# PASTORAL LEASES IN THE NORTHERN TERRITORY AND THE RESERVATION OF ABORIGINAL RIGHTS, 1863-1931

JAMIE DALZIEL*

## I. INTRODUCTION

One of the important questions left unresolved by the decision of the High Court in *Wik Peoples v The State of Queensland*[1] is what effect a pastoral lease which contains a reservation in favour of Aboriginal people has on native title rights and interests.[2] The first pastoral leases granted in New South Wales and Queensland[3] included reservations of this kind. Leases in South Australia, Western Australia and the Northern Territory still provide for Aboriginal access to pastoral land, although there were short periods when, in both Western Australia and the Northern Territory, pastoral leases were granted without a reservation clause.

The 1998 amendments to the *Native Title Act* 1993 (Cth) leave the question whether a pastoral lease is an exclusive pastoral lease, that is, one which extinguishes native title, to be determined by the common law.[4] One of the issues the courts will have to consider is the legal effect of a reservation clause. In particular, the nature of the rights and interests (reserved to Aboriginal people) *vis à vis* native title rights and the interaction between those rights and the rights and interests granted to a lessee by a pastoral lease will be relevant in determining the effect of a reservation in each particular case.

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1 (1996) 187 CLR 1.

2 R Webb and K Pettit, "The Effect of Wik on Pastoral Leases with Provision for Access by Aboriginal People" in G Hiley (ed), *The Wik Case: Issues and Implications*, Butterworths (1997) 30.

3 See *North Ganalanja Aboriginal Corporation v The State of Queensland* (1995) 132 ALR 565.

4 See *Native Title Act* 1993 (Cth), ss 248A(a) and 248B and Part 2, Division 2B.

Some guidance can be found in the case *Ben Ward & Ors on behalf of the Miriuwung Gajerrong Peoples v The State of Western Australia*,[5] in which Lee J considered the effect of reservations in pastoral leases in Western Australia and the Northern Territory. His Honour held that the reservation "was an acknowledgement by the Crown of rights of the type attaching to a subsisting native title" and that no intention to extinguish native title is "manifested in the actions of the Crown and, to the contrary, it is made plain that the Crown had no intention so to act".[6] However, the Western Australian and Northern Territory Governments appealed the decision on this and other grounds to the Full Federal Court. The appeal was heard in July 1999 but a decision had not been reached at the time of publication.

Of particular interest is the Alice Springs Arrernte Native Title Claim,[7] in which Olney J considered the legal effect of pastoral leases granted over land immediately surrounding the township of Alice Springs between 1876 and 1941, including the first pastoral leases issued in the Northern Territory. Most of these early leases contained a reservation in favour of Aboriginal people. However, when the Commonwealth assumed responsibility for the administration of the Territory in 1911 it decided, when drafting the *Crown Lands Ordinance* 1912 (Cth), not to include a reservation in Territory pastoral leases. As a result, pastoral leases granted under this Ordinance between 1912 and 1924 did not contain the usual reservation. This invited an argument, taken up in the submissions of the Northern Territory to the Federal Court, that the 'exclusion' of the clause evinced a clear and plain intention on behalf of the Commonwealth to confer rights of exclusive possession on pastoral lessees and thereby to extinguish native title rights and interests. Olney J rejected this argument, adopting the reasoning of the applicants.[8] The arguments put forward by the applicants are discussed in this article.

The purposes of this article are threefold: first, to examine the history of the reservation in Northern Territory pastoral leases; secondly, in light of this history, to consider what effect the grant of a lease containing a reservation of Aboriginal rights will have on native title rights and interests; and thirdly, to examine whether any legal inferences may be drawn from the omission of the reservation clause from pastoral leases granted under the *Crown Lands Ordinance* 1912.

With the annexation of the Northern Territory by South Australia in 1863, the laws of that colony became applicable to the Territory. Hence, the article begins, in Parts II and III, by examining the historical background to the drafting of the original reservation included in South Australian pastoral leases. Part IV briefly examines constitutional developments in Australia which enabled the governments of each of the colonies to pass laws regulating the disposition of land, and led eventually to the first South Australian Land Acts. Part V traces the legislative and administrative history of the reservation in Northern Territory

5 (1999) 159 ALR 483.

6 *Ibid* at 561.

7 *Hayes v Northern Territory* [1999] FCA 1248 (9 September 1999, unreported).

8 *Ibid* at [84].

pastoral leases, while the Territory remained under South Australian administration. It focuses on Pastoral Lease Nos 1 and 2, granted in 1876, which were the subject of the Alice Springs Arrernte Native Title Claim. Parts VI to IX then examine the period of Commonwealth administration of the Territory, in particular, the Commonwealth's attitude towards the protection of Aboriginal rights on pastoral leases as reflected in the drafting of the *Crown Lands Ordinances* of 1912 and 1924. Finally, Part X examines the legal effect of the reservation clause, as interpreted by the courts, with reference to the possible effect of the *Native Title Act*.

## II. THE ORIGINS OF THE RESERVATION IN PASTORAL LEASES IN SOUTH AUSTRALIA

In contrast with the approach taken to the settlement of New South Wales,[9] when the Colonial Office turned its attention to the colonisation of South Australia, it acknowledged that Aboriginal people were the "present Proprietors of the Soil"[10] whose "Proprietary Title to the land we have not the slightest ground for disputing".[11] From the outset, the rights of Aboriginal people to the actual occupation or enjoyment of land[12] were recognised and were to be respected in the course of colonising the new Province. Despite this difference in approach, the Colonial Office did not propose a radically different policy for the pastoral settlement of South Australia; rather, it adopted the policies which were emerging in New South Wales at the time.

### A. Imperial Legislation and Orders in Council

Whatever unique features may have attended the establishment of South Australia and the administration of public lands in the Province, *The Sale of Waste Lands Act* 1842 (Imp)[13] introduced a single system for the disposition of land in Australia. The principal object of the Act was to ensure that land was only alienated by way of sale. Section 1 provided that:

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9 While the presence of Aboriginal people was acknowledged in the Instructions issued to successive Governors of New South Wales there was no official recognition at the time of settlement and during the establishment of the colony of any indigenous rights and interests in the land. That New South Wales was *terra nullius* underpinned and came to explain the legal consequences of the settlement of the colony.

10 Memorandum from James Stephen (Permanent Under-Secretary, Colonial Office) to Mr Gairdner (Colonial Office), 7 January 1836, CO 13/3.

11 Letter from Sir George Grey to Colonel Torrens, South Australian Commission, 15 December 1835, CO 13/3.

12 Letters Patent dated 19 February 1836 erecting and establishing the Province of South Australia and fixing the boundaries thereof. See also the Preamble to "An Act to amend an Act of the Fourth and Fifth Years of His late Majesty, empowering His Majesty to erect South Australia into a British Province or Provinces," 1 & 2 Vic c 60 (1838). As to the legal effect of the Letters Patent, see *Fejo v Northern Territory of Australia* (1998) 156 ALR 721.

13 5 & 6 Vic c 36.

> within the Australian colonies the waste lands of the Crown shall be disposed of in the manner and according to the regulations hereinafter prescribed, and not otherwise.

"Australian colonies" was defined in s 22 to include New South Wales and South Australia. In a despatch to the South Australian Governor, the Secretary of State, Lord Stanley, pointed out that one of the principal advantages of the Act was that it guaranteed "stability and consistency of purpose in the administration of the land and land revenues of the Crown in New Holland".[14]

The lack of a power to grant leases in the 1842 Act was remedied by s 1 of *The Sale of Waste Lands Amendment Act* 1846 (Imp),[15] which authorised the "demise for any term of years not exceeding fourteen to any person or persons, any waste lands of the Crown in the colonies of New South Wales, South Australia and Western Australia". Section 6 authorised Her Majesty, by Order in Council, to make rules and regulations for any of the purposes of the Act, including the leasing of Crown lands.[16]

Secretary of State, Earl Grey, forwarded the 1846 Act to the South Australian Lieutenant-Governor, Robe, together with a copy of the 1847 New South Wales Order in Council which had introduced regulations for, among other things, the leasing of Crown lands for pastoral purposes. Grey suggested that Robe consider what parts of the regulations might be "applicable to the circumstances of the Colony under Your Government" and invited him to put forward proposals for an Order in Council dealing with the circumstances in South Australia. He continued:

> I concur with the Land Commissioners in thinking it expedient to leave it to you to suggest in the first instance, the principle on which you would propose to adopt the system which has been applied to New South Wales to the circumstances of South Australia.[17]

In April 1848 Grey sent Lieutenant-Governor Young, Robe's successor, a copy of his despatch to the Governor of New South Wales,[18] which expressed the (now much publicised) view that leases granted for pastoral purposes:

> give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require within the large limits thus assigned to them; but that these Leases are not intended to deprive the natives of their former right to hunt over these districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed.[19]

Grey sent a further copy of this despatch to Young in March 1850, together with another he had sent to New South Wales' Governor FitzRoy in February 1850, in which he stated that "the practice of driving the Natives from the Cattle runs is illegal, & that they have every right to the protection of the law from such

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14 Lord Stanley to Governor Grey, Despatch No 67, 15 September 1842, IUP Series of British Parliamentary Papers, "Papers Relative to Affairs of South Australia".

15 9 & 10 Vic c 104.

16 The 1847 and 1849 New South Wales Orders in Council, which were referred to by the High Court in the *Wik* case, were made pursuant to this power.

17 Earl Grey to Lieutenant-Governor Robe, Despatch No 97, 21 July 1847, State Records GRG 2/1/7.

18 Earl Grey to Lieutenant-Governor Young, Despatch No 2, 27 April 1848, CO 396/7.

19 Earl Grey to Governor Sir CA FitzRoy, Despatch No 24, 11 February 1848, Historical Records of Australia, Series I, vol 26, CO 201/382.

aggressions".[20] Grey explained that the measures he had ordered be adopted in New South Wales were equally applicable to South Australia and should be considered as instructions "in so far as they may be applicable to the cir[cumstan]ces of the Colony under your Government".[21]

It was Grey's despatch to FitzRoy of 11 February 1848 which prompted the proposal to include a condition in New South Wales pastoral leases preventing "the absolute exclusion of the Natives".[22] In July 1849 an Order in Council authorised the Governor "to insert in any pastoral lease hereafter to be made, such conditions and clauses of forfeiture, exceptions, or reservations, as to him shall seem requisite" for the purpose of "securing the peaceable and effectual occupation of the lands comprised in such leases, and for preventing the abuses and inconveniences incident thereto".[23] The Order in Council was proclaimed in New South Wales in April 1850 and a reservation in favour of the Aborigines was later inserted in the colony's pastoral leases.[24] The same course was subsequently followed in South Australia, but as discussed below, the South Australian Order was unambiguous in its language.

The history of the pastoral lease in New South Wales was briefly reviewed by Gaudron J in the *Wik* case. Her Honour concluded that:

> ... pastoral leases are statutory devices designed to suit the peculiar conditions of the Australian colonies, deriving from the Order-in-Council of 9 March 1847.

Pastoral leases were a novel concept and there is nothing to suggest that a right of exclusive possession was seen as a necessary incident of such leases in the conditions of the colony of New South Wales in 1847.[25] Indeed, the historical evidence suggests the opposite. This is important because, as Kirby J stated in the *Wik* case, developments in New South Wales "provide the common starting point for the evolution of Crown leasehold tenure", including pastoral leases in other Australian states.[26]

## B. Early South Australian Laws

As *The Sale of Waste Lands Act* 1842 (Imp) did not provide for the granting of leases it was necessary for colonial governments to look to other means of regulating the occupation of pastoral lands. In South Australia, ordinances introduced between 1842 and 1853[27] sought to achieve this by providing for

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20 Earl Grey to Sir C FitzRoy, Despatch No 26, 10 February 1850, CO 202/58.

21 Earl Grey to Lieutenant-Governor Young, Despatch No 23, 8 March 1850, CO 396/10.

22 Earl Grey to Sir Charles FitzRoy, Despatch No 134, 6 August 1849, Despatches to the Governor, Mitchell Library, MSA 1308.

23 New South Wales, *Government Gazette*, 26 April 1850 at 685-6.

24 Report of the Select Committee of the New South Wales Legislative Council on Crown Lands, New South Wales, *Votes and Proceedings*, Legislative Council, 29 November 1854, vol II, p 1137.

25 Note 1 *supra* at 152-3.

26 *Ibid* at 228.

27 *An Act for protecting the Waste Lands of the Crown in South Australia from encroachment intrusion and trespass* 1842 (SA); *An Ordinance to Regulate the Occupation of Crown Lands in South Australia* 1846 (SA); *An Ordinance to facilitate the Recovery of Assessments under the Crown Lands Ordinance* 1847 (SA); *An Ordinance to Regulate the Occupation of Crown Lands in South Australia* 1848 (SA); *An Act to Regulate the Occupation of Crown Lands in South Australia* 1853 (SA).

annual licences and the imposition of penalties for the unauthorised occupation of such lands. But, neither licences nor the depasturing of stock on Crown lands conferred "any title whatever against the Crown", or affected "in any respect the rights of Her Majesty, Her Heirs and Successors, in respect to any such land".[28]

## C. The South Australian Order in Council

In February 1849 Lieutenant-Governor Young responded to the invitation to submit proposals for an Order in Council suited to the circumstances of South Australia, by sending Earl Grey an outline of proposed regulations for the colony.[29] Grey readily adopted the views of the colonial government and in June 1850 forwarded to Young an Order in Council, "for regulating the occupation of the waste lands of the Crown, in the Colony of South Australia".[30] Chapter III dealt with the rules applicable to the leasing of land outside the 'Hundreds'.[31] Section 1 provided for:

> leases of any waste land of the Crown, not situate within the boundaries of any hundred, for any term or term of years not exceeding fourteen years in duration for pastoral purposes... Provided always that such leases shall be subject to such conditions as the said Governor shall think necessary to insert therein for the benefit of the aborigines.

