Queensland Government Gazette* Vol 138 No 53 1971 p 1193. Prior to its commencement, the *Mining Act 1968* (Qld) was amended by the *Mining Act Amendment Act 1971* (Qld) and the *Mining Act Amendment Act (No 2) 1971* (Qld).

81 *Mining Act 1968* (Qld) s 43. See also *Mining Act 1898* (Qld) s 24 (gold mining lease), s 30 (mineral lease); and *Mineral Resources Act 1989* (Qld) s 234 (mining lease).

82 A similar definition was contained, in various forms, in *Mining Act 1898* (Qld) s 3. The *Mineral Resources Act 1989* (Qld) does not contain an equivalent term as it is unnecessary because the *Mineral Resources Act 1989* (Qld), unlike the *Mining Act 1968* (Qld) and the *Mining Act 1898* (Qld), provides the same procedure for the grant of a mining lease over 'private land' as it does for 'Crown land'.

unalienated land and leasehold land under the *Land Act 1962* (Qld) was the subject of the power of the Governor in Council to grant a mining lease including unalienated land over which native title rights and interests may have existed. Despite the fact that reserves⁸³ were not included within the definition of Crown land, s 44 of the *Mining Act 1968* (Qld)⁸⁴ authorised the grant of mining leases over most reserves on certain conditions. Furthermore, separate provisions of the *Mining Act 1968* (Qld) provided for the grant of mining leases over freehold land.⁸⁵

The *Mining Act 1968* (Qld) provided for the determination of the area⁸⁶ and the term⁸⁷ of a mining lease. There was a statutory mechanism for the renewal of mining leases.⁸⁸ Rent on a mining lease was prescribed.⁸⁹ A

83 Defined *Mining Act 1968* (Qld) s 7 as:

Land (other than land alienated in fee-simple) which is-

(a) a road;

(b) vested in-

(i) the Minister for Education of Queensland; or

(ii) the Commissioner for Railways;

(c) granted in trust, reserved and set apart for public purposes other than as a Timber Reserve within the meaning of the *Forestry Act 1959-1968*; or

(d) exempted for the time being by this Act or otherwise, wholly or in part, from entry or occupation for mining purposes: Provided that when land is so exempted in part only it shall be a reserve only to the extent to which it is so exempted: The term does not include a miners common.

A similar definition, in various forms, was found in s 3 of the *Mining Act 1898* (Qld).

84 *Mining Act 1898* (Qld) Part 5 (Mining on Reserves, Residence Areas and Business Areas) made similar provision for mining on reserves.

85 *Mining Act 1968* (Qld) Part 12 (Mining on Private Land), as inserted by the *Mining Act Amendment Act 1971* (Qld) which also effected the repeal of the *Mining on Private Land Act 1909* (Qld), s 109(2) which provided: A miner's right, authority to prospect, coal-mining licence, mining lease, coal-mining lease, and any licence or other form of entitlement that may be granted or issued in relation to Crown land pursuant to any provision of this Act, other than this Part, or the Coal Mining Act 1925-1969 may be granted or issued in relation to private land as if such land were Crown land, but, to the extent this Part so provides, subject to and in accordance with this Part.

For Part 12 of the *Mining Act 1968* (Qld), 'private land' was defined in s 108 as land other than Crown land or a reserve. This essentially was freehold land or land being purchased as, or to which a person was conditionally entitled to as, freehold. The process for application for a mining lease over private land was different to that for an application over Crown land. In particular, an applicant was required to give notice of an application to the owner and occupier of private land: *Mining Act 1968* (Qld) s 123(2).

There was no provision in the *Mining Act 1898* (Qld) for mining on freehold land (except where mining was for gold or silver within the limits of a 'goldfield' or 'mineral field', see *Mining Act 1898* (Qld) Part 7 as enacted which was subsequently repealed by the *Mining on Private Land Act 1909* (Qld)). Rather, the *Mining on Private Land Act 1909* (Qld) rendered the provisions relating to 'mining tenements' under the *Mining Act 1898* (Qld) capable of application over private land. The definition of 'mining tenement' in s 3 of the *Mining Act 1898* (Qld) included a mining lease.

86 *Ibid* s 24. Cf *Mining Act 1898* (Qld) s 26(4) (gold mining lease area) and s 33(4) (mineral lease area). See also *Mineral Resources Act 1989* (Qld) s 271(1) under which the Minister may, after considering the warden's recommendation, recommend to the Governor in Council the grant of all or part of the area for which a lease application has been made.

87 *Ibid* s 25. Cf *Mining Act 1898* (Qld) s 26(2) (gold mining lease) and s 33(2) (mineral lease). See also *Mineral Resources Act 1989* (Qld) s 284 under which a mining lease may be granted for any period for which compensation between the lease applicant and owner has been agreed or determined.

88 *Ibid* s 26. Cf *Mining Act 1898* (Qld) s 26(3) (gold mining lease), s 33(3) (mineral lease) and

non-exhaustive list of covenants and conditions were provided⁹⁰ including a covenant to pay rent,⁹¹ to use the land demised continuously and *bona fide* for the purpose leased⁹² and a covenant not to assign, sublet or 'part with the possession' of the land or part of the land demised.⁹³ Security required for a mining lease was assessed prior to, and was a condition precedent to the grant of a mining lease.⁹⁴ Compensation was available for lessees and occupiers of Crown land⁹⁵ and freehold land.⁹⁶ On Crown land, the potential damage to improvements was assessed and required to be paid to the warden.⁹⁷ Money was then paid to the lessee or occupier as and when damage occurred.⁹⁸ On private land, compensation was either agreed between the parties or assessed by the Wardens Court on application.⁹⁹ Importantly, no mining lease could be granted over private land until compensation had been paid.¹⁰⁰ This was an important distinction between the operation of compensation provisions for Crown land and for private land.¹⁰¹

Was a mining lease under the Mining Act 1968 (Qld) a lease?

Given the statutory scheme of the *Mining Act 1968* (Qld), the issue of whether a mining lease under that Act is a lease properly so called will be examined. In *ICI Alkali (Australia) Pty Ltd v Federal Commissioner of Taxation*,¹⁰² a single judge of the Victorian Supreme Court, McInerney J, considered whether a miscellaneous lease under the *Mining Act 1930* (SA)

Mineral Resources Act 1989 (Qld) s 286.

89 *Ibid* s 27. Cf *Mining Act 1898* (Qld) s 26(1) (gold mining lease), s 33(1) (mineral lease) and *Mineral Resources Act 1989* (Qld) s 290.

90 *Ibid* s 28. Cf *Mining Act 1898* (Qld) s 28 (gold mining lease), s 34 (mineral lease) and *Mineral Resources Act 1989* (Qld) s 276.

91 *Ibid* s 28(1)(a)(i). Cf *Mining Act 1898* (Qld) s 28(1) (gold mining lease), s 34(1) (mineral leases) and *Mineral Resources Act 1989* (Qld) s 276(1)(m)(i).

92 *Ibid* s 28(1)(a)(ii). Cf *Mining Act 1898* (Qld) s 28(2), 34(5) (only in the case of a special mineral lease) and *Mineral Resources Act 1989* (Qld) s 276(1)(a).

93 *Ibid* s 28(1)(vi). Cf *Mineral Resources Act 1989* (Qld) s 276(1)(g). See also *Mining Act 1968* (Qld) s 37 which relevantly provided: Subject to this Act and with the approval of the Minister, a mining lease or any interest therein may be transferred, assigned sublet or encumbered in the prescribed manner and upon the payment of the prescribed fee.

94 *Ibid* s 29. Cf *Mining Act 1898* (Qld) s 34A (inserted in 1965 and applicable to a gold mining lease and a mineral lease) and *Mineral Resources Act 1989* (Qld) s 277.

95 *Ibid* s 43. Cf *Mineral Resources Act 1989* (Qld) ss 279 and 280 (applicable to both freehold and Crown leasehold land).

96 *Ibid* s 128.

97 *Ibid* s 43(1).

98 *Ibid* s 43(3).

99 *Ibid* s 129.

100 *Ibid* s 130. Under the *Mineral Resources Act 1989* (Qld) s 279 compensation is required to be paid to any 'owner' (which includes an owner of freehold or Crown leasehold) before the grant of a mining lease where the lease includes any part of the surface of the owner's land.