## D. Conclusion

Despite the differences between the colonisation of New South Wales and of South Australia, by the 1840s there had been a convergence of policies with respect to colonial land administration and the protection of Aboriginal peoples and, as the course of events shows, the legislative history and underlying policies which prompted the inclusion of a reservation in the pastoral leases of the respective colonies were the same.

Noting that the 1847 New South Wales Order in Council did not apply to land in South Australia or Western Australia, Dr Fry nevertheless pointed out:

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28 A similar approach was taken in the New South Wales *Crown Lands Unauthorized Occupation Acts* 1839-41. See *Wik*, note 1 *supra* at 109-10, per Toohey J.

29 Lieutenant-Governor Sir HEF Young to Earl Grey, Despatch No 25, 23 February 1849, IUP Series of British Parliamentary Papers, "Papers Relative to Crown Lands in the Australian Colonies", vol 12 at 18-30; Correspondence, Proclamations and Orders of the Queen in Council relative to the Granting of Pastoral Leases of the Waste Lands of the Crown, South Australian Parliamentary Paper No 176 of 1857. The Regulations differed from those in operation in New South Wales because of "differences of territorial character and extent of the two colonies".

30 Earl Grey to Lieutenant-Governor Sir HEF Young, Despatch No 48, IUP Series of British Parliamentary Papers, "Papers Relative to Crown Lands in the Australian Colonies", vol 12 at 53-6; Letter from Colonial Land and Emigration Office, 8 September 1849, CO 13/65.

31 A county subdivision, which in this context was employed to distinguish between the settled and unsettled parts of the colony: "Col Light was instructed by the Colonization Commissioners to divide the province into towns and Counties... By 1846 it was clear that units smaller than Counties would be needed as a framework for surveying rural Sections and for delimiting the extent of temporary grazing rights which early purchasers of land had over the neighbouring unsold Sections. A system of Hundreds, as used in some parts of England, as adopted. Hundreds in South Australia were frequently, but not universally, of about 100 square miles", T Griffin and M McGaskill (eds), *Atlas of South Australia*, South Australian Government Printing Division and Wakefield Press (1986) p 14.

> The year 1846 saw the first step taken along a road which led to the subsequent invention of a multitude of Australian tenures of new types.[32]

The 1847 Order in Council introduced a system of Crown leasehold tenures which led to the whole of Australia being transformed in subsequent decades into a patchwork quilt of freeholdings, Crown leaseholdings, and Crown "reserves".

## III. THE DRAFTING OF THE RESERVATION

### A. Background[33]

The South Australian Order in Council was proclaimed on 7 November 1850.[34] On 3 January 1851 the Colonial Secretary, Charles Sturt, wrote to the Commissioner of Crown Lands seeking an outline of the reservation to be inserted in leases issued under the Order in Council. The Commissioner, Charles Bonney, replied on 16 January, suggesting that "it would be expedient to insert a clause reserving the right of the natives to dwell upon the lands held under lease, and to follow their usual customs in searching for food". He was aware of the importance of the subject:

> and of the serious inconvenience which would result from alienating large tracts of country for so long a period unless proper precautions be taken to guard the public interests by limiting the operation of the leases to the use of the pasturage.[35]

The South Australian government was also reminded of the need to take steps to protect Aboriginal rights of access to pastoral runs in the colony by the continuing conflict between settlers and local tribes in the Port Lincoln District. In November 1850 a settler named Baird had been speared to death by Aborigines. Lieutenant-Governor Young sent Police Commissioner George Dashwood and the Protector of Aborigines Matthew Moorhouse to Port Lincoln to investigate the circumstances of Baird's death. They also inquired into the conduct of a police party, which, accompanied by local squatters, had fired at a large group of Aborigines camped in the vicinity of Baird's station.

In a lengthy report, which Young had published in the *Government Gazette*, Dashwood and Moorhouse explained that local Aborigines were unwilling to follow them all the way to Baird's station because they feared "passing through the runs of the settlers, which we regret to find can seldom be done by the natives with impunity".[36] Young sent a copy of the report to Earl Grey, describing Baird as "very reckless of his life" to settle in the "vicinity of a tribe

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32 TP Fry, "Land Tenures in Australian Law" (1947) 3 *Res Judicatae* 158 at 160-1.

33 See R Foster, "The Origin of the Protection of Aboriginal Rights in South Australian Pastoral Leases", Issues Paper No 24, in *Land, Rights, Laws: Issues of Native Title*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, August 1998 at 3-7.

34 South Australian Parliamentary Paper 176, *Correspondence, Proclamations and Orders of the Queen in Council relative to the Granting of Pastoral Leases of the Waste Lands of the Crown*, 1857 at 9-11.

35 Commissioner of Crown Lands to Colonial Secretary, 16 January 1851, South Australia, *Government Gazette*, 30 January 1851 at 79.

36 South Australia, *Government Gazette*, 30 January 1851 at 75.

not theretofore familiar with Europeans or with other natives friendly to them", and pointing out that he was "without any official license to occupy the remote & uninviting Country in which he depastured his sheep".[37] However, he concluded:

> I have called the particular attention of the Commr of the Waste Lands of the Crown to that part of the report which refers to the natives being unable to pass thro' the Squatters Runs at Port Lincoln with impunity and I have directed that the right to do so shall be the subject of a distinct recognition in the Leases which the recent Royal Order in Council entitles the squatters to claim.[38]

The Colonial Secretary, Charles Sturt, had written to the Commissioner of Crown Lands in January 1851, drawing his attention to that part of the report which referred to the "well-grounded fears" of the natives of Port Lincoln in "passing through the runs of the settlers".[39] He directed Bonney not to issue any leases unless they contained clauses "recognizing the undoubted right of the natives to traverse the runs, so long as they do not violate the rights of property; and also providing for their due protection".[40] Sturt also wrote to the Police Commissioner requesting that he "cause intimation to the Stockholders and Occupiers of Runs that the Natives have an undoubted right to traverse the Runs in the District so long as the claims of property are respected".[41] In February, the government resident at Port Lincoln was directed to make it known to the police and magistracy in the District that they should "see to the practical enjoyment by the Natives" of "undisturbed occupation of the Country used by the Squatters for depasturing purposes".[42]

Having publicly stated its intentions, the South Australian Government now had to produce a form of pastoral lease which safeguarded Aboriginal rights in the ways suggested by Lieutenant-Governor Young and Commissioner Bonney. The aim was to draft a clause "reserving the right" of Aborigines to pass through and live on lands held under lease and, in the words of Bonney, to "follow their usual customs of searching for food"[43] on traditional lands now held under lease.

## B. Nature of the Reservation

Commissioner Bonney realised that it would be difficult to draft an appropriate clause and pointed out to Sturt that apart from the reservation clause he had outlined in his letter of 16 January, "I am not able to suggest any other protective clauses which would be likely to operate usefully".[44] In addition, in May 1851 Matthew Hale, the Archdeacon of Adelaide, wrote to Lieutenant-

37 Lieutenant-Governor Young to Earl Grey, Despatch No 23, 6 February 1851, State Records, GRG 2/5/13.

38 *Ibid.*

39 Note 35 *supra.*

40 Colonial Secretary's Office, Correspondence Files, State Records, GRG 24/4/1851/166, 22 January 1851.

41 *Ibid*, State Records, GRG 24/4/1851/164, 22 January 1851.

42 *Ibid*, State Records, GRG 24/4/1851/267, 10 February 1851.

43 Note 35 *supra.*

44 Commissioner of Crown Lands to the Colonial Secretary, 24 January 1851, South Australia, *Government Gazette*, 30 January 1851 at 79.

Governor Young from Port Lincoln.[45] In a lengthy letter, Hale set out the measures which he thought would remedy the problems experienced in that district. Hale was concerned that the exercise of rights reserved to Aborigines in pastoral leases would lead to conflict. He explained, that while the presence of settlers had adversely affected the ability of the Aborigines to "procure the necessaries of life", they nevertheless continued with such practices as burning the country to catch game, which were "most diametrically opposed to the interests of the white occupiers of the country".[46] He cautioned that whatever decision was eventually taken must be clearly communicated to the parties, and steps would have to be taken to provide for its enforcement.

Hale also felt that the "right to dwell upon lands held under lease" brought into question the right of Aborigines to camp at watering places, which he pointed out were often the sites of stations. However, "any permission to dwell upon lands which is fettered by a prohibition against their dwelling there after this fashion in conformity with their natural and unalterable habits is, in point of fact, no permission at all". The Archdeacon concluded his letter by stating that he had no desire to attempt to restore to Aboriginal people the full enjoyment of those rights of which "the very fact of our presence in this country deprives them". Their welfare, he suggested, would not be promoted "by attempting to give them back a liberty which they can never enjoy or rights which they can never exercise".

Young referred Hale's letter to the Protector of Aborigines, the Commissioner of Crown Lands and the Commissioner of Police indicating that he wanted to "carry out such of the Archdeacon's suggestions as may appear feasible". On 3 June 1851 Commissioner Bonney wrote to the Colonial Secretary about the problems which might arise where the "customs of the natives are directly at variance with the purposes for which the country is occupied by the holders of runs".[47] He thought that the difficulty might be overcome, if the Aborigines were compensated "for what they lose by any restrictions which it may be found necessary to impose upon them" by regular supplies of food and clothing.

Despite the misgivings of others, Young insisted that all pastoral leases were to contain a reservation for the Aborigines "'to follow their usual customs in searching for food' and 'to dwell on lands held under lease'", and "also for watering places for the Aborigines".[48] In the meantime, Commissioner Bonney had looked more closely at Hale's proposals and on 24 June 1851 he wrote to the Colonial Secretary suggesting that, in addition to the reservation in favour of the Aborigines:

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45 Archdeacon Hale to Lieutenant-Governor Young, Port Lincoln, "Relative to recent murders committed and attempted by Natives in that District", 27 May 1851, Colonial Secretary's Office, Letters received, Docket No 1581 of 1851, GRG 24/6/1851/1581.

46 *Ibid.*

47 Commissioner of Crown Lands to the Colonial Secretary, 3 June 1851, Colonial Secretary's Office, Letters received, Docket No 1662 of 1851, GRG 24/6/1851/1662.

48 Colonial Secretary to Commissioner of Lands, 17 June 1851, Colonial Secretary's Office, Letter Book: Letters sent, No 1331, GRG 24/4/S 1851.

> It might be expedient however to insert a covenant binding the lessees to conform to any regulations which may at any time be made by the Governor for the purpose of protecting the aborigines.[49]

Turning to the difficulties that Hale anticipated would occur in reconciling certain customs of the Aborigines with the interests of settlers, Bonney proposed that such reservations should be inserted in leases as "give the Government complete control in the matter". "I am of the opinion", he concluded:

> that the knowledge that the Government is in possession of this power and that the runs are liable to be resumed for the use of the natives, will be sufficient to ensure the forbearance of the white people, and to render them rather desirous of conciliating the natives in order that no necessity may arise for the exercise of these powers.[50]

Bonney proceeded to draft a reservation clause expressed in the broadest possible language:

> RESERVING NEVERTHELESS AND EXCEPTING out of the said demise, to Her Majesty, her heirs and successors, for and on account of the present aboriginal inhabitants of the province and their descendants, during the continuance of the demise, full and free right of ingress, egress and regress into, upon and over the said waste lands of the Crown hereby demised, and every part thereof, and in and to the springs and surface water, thereon.

Also excepted from the demise and reserved to the Crown were:

> all such part or parts of the waste lands of the Crown hereby demised as it may be necessary for the public service to resume the possession of, either for the purpose of sale, or for the making of reserves for the aboriginal inhabitants of the said province.

The lessee covenanted that:

> the said aboriginal inhabitants and their descendants shall and may at all times during this demise use, occupy, dwell on and obtain food and water thereon and every part thereof unobstructed by [the lessee] and shall and may make and erect such wurlies and other dwellings as they have heretofore been accustomed to make and erect, and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to if this demise had not been made.

The lessee further covenanted to:

> He and they shall and will at all times hereafter during this demise in every respect comply with, do, perform, and carry into effect all and every the regulations which the Governor for the time being shall at any time hereafter, or from time to time, see fit to make, order, and promulgate for the governance of the aboriginal inhabitants of the province, in so far as such regulations may affect [the lessee] in respect of the reservation herein-before contained, and the rights of entry and other rights which it is the intention of these presents that such aboriginal inhabitants shall from time to time have, use, and exercise: Provided always that ... if [the lessee] shall break or infringe any of the covenants, reservations, exceptions, conditions, provisions, or agreements herein contained, and which by him or them ought to be observed and performed, then and in such cases these presents, and the demise hereby made, and the term hereby granted, shall cease, determine, and be void.

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49 Commissioner of Crown Lands to Colonial Secretary, 24 June 1851, Colonial Secretary's Office, Letters received, Docket No 1885 of 1851, GRG 24/6/1851/1885.

50 *Ibid.*

A copy of the form of lease was forwarded to Earl Grey,[51] who indicated that it met with his approval.[52] Leases were issued in this form from 1 July 1851.

### C. Conclusion

The South Australian Order in Council had authorised the Governor to insert a condition in pastoral leases, "for the benefit of the Aborigines". The clause would take the form of a reservation, the purpose of which was to ensure that Aboriginal people could continue to exercise rights over and enjoy the use of lands held under lease, according to their customs. The eventual reservation provided for this, without introducing any limitations on the exercise of particular rights or practices, as suggested by Archdeacon Hale.

It would seem, from the context in which it was drafted, that the rights reserved to the Aborigines were intended to co-exist with the rights of lessees, rather than be subordinate to them. Indeed Young, and subsequently Commissioner Bonney, both rejected the idea that the lease should state how particular co-existing rights were to be reconciled, for example, by prohibiting the practice of burning the country to catch game. Fully aware of the complexities of the situation and the problems which might arise 'on the ground', Bonney nevertheless opted for co-existence rather than the curtailment of existing Aboriginal rights.

## IV. CONTROL OF THE DISPOSITION OF LAND IN COLONIAL AUSTRALIA

### A. Constitutional Development in the Australian Colonies

Originally, the management of land in the Australian colonies was a matter exclusively within the control of the Imperial Parliament. *An Act for the Better Government of South Australia* 1842 (Imp)[53] repealed *The South Australian Colonization Act* 1834-38 (Imp)[54] and provided for the establishment of a Legislative Council which could make laws for the peace, order and good government of the colony. The Council's power to make laws with respect to waste lands in the colony was limited by the operation of *The Sale of Waste Lands Act* 1842, which applied in South Australia.[55]

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51 Lieutenant-Governor Sir HEF Young to Earl Grey, Despatch No 108, 11 August 1851, IUP Series of British Parliamentary Papers, "Papers Relative to Crown Lands in the Australian Colonies", vol 15 at 40-7.

52 Earl Grey to Lieutenant-Governor Young, Despatch No 10, 6 February 1852, State Records, GRG 2/5/13.

53 5 & 6 Vic c 61.

54 4 & 5 Will c 95.

55 Sections 21 and 22 of *The Sale of Waste Lands Act* 1842 (Imp). See also, United Kingdom, *Report from the Select Committee on South Australia: Together with Minutes of Evidence*, IUP Series of British Parliamentary Papers, vol 2; Villiers and Elliot (Colonial Land and Emigration Office) to James Stephen (Colonial Office), 17 July 1841, CO 386/59.

However, s 7 of *The Australian Constitution Act* 1850 (Imp)[56] permitted the South Australian legislature to establish a partly appointed and partly elected Legislative Council. Section 14 confirmed that the Imperial Parliament retained control over the disposition of land in the Australian colonies by providing that the Governor of a colony with the advice and consent of the colony's Legislative Council could make laws for the peace, welfare and good government of the colony as long as they did not interfere with the sale or appropriation of Crown lands. Section 32[57] conferred on the Governor and Legislative Council of a colony the power to pass laws altering the constitution of the Legislative Council and investing any newly established legislative body with the same powers and functions as those presently possessed by the Legislative Council.

### B. South Australia

As the South Australian Legislative Council was willing to accept the limitations implicit in s 32 of *The Australian Constitution Act* 1850 (Imp) an Imperial enabling Act was not needed to give effect to *The Constitution Act* 1856 (SA), which was reserved for the signification of Her Majesty's Pleasure on 4 January 1856. Section 1 provided that the Parliament of South Australia, comprising a Legislative Council and a House of Assembly, "shall have and exercise all the powers and functions of the existing Legislative Council". In contrast with New South Wales, the Act did not purport to confer on Parliament any power to legislate with respect to the management of Crown lands in the colony.

However, s 1 of *The Australian Waste Lands Act* 1855 (Imp) repealed the 1842 and 1846 Imperial Acts relating to the sale of waste lands from the date of the proclamation in South Australia of Her Majesty's assent to *The Constitution Act* 1856 (SA). Section 5 of the 1855 Act conferred on Parliament the power to make laws regulating the sale and disposal of Crown lands in the colony. Section 6 confirmed that regulations with respect to the sale or other disposal of Crown lands made under the authority of the 1842 or 1846 Acts remained in force until the local legislature provided otherwise.

It was not until November 1857 that the South Australian Parliament exercised its newly acquired power to legislate with respect to Crown lands in the colony. The preamble to *The Waste Lands Act* 1857 (SA) cited *The Australian Waste Lands Act* 1855 (Imp) as the source of Parliament's power to enact legislation "regulating the sale and other disposal of the Waste Lands of

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56 13 & 14 Vic c 59.

57 In New South Wales s 32 was regarded as an opportunity to achieve legislative and executive independence from the United Kingdom. However, to secure control over the management of Crown lands the relevant constitutional provisions had to be incorporated in an Act of the Imperial Parliament. *The New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vic c 54) and *The Australian Waste Lands Act* 1855 (Imp) (18 & 19 Vic c 56) transferred control over the management of Crown lands to the local legislature.

the Crown"[58] in the Province. Section 1 provided that all waste lands of the Crown were to be disposed of "in the manner and according to the regulations herein provided, and not otherwise", which was by way of sale. However, s 12 stated that in order to encourage the development of the pastoral resources of the colony, the discoverer or first occupier of waste lands should be permitted to occupy those lands for a limited period for pastoral purposes. The Governor could, without first offering the land for sale at public auction, "demise, for any period not exceeding fourteen years for pastoral purposes, to the discoverer or first occupier of the same" and insert in the demise such conditions and clauses of forfeiture and resumption as prescribed in the relevant regulations. In December 1857 the Governor in Council made regulations under *The Waste Lands Act*. Regulation 8 provided that leases would be granted subject to such conditions "as the Government shall think necessary to insert therein for the protection of the Aborigines".

## V. PASTORAL LEASES IN THE NORTHERN TERRITORY

The years 1863-1931 span two distinct periods in the constitutional history of the Northern Territory. From 6 July 1863 to 31 December 1910 the Territory formed part of and was administered by South Australia, and was therefore subject to its laws. On 1 January 1911 the Commonwealth assumed responsibility for the Territory and from that time, subject to s 7 of *The Northern Territory Acceptance Act* 1910 (Cth) and s 5 of the *Northern Territory (Administration) Act* 1910 (Cth), the law applicable to the Territory was found in relevant Commonwealth Acts and Ordinances.

This Part deals with the period 1863 to 1911. South Australian legislation relating to pastoral leases in the Territory is examined by tracing the history of two leases in particular, Pastoral Lease Nos 1 and 2, first granted in 1876 and expiring on 30 September 1912. Both leases contained a reservation in favour of Aboriginal people and, as noted in the Introduction, the legal effect of the reservation, as well as the validity of the leases themselves, was considered in the Alice Springs Arrernte Native Title Claim.[59]

### A. Background

Between 1825 and 1863 the land which presently comprises the Northern Territory was part of New South Wales. On 6 July 1863 the area was annexed to

58 The term "Waste Lands of the Crown" was defined in s 17 to comprise any lands in South Australia "which now are, or shall hereafter be vested in Her Majesty, Her heirs, and successors, and which have not already been granted or lawfully contracted to be granted to any person or persons in fee simple, or for an estate of freehold, or for a term of years, and which have not been dedicated and set apart for public use".

59 Note 7 *supra*.

the Province of South Australia.[60] *The Northern Territory Justice Act* 1884 (SA) sought "to assimilate, as far as possible, the law of the Northern Territory to the law of the rest of South Australia".[61] With the exception of the statutes listed in the schedule, from 22 September 1863 the law of South Australia was deemed to be the law of the Northern Territory. The schedule included *The Waste Lands Act* 1857 (SA) and subsequent amending Acts.[62] Section 3 provided that all future South Australian statutes would be applicable to the Northern Territory unless the Territory was expressly excepted from their operation.

### B. *The Northern Territory Act* 1863 (SA)

Within months of its annexation to the Province, the South Australian Parliament passed legislation dealing with the newly acquired territory. The preamble to *The Northern Territory Act* 1863 (SA) stated that land in the Northern Territory was to be disposed of in the manner provided for in the Act, and any existing South Australian land laws which purported to affect the annexed land were amended to the extent required. It was intended that the source of law in relation to the disposition of land in the Northern Territory would be *The Northern Territory Act*, incorporating the unamended provisions of the 1857 and 1858 South Australian Land Acts.[63]

*The Northern Territory Act* did not include any substantive provisions with respect to the granting of pastoral leases and therefore s 12 of *The Waste Lands Act* 1857 must be taken to have been incorporated into the Act, subject to s 11 which authorised the Governor in Council to "make, vary, and alter, such rules as may be necessary for regulating the terms, period or mode of leasing, or occupation, or disposal by sale of the said waste lands of the Crown". Regulations in relation to pastoral leases were made under the Act in 1863, 1866 and 1871. Regulation 8 provided that "Leases will be granted subject ... to such conditions as the Government shall think necessary to insert therein for the protection of the aborigines".[64]

### C. Administration

The South Australian government realised that settlement of the Territory could not proceed without some form of local administration. Section 12 of *The Northern Territory Act* provided for the appointment of a Government Resident and other officers required for the "order and good government" of the Territory.

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60 *Supplementary Commission under the Great Seal for Altering the Boundary of the Colony of South Australia in Duke of Newcastle to Governor of South Australia*, Sir Dominick Daly, 16 July 1863, South Australia, Parliamentary Paper, No 113 of 1863. See also, South Australia, Parliamentary Paper, No 127 of 1863.

61 Preamble to *The Northern Territory Justice Act* 1884 (SA).

62 See also, *Sources of Law Act* 1985 (NT).

63 *The Northern Territory Act* 1863 (SA), s 15.

64 Initially leases could be granted for any period not exceeding 14 years; however, the maximum term was extended to 25 years by s 7 of *The Waste Lands Amendment Act* 1865-66 (SA). At the expiration of the term the land and all improvements reverted absolutely to the Crown. This amendment was incorporated into *The Northern Territory Act*.

In April 1864 a party comprising the newly appointed government resident Colonel BT Finniss and other officials of the first Northern Territory administration, departed from Adelaide. The instructions[65] issued to Finniss described in detail the steps to be taken to establish a port and settlement on or adjacent to the north coast. Copies of *The Northern Territory Act* 1863 and land regulations, which, he was cautioned, "must be carefully obeyed", were enclosed. Even at this early stage the government resident was authorised to accept applications for pastoral leases and perhaps somewhat optimistically, it was suggested that to assist in determining applications a survey party should be sent into the interior to "make sketches of the principal features of the country".

A Protector of Aborigines was appointed and accompanied the official party. This was consistent with the history of settlement in South Australia,[66] the contemporary recommendations of the Select Committee on "The Aborigines"[67] and more generally, with the importance placed upon the subject by the South Australian Government. The Protector was to foster good relations between settlers and local Aborigines. In particular, he was to try to make them understand that they were British subjects and both amenable to and protected by the law. His instructions noted that he would be able to assist the government surveyors in identifying the best locations for reserves "for the use of the aborigines so as to secure them free access to water and an ample supply of wood for canoes and implements of the chase" and so as "not to interfere with their favorite hunting grounds, or places of resort". These instructions remained largely unchanged throughout the period from the settlement of the Territory in 1864 to the grant of the first pastoral leases in 1876.[68]

## D. The First Northern Territory Pastoral Leases

Although the first applications to lease land in the Territory for pastoral purposes were made in 1864[69] no leases were granted until June 1876, when Pastoral Lease Nos 1 and 2 were issued to EM Bagot,[70] over 275 and 300 square

65 Governor Daly to Duke of Newcastle (Enclosures), Despatch No 20, 25 April 1864, CO 13/114.

66 South Australian Colonization Commission to Lord Glenelg, 1 January 1836, CO 13/4; Sir George Grey to Robert Torrens, 11 January 1836, CO 13/4; Robert Torrens, South Australian Commission to Sir George Grey, 16 January 1836, CO 13/4; Sir George Grey to Colonel Torrens, South Australian Commission, 21 January 1836, CO 13/5; *First Annual Report of the Colonization Commissioners of South Australia*, ordered by the House of Commons to be printed, 28 July 1836, CO 13/4; *Report from the Select Committee on the Disposal of Lands in the British Colonies: together with Minutes of Evidence and Appendix*, ordered by the House of Commons to be printed, 1 August 1836, CO 13/4; Official Instructions to William Wyatt Esq *Ad Interim* Protector of Aborigines, *South Australian Gazette and Colonial Register*, 12 August 1837, vol I, No 5; *Second Annual Report of the Colonisation Commissioners for South Australia*, 22 December 1837, CO 13/8.

67 South Australia, *Report of the Select Committee of the Legislative Council upon "The Aborigines": together with Minutes of Evidence and Appendix*, South Australian Parliamentary Paper, No 165 of 1860.

68 Instructions to the Government Resident of the Northern Territory, *South Australian Government Gazette*, No 22, 12 May 1870 at 542-7; Instructions to the Government Resident of the Northern Territory, South Australian Parliamentary Papers, vol III, No 123 at 1-4.

69 Pastoral Applications in the Northern Territory, State Records, GRS 1/132/72, Docket 132/72.

70 D Carment, R Maynard, A Powell (eds), *Northern Territory Dictionary of Biography*, NTU Press (1990) pp 8-9.

miles respectively of land in the vicinity of Alice Springs. Bagot had applied for 600 square miles on 13 February 1872[71] under *The Northern Territory Act* 1863 and the 1871 Waste Land Regulations. Run No 50, which incorporated Bagot's two blocks, was declared stocked on 31 May 1875.

*(i) The Northern Territory Land Act* 1872 (SA)

The Act commenced on 30 November 1872 and was intended to "consolidate the law as far as it related to dealing with lands in the Northern Territory".[72] Although it repealed certain sections of *The Northern Territory Act* and "all rules and regulations made thereunder", s 15, which provided for the incorporation of the unamended provisions of the 1857 and 1858 South Australian *Waste Lands Acts* into *The Northern Territory Act*, was not repealed. Section 4 saved "all rights, claims, penalties, and liabilities already accrued or incurred, or in existence" under *The Northern Territory Act*. Section 5 provided that after the commencement of the Act none of the legislation mentioned in the Second Schedule had any force or effect whatever in the Northern Territory.[73] The Schedule included the *Waste Lands Act* 1857 and subsequent amending Acts.[74] Under s 6 waste lands in the Northern Territory could only be sold, demised or otherwise disposed of "in the manner and subject to the provisions of this Act, and not otherwise."

New provisions dealing with pastoral occupation were contained in Part VI of the Act. Section 74 provided that the Governor could grant a lease "for grazing and other pastoral purposes" for any period not exceeding 25 years. Section 93 dealt with unauthorised occupation of Crown lands and under s 107 the Governor in Council could make regulations.