101 The compensation provisions in respect of Crown land were substituted by similar provisions under the *Mining Act and Another Act Amendment Act 1974* (Qld). By the *Mining Act and Other Acts Amendment Act 1982* (Qld), the compensation provisions in respect of Crown land were brought into line with those of private land including the requirement that compensation be paid or agreed as a condition precedent to the grant or renewal of a mining lease (the requirement for the payment of, or agreement to pay, compensation prior to *renewal* of a mining lease over land private rather than only the grant of the lease was introduced by the *Mining Act Amendment Act 1979* (Qld)).

102 (1976) 11 ALR 324 and [1977] VR 393.

conferred exclusive possession and was a lease properly so called. The miscellaneous lease was granted by the Governor of South Australia. Faced with the assertion that the miscellaneous lease was merely a mere licence, McInerney J examined the terms of the lease and the relevant statutory provisions.

The lease document included words of grant typical for a lease.¹⁰³ A covenant not to part with possession and a covenant to deliver up possession at the end of, or upon sooner determination of the lease were, McInerney J considered, consistent with a right of possession of the land in the lessee.¹⁰⁴ He took the view that a proviso for entry by the Governor was consistent with possession and usual in a lease.¹⁰⁵ A mining lease granted over a subsisting pastoral lease was, under s 118 of the *Mining Act 1930* (SA), subject to a right of the pastoral lessee to access and use the land for domestic purposes. McInerney J held that this provision, and similar reservations in the lease, did not prevent a grant of exclusive possession under the lease.¹⁰⁶ He concluded that the miscellaneous lease was a lease in the ordinary meaning of the term.¹⁰⁷ McInerney J also considered the effect of two lease applications under the *Mining Act 1930* (SA) which were approved by the Minister but were not the subject of a lease executed by the Governor. Despite the fact that during the time between acceptance of the application and grant of any lease these applications were deemed to be leases,¹⁰⁸ McInerney J held they did not give rise to a leasehold interest.

On appeal to the High Court,¹⁰⁹ the Court unanimously supported the conclusion that the grant of the miscellaneous lease was a lease in law.¹¹⁰ The majority of the Court also held that the acceptance of the application gave rise to a lease.¹¹¹ As Barwick CJ said:

The position, therefore, at law was that the successful applicant became a tenant from year to year, the rent being payable yearly, that tenancy continuing from year to year as a continuous tenancy until brought to an end by a lawful act of the Minister. I see no difficulty arising from the fact that the land was Crown land - as, in my opinion, it was - and that the power to deal with it was

103 *ICI Alkali (Australia) Pty Ltd v Federal Commissioner of Taxation* (1976) 11 ALR 324 at 335.

104 *Ibid* at 337.

105 *Ibid*.

106 *Ibid* at 338.

107 *Ibid* at 339.

108 *Mining Act 1930* (SA) s 23c.

109 *ICI Alkali (Australia) Pty Ltd v Commissioner of Taxation (Cth)* (1979) 53 ALJR 220.

110 *Ibid* at 223 per Barwick C, with whom Mason agreed at 228, where it was said: In my opinion, the conclusion that Miscellaneous Mining Lease No. 234 was relevantly a lease was so clearly right that no elaboration or, indeed, any discussion of the matter is required. Gibbs J, at 226, reached a similar conclusion.

111 *Ibid* at 224 per Barwick C, with whom Mason J agreed. Gibbs J, at 226, found it unnecessary to determine the status of the successful applications.

*circumscribed by statute.*¹¹²

The form of a mining lease under the *Mining Act 1968* (Qld) was prescribed by regulation.¹¹³ The habendum of this lease was in the usual form of grant ('demise and lease')¹¹⁴ and described the consent of the Governor to the lease and the purpose for which the lease was granted (ie mining specified minerals). The yearly rent payable for the lease was stated which may, as it was drafted by a Parliamentary drafter, suggest the intention to lease land.¹¹⁵ The body of the lease included the consideration for the grant of the lease and the term for which the lease was granted. The form lease reserved the right for the Minister for Mines and persons appointed by him to enter and inspect; and reserved all petroleum and a right for authorised persons to enter the land to search for petroleum.¹¹⁶ The lease included all covenants and conditions prescribed by the *Mining Act 1968* (Qld) including a covenant not to part with possession.¹¹⁷ Provision was made for the recovery of possession upon termination or expiry of the lease.¹¹⁸

Any document must be considered on its face to determine whether or not it operates as a lease and conveys the right to exclusive possession.¹¹⁹ There are no provisions of the *Mining Act 1968* (Qld) that operate to controvert the apparent intention of the form lease, and the Act itself, that a mining lessee be granted exclusive possession. The terms of the lease must be read in light of these surrounding circumstances.¹²⁰ As noted above, it would be extremely unusual if the grant of a mining lease did not confer a right to exclude third parties.¹²¹ For example, it was possible for a mining lease to include a road.¹²² It would be unsafe for the public right to use the road to continue during the life of the lease. The provisions of the *Mining Act 1968* (Qld) which authorised the holder of a mining lease to issue proceedings against trespassers¹²³ were merely to facilitate such proceedings, in that they allowed those proceedings to take place in the Wardens Court, rather than being the source of the right against trespassers which arose from the lease itself.

Although the Governor in Council and the applicant for a mining

112 *Ibid.*

113 *Mining Regulations 1971* (Qld) s 62 and Schedule 2 Form No 24.

114 See *ICI Alkali (Australia) Pty Ltd v Federal Commissioner of Taxation* (1976) 11 ALR 324 at 335 (Supreme Court of Victoria).

115 Cf *Ibid* at 336.

116 See *Radaich v Smith* (1959) 101 CLR 209 at 222 per Windeyer J where the right to re-entry to view or repair was said to be consistent with a grant of exclusive possession.

117 *Mining Act 1968* (Qld) s 28(1)(a)(vi). Compare *ICI Alkali (Australia) Pty Ltd v Federal Commissioner of Taxation* (1976) 11 ALR 324 at 336 (Supreme Court of Victoria).

118 Cf *ICI Alkali (Aust) Pty Ltd v Federal Commissioner of Taxation* (1976) 11 ALR 324 at 335 (Victorian Supreme Court).

119 *Radaich v Smith* (1959) 101 CLR 209 at 214 per McTiernan J, 219 per Taylor J and, by implication, at 222 per Windeyer J.

120 *Ibid* at 222-3 per Windeyer J.

121 Cf *Radaich v Smith* (1959) 101 CLR 209 at 223 per Windeyer J.

122 *Mining Act 1968* (Qld) s 44 (Mining leases and authorities to prospect over reserves etc.) and the definition of 'reserve' in s 7 which includes a road.

123 *Ibid* s 99(2).

lease had the capacity to agree to additional covenants and conditions beyond those prescribed by the *Mining Act 1968* (Qld),¹²⁴ it is likely that additional covenants and conditions which might otherwise operate to deprive the lease of its effect of conveying exclusive possession would be invalid. This is because additional covenants and conditions were required to be not inconsistent with the *Mining Act 1968* (Qld).¹²⁵ It would neither be consistent with the scheme contemplated by the *Mining Act 1968* (Qld), nor would it promote the object of the Act which is to facilitate mining,¹²⁶ for a lease granted under that Act to operate as a licence. If it were to do so, the safety and security of a mining lease would be substantially diminished and the continuous working of the land leased¹²⁷ would be frustrated.

It is concluded that a the grant of a mining lease under the *Mining Act 1968* (Qld) operates to confer exclusive possession. Given the prescribed form of a mining lease under the *Mining Act 1968* (Qld) it appears extremely likely that, in the absence of exceptional circumstances,¹²⁸ such a mining lease operates to confer exclusive possession. Given the quite similar operation of the *Mining Act 1898* (Qld), it is also probably the case that leases under that Act, in the absence of similar exceptional circumstances, operate to confer exclusive possession. It follows from this conclusion that, at least before the commencement of the *Racial Discrimination Act 1975* (Cth)¹²⁹, any pre-existing native title rights and interests were extinguished by the grant of a mining lease under the *Mining Act 1968* (Qld).¹³⁰

It is unnecessary to consider the extinguishment of native title by the grant of a mining lease under the *Mineral Resources Act 1989* (Qld) as the effect of such a lease would, in any event, be qualified by the protection to native title afforded by s 10(1) of the *Racial Discrimination Act 1975* (Cth) so as to remove the common law vulnerability of native title to extinguishment.¹³¹

124 *Ibid* s 28(1).