*(ii) Regulations Made Under the Act*

Regulations were made and published in the *Gazette* in January 1873 under s 107 of the *Northern Territory Land Act*.[75] They were subsequently rescinded and replaced by new regulations in December 1874.[76] Regulation 1 provided that an applicant for "country not previously applied for" for pastoral purposes was entitled, subject to the approval of the Commissioner and the regulations with respect to stocking the run, to a preferential right to a lease for any period

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71 Index to Pastoral and Mineral Applications and Leases, NT 1864-84, National Archives of Australia, Northern Territory. In the subsequent footnote references the following abbreviations are used – NAAACT: National Archives of Australia, ACT; NAANT: National Archives of Australia, NT.

72 Second Reading Speech by the Commissioner of Crown Lands, South Australia, House of Assembly 1872, Debates, 16 May 1872 to 28 November 1872, pp 952-2815. The Chief Secretary thought there would be considerable convenience in being able "to find the whole of the laws upon the subject, comprised in one Act": South Australia, Legislative Council 1872, Debates, 8 October 1872 to 27 November 1872, pp 2179-770.

73 It seems the purpose of s 5 was to make it clear that legislation which purported to apply to the colony as a whole did not apply in the Northern Territory. The 1872 Act was intended to "contain the entire law with respect to dealing with land in the Northern Territory".

74 See *Osborne v Commonwealth* (1911) 12 CLR 321 as to the effect of the repeal of a prior Act, all or part of which had been incorporated in a later Act.

75 South Australia, *Government Gazette*, 9 January 1873 at 36-8.

76 South Australia, *Government Gazette*, No 53, 31 December 1874 at 2515-17.

not exceeding 25 years of a block of not more than 300 square miles in area. Regulation 2 provided that a lease was not to be granted until a run had been stocked. Under the 1874 regulations, runs were required to be declared stocked within three years from the first quarter date succeeding the date of the application.

Although Bagot had applied for his runs under *The Northern Territory Act* 1863 he purported to declare them stocked on 31 May 1875 under the 1874 regulations.[77] It was unclear, however, whether a lease application referred to in regulation 2 was an application made under *The Northern Territory Land Act* 1872 or included an application made under the earlier 1863 Act in relation to which there existed a preferential right, saved by s 4 of the 1872 Act.

Regulation 8 provided (in identical form to that made under *The Northern Territory Act*) that leases would be granted subject "to such conditions as the Government shall think necessary to insert therein for the protection of the aborigines". As no leases had been granted in the Territory it was not yet known what form the reservation might take.

*(iii) Grant of the Leases*

Immediately before the commencement of the 1872 Act, Bagot was, subject to compliance with the conditions with respect to stocking, "entitled to a preferential right" to be granted a lease under the *Northern Territory Act* 1863 and regulations. Bagot's entitlement to a lease, whether granted under the 1863 or 1872 Acts, depended on the continued existence of this 'right' to preferment. At the commencement of the 1872 Act there had been no breach of the stocking conditions. As all regulations under the *Northern Territory Act* were repealed by the 1872 Act it may therefore be possible to rely on the 1873 regulations and argue that they were the regulations applicable to Bagot's application and that therefore he was entitled to an extension of time regarding stocking requirements. However, there are a number of problems in seeking to rely on these regulations. First, there is no evidence that the Commissioner permitted the extension of time referred to in regulation 2. Secondly, the application referred to in regulation 2 appears to be an application made under the 1872 Act as provided for in regulation 1. Thirdly, even assuming that these arguments could be rebutted, a six month extension of time to stock the run would have lapsed, at the latest, on 31 September 1873. As Bagot had failed to stock his run, either by 31 March 1873 or 31 September 1873, it is suggested that his application and with it his preferential right to a lease lapsed before the commencement of the 1874 regulations under which he purported to declare his run stocked.

Without making a new application under the 1874 regulations, Bagot, with the apparent acquiescence of the Northern Territory administration, simply treated his earlier applications as having been made under the 1874 regulations. However, the reference to an application in regulation 2 appears to be a reference to an application made under the 1874 regulations. There are no

77 Declaration of Stocking for Run No 50 by EM Bagot, State Records, GRS 1/237/1875 Docket 237/1875.

transitional provisions which would allow the regulations to apply to applications made under earlier legislation, let alone applications which had lapsed. Furthermore, runs had to be declared stocked within three years after the first quarter date following the relevant application. It will be recalled that Bagot's applications were made on 13 February 1872 and therefore even that period would have expired on 31 March 1875, two months before the declaration of 31 May 1875. It is impossible to impute any later date for the application from the Act, the regulations or the circumstances of the case unless the date of the regulations is to be treated as the relevant date of the application. On any view, this would be an improbable construction.

Having declared his runs stocked on 31 May 1875, the administration purported to grant Bagot the first pastoral leases of land in the Northern Territory. Only the coversheet of Pastoral Lease No 1 is extant.[78] However, Pastoral Lease No 2 was granted on 14 June 1876 for a term of 25 years commencing from 1 April 1872.

*(iv) Validity of the Leases*

The obligation to stock and declare a run to be stocked was mandatory and a pastoral lease could not be granted until the condition had been complied with. As discussed above, on any sensible construction of the regulations, Bagot failed to stock his runs as required and therefore was not entitled to a lease. Since there was no statutory power to grant a lease unless the statutory pre-conditions were satisfied, the first pastoral leases in the Northern Territory were invalid.

Supposing that the declaration of stocking under the 1874 regulations had been valid, it is doubtful whether the administration was empowered to grant leases under the 1863 Act.[79] After the commencement of the 1872 Act an applicant's right to be granted a lease under the provisions of the *Northern Territory Act* 1863 was contingent on the applicant possessing a preferential right to a lease accrued under that Act and its accompanying regulations. Although Bagot had such a right at the commencement of the 1872 Act, it lapsed, at the latest, on 31 September 1873 by reason of his failure to declare his run stocked by that date. This was fully 15 months before the gazettal of the 1874 regulations under which he declared the run stocked in May 1875.

Even if Bagot's run could have been declared stocked under the 1874 regulations the leases should have been granted, if at all, under the 1872 Act. The Governor had no power to grant a lease of land in the Northern Territory under the South Australian Waste Lands Act or, after the commencement of the 1872 Act, the *Northern Territory Act* 1863, unless an applicant had a preferential right to a lease accruing under the earlier Act and continuing to exist under the 1872 Act. Bagot had no such right after 31 September 1873 (and probably

78 See *Registers of Northern Territory Pastoral Leases*, NTAS: F670, Box 1 shows details of the date of grant, commencement and term of Pastoral Lease No 1. It is assumed that Pastoral Lease No 1 issued in the same form as the extant Pastoral Lease No 2.

79 Pastoral Lease No 2 was expressed to be granted under the *Waste Lands Act* 1857 and the *Waste Lands Amendment Act* 1865-66. It may be accepted that it was intended to grant the lease (and also Pastoral Lease No 1) under *The Northern Territory Land Act* 1863.

earlier). Prior to that date he was not entitled to a preferential right because he had not complied with the statutory pre-conditions for the grant of a lease.

Nor can the leases be treated as though they were granted under the 1872 Act. The grant of a statutory lease operates as a contract between the Crown and the lessee[80] and the terms and conditions of the contract are defined in the Act and regulations under which the relevant lease is granted. Accordingly, the description in the lease instrument of the legislation under which the grant is made and the regulations which apply to it must be regarded as a matter going to the validity of the grant and which cannot be cured by simply dealing with the lease as if it had been granted under the appropriate Act and regulations. To illustrate the difficulties, Lease Nos 1 and 2 provided for a yearly 'peppercorn' rental during the first seven years. This is both stated in the lease and imposed by the 1871 regulations. However, the regulations made under the 1872 Act imposed a yearly rental during the first seven years of 6d per square mile. But the leases do not contemplate an alteration in the reserved rent, nor do the relevant Acts or regulations provide for the rent of existing leases to be altered in the manner required. Under the 1872 Act the Governor had no power to grant a lease other than at the prescribed yearly rental. According to common law principles, then, the leases cannot be taken to have been granted under and subject to the terms and conditions of the 1872 Act and regulations.

Pastoral Lease Nos 1 and 2 were invalidly granted as Bagot had failed to stock his runs as required by the 1874 regulations. Even assuming that he was entitled to be granted leases they should have been granted under the 1872 Act and not the earlier South Australian Waste Lands Acts or *The Northern Territory Act* 1863.

## E. The Northern Territory Reservation

The form of South Australian pastoral leases changed in 1854 and with it the drafting of the reservation.[81] The content, however, remained unchanged. As required by regulations under the *Northern Territory Act* and also the *Northern Territory Land Act*, Pastoral Lease Nos 1 and 2 provided for the "protection of the aborigines" in the following terms:

> RESERVING NEVERTHELESS AND EXCEPTING out of the demise to Her Majesty Her Heirs and Successors for and on account of the present Aboriginal Inhabitants of the Province and their descendants during the continuance of this demise full and free rights of ingress egress and regress into and upon and over the said Waste Lands of the Crown hereby demised and every part thereof and in and to the springs and surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to do if this demise had not been made

The leases were granted:

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80 *O'Keefe v Williams* (1910) 11 CLR 171. See also *Cudgen Rutile [No 2] Pty Ltd v Chalk* [1975] AC 520.

81 Memorandum, *Re altered form of Lease for the Waste Lands of the Crown*, Colonial Secretary's Office, Docket No 577 of 1854.

> SUBJECT also to any regulations which now are or hereafter may be in force regulating in any way the tenure or occupation of the Waste Lands of the Crown in the Province ... excepting and reserving to Her Majesty Her Heirs and Successors and [to the Governor] all such part or parts of the Waste Lands of the Crown hereby demised as it may be necessary or expedient for the Public Service to resume the possession of either for the purpose of sale or demise ... or for the making of a reserve for the Aboriginal Inhabitants of the said Province.

The lessee covenanted to:

> comply with do perform and carry into effect all and every the regulations which the Governor for the time being shall at any time hereafter or from time to time see fit to make order and promulgate either regulating the tenure or occupation of the Waste Lands of the Crown in the Province or for the governance of the Aboriginal Inhabitants of the Province in so far as such regulations may affect the lessee in respect of the reservation hereinbefore contained and the rights of entry and other rights which it is the intention that such Aboriginal Inhabitants shall from time to time have use and exercise...
>
> PROVIDED ALWAYS ... if the lessee shall break or infringe any covenants reservations exceptions conditions provisions or agreements herein contained and which by such Lessee ought to be observed and performed or allowed then and in such case these presents and the demise hereby made and the term hereby granted shall at the option of [the Governor] cease determine and be void [save in the case of non-payment of rent].

Despite the changes the provisions were substantially the same as originally drafted by Commissioner Bonney in 1851. The most significant change was the omission of the covenant by the lessee, that Aborigines could "use, occupy, dwell on and obtain food and water" from the leased land unobstructed by the lessee. The covenant added that the lessee would not interfere with the exercise of those rights. However, as the Governor could determine a lease for the breach or infringement of any covenant or reservation, the omission of this particular covenant ultimately had no effect on the protection which the lease afforded Aborigines in the exercise of their reserved rights. Since the rights referred to in the covenant were in substance those reserved from the lease to the Aborigines, the same conduct that would have resulted in a breach of the covenant would also infringe the reservation of Aboriginal rights.

## F. Subsequent History of Pastoral Lease Nos 1 and 2

The *Northern Territory Land Act* 1872 was repealed in 1882 by *The Northern Territory Crown Lands Consolidation Act* 1882 (SA),[82] which in turn was repealed by *The Northern Territory Crown Lands Act* 1890 (SA).

### *(i) The Northern Territory Crown Lands Act* 1890 (SA)

The Act extended the maximum term of new pastoral leases from 25 to 42 years. Section 66 provided that except in the case of resumption, at the expiration or sooner determination of a pastoral lease, the land and all improvements vested absolutely in the Crown. Under s 76, the holder of an

82 Section 4 of the Act repealed ss 1-9 of *The Northern Territory Act* 1863 together with other statutes set out in the First Schedule. Section 5 re-enacted s 5 of *The Northern Territory Land Act* 1872.

existing lease under any Act repealed by the 1890 Act[83] could, with the consent of the Minister, at any time within 12 months from the passing of the Act, obtain a new lease for an additional term of 14 years added to the term of the old lease. New regulations were proclaimed on 24 February 1891. Again, regulation 39 provided that every lease was to be subject to "such conditions as the Governor in Council shall think necessary to insert for the protection of the aborigines".

As Pastoral Lease Nos 1 and 2 were due to expire on 30 April 1897 the lessee, The Willowie Land and Pastoral Association Limited,[84] sought to take advantage of s 76. Notwithstanding its failure to apply for new leases in the prescribed form, within the time period specified in the Act, new Pastoral Lease Nos 1 and 2 were granted to the Association on 8 November 1898. The term of both leases commenced on 1 April 1893 and expired on 31 March 1911. The leases were entered in the Register of Crown Leases as required by s 93 of the *Real Property Act* 1886 (SA).[85]

The wording of the reservation had changed once again:

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

The covenant by the lessee to comply with regulations "in respect of the reservation" and "the rights of entry and other rights which it is the intention that such Aboriginal Inhabitants shall from time to time have use and exercise" had been omitted. Despite the changes the content of the reservation remained substantially the same.

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83 Pastoral Lease Nos 1 and 2 were not "held under" the 1882 Act. Section 4 of that Act saved "all rights, claims, penalties, and liabilities already accrued or incurred, or in existence" under the 1872 Act, which it repealed. Section 4 of the 1872 Act saved all rights and liabilities under the repealed provisions of the 1863 Act. Assuming that the leases were otherwise valid the saving of rights and liabilities does not appear to be intended to convert a lease granted under an earlier Act into a lease "held under" the 1882 Act. Indeed the intended effect of savings clause would seem to be to save any accrued or existing rights and liabilities on the terms of the repealed Acts rather than treating them as having accrued under the later Act. If s 76 of the 1890 Act was intended to apply to *any* existing pastoral lease the following words might have been used – "Any holder of an existing lease of country may with the consent of the Minister ...". Cf the wording in reg 44. The provisions of the 1882 Act and 1883 Regulations operated prospectively and did not purport to apply to leases granted under the 1872 or earlier Acts.

84 Bagot assigned the leases to Andrew Tennant, John Love and Robert Love in 1877. After several intervening transfers the leases were finally transferred to The Willowie Land and Pastoral Association Limited in July 1891.

85 Section 93 ensured that registered proprietors secured an indefeasible title, but registration and the application of the doctrine of indefeasibility did not operate to render an invalid grant valid. Therefore, leases invalidly granted for failure to comply with a statutory pre-condition, as in this case, will not be "valid" for the purposes of s 23B(2) of the *Native Title Act*: see also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 59 and 63, per Brennan J. The *Real Property Act* 1861 did not make provision for the registration of Crown leases, which explains why the original leases granted to Bagot in 1876 were not assigned a Volume and Folio number.

*(ii) The Northern Territory Land Act* 1899 (SA)

The 1899 Act, the provisions of which were incorporated and to be read as one with the 1890 Act, repealed Part V of that Act, which had dealt with pastoral leases, and introduced a new, more comprehensive regulatory regime. Many provisions which had formerly appeared in the regulations were now included in the Act itself.

Section 7 provided that the Governor "shall not hereafter grant any such [pastoral] lease except in the manner provided by this Act". The term of new pastoral leases was not to exceed 42 years, every lease was to contain the covenants, exceptions, reservations and provisions set out in Schedule A of the Act and leases were to be in a form approved by the Minister or as prescribed. Schedule A, paragraph (q) provided that:

> Such lease shall also contain all such exceptions and reservations in favour of the ... aborigines of the colony ... necessary or proper for giving effect to any Act or regulation for the time being in force, or not inconsistent therewith, or as the Minister may require.

Prior to the enactment of s 7 of *The Northern Territory Crown Lands Amendment Act* 1896 there had been no general right for a lessee to surrender his or her lease. The 1899 Act contained a number of provisions dealing with surrenders. Section 62 provided that a lessee under an existing lease could, within three years from the passing of the Act, with the consent of the Minister and in the manner prescribed, surrender the lease and obtain a new lease for a term not exceeding 42 years. Section 85 simply provided that a lessee under any of the Northern Territory Land Acts could at any time during the currency of their lease, surrender it in the manner and form prescribed by the regulations.[86] Section 86 provided that when a lease was surrendered under s 85, a new lease could be granted to any person nominated by the lessee surrendering the lease. The new lease was to be for the unexpired term of the surrendered lease.

This is what appears to have occurred when The Willowie Land and Pastoral Association Limited surrendered Pastoral Lease Nos 1 and 2. In a letter to the Surveyor-General the company nominated NA Richardson as the person to whom the leases should be granted.[87] The new leases were granted to Richardson on 27 May 1908, not for the "unexpired period of the term" of the surrendered leases as required by s 86, but for the original term of 18 years commencing on 1 April 1893, "In lieu of Surrendered NT Pastoral Lease" Nos 1 and 2 respectively. It is unclear why the new leases were in the same form as the 1898 leases and why they stated that the lease had been applied for by the applicant, and granted by the Governor, under the terms of the *Northern Territory Crown Lands Act* 1890, Part V of the 1890 Act having been repealed by the 1899 Act, which required the Governor to grant pastoral leases only in the manner provided by that Act "or for the purpose of giving effect to any right which may be existing at the passing of this Act". At the time the new leases

86 No surrender was to be of any force or effect until accepted by the Governor.

87 Although it was pointed out that Richardson had sold the leases to Messrs W Hayes & Sons: Correspondence relating to the Transfer of Lease Nos 1 and 2, State Records, GRS 1/355/1907, Docket 355/1907.

were granted to him, the lessee, Richardson, had not had a subsisting right to a lease as required by the Act. On the contrary, he had acquired a new right when the leases were transferred to him in conjunction with their surrender by The Willowie Land and Pastoral Association Limited.

If the leases granted in 1898 were invalid for failure to comply with the relevant statutory pre-conditions, the 1908 leases must also have been invalid, the grant of a new lease under s 86 of the 1899 Act being dependent upon the surrender of an existing lease under s 85. However, there was no valid lease to surrender. Registration of the leases under the *Real Property Act* had the limited effect described above.[88]

Formal consent was later given for the transfer of Pastoral Lease Nos 1 and 2 to the Hayes on 1 July 1908 and the transfer was registered on 3 July 1908. The leases were subject to the same reservation for the protection of the Aborigines as the 1898 leases.

With both leases due to expire on 31 March 1911, the Hayes applied for a "permit to occupy land contained in Pastoral Leases Nos 1 and 2 until re-allotted".[89] On 6 July 1911 the Executive Council[90] approved the extension of the term of Pastoral Lease Nos 1 and 2 to 30 September 1912,[91] to secure simultaneous expiry with contiguous Leases 16 and 17.[92] The leases expired on 30 September 1912 and were determined on 6 January 1913.[93]

After the determination of the leases in 1913, the Hayes continued in occupation of the land until granted new leases in 1921 under the *Crown Lands Ordinance* 1912-18. In April 1919 the Minister approved the re-leasing of the land formerly comprised in Pastoral Lease Nos 1 and 2.[94] Although the Hayes applied for, and were allotted, the land concerned in December 1919, the new leases were not granted until 7 February 1921. Pastoral Lease Nos 2386 and 2387, which commenced from 1 January 1920, did not contain a reservation clause. Nor was there a reservation in the leases when they were re-granted to the Hayes in 1923.

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88 See note 85 *supra*.

89 Dalgety and Company Limited to the Surveyor-General, 18 February 1911, NAAACT:CRS A3 NT 1921/2633.

90 W Hayes & Sons, Blocks 1, 2, 16 and 17, Alice Springs, Minute Paper for Executive Council, NAANT:CRS A3/1, 6 July 1911.

91 Acting Secretary External Affairs to Messrs Dalgety and Company, 10 July 1911, NAAACT:CRS A3 NT 1921/2633.

92 Memorandum, JD Bancroft, Department of External Affairs, 3 September 1912, NAAACT:CRS A3 NT 1921/2633. The extension was granted under s 81 of the 1899 Act.

93 Notice No 3108, Register Book, Vol 27 Folio 10; Vol 27 Folio 11; see also, Memorandum, JD Bancroft, Lands Officer, 19 December 1912, NAAACT CRS A3 NT 1921/2633.

94 Lettergram, Atlee Hunt to Government Secretary, Darwin, 17 April 1919, NAAACT:CRS A3 NT 1921/2633.

## VI. COMMONWEALTH ADMINISTRATION OF THE NORTHERN TERRITORY

In 1907 the South Australian Parliament enacted *The Northern Territory Surrender Act* which came into force on 1 January 1911.[95] In 1910 the Commonwealth Parliament enacted *The Northern Territory Acceptance Act* which also was proclaimed to come into force on 1 January 1911.[96] Accordingly, on 1 January 1911 the Northern Territory was surrendered to and accepted by the Commonwealth of Australia.[97]

Section 7 of *The Northern Territory Surrender Act* 1907 (SA) stated that the surrender to the Commonwealth was:

> subject to all freehold, leasehold, or other estates or interests in or agreements, securities or rights in respect of land within the said Territory in existence at the time of the acceptance of such surrender by the Commonwealth.

*The Northern Territory Acceptance Act* 1910 (Cth) declared in s 6 that the Northern Territory was "accepted as a Territory under the authority of the Commonwealth, by the name of the Northern Territory of Australia". Section 7 provided that all laws in force in the Northern Territory at the time of the acceptance would continue in force, but could be altered or repealed by or under any law of the Commonwealth. Section 10 provided that:

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

The Commonwealth also enacted the *Northern Territory (Administration) Act* 1910 (Cth), an "Act to provide for the Provisional Government of the Northern Territory", which, again, commenced on 1 January 1911.[98] The Act contained several important provisions. Under s 5 South Australian laws continued in force by s 7 of the *Acceptance Act* had effect in the Territory, subject to any Commonwealth Ordinance, as if they were laws of the Territory. Section 13 provided that Ordinances having the force of law in the Northern Territory could be made by the Governor-General and, subject to disallowance, would take effect from the date of notification in the *Gazette* or from a later date to be specified in the Ordinance. There were no express limitations, as to subject-

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95 Section 4 was to come into force on a day to be fixed by proclamation dated 21 December 1910.

96 Section 2 was to come into force on a date to be fixed by proclamation, as published in the Commonwealth Gazette on 24 December 1910.

97 Section 111 of the Commonwealth *Constitution* provides that: "The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth". See s 52(iii) of the *Constitution*. See also *Svikart v Stewart* (1994) 181 CLR 548 at 566, per Brennan J.

98 Under s 122 of the *Constitution* the Commonwealth Parliament can "may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth."

matter or otherwise, on the powers of the Commonwealth to make laws for the Northern Territory.[99]

## VII. CROWN LANDS ORDINANCE 1912

### A. Background

Two Crown Lands Ordinances were made in 1912. The *Crown Lands Ordinance* (No 3 of 1912) was the Commonwealth's first attempt to legislate in the area of land policy for the Northern Territory and it was regarded as one of the most important measures introduced in the session.[100] Importantly, the Ordinance did not provide for a reservation in favour of Aboriginal people to be included in pastoral leases. The Ordinance was approved by the Executive Council on 20 March 1912, gazetted on 22 March 1912 and tabled in the House of Representatives and the Senate on 19 June 1912.[101] However, on 1 August 1912, Senator Millen moved that the Ordinance be disallowed[102] and on the next day there was a similar motion in the House of Representatives.[103] There was concern that the proposed law, being an Ordinance rather than a Bill, could not be debated clause by clause, thereby inviting rejection of the whole. The Senate motion was negatived[104] and early in September 1912 debate was adjourned in the House of Representatives. There was no mention in the debates of the absence of a clause reserving Aboriginal rights over lands held under pastoral lease.

On 7 September 1912 the Secretary of the Department of External Affairs, Atlee Hunt, informed the Northern Territory Administrator, John Gilruth, that the Government proposed withdrawing the Ordinance. The Government accepted that a majority of members were opposed to its main principles and that it would be necessary to draft a new Ordinance. In response to a question on notice, the Department of External Affairs stated that, "No leases are being granted at present. None will be issued until the new Lands Ordinance becomes law".[105]

On 8 November 1912, the *Northern Territory Crown Lands Ordinance* 1912 (No 2) (Cth)[106] was approved by the Executive Council.[107] Section 4 repealed

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99 See generally, *Kruger v Commonwealth* (1997) 190 CLR 1 at 40-5, per Brennan CJ; at 49-50, 53-61, per Dawson J; at 78-97, per Toohey J; at 102-24, per Gaudron J and at 152-76, per Gummow J; McHugh J agreed with the reasoning of Dawson J. *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513 at 535-45, per Brennan CJ; at 547-59, per Dawson J; at 560-1, per Toohey J; at 564-9, per Gaudron J; at 574-86, per McHugh J; at 591-5, 597-614, per Gummow J and at 640-62, per Kirby J.

100 Governor-General's Speech – Address in Reply (Minister of External Affairs), Australia, House of Representatives 1912, Debates, vol HR lxiv, p 392.

101 See *Northern Territory (Administration) Act* 1910 (Cth), s 13(2)(c).

102 Australia, Senate 1912, Debates, vol HR lviii, p 1523.

103 Australia, House of Representatives 1912, Debates, vol HR lxv, p 1645.

104 Note 102 *supra*, p 1894.

105 House of Representatives, Notice Paper No 61, NAAACT:CRS A3/16 NT 1913/3924.

106 This subsequently became *Crown Lands Ordinance* 1912 (Cth) (No 8 of 1912).

107 Executive Council Minute, NAAACT CRS A3/16 NT 1913/3924.

Ordinance No 3 of 1912. One of the more important changes introduced by the new Ordinance was that pastoral leases were not to be granted in perpetuity. The Ordinance, No 8 of 1912, was published in the Commonwealth *Gazette* on 11 November 1912. It was tabled in the Senate on 13 November 1912[108] and a further motion by Senator Millen that it "be disagreed with" was negatived on 4 December 1912.[109] Replying to Senator Millen's objections, Senator McGregor assured those present:

> that the Government regard this Ordinance merely as a tentative measure for the purpose of speedily doing something for the settlement of the Northern Territory and that, as soon as it is possible, the Government will bring down a comprehensive Land Bill for the Northern Territory.[110]

On 20 December 1912 a motion in the House of Representatives to disallow the Ordinance was negatived.[111]

## B. Protection of Aboriginal Rights

In *Mabo [No 2]* Brennan J pointed out that:

> the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive.
>
> A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. *The extinguishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy the native title.*[112]

Deane and Gaudron JJ stated the relevant principles as follows:

> The ordinary rules of statutory interpretation require, however, that clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation. Thus, general waste lands (or Crown lands) legislation is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title. If lands in relation to which such title exists are clearly included within the ambit of such legislation, the legislative provisions conferring executive powers will, in the absence of clear and unambiguous words, be construed so as not to increase the capacity of the Crown to extinguish or diminish the native title.[113]

In *Wik*, the High Court applied these principles and held that the grant of a pastoral lease under legislation which did not provide for a reservation in favour of Aboriginal people to be included in leases did not necessarily extinguish all incidents of native title in the land concerned.

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108 Australia, Senate 1912, Debates, vol HR lxviii, p 5316.

109 *Ibid*, pp 5947, 6345.

110 *Ibid*, p 6336.

111 Australia, House of Representatives 1912, Debates, vol HR lxvi, p 7679.

112 Note 85 *supra* at 64 and 68. Emphasis added.

113 *Ibid* at 111.

In the Alice Springs Arrernte Native Title Claim, the Northern Territory sought to argue that the circumstances surrounding the drafting of the first *Crown Lands Ordinance* (No 3 of 1912) revealed a clear and plain intention to extinguish native title rights and interests in land affected by the grant of a pastoral lease. And further, that the same clear and plain intention was present in the second Ordinance of 1912, since it also failed to provide for a reservation in favour of Aboriginal people.