125 *Ibid*.

126 The short title of the *Mining Act 1968* (Qld) was 'an Act to provide for the encouragement and regulation of mining within the State of Queensland'.

127 As contemplated by s 28(1)(a)(iii) of the *Mining Act 1968* (Qld).

128 An exceptional circumstance would be the presence in a mining lease of a reservation for the benefit of Aboriginal people in the form contemplated by French J in *Re Waanyi People's Application* (1995) 129 ALR 118 at 137 and in *Re Wadi Wadi People's Application* (1995) 129 ALR 167 at 188-9 where he concluded that leases with reservations in favour of continued access by Aboriginal people do not evidence a clear and plain intention to extinguish native title.

129 See discussion of the operation of the *Racial Discrimination Act 1975* (Cth) *supra*.

130 *Mabo [No 2]* at 68 and 69 per Brennan J and 110 per Deane and Gaudron J.

131 See *Western Australia v Commonwealth* (1995) 128 ALR 1 at 34 per Mason C *et al*. Also, s 10 of the *Mineral Resources Act 1989* (Qld) provides that a mining lease does not create an interest in land. This may prevent a mining lease under the *Mineral Resources Act 1989* (Qld) from operating as a lease and thereby conferring exclusive possession. As Taylor J said in *Radaich v Smith* (1959) 101 CLR 209 at 217: I have treated the question in this case as concluded by the fact that the instrument conferred upon the appellant the right to exclusive possession for the specified term. And, it seems to me, that where, as in cases such as the present, it becomes necessary to identify a

Mining Leases and the *Racial Discrimination Act 1975* (Cth)

Operation of the Racial Discrimination Act 1975 (Cth)

The *Racial Discrimination Act 1975* was enacted to implement Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as the 'ICEAFRD') and commenced to operate on 31 October 1975. Section 10 of the *Racial Discrimination Act 1975* (Cth), the critical provision of the Act that operates to protect native title rights and interests, relevantly provides:

10 (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by person of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

The rights that s 10 of the *Racial Discrimination Act 1975* (Cth) protect are human rights rather than legal rights under domestic law.¹³² The most significant human rights under the ICEAFRD, in relation to the protection of native title,¹³³ are the rights to own property alone as well as in association with others,¹³⁴ the right to inherit¹³⁵ and the right to equal treatment before the tribunals and all other organs administering justice.¹³⁶ It is necessary to demonstrate not only that a relevant law is discriminatory but also that it operates to impair the enjoyment of a human right on an equal footing.¹³⁷ The concept of property in the human rights context

particular transaction as either a lease or a licence this factor must be decisive. The instrument either makes a grant of an interest in the land or it does not; if it does a leasehold interest is created and if it does not then nothing more than a licence is given.

This passage may mean that s 10 of the *Mineral Resources Act 1989* (Qld) renders a mining lease under that Act a licence in law.

132 *Gerhardy v Brown* (1984-5) 159 CLR 70 at 86 per Gibbs C, 97 per Mason J and 125-6 per Brennan J and *Mabo v State of Queensland* (1988) 166 CLR 186 at 217 per Brennan, Toohey and Gaudron J.

133 *Western Australia v Commonwealth* (1995) 128 ALR 1 at 22-3 per Mason C *et al.*

134 ICEAFRD Article 5(d)(v).

135 ICEAFRD Article 5(d)(vi).

136 ICEAFRD Article 5(a).

137 *Gerhardy v Brown* (1984-5) 159 CLR 70 at 97 per Mason J.

includes native rights and interests.¹³⁸

In effect, s 10 of the *Racial Discrimination Act 1975* (Cth) operates to ensure equality before the law by providing that a person of a race discriminated against by a discriminatory law shall enjoy the same rights under that law as other persons.¹³⁹ This does not, however, prevent s 10 from operating to effectively 'invalidate' (ie prevent the operation of) a State law which is inconsistent with the operation of s 10¹⁴⁰

In respect of native title, the two-fold operation of s 10(1) of the *Racial Discrimination Act 1975* (Cth) has been described as follows:

Where, under 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 property. Section 10(1) thus protects the enjoyment of traditional interests in land recognised by the common law. However, it has further operation.

If a law of a State provides that property held by members of the community generally may not be expropriated except for prescribed purposes or on prescribed conditions (including the payment of compensation), a State law which purports to

138 *Mabo v State of Queensland* (1988) 166 CLR 186 at 217 per Brennan, Toohey and Gaudron J and, implicitly, at 230-1 per Deane J and *Western Australia v Commonwealth* (1995) 128 ALR 1 at 24 per Mason C *et al*.

139 *Gerhardy v Brown* (1984-5) 159 CLR 70 at 94 per Mason J.

140 *Mabo v The State of Queensland (No 1)* (1988) 166 CLR 186 at 289 per Brennan, Toohey and Gaudron J where it was stated: [T]his means that if traditional native title was not extinguished before the *Racial Discrimination Act* came into force, a State law which seeks to extinguish it will now fail. It will fail 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. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native group cannot prevail over s. 10(1) of the *Racial Discrimination Act* which restores the immunity to the extent enjoyed by the general community.

See also *Western Australia v Commonwealth* (1995) 128 ALR 1 at 35 per Mason J *et al* where it was held that the operative provisions of the *Land (Titles and Traditional Usage) Act 1993* (WA), which were the linchpins of the entire Act, had no legal operation. The High Court majority there emphasised that the *Racial Discrimination Act 1975* (Cth) did not operate to render State laws invalid in the sense that they were beyond legislative power. Rather, the operation of s 10(1) of the *Racial Discrimination Act 1975* (Cth) in conjunction with s 109 of the *Commonwealth Constitution* left no room for the legal operation of the *Land (Titles and Traditional Usage) Act 1993* (WA).

*authorise expropriation of property characteristically held by 'persons of a particular race' for purposes additional to those generally justifying expropriation or on less stringent conditions (including lesser compensation) is inconsistent with s 10(1) of the Racial Discrimination Act.*¹⁴¹

The operation of s 10(1) is said to ensure that native title holders have the same 'security of enjoyment of their traditional rights' as the holders of title granted by the Crown.¹⁴² A State law purporting to diminish that security of title is inconsistent with s 10(1) of the *Racial Discrimination Act 1975* (Cth) and, by the operation of s 109 of the *Constitution*, inoperative.¹⁴³ The passage quoted above applies equally to an element of the common law that operates in a discriminatory way in relation to the 'security of enjoyment' of native title compared with the security of the holders of other titles granted by the Crown.¹⁴⁴

While the validity of dealings over land where native title survived after the commencement of the *Racial Discrimination Act 1975* (Cth) has not been directly decided,¹⁴⁵ it is apparent that the operation of the *Racial Discrimination Act 1975* (Cth) to confer upon native title holders the same 'security of enjoyment' as the holders of other titles suggests that actions purportedly done over native title which would not be authorised by legislation if done over 'other titles' may be invalid. The 'overriding operation of the *Racial Discrimination Act 1975* (Cth) would have made inconsistent State and Territory laws inoperative or would have required the reading down of State and Territory laws so as to be consistent with the *Racial Discrimination Act 1975* (Cth)¹⁴⁶ and the 'legislative authority which State and Territory laws were capable of giving executive acts affecting native title was restricted accordingly'.¹⁴⁷

It also seems likely that, even where statutory authority did authorise an executive act, such as granting a mining lease, in a manner that was not

141 *Western Australia v Commonwealth* (1995) 128 ALR 1 at 24 per Mason CJ *et al* citing *Mabo v State of Queensland* (1988) 166 CLR at 217-9 per Brennan, Toohey and Gaudron J and 230-1 per Deane J.

142 *Ibid.*

143 *Ibid.*

144 See also *Western Australia v Commonwealth* (1995) 128 ALR 1 at 34 per Mason C *et al* where it was stated that certain provisions of the *Land (Titles and Traditional Usages) Act 1993* (WA) and the *Public Works Act 1902* (WA) operated to deny native title holders 'the same protection against compulsory acquisition as the protection by way of notice, the right to object and the right to proper consideration of objection which the law and judicial review accord to the holders of other forms of title'. It was also concluded, *ibid.*, that these provisions were inconsistent with s 10(1) of the *Racial Discrimination Act 1975* (Cth). This contemplates both that:

the *Racial Discrimination Act 1975* (Cth) can operate in respect of the common law (here judicial review) and statute law; and

the right to notice is an element of the 'security of enjoyment' associated with the holders of forms of title other than native title.