*(i) The Drafting of the Ordinance*

When the Ordinance was being drafted, Atlee Hunt consulted Administrator Gilruth and later, sent an undated memorandum[114] to the Minister, which began:

> The rough draft of the Lands Ordinance prepared by the [Attorney-General's] Department has been considered by Professor Gilruth and myself who desire to submit the following suggestions.

With respect to draft clause 17(i), the proposed reservation, Hunt and Gilruth suggested that it be deleted:

> It is thought that to leave the clause as it stands might impose hardship on the lessee and it would enable aborigines to do as they pleased, e.g. camp permanently round the water-hole and prevent access to it by the lessee's stock. It appears advisable to leave all provisions relating to aborigines to be dealt with under the aborigines law, or the regulations thereunder. It is understood that Professor Spencer is now considering this aspect of the aborigines question.

On 1 March 1912 Atlee Hunt sent a memorandum to the Secretary of the Attorney-General's Department containing the Minister's amendments to the rough draft of the Ordinance,[115] which included an instruction to delete clause 17(i) and the comment that "provision will be made in Aboriginals law for dealing with matter".[116] A typed draft was subsequently produced containing the Minister's amendments and on page 10 the following paragraph was struck out, "[17] (i) A covenant not to interfere with aborigines".[117]

*(ii) "Provision will be made in the Aboriginals law"*

Atlee Hunt's advice, that it would be "advisable to leave all provisions relating to aborigines to be dealt with under the aborigines law, or the regulations thereunder", was given on the understanding that "Professor Spencer is now considering this aspect of the aborigines question". Baldwin Spencer, who at the time was Professor of Biology at the University of Melbourne, proposed and was appointed leader of a preliminary scientific expedition to the Northern Territory. Other members of the party were Dr Woolnough, Dr Breinl,

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114 Memorandum [unsigned and undated] from Department of External Affairs to the Minister, NAAACT:CRS A3/16 NT 1913/3924.

115 Atlee Hunt, Secretary External Affairs to the Secretary Attorney-General's Department, 1 March 1912, NAAACT:CRS A3/16 NT 1913/3924.

116 The amendments are similar, but not identical to those in Hunt's earlier memorandum to the Minister.

117 Northern Territory, No ... of 1912 (the number had not been allocated at this stage in the drafting process). An Ordinance relating to Crown Lands, NAAACT:CRS A3/16 NT 1913/3924.

and Dr JA Gilruth.[118] Professor Spencer, recognised as an anthropologist, was to study the Aborigines.[119] The party travelled to different parts of the north of the Territory from June to August 1911. In the *Summary of Report of Preliminary Scientific Expedition to the Northern Territory*, the section on 'Aborigines' concluded "it is urgent that a systematic study of the organisation, customs and beliefs of the various tribes should be undertaken without delay".[120]

On 1 January 1912 Spencer was appointed Special Commissioner and Chief Protector of Aborigines for the Northern Territory.[121] He was expected to "formulate a definite policy for the future" in relation to the Aboriginal population of the Territory.[122] Spencer arrived in Darwin to take up his duties on 15 January 1912 and stayed in the Territory until 25 December 1912. In January 1913 he submitted a draft report to the Minister for External Affairs, which was then, as Spencer had requested, provided to Administrator Gilruth for his comments.[123] Gilruth suggested that Spencer "should endeavour to consolidate the present law which is partly South Australian Act and partly Amending Ordinance, inserting the alterations he desires made in a new Draft Ordinance to be submitted for consideration".[124] Spencer submitted a revised report to the Minister on 19 May 1913.[125] Although titled a "Preliminary Report on the Aboriginals of the Northern Territory" a further report was never submitted.[126]

In both versions of the draft report, under the heading "Present Conditions and Treatment of the Aboriginals", Spencer made the following observations about Aboriginal people living on "Large Pastoral Areas":

> These pastoral areas ... occupy great stretches of country over which the natives roam more or less freely. A limited number of them are employed on the stations where they are well treated and do most useful work for which they receive tucker, clothes, tobacco [etc]. ... It is not too much to say that under present conditions, the majority of the stations are largely dependent on the work done by black 'boys'.[127]

In respect of Aboriginal people living outside town areas, Spencer proposed the development of large reserves. He wrote:[128]

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118 DJ Mulvaney and JH Calaby, *So Much That Is New: Baldwin Spencer 1860-1929*, Melbourne University Press (1985) p 268. Dr Gilruth was Professor of Veterinary Pathology at the University of Melbourne and later Administrator of the Northern Territory.

119 PF Donovan, *At The Other End of Australia: The Commonwealth and the Northern Territory 1911-1978*, University of Queensland Press (1984) p 8.

120 Northern Territory: Preliminary Scientific Expedition 1911, Professor Spencer's Report re: Aborigines, NAAACT:CRS A1/2 1912/2991.

121 Note 118 *supra*, p 274.

122 Australia, *The Northern Territory of Australia Report of the Administrator for the Year 1912*, Parliamentary Papers, No 45 of 1913 at 12.

123 Professor Baldwin Spencer's Report re: Northern Territory Natives, 13 January 1913, NAAACT:CRS A3 1919/2897.

124 Memorandum by Administrator JA Gilruth, 16 April 1913, NAAACT:CRS A3 1919/2897.

125 The report was published as *Bulletin of the Northern Territory* No 7 in July 1913 and was included in the Administrator's Annual Report, note 122 *supra*.

126 Note 118 *supra*, p 306.

127 "Preliminary Report on the Aboriginals of the Northern Territory", Bulletin of the Northern Territory No 7 in Commonwealth of Australia, *The Northern Territory of Australia Report of the Administrator for the Year 1912*, Parliamentary Papers, No 45 of 1913 at 42-3.

128 *Ibid* at 48-9. Emphasis added.

> ... there is no other practicable policy but that of the establishment of reserves if the aboriginals are to be preserved and if any serious effort is to be made for their betterment. *It will not however be either necessary or wise to attempt to force them at present on to reserves in those large areas occupied by pastoral runs.*

Spencer clearly assumed that Aboriginal people would continue to have access to and to occupy lands held under pastoral leases; while his draft report commented on the *Crown Lands Ordinance* 1912, the *Aboriginals Act* 1910 (SA) and the *Aboriginals Ordinance* 1911 (Cth), he made no recommendations concerning the continued exercise and protection of Aboriginal rights over pastoral lease land. The end result was that these issues were not dealt with in the *Aboriginals Ordinance* 1918 as Hunt had originally contemplated in his advice to the Minister.

*(iii) Conclusions*

There is no evidence that the recommendation to delete clause 17(i) from the draft Ordinance was intended either to prevent Aboriginal people from continuing to exercise their rights over lands held under pastoral lease, or to enable lessees to expel Aboriginal people from leased lands. Rather, there was an expectation that the scope of Aboriginal rights and more particularly, express protection of them, would be dealt with under the Aboriginals' law.

Furthermore, the decision not to include a reservation in pastoral leases was *not* a decision to omit or delete the reservation from an already existing law. In drafting what was described as "as a tentative measure for the purpose of speedily doing something for the settlement of the Northern Territory",[129] the Commonwealth merely chose not to follow the practice adopted in South Australian legislation of providing for a reservation in pastoral leases.

Even taking account of Atlee Hunt's memorandum, in which he proposes the deletion of clause 17(i), it is neither clear nor plain that the Commonwealth intended that Aborigines would no longer have any rights of access to, or use of, pastoral lands in the Territory. In fact the memorandum seems to suggest that it was thought the reservation afforded Aboriginal people greater rights than they were entitled to, or, given our present understanding of the law, rights beyond those derived from native title (for example, the right to "camp permanently round the water-hole and prevent access to it by the lessee's stock"[130]). Under the Ordinance, Aboriginal people would in fact continue to exercise their rights in relation to the pastoral lands of the Territory as before, but their rights would not, at least for the time being, be the subject of a reservation in pastoral leases. Atlee Hunt's concern was not that Aboriginal people possessed and exercised rights over pastoral leases, but that "to leave the clause as it stands might impose hardship on the lessee and it would enable aborigines to do as they pleased". There was no suggestion that Aboriginal rights derived exclusively from the reservation or that they should absolutely cease.

A comparison can be made with Queensland, where from the very first leases granted under the *Unoccupied Crown Lands Occupation Act* 1869 (Qld) until at

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129 Note 108 *supra*, p 6336.

130 That is, that Aboriginal rights prevailed over the rights of lessees.

least the early years of this century, all pastoral leases contained a reservation in favour of Aboriginal people. However, there was no provision in relevant Queensland land legislation for the inclusion of a reservation in pastoral leases, and the clause, apparently inserted administratively, was ultimately excluded from later forms of lease. In *Wik*, the High Court considered the terms of the relevant legislation and drew no adverse inference from the fact that the reservation had been omitted from the forms of lease currently in use in that State.

*(iv) Continued Operation of South Australian Laws*

On the commencement of the *Northern Territory Acceptance Act* 1910 (Cth) the Commonwealth acquired radical title to all land in the Northern Territory then subject to subsisting native title rights.[131] South Australian legislation dealing with Crown lands continued in force but could be altered or repealed by the Commonwealth.[132] The provisions of the *Northern Territory Crown Lands Act* 1899 (SA) remained in force under s 54 of the *Crown Lands Ordinance* 1912 (Cth), and applied to leases granted under the Ordinance "so far as they are applicable and are not inconsistent" with the provisions of the Ordinance. Schedule A clause (q) of the 1899 Act authorised the inclusion in leases of a reservation protecting Aboriginal rights over lands held under pastoral lease. As noted above, the 1908 leases granted to Richardson and subsequently to the Hayes' over land in the Alice Springs district contained such a reservation. The *Crown Lands Ordinance* 1912 did not contain any provisions expressly inconsistent with Schedule A clause (q) of the 1899 Act.

While it may not be possible to argue that pastoral leases granted under the 1912 Ordinance should have contained or should be construed as containing a reservation in favour of Aboriginal people, the absence of any clear and plain intention to extinguish native title is reinforced both by reading the 1912 Ordinance together with Schedule A clause (q) of the 1899 Act, and the knowledge that Aboriginal people continued to have access to and to occupy land in the Northern Territory subject to leases under the South Australian legislation.

## VIII. CROWN LANDS ORDINANCE 1924

### A. Background

By the middle of 1922 a comprehensive new land policy for the Northern Territory was under consideration by the Commonwealth.[133] On 27 March 1923 Senator Pearce, Minister for Home and Territories, forwarded proposals for a new lands Ordinance to the Vice-President of the Executive Council, noting that

131 *Northern Territory Surrender Act* 1907 (SA), s 7 and *Northern Territory Acceptance Act* 1910 (Cth), s 6. See *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513 at 615, 634-5, per Gummow J.

132 *Northern Territory Acceptance Act* 1910 (Cth), s 7.

133 Memorandum, Policy background to the 1923 Crown Lands Ordinance, NAAACT A431 46/869.

two-thirds of the pastoral leases in the Northern Territory were still held under South Australian legislation, and indicating that the object was to induce these lessees to surrender their leases.[134] Later in March, the Secretary of the Department of Home and Territories wrote to the Secretary of the Attorney-General's Department forwarding "a memorandum setting out the principal proposals put forward by the Minister and approved by the Government as the basis of a new Lands Policy for the Northern Territory".[135] One of the objects of the new policy, he wrote, was "to create a complete and uniform land law for the Territory by eliminating the South Australian Land Acts still in force and the existing Crown Lands Ordinance."[136]

The new Ordinance, No 7 of 1923, was gazetted on 10 May 1923 and was to commence on 1 July 1923. However, on 29 June 1923 Prime Minister Bruce gave an undertaking to Parliament to postpone the commencement of the Ordinance and to give members an opportunity to discuss its provisions. An amending Ordinance postponing commencement was approved on the same day[137] and the next day the Administrator of the Northern Territory was advised that the "Minister instructs that no lands are to be made available for [pastoral] lease until further advised".[138] To allow Parliament to consider the individual clauses of the Ordinance, its provisions were introduced on 11 July 1923 by Senator Pearce in the form of a schedule to the Northern Territory Crown Lands Bill.[139] The Senator explained that the Bill would be passed up to its final stages and then an Ordinance would be drafted, embodying the principles of the Bill as amended.[140]

The session ended with the debate on the Bill in the House of Representatives unfinished. During the parliamentary recess it was suggested in a memorandum by WB Hicks that a reservation should be included in Territory pastoral leases. The memorandum set out the "exception in favour of the Aboriginals" included in pastoral leases under the South Australian Land Acts and suggested that "a reservation to the above effect should only be included in pastoral leases".[141] The memorandum continued:

> To give effect to the above, an additional reservation could be included in Section 39 of the new Lands Ordinance, as a reservation in favour of the Aboriginal inhabitants of the Northern Territory. And an additional clause would need to be inserted in Section 26.

The proposal was approved by the Minister on 7 September 1923. An annotation initialled 'WBH' and dated 18 September 1923 noted "amendment to be prepared when Ordinance considered next session". The inclusion of the

134 GF Pearce to Mr Atkinson MP, 27 March 1923, NAAACT A431 46/869.

135 JG McLaren (Secretary) to Secretary, Attorney-General's Department, 27 March 1923, NAAACT A431 46/869.

136 *Ibid.*

137 Minute Paper for the Executive Council, 29 June 1923, NAAACT A431 46/869.

138 Telegram to Administrator, Darwin, 30 June 1923, NAAACT A431 46/869.

139 See JG McLaren, Secretary to Secretary Attorney-General's Department, 3 July 1923, NAAACT A431 46/860.

140 Australia, Senate 1923, Debates, vol HR ciii-v, pp 873-1604.

141 Memorandum signed WBH [WB Hicks], 6 September 1923, NAAACT A431/1 46/860.

reservation as clause 26(e) and the consequential amendment to clause 39 were included in the printed list of amendments to be proposed in the House of Representatives.[142] Debate on the Bill resumed in the House of Representatives on 23 May 1924 and on 1 June 1924 the amendments to clauses 26 and 39 were passed in Committee without debate.[143]

A copy of the Bill was annotated with the amendments made in the House of Representatives and initialled 'WBH'.[144] The following annotation explained the purpose of the amendment to clause 26:

> Pastoral leases under the South Australian Acts contain a reservation in favour of the aboriginals of the Northern Territory in the above terms, but pastoral leases under the existing Ordinance contain no such reservation. In consequence of this omission, it has been found that certain lessees under the existing Ordinance have arbitrarily ordered the natives away from natural waters and areas etc. which they were accustomed to use or hunt over. In view of this treatment it has been decided that the rights of the natives must be respected, and every pastoral lease issued under this Ordinance will contain a reservation in favour of the aboriginal inhabitants of the Northern Territory.

The Bill was returned to the Senate on 3 July 1924. The amendments to clauses 26 and 39 were moved by Senator Pearce, who remarked:

> Honorable Senators will agree that this is a very wise provision. Certain of the leases under the South Australian acts contained reservations in favour of the aboriginal inhabitants of the Northern Territory in the terms of this amendment, and certain of the leases under our own ordinances contain no such reservations. In consequence of this omission lessees occasionally have arbitrarily ordered natives away from recognized watering places, and from areas in which they or their progenitors have been hunting for centuries.[145]

In the brief debate which followed, Senator Pearce clarified that the provision was "designed to prevent lessees from denying to aboriginals the right of ingress to certain watering and camping places which they may have been accustomed to use".[146] The amendments were subsequently passed by the Senate and the *Crown Lands Ordinance* (No 15 of 1924) was approved by the Executive Council and gazetted on 9 July 1924.[147]

## B. The Reservation in Pastoral Leases

Section 39 provided that "pastoral leases shall contain reservations, covenants, conditions and provisions as follows":

(b) a reservation in favour of the aboriginal inhabitants of the Northern Territory.

Section 26 provided that, "In any lease under this Ordinance":

142 Northern Territory Crown Lands Bill (1923), NAAACT A2683 1924/65.

143 Australia, House of Representatives 1924, Debates, vol HR cvi, pp 1076-7.

144 Bill for an Act Relating to Crown Lands in the Northern Territory of Australia [initialled WBH on front page], NAAACT A431/1 46/860.

145 Australia, Senate 1923, Debates, vol HR cvii, p 1799.

146 *Ibid*, p 1800.

147 *Commonwealth Gazette*, No 44, 9 July 1924 at 1431-60.

> (e) a reservation in favour of the aboriginal inhabitants of the Northern Territory shall be read as a reservation giving to all aboriginal inhabitants of the Northern Territory and their descendants full and free right of ingress, egress and regress into, upon and over the leased land and every part thereof, and in and to the springs and natural surface water thereon, and to make and erect thereon such wurlies and other dwellings as those aboriginal inhabitants have before the commencement of the lease been accustomed to make and erect, and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to do if the lease had not been made.

The clause is expressed in substantially the same terms as the reservation included in leases under *The Northern Territory Land Act* 1899 (SA). Provision was made for the inclusion of a reservation clause in pastoral leases when it became apparent that Aboriginal 'rights' were being infringed by certain lessees who "have arbitrarily ordered the natives away from natural waters and areas etc which they were accustomed to use or hunt over".[148]

Although the enforceability of these customary rights by Australian courts was not recognised until 1992, the Commonwealth in 1924 clearly did not believe that leases granted by it under the 1912 Ordinance had destroyed the customary entitlements of Aboriginal people. The reinstatement of express protection of customary rights in the new s 26(e) can be seen as quite inconsistent with any suggestion that it was the intention of the Commonwealth in 1912 to extinguish those rights.

Like New South Wales and South Australia some seventy years earlier, the intended purpose of the reservation in Commonwealth pastoral leases was not to create new rights for Aboriginal people but to ensure that lessees knew about and respected their existing rights over the land.

## IX. SUBSEQUENT DEVELOPMENTS: CROWN LANDS ORDINANCES 1927-31

After the commencement of the *Crown Lands Ordinance* 1924 (Cth) all leases for pastoral purposes in the Territory included "a reservation in favour of the aboriginal natives of the Northern Territory".[149] Section 36 of the *Northern Australia Act* 1926 (Cth)[150] provided for the division of the Northern Territory into the Territories of North and Central Australia, each to be separately administered under the authority of the Commonwealth. Crown Lands Ordinances were made for each territory, containing provisions identical to ss 26(e) and 39[151] of the 1924 Ordinance. A reservation in favour of the "aboriginal natives of Central Australia" and "North Australia", (as appropriate) was subsequently included in every pastoral lease granted in each Territory.

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148 Note 144 *supra*.

149 Section 39(b).

150 Commenced on 1 February 1927.

151 For example, *Crown Lands Ordinance* 1927 (Cth), ss 21(e) and 34(b).

The *Northern Territory (Administration) Act* 1931 (Cth)[152] repealed the *Northern Australia Act* and brought the Territory under a single administration once again. The *Crown Lands Ordinance* 1931 (Cth) commenced on 12 June 1931 and s 2 provided that the land Ordinances of North and Central Australia ceased to apply to the Northern Territory. Section 37(b) provided that all pastoral leases had to contain a "reservation in favour of the aboriginal inhabitants of the Northern Territory". Section 24(e) was in the same terms as s 26(e) of the *Crown Lands Ordinance* 1924.

## X. EFFECT OF THE RESERVATION

### A. Judicial Consideration of the Reservation

*(i) The Gove Land Rights Case*

In *Milirrpum v Nabalco Pty Ltd*,[153] Blackburn J, in the course of reviewing a large body of historical material bearing upon the existence of a doctrine of communal native title in Australia, considered the terms of the reservation in Northern Territory pastoral leases. He pointed out that an attempt had consistently been made to ensure that pastoral leases in the Territory "interfered as little as possible with the use by the aboriginals of the leased land".[154] After setting out the terms of the reservation in an 1886 lease, he continued:

> Mr Woodward conceded that this clause was not a recognition of any native title, but said that at least it had the effect of preventing the lease from terminating the native title. He said that the clause showed an intention to preserve the status quo. The language, he said, is in terms of an existing right which is being continued.
>
> It seems to me that the utmost effect of the clause is to ensure that aboriginals *generally* (not in particular) should not be prevented from using any of the land demised in the manner in which it had previously been used by aboriginals. The fact that in the earlier leases the reservation was expressed to be not only to the Crown but also to the aboriginals themselves (who were not parties to the lease) merely makes a legal puzzle. If it is argued that the words "as they would have been entitled to do if this demise had not been made" support the existence of title in the aboriginals before the lease, the effect is two-edged; a lease without such a clause must then be effective to extinguish such title...
>
> In truth, however, I do not think that this form of pastoral lease has any particular relevance except that it is entirely consistent with the whole pattern of non-recognition of communal native title by Australian law.[155]

It is suggested that the concession by Mr Woodward, counsel for the plaintiffs, that the reservation clause was not a recognition of native title, was made on the basis that the common law recognised pre-existing customary rights and interests "only upon an express act of recognition by the new sovereign".[156] Although the reservation did not amount to an express act of acknowledgment,

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152 The Act was proclaimed to commence on 12 June 1931.

153 (1971) 17 FLR 141.

154 *Ibid* at 259.

155 *Ibid* at 259-61.

156 *Mabo [No 2]*, note 85 *supra* at 55, per Brennan J.

counsel was not, however, conceding that the clause did not recognise the continued existence of native title rights and interests in land subject to pastoral lease. In *Mabo [No 2]*[157] Brennan J specifically rejected the proposition that "pre-existing customary rights and interests in land are abolished upon colonization of inhabited territory, unless expressly recognized by the new sovereign."

A number of points can be made about the observations of Blackburn J. The first and most obvious is that his decision preceded and was not followed by the High Court in *Mabo [No 2]*. Had his Honour accepted that, before the grant of a lease, Aboriginal people exercised rights recognised by Australian law which derived from their native title, he may well have been more willing to accept the argument that the reservation preserved existing rights. Secondly, Blackburn J does not appear to have considered historical material relating to the drafting of the reservation clause. This material is consistent with the interpretation favoured by counsel for the plaintiff. Thirdly, his Honour suggested that the effect of the reservation was to ensure that Aboriginal people "*generally* (not in particular) should not be prevented from using any of the land demised in the manner in which it had previously been used by aboriginals". This implies that the reservation does not preserve pre-existing rights but confers new rights, including upon Aboriginal people who would not otherwise have any rights in the land concerned, according to Aboriginal law and custom.

Justice Blackburn's analysis depends on the meaning given to the words "Aboriginal Inhabitants" in the reservation clause itself. In *Mabo [No 2]* Brennan J discussed the expression "Aboriginal inhabitants of the State" and concluded:

> Nor is native title impaired by a declaration that land is reserved not merely for use by the indigenous inhabitants of the land but 'for use of Aboriginal Inhabitants of the State' generally. If the creation of a reserve of land for Aboriginal Inhabitants of the State who have no other rights or interest in that land confers a right to use that land, the right of user is necessarily subordinate to the right of user consisting in legal rights and interests conferred by native title. Of course, a native title which confers a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time.[158]

In the context of the Northern Territory, having regard to the historical materials relating to the drafting of the reservation clause and the textual references to customary use and practice (in particular: "as they have heretofore been accustomed to make and erect" and "in such manner as they would have been entitled to if this demise had not been made") it would appear that the words "Aboriginal Inhabitants of the Province" should be taken to mean those Aboriginal inhabitants of the province whose rights with respect to the leased land are derived from Aboriginal law and custom. Once it is understood that the rights exercised over land prior to the grant of a pastoral lease were rights derived from native title, the words "as they would have been entitled to do if this demise had not been made" are clearly seen to mean no more than that it is

157 *Ibid* at 54-8.
158 *Ibid* at 66-7.

*those rights* which continue, as if the lease had not been made. It does not follow that a lease without a reservation is effective to extinguish native title. As the High Court held in *Wik*, whether a lease extinguishes native title will depend upon the terms of the relevant statute and lease instrument.

*(ii) The Ben Ward (Miriuwung Gajerrong) Case*

In *Ben Ward on behalf of the Miriuwung Gajerrong Peoples v Western Australia*,[159] Lee J considered the legal effect of reservations in pastoral leases granted under *The Northern Territory Crown Lands Act* 1890 (SA), the *Crown Lands Ordinance* 1927 (Cth) and the *Crown Lands Ordinance* 1931 (Cth). With respect to the Territory, his Honour held that the:

> ... limitation of the statutory interest granted by the colony of South Australia, and later by the Territory by statutory reservation, was an acknowledgement by the Crown of rights of the type attaching to a subsisting native title. The form of statutory interest described as a pastoral lease was moulded to coexist with the exercise of the existing rights of Aboriginal people. No intention to extinguish native title is manifested in the actions of the Crown and, to the contrary, it is made plain that the Crown had no intention so to act.[160]

The Territory submitted that the provision described as a reservation constituted the substitution of statutory rights for rights obtained under native title and demonstrated an intention by the Crown to extinguish native title. Counsel for South Australia referred to *Mayor of New Windsor v Taylor*[161] in support of its submission. In that case, a prescriptive right to exact tolls had been replaced by authority provided by statute, and it was held that the original prescriptive right no longer existed. However, that case can easily be distinguished since, in the case of the reservation in pastoral leases granted in the Northern Territory, the Crown reserved or excepted from the interest granted an interest in favour of a third party with pre-existing rights. The effect of this was simply to preserve existing rights, rather than confer new ones.

The state argued further that words used in the exception clauses of the first leases, namely, "*as they would have been entitled to do if the lease had not been made*", were words which acknowledged that the effect of the lease was to destroy a pre-existing right and to provide for replacement of that right. But those words must be read in the context of the terms and purpose of the exception to the grant of the lease. The exception is an acknowledgement by the Crown that the Crown's interest in the land is subject to the rights of the Aboriginal inhabitants. Thus, the interest granted to a lessee cannot be said to reflect a Crown intention to extinguish native title, which, therefore, continues notwithstanding the grant of a pastoral lease.

In considering the effect of the reservation in Western Australian pastoral leases, Lee J observed that:

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159 Note 5 *supra*.
160 *Ibid* at 561.
161 [1899] AC 41.

> The effect of that exception was to limit the interest granted by the Crown as a pastoral lease and to preserve an existing right of Aboriginal people. (*Wade v New South Wales Rutile Mining Company Pty Ltd* (1969) 121 CLR 177 per Windeyer J at 194; *Wik* per Gummow J at 200-201)[162] The statutory exception to, or reservation upon, the statutory interest granted in the form prescribed did not create a new right in Aboriginal people but reserved and acknowledged an existing right. (*The Yandama Pastoral Company v The Mundi Mundi Pastoral Company Limited* (1925) 36 CLR 340 per Knox CJ at 348; per Higgins J at 377)...
>
> The use of that substantive statutory provision, which stated that access to unenclosed and unimproved land of pastoral leases for Aboriginal people seeking sustenance in their accustomed manner was unrestricted, made clear that the statutory interest granted to a pastoral lessee did not include a right in the lessee to exclude Aboriginal people from land held for pastoral purposes, nor permit the lessee to restrict the exercise of a right of Aboriginal people to the convenience of the lessee. The substance of the statutory provision was the acknowledgement by the Crown of an existing right based on custom and that such a right, although regulated, continued after the grant of a pastoral lease. Such a statutory provision made it unnecessary for the Crown to further define the nature of the interest granted as a pastoral lease by an express exception or reservation to the grant...
>
> The reference to seeking subsistence, or sustenance, from the land in an accustomed manner made it plain that in the exception clauses, and in s 106(2) of the *Land Act* 1933 (WA), the Crown acknowledged an existing right of access to land over which the Crown had granted rights to depasture stock. Such an acknowledgement was inconsistent with any intention to extinguish native title under which such rights of access and use arose.[163]

Lee J concluded that a pastoral lease containing a reservation was not an "exclusive pastoral lease" as defined in s 248A of the *Native Title Act* 1993 (Cth).[164] He rejected the suggestion that pastoral leases in the Northern Territory conferred a right of exclusive possession, pointing out "that the interest granted by the Crown as a pastoral lease in the Territory did not include a right to exclude Aboriginal people exercising existing rights" and at the time of grant "was subject to the rights of access and use of Aboriginal people arising under native title".[165]

While the correctness of this decision is currently being challenged on appeal to the Full Federal Court, it is respectfully suggested that his Honour's conclusions that:

(a) the reservation did not create new rights but preserved existing rights of Aboriginal people;

(b) that those existing rights were rights exercised according to Aboriginal custom; and

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162 Gummow J commented as follows: "The term 'reservation' in strict usage identifies something newly created out of the land or tenement demised and is inappropriate to identify an exception or keeping back from that which is the subject of the grant. However, in accordance with the Australian usage referred to by Windeyer J in *Wade v New South Wales Rutile Mining Co Pty Ltd*, 'reservation' was apt in Form 3 to identify that which was withheld or kept back by the grants made by the Governor in Council under the 1910 Act".