145 *Western Australia v Commonwealth* (1995) 128 ALR 1 at 35 per Mason CJ *et al.*

146 *Ibid* at 37 per Mason CJ *et al.*

147 *Ibid* at 37-8 per Mason CJ *et al.*

contrary to s 10(1) of the *Racial Discrimination Act 1975* (Cth), the liability of native title to extinguishment by that act before the commencement of the *Racial Discrimination Act 1975* (Cth) would be removed by s 10(1) in circumstances where 'other titles' were not extinguished by the act.¹⁴⁸ An assessment of the validity of particular executive acts over native title after the commencement of the *Racial Discrimination Act 1975* (Cth) requires an examination of the effect of s 10(1) of the *Racial Discrimination Act 1975* (Cth) on the particular legislative provisions supporting the executive act. In this case, the effect of s 10(1) on the grant of a mining lease under the *Mining Act 1968* (Qld) and the *Mineral Resources Act 1989* (Qld) will be considered.

Mining leases and the Racial Discrimination Act 1975 (Cth)

It is considered that the *Racial Discrimination Act 1975* (Cth) confers only such additional protection or additional rights as will eliminate discrimination on the basis of race, colour or national or ethnic origin. In relation to native title, this would mean that where a particular legislative scheme operates differently in respect of different forms of property, s 10(1) of the *Racial Discrimination Act 1975* (Cth) will operate to confer on native title holders rights and protections similar to that of the least favourably treated category of property. Section 10(1) of the *Racial Discrimination Act 1975* (Cth) will only operate to remove discrimination on the basis of race and will not confer rights or protection additional to this. Therefore, where under the *Mining Act 1968* (Qld) leasehold land is treated less favourably than freehold land, s 10(1) of the *Racial Discrimination Act 1975* (Cth) will operate to confer upon native title holders the same 'security of enjoyment' as it does upon leasehold land. From that point, it cannot be said that native title holders are treated less favourably than the holders of other forms of title granted by the Crown.

The *Mining Act 1968* (Qld), because of the definition of 'Crown land',¹⁴⁹ authorised the grant of a mining lease over land where native title survived and also over Crown leasehold land under the *Land Act 1962* (Qld). Because a 'mining lease' was able to be granted over 'other titles',¹⁵⁰ there was no discriminatory treatment of native title under the power to grant a mining lease in respect of which s 10(1) of the *Racial Discrimination Act 1975* (Cth) could operate. Rather s 10(1) of the *Racial Discrimination Act*

148 See *Western Australia v Commonwealth* (1995) 128 ALR 1 at 45 per Mason *Cet al.* where it was stated: Section 10 of the Racial Discrimination Act added statutory protection to the common law rights of the holders of native title so that the holders of native title were able to enjoy their title equally with the enjoyment of other title by the holders thereof. Thus the *Racial Discrimination Act* protects native title holders against discriminatory extinction or impairment of native title.

149 *Mining Act 1968* (Qld) s 7.

150 Under s 21 of the *Mining Act 1968* (Qld), a mining lease could be granted over Crown land which included Crown leasehold under the *Land Act 1962* (Qld). Under Part 12 of the *Mining Act 1968* (Qld) a mining lease could be granted over freehold land, although on different terms to the grant of a mining lease over Crown land.

1975 (Cth) operated to require rights given to the holders of leasehold land to also be given to native title holders. The failure to confer these rights upon native title holders, given the non-recognition of native title before *Mabo [No. 2]*, is a source of potential invalidity of mining leases granted under the *Mining Act 1968* (Qld).

There are few provisions of the *Mining Act 1968* (Qld) where a failure to comply in respect of native title holders would give rise to invalidity. It is apparent from the summary of the *Mining Act 1968* (Qld) above, rights were given to the lessees of 'Crown land'. The relevant rights for consideration here are the right for an occupier of Crown land to be notified of an application for a mining lease and the right of a lessee of Crown land to compensation.

From 19 December 1974, the occupiers of Crown land were entitled to be served with notice of an application for a mining lease and with a copy of the certificate of application issued by the registrar.¹⁵¹ The duty to give notice to an occupier of Crown land was relocated to s 21 of the *Mining Act 1968* (Qld) by the *Mining Act Amendment Act 1979*. Given that the protection afforded to native title by the *Racial Discrimination Act 1975* (Cth) may include the duty to give notice where such a right is afforded to the holders of other titles granted by the Crown,¹⁵² native title holders would have been entitled to notice under the *Mining Regulations 1971* (Qld) or s 21 of the *Mining Act 1968* (Qld) either as occupiers of Crown land or by virtue of s 10(1) of the *Racial Discrimination Act 1975* (Cth).

The failure to give notice to native title holders is probably not a basis for invalidity of the grant of a mining lease. The *Mining Act and Another Act Amendment Act 1974*,¹⁵³ amended s 21 of the *Mining Act 1968* (Qld) to include the following:

For the purposes of this subsection [which related to applications] a person shall be taken to have complied with the provisions of this Act if he has, in the opinion of the Governor in Council, substantially complied with those provisions.

Under s 38 of the *Mining Regulations 1971* (Qld),¹⁵⁴ applicants were also required to post a copy of the certificate of application on the land and at the Wardens Office in the relevant Mining District and advertise a copy in a local newspaper. Compliance with these provisions was required to be stated in a statutory declaration provided to the Warden.¹⁵⁵ If an applicant had substantially complied with the requirements of the *Mining Act 1968*

151 *Mining Regulations 1971* (Qld) s 38A as inserted by amending regulations of 19 December 1974: see *Queensland Government Gazette* Vol 247 No 66 1974 pp 1515-1522.

152 *Western Australia v Commonwealth* (1995) 128 ALR 1 at 34 per Mason C *et al.*

153 The *Mining Act and Another Act Amendment Act 1974* (Qld) commenced on 21 September 1974: 'Proclamation' in *Queensland Government Gazette* Vol 147 No 16 1974 pp 270-1.

154 These requirements were later relocated to s 21 of the *Mining Act 1968* (Qld) by the *Mining Act Amendment Act 1979* (Qld).

155 *Mining Regulations 1971* (Qld) s 38(5).

(Qld), including those under s 38 of the *Mining Regulations 1971* (Qld), and a grant of a mining lease was made by the Governor in Council, it is likely that the requirement for substantial compliance was satisfied.

The operation of the *Constitution (Executive Actions Validity) Act 1988* (Qld)¹⁵⁶ is also relevant. This Act, enacted to validate certain procedural irregularities of the Governor in Council in failing to consider validly made objections prior to making orders in council under the *City of Brisbane Town Planning Act 1964* (Qld),¹⁵⁷ relevantly provided as follows:

S 4. *Executive action not affected by breach of procedure.*

- (1) *An executive action shall not be taken-*
- (a) *to be invalid or to have ever been invalid; or*
 - (b) *to fail or to have ever failed to have the effect in law intended for such action, by reason only that in connexion with the performance of that action any procedure prescribed by an Act for the performance of that action has been contravened or has not been observed.*

The term 'executive action' included the grant of a mining lease under s 21 of the *Mining Act 1968* (Qld) by the Governor in Council.¹⁵⁸ The requirement for an applicant for a mining lease to give notice is a 'procedure prescribed by an Act for the performance of [an] action' because s 21 of the *Mining Act 1968* (Qld) authorises the grant of a mining lease by the Governor in Council 'upon the applicant complying with the provisions of this Act relating to such an application'. Consequently, if any mining lease was granted over land where native title existed, or over land subject to a lease or over freehold land¹⁵⁹ and the procedure of the *Mining Act 1968* (Qld) in relation to notification had not been complied with so as to render the grant invalid, that invalid grant would have been validated by the *Constitution (Executive Actions Validity) Act 1988* (Qld). For the reasons above, it appears unlikely that a failure to give notice to native title holders resulted in the invalidity of the grant of a mining lease under the *Mining Act*

156 The operative provisions of the *Constitution (Executive Actions Validity) Act 1988* (Qld) were repealed by s 59 of the *Judicial Review Act 1991* (Qld) from 1 June 1992 (the commencement of s 59 of the *Judicial Review Act 1991* (Qld); see SL No 110 of 1992).

157 See generally *Brisbane City Council v Mainsel Investments Pty Ltd* (1988) 67 LGR 283.

158 *Constitution (Executive Actions Validity) Act 1988* (Qld) s 3 defined 'executive action', as follows: 'executive action' means the performance by the Governor or the Governor in Council, purporting to act in pursuance of the provisions of an Act, of an action required or authorized by an Act to be performed by the Governor or the Governor in Council, including-

- (a) *the making of any Proclamation or Order in Council;*
- (b) *the making or approval of any regulation, ordinance, by-law, statute, rule or other instrument;*
- (c) *the making of any declaration or appointment;*
- (d) *the granting of any approval.*

159 This eliminated the possible application of s. 10(1) of the *Racial Discrimination Act 1975* (Cth) to restrict the validating effect of the *Constitution (Executive Actions Validity) Act 1988* (Qld).

1968 (Qld).

Although similar notification provisions are found in the *Mineral Resources Act 1989* (Qld),¹⁶⁰ the acceptance of substantial performance of anything required to be done under that Act as sufficient by the Governor in Council, the Minister, the chief executive, a warden or a mining registrar is required to be recorded in writing.¹⁶¹ It is unlikely that, where a native title holder was not notified of an application for a mining lease as required under the *Mineral Resources Act 1989* (Qld), the Governor in Council recorded in writing that there had been sufficient compliance with the notification requirements of the *Mineral Resources Act 1989* (Qld). Therefore, after the application of the *Constitution (Executive Actions Validity) Act 1988* (Qld) ceased,¹⁶² the failure of notification to a holder of native title may have rendered the grant of a mining lease invalid if the acceptance of substantial performance was not recorded by the Governor in Council and the notification requirement was a mandatory one.¹⁶³

The provisions of the *Mining Act 1968* (Qld) also conferred a right to compensation.¹⁶⁴ Despite the fact that s 10(1) of the *Racial Discrimination Act 1975* (Cth) operated to confer an equivalent right to compensation upon native title holders, these compensation rights arose only where an application was made to a warden.¹⁶⁵ Given the non-recognition of native title before *Mabo [No. 2]*, it is unlikely that native title holders, in that capacity, made such an application.

The *Mining Act and Another Act Amendment Act 1974* (Qld)¹⁶⁶ reformulated the compensation provisions for Crown land by inserting a new Division 4 in Part 4 of the *Mining Act 1968* (Qld). Under that reformulated scheme, compensation remained available only upon application.¹⁶⁷ Under the *Mining Act and Other Acts Amendment Act 1982* (Qld),¹⁶⁸ the compensation arrangements for Crown land were made consistent with those that had operated for freehold land since the commencement of the *Mining Act 1968* (Qld).¹⁶⁹ These provisions required the payment of compensation by the applicant for, or the holder of a mining lease to a lessee¹⁷⁰ or owner¹⁷¹ of Crown land, or agreement about compensation

160 *Mineral Resources Act 1989* (Qld) s 252(7)(c)(i).

161 *Ibid* s 392.

162 The application of the operative provisions of the *Constitution (Executive Actions Validity) Act 1988* (Qld) ceased on 1 June 1992; the date of the commencement of s 59 of the *Judicial Review Act 1991* (Qld) which repealed the operative provisions of the *Constitution (Executive Actions Validity) Act 1988* (Qld) (see SL No 110 of 1992).

163 See *Scurr v Brisbane City Council* (1973) 133 CLR 242.

164 *Mining Act 1968* (Qld) s 43.

165 *Ibid* s 43 as enacted.

166 The *Mining Act and Another Act Amendment Act 1974* (Qld) commenced on 21 September 1974; see 'Proclamation' in *Queensland Government Gazette* Vol 147 No 16 1974 pp 270-1.

167 *Mining Act 1968* (Qld) s 43AA.

168 The *Mining Act and Other Acts Amendment Act 1982* (Qld) commenced on 1 August 1982; see 'Proclamation' in *Queensland Government Gazette* Vol 170 No 120 1982 p 2422.

169 *Mining Act 1968* (Qld) s 130.

170 Defined *Mining Act 1968* (Qld) s 43, as inserted by the *Mining Act and Another Act Amendment Act 1974* (Qld), as 'a person for the time being lawfully entitled to possession' of the land in a

between those parties as a condition precedent to the grant or renewal of a mining lease.¹⁷² Given that native title holders would be entitled to compensation under these provisions, either on their face¹⁷³ or by the operation of s 10(1) of the *Racial Discrimination Act 1975* (Cth) and the unlikelihood of compensation being paid to native title holders under the provisions, the grant or renewal of mining leases after the commencement of the *Mining Act and Other Acts Amendment Act 1982* (Qld) over land where native title survived was probably invalid.

Similar compensation entitlements were conferred by the *Mineral Resources Act 1989* (Qld) by ss 279 and 280. In contradistinction to the operation of the provisions of the *Mining Act and Other Acts Amendment Act 1982* (Qld), the *Mineral Resources Act 1989* (Qld) requires only compensation for a mining lease which includes the surface of land to be determined as a condition precedent to the grant of a lease.¹⁷⁴ Because of the operation of s 10(1) of the *Racial Discrimination Act 1975* (Cth) in respect of such a compensation entitlement, the grant of a mining lease under the *Mineral Resources Act 1989* (Qld) including the surface of land will be invalid where compensation has not been paid to a native title holder before grant. Although native title holders would be entitled to compensation where the grant of a mining lease did not include the surface of land,¹⁷⁵ invalidity would not result from such a grant because the payment of compensation is not a condition precedent to the grant.¹⁷⁶

The *Constitution (Executive Actions Validity) Act 1988* (Qld) cannot apply in relation to the payment of compensation as a condition precedent to the grant of a mining lease because it is not a 'procedure prescribed by an Act for the performance of [an] action' but, rather, an express limitation on the exercise of the power to grant a mining lease.

mining claim or mining lease. Where native title rights and interests confer a right to possession, this definition will of itself entitle native title holders to compensation under Division 4 of Part 4 of the *Mining Act 1968* (Qld). Where native title rights and interests do not confer such a right, the operation of s 10(1) of the *Racial Discrimination Act 1975* (Cth) will be triggered to ensure the same 'security of enjoyment' of native title and, therefore, a right of compensation.

171 Defined *Mining Act 1968* (Qld) s 43, as inserted by the *Mining Act and Another Act Amendment Act 1974* (Qld), as 'a person lawfully entitled to the use of improvements' on the land included in a mining claim or mining lease.

172 *Mining Act 1968* (Qld) s 43GA.

173 Ie as a 'lessee', being entitled to possession of the land, or 'owner', being lawfully entitled to the use of improvements eg when native title survives over land reserved for the benefit of Aboriginal people and the residents of that reserve are native title holders they will be 'owners' because they are lawfully entitled to use the improvements of the reserve.

174 *Mineral Resources Act 1989* (Qld) s 279(1).

175 *Ibid* s 280 given the modified operation of that provision in respect of land subject to native title rights and interests resulting from the operation of s 10(1) of the *Racial Discrimination Act 1975* (Cth).

176 See also *Mineral Resources Act 1989* (Qld) s 284 where the initial term of a mining lease is restricted to the period in respect of compensation has been agreed or determined where the surface of land is the subject of a grant. The period for which compensation for a mining lease has been agreed or determined where the surface of land is not included in a lease does not restrict the initial term of that lease.

Where compensation is not paid, the Governor in Council is deprived of the authority to grant a mining lease.

Even where the grant of a mining lease is not rendered invalid by the operation of s 10(1) of the *Racial Discrimination Act 1975* (Cth), the valid grant of a mining lease after 31 October 1975 would not operate to extinguish native title because the plain operation of the *Mining Act 1968* (Qld) and the *Mineral Resources Act 1989* (Qld) is to allow the continuation of 'other titles', such as leasehold or freehold, after a mining lease expires. Rather, s 10 of the *Racial Discrimination Act 1975* (Cth) would operate to confer the same security of enjoyment on holders of native title to ensure the continuation of native title rights and interests after the expiry of a grant under the *Mining Act 1968* (Qld) or the *Mineral Resources Act 1989* (Qld).¹⁷⁷

Summarising the effect of the *Racial Discrimination Act 1975* (Cth) upon the grant of mining leases under the *Mining Act 1968* (Qld), it appears that mining leases granted over land where native title survives will be invalid only after the commencement of the *Mining Act and Other Acts Amendment Act 1982* (Qld) where compensation was not given to, or agreed with native title holders prior to the grant of a mining lease. Mining leases which were granted before the commencement of that Act but after the commencement of the *Racial Discrimination Act 1975* (Cth) will be valid but will not operate to extinguish native title. The effect of the survival of native title where a valid mining lease was granted after 31 October 1975 will be considered below in relation to the 'right to negotiate' procedure of the *Native Title Act 1993* (Cth).

Mining Leases and the *Native Title Act 1993* (Cth)

***Native Title Act 1993* (Cth)**

Native title cannot be extinguished in a manner contrary to the *Native Title Act 1993* (Cth)¹⁷⁸ which therefore ensures that the provisions of the *Native Title Act 1993* (Cth) which permit the extinguishment or impairment of native title constitute an exclusive code with which compliance is essential for the effective extinguishment or impairment of native title.¹⁷⁹

The *Native Title Act 1993* (Cth) was enacted as the response of the Commonwealth Government to the issues emerging from *Mabo [No 2]*.¹⁸⁰ In *Western Australia v Commonwealth*, in which the validity of all but s 12 of the *Native Title Act 1993* (Cth) was upheld, the majority judgment described three aspects of the operation of the *Native Title Act 1993* (Cth) that were of

177 *Western Australia v Commonwealth* (1995) 128 ALR 1 at 24 per Mason CJ *et al.*

178 *Native Title Act 1993* (Cth) s 11(1).

179 *Western Australia v Commonwealth* (1995) 128 ALR 1 at 37 per Mason C *et al.*

180 Cth of Aust House of Representatives 'Debates' 16 November 1993 2877.

central importance to its constitutional character, namely the recognition and protection of native title, the giving of full force and effect to 'past acts' which might not otherwise have been effective to extinguish or impair native title and the giving full force and effect to 'future acts' which might not otherwise be effective to extinguish or impair native title.¹⁸¹

Given the invalidity of dealings over native title land arising from the *Racial Discrimination Act 1975* (Cth), the *Native Title Act 1993* (Cth) within the constitutional constraints of the Commonwealth¹⁸² validates 'past acts'¹⁸³ attributable to the Commonwealth.¹⁸⁴ The term 'past act' is a compound definition. The term 'act' is broadly defined.¹⁸⁵ Fundamentally, a 'past act' is a legislative 'act' before 1 July 1993 or a non-legislative 'act' before 1 January 1994 over land or waters where native title exists, and which is invalid but which would be valid if native title did not exist.¹⁸⁶ A non-legislative 'act' can be a 'past act' even after 30 December 1993 when:

- it arises from the exercise of a legally enforceable right created by legislation before 1 July 1993 or by any other act before 1 January 1994;¹⁸⁷
- it takes place in giving effect to an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993 and evidenced in writing;¹⁸⁸
- it is a renewal, extension or regrant of an earlier interest;¹⁸⁹
- it is done in accordance with the authority conferred by an earlier 'past act'.¹⁹⁰

The *Native Title Act 1993* (Cth) provides for the effect of validation of 'past acts' on pre-existing native title by dividing 'past acts' into four

181 *Western Australia v Commonwealth* (1995) 128 ALR 1 at 36 per Mason C *et al.*

182 See *University of Wollongong v Metwally* (1984) 158 CLR 447 where the High Court held that Commonwealth legislation could not retrospectively remove the invalidity of State law under s 109 of the *Commonwealth Constitution*.

183 Defined *Native Title Act 1993* (Cth) s 228.

184 *Native Title Act 1993* (Cth) s 14 (Validation of Commonwealth acts) which relevantly provides: *If a past act is an act attributable to the Commonwealth, the act is valid, and is taken always to have been valid.*

185 Defined *Native Title Act 1993* (Cth) s 226 and includes 'the making, amendment or repeal of legislation' (s 226(2)(a)) and 'the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise' (s 226(2)(d)).

186 *Native Title Act 1993* (Cth) s 228(2).

187 *Ibid* s 228(3)(b)(i).

188 *Ibid* s 228(3)(b)(ii).

189 *Ibid* s 228(4). The term 'interest' is defined by *Native Title Act 1993* (Cth) s 253 which provides:

'interest', in relation to land or waters, means:

(a) a legal or equitable estate in the land or waters; or

(b) any other right (including a right under an option and a right of redemption),

charge, power or privilege over, or in connection with:

(i) the land or waters; or

(ii) an estate or interest in the land or waters; or

(c) a restriction on the use of the land or waters, whether or not annexed to other land or waters.

190 *Ibid* s 228(9).

categories, 'categories A-D'. 'Category A past acts'¹⁹¹ include most grants of freehold estates and most commercial, agricultural, pastoral and residential leases and the construction of 'public works'.¹⁹² 'Category B past acts' are most leases which are not 'Category A past act' leases.¹⁹³ 'Category C past acts' are grants of mining leases.¹⁹⁴ 'Category D past acts' are the residual category and include any 'past act' that is not a Category A-C past act.¹⁹⁵

The validation of 'past acts' either extinguishes native title in the case of 'Category A past acts';¹⁹⁶ extinguishes native title to the extent of any inconsistency between the relevant 'past act' and the native title rights and interests in the case of 'Category B past acts';¹⁹⁷ or suppresses native title rights and interests that are inconsistent with the 'past act' for the duration of the 'past act' under the 'non-extinguishment principle'¹⁹⁸ in the case of 'Category C and D past acts'.¹⁹⁹ It is apparent, therefore, that when the grant of a mining lease is a 'past act', it will be validated as a 'Category C past act' and the 'non-extinguishment principle' will apply.

Compensation entitlements for native title holders flow from the validation of 'past acts'.²⁰⁰ Importantly, the compensation for 'past acts' attributable to the Commonwealth are paid by the Commonwealth²⁰¹ while those attributable to Queensland are met by the State.²⁰²

The *Native Title Act 1993* (Cth) operates to recognise and protect native title²⁰³ by removing its vulnerability to sterilisation at common law by providing a prima facie sterilisation of all acts that would otherwise defeat

191 Defined *Native Title Act 1993* (Cth) s 229.

192 Defined *Native Title Act 1993* (Cth) s 253 which provides:

'public work' means:

- (a) a building, or other structure, that is a fixture; or
- (b) a road, railway or stock-route; or
- (c) any major earthworks;

constructed or established by or on behalf of the Crown, or a statutory authority of the Crown, in any of its capacities.

193 *Native Title Act 1993* (Cth) s 230.

194 *Ibid* s 231.

195 *Ibid* s 232.

196 *Ibid* s 15(1)(a)&(b).

197 *Ibid* s 15(1)(c).

198 Defined *Native Title Act 1993* (Cth) s 238 which relevantly provides:

- (1) *This section sets out the effect of a reference to the non-extinguishment principle applying to an act.*
- (2) *If the act affects native title in relation to the land or waters concerned, the native title is nevertheless not extinguished, either wholly or partly.*
- (3) *In such a case, if the act is wholly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety but the rights and interests have no effect in relation to the act.*
- (4) *If the act is partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency.*

199 *Native Title Act 1993* (Cth) s 15(1)(d).

200 *Ibid* s 17.

201 *Ibid* s 17(4).

202 *Native Title (Queensland) Act 1993* (Qld) s 15.

203 *Native Title Act 1993* (Cth) s 11(1).

native title.²⁰⁴ The *Native Title Act 1993* (Cth) provides a scheme with which all 'future acts'²⁰⁵ must comply in order to validly affect native title rights and interests. Under the *Native Title Act 1993* (Cth), 'future acts' are either 'permissible future acts' or 'impermissible future acts'.²⁰⁶ A legislative 'permissible future act' is one which applies to native title holders as it applies to an owner of 'ordinary title'²⁰⁷ or which means that native title holders are not treated in a more disadvantageous way than owners of 'ordinary title'.²⁰⁸ A non-legislative 'permissible future act' is one which could be done over land subject to native title if the native title holders held 'ordinary title' or over waters subject to native title if the native title holders held 'ordinary title' to the adjoining land.²⁰⁹

The term 'permissible future act' also includes:

- the renewal, regrant or extension of valid commercial, agricultural, pastoral and residential leases;²¹⁰
- any future act in relation to an 'offshore place';²¹¹
- a 'low impact future act';²¹² and
- an 'act' to which native title holders have given their consent.²¹³

204 *Western Australia v Commonwealth* (1995) 128 ALR 1 at 37 per Mason C *et al.*

205 Defined *Native Title Act 1993* (Cth) s 233 as an 'act' which:

- is either a legislative 'act' which takes place after 30 June 1993 or a non-legislative 'act' which takes place after 31 December 1993; and
- is not a 'past act';
- validly affects native title or is, apart from the *Native Title Act 1993* (Cth), invalid to any extent and, if valid, would affect native title.

An act 'affects' native title if it extinguishes native title or is wholly or partly inconsistent with the continued existence of native title: *Native Title Act 1993* (Cth) s 227.

206 See *Native Title Act 1993* (Cth) s 236 which provides that a 'impermissible future act' is any act that is not a 'permissible future act'.

207 *Native Title Act 1993* (Cth) s 253, in respect of 'onshore land' only. In the ACT and Jervis Bay Territory, 'ordinary title' means a lease granted by or on behalf of the Commonwealth under a law of the Commonwealth or the ACT. In respect of all other land, 'ordinary title' means a freehold estate in fee simple has been made.

208 *Ibid* s 235(2).

209 *Ibid* s 235(5).

210 *Ibid* s 235(7).

211 *Ibid* s 235(8)(a) and s 253 which defines 'offshore place' as any land or waters to which the Act extends other than land or waters in an 'onshore place'. The same section defines an 'onshore place' as land or waters within the limits of a State or Territory. This definition imports considerations of the limits of a State as at 1 January 1901: see *New South Wales v The Commonwealth* (1975) 135 CLR 337 (the '*Seas and Submerged Lands Act Case*') which generally concludes that the limits of the States is the low water mark as at mean spring tide.

212 *Ibid* s 235(8)(b) and s 234 which defines a 'low impact future act' as an 'act' which takes place before an 'approved determination of native title', defined in *Native Title Act 1993* (Cth) s 13, that native title exists and does not involve matters such as the grant of a lease or a freehold estate, the excavation or clearing of land or mining.

213 *Ibid* s 235(8)(c) and s 21 provides for agreements between native title holders and the Commonwealth, a State or a Territory about the surrender of native title or consent to an 'act' which would affect native title.

An 'impermissible future act' is invalid to the extent that it affects native title.²¹⁴ A 'permissible future act' is valid.²¹⁵

Native title holders are entitled to any procedural right to which a holder of 'ordinary title' would be entitled.²¹⁶ The *Native Title Act 1993* (Cth) provides a substituted service process for the notification of native title holders before a determination of native title has been made.²¹⁷ In respect of a 'permissible future act' that involves 'mining',²¹⁸ a negotiation process must be undertaken before a right to 'mine' can validly be granted.²¹⁹

Native title holders are entitled to compensation in respect of certain 'permissible future acts'.²²⁰

The *Native Title Act 1993* (Cth) establishes a claims process for native title,²²¹ for which the National Native Title Tribunal is established²²² to provide mediation services for contested native title determination applications.²²³ Although the *Native Title Act 1993* (Cth) provides that none of the determinations of the National Native Title Tribunal are final and binding, except those relating to the right to negotiate procedure,²²⁴ there is a procedure for the registration of determinations in the Federal Court which gives the determination the effect of an order of the Federal Court.²²⁵ A virtually identical procedure under the *Racial Discrimination Act 1975* (Cth) has been impugned by the decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission*.²²⁶ The equivalent provisions of the *Native Title Act 1993* (Cth)²²⁷ are therefore of doubtful

214 *Ibid* s 22.

215 *Ibid* s 23(2). The meaning of the term 'valid', which is defined in *Native Title Act 1993* (Cth) s 253 to include 'having full force and effect', was discussed in *Western Australia v Commonwealth* (1995) 128 ALR 1 at 50 per Mason *et al*, where it was said: [T]he term 'valid' (or one of its derivatives) ...has more than one meaning and it is defined in the *Native Title Act* to include 'having full force and effect'. In accordance with s 15A of the *Acts Interpretation Act 1901* (Cth), that term must be construed to have a meaning which is supported by Commonwealth legislative power; it must not be construed to have a meaning which, in its context, would carry the Act outside Commonwealth power. Therefore the use of the respective terms relate to a State law, must be taken to mean having, or not having, (as the case may be) full force and effect upon the regime of protection of native title otherwise prescribed by the Act. In other words, those terms are not used in reference to the power to make or to the making of a State or Territory law but in reference to the effect which a State law, when validly made, might have in creating an exception to the blanket protection of native title by s 11(1). In using the terms 'valid' and 'invalid', the Act marks out the areas relating to native title left to regulation by State and Territory laws or the areas relating to native title regulated exclusively by the Commonwealth regime.

216 *Ibid* s 23(6).

217 *Ibid* s 23(7).

218 *Ibid* s 253 defines 'mine' to include exploration and prospecting activities and quarrying.

219 *Ibid* Part 2 Division 3 Subdivision B, particularly s 28. This process requires notification (s 29), negotiation (s 31) and, in the absence of agreement, provides for a determination of whether an action may proceed or grant may be given (ss 35-39).

220 *Ibid* s 23(3)&(4).

221 *Ibid* Part 3 (Applications).

222 See *Native Title Act 1993* (Cth) Part 6 (National Native Title Tribunal) generally.

223 *Native Title Act 1993* (Cth) s 74 provides that, where no agreement is reached for an opposed application, the application must be referred to the Federal Court.

224 *Ibid* Part 2 Division 3 Subdivision B (right to negotiate).

225 *Ibid* s 167(1).

226 (1995) 127 ALR 1.

227 *Native Title Act 1993* (Cth) ss 166-8.

validity.

Mining leases after the Native Title Act 1993 (Cth)

Any mining leases that are invalid because of the existence of native title and the operation of s 10(1) of the *Racial Discrimination Act 1975* (Cth) will be validated by the *Native Title Act 1993* (Cth) as 'past acts'. Where the grant of a mining lease is a 'past act' it is specified to be a 'Category C past act'²²⁸ to which the 'non-extinguishment' principle applies.²²⁹

Given the conclusion that a mining lease confers exclusive possession, the operation of the 'non-extinguishment principle' will be to render native title rights and interests of no effect in relation to the lease.²³⁰ Native title rights and interests will become fully effective upon the expiry of the mining lease.²³¹

Even though the 'non-extinguishment principle' applies to a 'Category C past act', native title holders are entitled to compensation for a 'past act' where ordinary title²³² holders were entitled to compensation.²³³ Freehold owners were entitled to compensation under *Mining Act 1968* (Qld) s 128²³⁴ and *Mineral Resources Act 1989* (Qld) ss 279 and 280. Therefore the holders of native title in respect of land where a mining lease was invalidly granted and a 'past act' are entitled to compensation. Compensation in respect of the validation of a mining lease is payable by the State of Queensland.²³⁵

Where the grant of a mining lease is a 'past act', the lease can be renewed at any time.²³⁶ After 31 December 1993, the grant or renewal of a mining lease that is not a 'past act', but is done over land subject to native rights and interests, is a 'future act'.²³⁷ Given that the *Mineral Resources Act*

228 *Ibid* s 231.

229 *Ibid* s 15(1)(d).

230 *Ibid* s 238(3).

231 *Ibid* s 238(6) and the example in s 238(8) which specifically refers to the grant of a mining lease and its expiry.

232 Defined *Native Title Act 1993* (Cth) s 253 as, for Queensland 'onshore' places, a freehold estate in fee simple.

233 *Native Title Act 1993* (Cth) s 17(2)(a) and 20(1).

234 Interestingly, the *Native Title Act 1993* (Cth) requires the same compensation entitlement for native title holders for a 'past act' as freehold owners would be entitled to: see *Native Title Act 1993* (Cth) s 17. It has been concluded above that the *Racial Discrimination Act 1975* (Cth) required only the treatment of native title holders as the holders of 'other forms of title' sufficient to remove any discriminatory treatment. Under the *Mining Act 1968* (Qld), this would mean that native title holders were entitled to compensation as if they were the lessees of Crown leasehold. This in turn means that, because until the *Mining Act and Other Acts Amendment Act 1982* (Qld) the payment of compensation was contingent upon an application (which it is unlikely native title holders would have made), native title holders can receive no compensation in respect of a valid mining lease granted after 31 October 1975. Invalidation is necessary for an act to be a 'past act' and creates an entitlement to compensation equivalent to an owner of freehold.

235 *Native Title Act 1993* (Cth) s 20(3) and *Native Title (Queensland) Act 1993* (Qld) s 15(2).

236 *Native Title Act 1993* (Cth) s 228(4).

237 A 'future act' is an 'act' which occurs after a certain time and is not a 'past act' but which either affects

1989 (Qld), the only legislation applicable in this time frame, authorises the grant or renewal of a mining lease over 'ordinary title' (ie freehold²³⁸) as well as native title land, such a grant or renewal is a 'permissible future act' and, because it relates to mining, the 'right to negotiate' process of the *Native Title Act 1993* (Cth) must be undertaken before the grant or renewal. Also, native title holders are entitled to the same procedural rights as an owner of freehold.²³⁹

If the 'right to negotiate' process is not undertaken, the grant or renewal will be invalid.²⁴⁰ It is important to note that the renewal of a mining lease granted after the commencement of the *Racial Discrimination Act 1975* (Cth) which is *valid* is a 'permissible future act' and can only be renewed subject to the 'right to negotiate procedure'.²⁴¹ Given the conclusions above, this includes the renewal of all mining leases granted over land subject to native title rights and interests after the commencement of the *Racial Discrimination Act 1975* (Cth) (31 October 1975) and before the commencement of the *Mining Act and Other Acts Amendment Act 1982* (Qld) (1 August 1982).

The 'non-extinguishment principle', discussed above, applies to a 'permissible future act' that is the grant or renewal of a right to mine.²⁴² Given that mining is not a 'low impact future act',²⁴³ native title holders are entitled to compensation under the *Native Title Act 1993* (Cth) because the *Mineral Resources Act 1989* (Qld) provides a right of compensation to owners of freehold but not native title holders.²⁴⁴ Compensation for a mining lease that is a 'permissible future act' is payable by the applicant for a mining lease.²⁴⁵

Conclusions

Before the commencement of the *Racial Discrimination Act 1975* (Cth), it is highly likely that the grant of a mining lease under the *Mining Act 1898* (Qld) or the *Mining Act 1968* (Qld) operated to confer exclusive possession

native title or may be, apart from the *Native Title Act 1993* (Cth), invalid because of the existence of native title: *Native Title Act 1993* (Cth) s 233.

238 *Native Title Act 1993* (Cth) s 253.

239 *Ibid* s 23(6). Note also the alternative process for notification in *Native Title Act 1993* (Cth) s 23(7).

240 *Ibid* s 28.

241 Young D, 'How Companies Should Respond to a Claim on Title', a paper presented at the *Working with the Native Title Act Conference* (Sydney AIC Conferences 16-18 May 1994) 3.

242 *Native Title Act 1993* (Cth) s 23(4)(a).

243 Mining is specifically excluded from the definition of 'low impact future act' by *Native Title Act 1993* (Cth) s 234(b)(v).

244 *Native Title Act 1993* (Cth) s 23(4). Despite the fact that the *Racial Discrimination Act 1975* (Cth) may operate to create a right of compensation for native title holders in respect of the grant of a mining lease, the *Mineral Resources Act 1989* (Qld) does not itself provide that compensation.

245 *Ibid* s 23(5)(b)(i). Also, native title holders are 'owners' under the *Mineral Resources Act 1989* (Qld) (*Native Title (Queensland) Act 1993* (Qld) s 152) and the duty to pay compensation to 'owners' under the *Mineral Resources Act 1989* (Qld) is on the applicant for a mining lease: *Mineral Resources Act 1989* (Qld) ss 279 and 281 (in the case of an application for a mining lease of the surface of land).

and, in the absence of a reservation for access by indigenous people (which is unlikely), extinguished native title.

After the commencement of the *Racial Discrimination Act 1975* (Cth) and before 1 January 1994, native title rights and interests will not be extinguished by the grant of valid mining leases because of the protective operation of s 10 of that Act. Also, because a failure to comply with notice requirements is unlikely to result in invalidity, the grant of mining leases after the commencement of the *Racial Discrimination Act 1975* (Cth) (31 October 1975) and before the commencement of the *Mining Act and Other Acts Amendment Act 1982* (Qld) (1 August 1982) was valid. After that time, the failure to pay compensation to native title holders before the grant or renewal of a mining lease, which was required because of the operation of s 10 of the *Racial Discrimination Act 1975* (Cth), resulted in the invalidity of the grant or renewal.

In the same time frame (after the commencement of the *Racial Discrimination Act 1975* (Cth) and before 1 January 1994), under the *Mineral Resources Act 1989* (Qld), mining leases that included the surface of land were rendered invalid in the same way. In the case of the grant of a mining lease excluding the surface of land under the *Mineral Resources Act 1989* (Qld), the grant may have been invalid for failure to give notice to the native title holder after the repeal of the *Constitution (Executive Actions Validity) Act 1988* (Qld).²⁴⁶ Otherwise, the grant of such a lease was valid.

Any mining lease that was invalid because of the existence of native title is a 'past act' and is validated by the *Native Title (Queensland) Act 1993* (Qld). Such mining leases may be renewed at any time as a 'past act'. The grant or renewal of mining leases over native title land after 30 December 1993 that are not 'past acts' will be subject to the provisions of the *Native Title Act 1993* (Cth). Unless the grant or renewal is for a mining lease exclusive of the surface of land, the grant or renewal will be a 'future act' and must be granted or renewed in accordance with the 'right to negotiate' process. This includes the renewal of a grant made before 1 January 1994 that was valid.

Where a mining lease is granted or renewed exclusive of the surface of land, native title rights will probably be undisturbed. If this is the case, the grant or renewal of such a mining lease after 30 December 1993 will not be subject to the 'right to negotiate' process because the grant or renewal does not 'affect'²⁴⁷ native title, which is a prerequisite to an 'act' being a 'future act'.²⁴⁸ The *Racial Discrimination Act 1975* (Cth) would, however,

246 This was only the case if notification was a mandatory requirement and was not excused under *Mineral Resources Act 1989* (Qld) s 392. See *Scurr v Brisbane City Council* (1973) 133 CLR 242.

247 Defined *Native Title Act 1993* (Cth) s 227 as an act which extinguishes native title or is partly or wholly inconsistent with native title.

248 *Native Title Act 1993* (Cth) s 233, given that the grant would also not be invalid under the *Racial*

operate to preserve compensation²⁴⁹ and notification entitlements of native title holders.²⁵⁰

All mining leases which are validated 'past acts' will be 'Category C past acts' and the non-extinguishment principle will apply. The same is true of a mining lease that is a 'permissible future act'. In these cases, native title will be completely suppressed, because native title is wholly inconsistent with a mining lease, for the duration of a mining lease which is a 'past act' or a 'permissible future act'.

Given the complex nature of validity and invalidity of mining leases, it will be difficult to determine when the 'right to negotiate' process of the *Native Title Act 1993* (Cth) must be undertaken. Because of the invalidity that flows from a failure to undertake the 'right to negotiate' process when it applies and the substantial investments that many mining lease applications represent, consideration should be given to undertaking the 'right to negotiate' process when its application is uncertain to ensure the validity of any subsequent grant of a mining lease. This would necessitate an assessment of the relative cost of undertaking the 'right to negotiate' process against that of failing to secure access to part of a mineral resource. This assessment will result in the mining industry either making commercial decisions not to secure some mineral resources or meeting the additional cost of the 'right to negotiate' process to ensure access to those resources. Similarly, native title holders and native title claimants should be particularly aware of the potential for the renewal of certain mining leases to trigger the 'right to negotiate' process and must be equipped to undertake that process where it is required.

Discrimination Act 1975 (Cth) because the *Mineral Resources Act 1989* (Qld) authorises the grant of a mining lease over freehold land as well as land subject to native title rights and interests.

249 As noted above, compensation for a mining lease not including the surface of land is not required to be determined or agreed before a mining lease is granted: compare *Mineral Resources Act 1989* (Qld) ss 279 and 280. The grant of such a mining lease is therefore not invalid because of the operation of the *Racial Discrimination Act 1975* (Cth).

250 *Native Title Act 1993* (Cth) s 7 preserves the operation of the *Racial Discrimination Act 1975* (Cth) except in relation to the validation of 'past acts' by, or in accordance with, the *Native Title Act 1993* (Cth).