163 Note 5 *supra* at 556-7.

164 *Ibid* at 636.

165 *Ibid* at 562. See *Native Title Act* 1993 (Cth), ss 23B(2)(c)(iv) and (viii).

(c) that the reservation was not intended to extinguish or replace any subsisting Aboriginal rights over lands held under pastoral lease

are consistent with the history surrounding the drafting of the original South Australian reservation clause, which remained in substantially the same form in Northern Territory pastoral leases. In 1924, when the Commonwealth decided to include a reservation clause in pastoral leases to be granted under the new Crown Lands Ordinance, reference was again made to the need to respect the "rights of the natives" (which clearly could not have been derived from a reservation clause) who were being "arbitrarily ordered ... away from natural waters and areas etc which they were accustomed to use or hunt over".[166] The reservation and contemporary references to it describe the rights of Aboriginal people in language referable to customary use and practices which, had there not been a lease, would have continued without interference. It was those rights which were to continue as if the lease had not been made.

*(iii) Hayes v The Northern Territory*

In *Hayes*,[167] Olney J held that a Northern Territory pastoral lease containing a reservation clause under the South Australian Land Acts did not disclose an intention to extinguish native title rights:

> The Crown obviously recognised at the time that the Aboriginals in question had an existing entitlement to erect wurlies and other dwellings on the land (and thus to occupy the land in the sense of living on it) and to take and use birds and wild animals for food, and whilst it may well be said that the pre-existing entitlement was replaced by an entitlement derived ultimately from the statute which authorised the granting of the lease it must be remembered that the Aboriginal inhabitants were not a party to the leases and had no contractual basis upon which to enforce the rights which the lease instruments recognised as existing. The terms of the leases are not inconsistent with a native title right to hunt on the land, nor are they inconsistent with a native title right to have free access to the land and its springs and surface waters. By recognising the right to erect dwellings upon the land it was contemplated that Aboriginal people would continue to live there. Whilst neither form of reservation makes express reference to the gathering of food (other than birds and wild animals) or to the actual use of the waters, it may fairly be said that the South Australian leases contemplated the continued existence of native title rights of the same character as those rights which have been referred to by the applicants' witnesses in this proceeding as the rights which they have inherited from the original inhabitants of their respective countries. In a practical sense, the granting of PLs 1 and 2 would not have affected the exercise of the existing native title rights and interests of the inhabitants of the leased land. It must necessarily follow that the leases do not disclose an intention to extinguish those rights and interests.[168]

As we have seen the reservation provided for in the *Crown Lands Ordinance* 1924 was in substantially the same terms as the clause included in leases under the South Australian legislation.

166 Note 144 *supra*.
167 Note 7 *supra*.
168 *Ibid* at [77].

*(iv) Further Cases*

In *Re Waanyi People's Native Title Application*,[169] French J expressed the view that a lease which contained "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",[170] on the basis that:

> the decision of the High Court in *Mabo (No 2)* establishes a principle that generally speaking the grant of a leasehold interest conferring rights of exclusive possession upon the lessee unqualified by any right of access in favour of Aboriginal people is inconsistent with the continuance of native title rights and interests.[171]

On appeal to the Full Federal Court, Justices Jenkinson[172] and Lee[173] agreed with French J that a lease containing a reservation[174] in favour of Aboriginal people would not extinguish all native title rights and interests in the land concerned. Hill J was more circumspect, concluding that it was a question of considerable difficulty and "would require findings of the nature of the claimed title and whether, and if so, to what extent there was an inconsistency with the claimed title".[175]

*(v) Effect of a Reservation – Australian Usage*

As Lee J held in the *Miriuwung Gajerrong* case, the view that a 'reservation' does not create new rights is consistent with Australian usage.[176] In *Wade v New South Wales Rutile Mining Company Pty Ltd*,[177] Windeyer J considered the meaning of the words "reservation of minerals" in Crown grants and concluded that:

> In a strict legal sense reservations are not equivalent to exceptions: *Doe d Douglas v Lock* (1835) 2 Ad & E 705 at pp 743-745 (11 ER 271, at p 287). But the words 'reservation', 'reserving' etc are often used to mean a keeping back of a physical part of a thing otherwise granted: and so they are to be understood and have long been understood in the Australian law of real property: see the notable judgment Sir Alfred Stephen delivered in *Attorney-General v Brown* (1847) 1 Legge 312, at 322, the case concerning the coal seams at Newcastle; and cf *McGrath v Williams* (1912) 12 SR (NSW) 477; *Neild v Davidson* (1890) 11 LR (NSW) Eq 209.

In *Yandama Pastoral Company v Mundi Mundi Pastoral Company*,[178] the High Court considered whether the *Pastoral Act* 1904 (SA) and the *Stock Diseases Act* 1888 (SA) conferred a right to cross the lands of a lessee with

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169 (1995) 129 ALR 118.

170 *Ibid* at 137.

171 *Ibid* at 138.

172 Note 3 *supra* at 576.

173 *Ibid* at 581

174 The reservation in relevant Queensland pastoral leases was expressed in the following terms: "... AND WE DO FURTHER RESERVE to the Aboriginal Inhabitants of Our said Colony such free access to the said Run or parcel of Land hereby demised, or any part thereof, and to the trees and water thereon, as will enable them to procure the animals, birds, fish, and other food on which they subsist...".

175 Note 3 *supra* at 607.

176 Note 5 *supra* at 556.

177 (1969) 121 CLR 177 at 194, per Windeyer J.

178 (1925) 36 CLR 340.

travelling stock.[179] On the question of the effect of a reservation with respect to travelling stock, Higgins J held that:

> In this lease, after a reservation in favour of the aborigines, there appears this 'reservation' (I assume that it was required by the Commissioner): 'And reserving to all persons the rights of crossing the said lands with travelling stock subject to the provisions of Act No 443 of 1888' (the *Stock Diseases Act*) 'or any other Act for the time being regulating travelling stock'. What is 'reserved' is the 'rights', in the plural - whatever rights persons travelling stock had or should have from time to time. The words are obviously not meant to create a new right. It is to be noticed that the *Stock Diseases Act* is not treated as giving a right, but as limiting, regulating the rights. Then follows in the lease a limitation of the grant (it is not called a reservation): 'Subject to the right of His Majesty's subjects to use all and every the roads paths or ways heretofore made and used by them or hereafter to be duly opened and dedicated to the public use for the purpose of passing upon through and over the said lands or any part thereof'. There is no reference here to travelling stock. The land was to be subject to the public right - the existing public right; and the right of the public is to use public roads.[180]

Knox CJ held that:

> The reservations contained in the leases to the respondent do not assist the appellant: their effect is to preserve existing rights (if any) not to confer rights to cross the lands with travelling stock when no such right existed.[181]

While the language used in the reservation in Northern Territory pastoral leases is not quite so unambiguous as that considered in the *Yandama Pastoral Company* case, the history of the South Australian clause, the circumstances surrounding the inclusion of a reservation in the *Crown Lands Ordinance* 1924 and the phrases "have been heretofore accustomed to make and erect"[182] and "in such manner as they would have been entitled to do if this demise had not been made" would all seem to suggest that, consistent with Australian usage, the purpose of the clause was to reserve to the Aborigines existing rights, not to confer new rights of access and use when no such rights previously existed. It is submitted that in the face of these authorities, clear words (which are absent in the Northern Territory reservation) would be needed to support any argument that, contrary to Australian usage, a particular reservation clause in fact created new rights.

## B. Inconsistency of Co-existing Rights

In *Miriuwung Gajerrong*, Lee J declined to consider the relationship between the rights of a lessee and the native title holders, "where the interest created by the Crown in the form of a pastoral lease" contained a reservation of Aboriginal rights, but he did remark that:

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179 The Third Schedule of the *Pastoral Act* 1904 (SA) is substantially the same as Schedule A of the *Northern Territory Land Act* 1899.

180 Note 178 *supra* at 376-7.

181 *Ibid* at 348.

182 The wording of the reservation in the *Crown Lands Ordinance* 1924 is even clearer, "as those aboriginal inhabitants have before the commencement of the lease been accustomed to make and erect": s 26(e).

> By reason of the exception, or reservation, to the interest granted by the Crown to a pastoral lessee, the interest of a pastoral lessee is also burdened by the native title which burdens the title of the Crown. Under the grant of a lease the pastoral lessee does not receive an interest that is free of that burden, *although rights granted by the Crown to the pastoral lessee will be concurrent with rights exercisable under native title and in some circumstances may be intended by the Crown to have priority over the latter when exercised.*[183]

In the Postscript to his judgment in *Wik*, Toohey J stated that:

> To say that the pastoral leases in question did not confer rights to exclusive possession on the grantees is in no way destructive of the title of those grantees.[184]

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

Where the grant of a lease does not necessarily extinguish all subsisting native title rights and interests, the rights of the lessee and those of the native title holders will co-exist. However, to the extent of any inconsistency, the exercise of rights by the lessee will prevail over the exercise of native title rights and interests. It is the exercise of rights which crystallises the existence of inconsistency between otherwise co-existing rights and brings into operation the concept of native title yielding to or being prevailed over by the exercise of rights provided for in the lease.[185]

It is submitted that the exercise of native title rights and interests on land subject to a lease containing a reservation in favour of Aboriginal people must necessarily be an exception to this general principle. The reservation contemplates that the existing rights which it preserves will co-exist and be exercised concurrently with the rights possessed by the holder of a pastoral lease. Furthermore, the rights granted to a lessee are exercisable subject to the reservation, which withholds or keeps back[186] from the lessee any entitlement to exercise his or her rights under the lease in such a manner as to interfere with the exercise of the rights preserved by the reservation. The reservation operates so as to avoid inconsistency between the exercise of the respective rights of the lessee and the holders of native title because the lessee does not possess rights sufficient in scope to allow any inconsistency to arise.

This analysis may of course invite not only more detailed scrutiny of the reservation but also the argument that native title is extinguished at least to the extent that claimed native title rights and interests are not co-extensive with the incidents and activities contemplated by the reservation.[187] First, it is suggested that it is difficult to see how the rights contemplated by the reservation could not

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183 Note 5 *supra* at 561-2. Emphasis added.

184 See note 1 *supra* at 133. This statement was made with the concurrence of all other members of the majority.

185 Cf *Victoria v The Commonwealth (Kakariki)* (1937) 58 CLR 618. For the purpose of s 109 of the *Constitution* where a federal law confers a power the exercise of which is intended to be exclusive, no inconsistency between that law and a state law conferring power in the same area will arise until the federal power is exercised. See also *Flaherty v Girgis* (1987) 162 CLR 574 at 608, per Brennan J.

186 See note 162 *supra*.

187 See for example, note 2 *supra* at 33-4.

coincide with the full complement of native title rights and interests which might be claimed by a particular group of Aboriginal people in relation to land affected by a lease. This much appears to have been accepted by Lee J in *Miriuwung Gajerrong*, at least with respect to the question of extinguishment, and Olney J in *Hayes* would seem to take the same view. Secondly, such an argument would seem to depend on whether there can be 'partial extinguishment' of native title. While Lee J rejected the idea that native title was a "bundle of rights" which could be severally extinguished,[188] we will have to await the decision of the Full Federal Court in the appeal from the decision in the *Miriuwung Gajerrong* case to see whether this approach has wider judicial support. And, thirdly, for such an argument to be successful, it would be necessary to find that in the relevant statutory context the form taken by the reservation and other provisions in the instrument of lease disclosed a clear and plain intention to extinguish native title to the extent that the incidents and activities contemplated by the reservation were more limited than claimed native title rights and interests. But, as previously discussed, it is difficult to conceive of circumstances in which this might arise.[189]

### C. The Effect of the *Native Title Act* 1993 (Cth)

Section 23G(1) of the *Native Title Act* applies to previous non-exclusive possession acts[190] (such as non-exclusive pastoral leases) which involve respectively, the grant of rights and interests that are not inconsistent with native title rights and interests (subsection (a)) or which are inconsistent with such rights and interests (subsection (b)). If the rights and interests granted are not inconsistent with native title, those rights and the doing of any activity in giving effect to them, prevail over native title rights and interests. If, apart from the *Native Title Act*, native title is not extinguished but the rights and interests granted are inconsistent with native title, native title rights and interests are suspended while the grant is in force.[191]

In the case of a pastoral lease containing a reservation, it may be accepted that it does not involve the grant of rights which are inconsistent with native title rights and interests, because the reservation operates to withhold or keep back from the lessee any rights which would give rise to an inconsistency. The lease itself contemplates the reserved rights co-existing with the granted rights and interests. However, s 23G(1)(a) provides that the Act applies to grants that are *not* inconsistent with native title rights and interests.

While there is some difficulty in understanding exactly what is intended by subsection (1)(a), it certainly seems to cover leases containing a reservation as the granted rights and interests are capable of co-existing and being exercised

188 Note 5 *supra* at 508, 510.

189 It might be the case however, that if the rights under the reservation are more limited than those claimed and determined, only reserved rights and interests would prevail over the rights of the lessee, to the extent of any inconsistency.

190 Section 23F. A previous non-exclusive possession act includes a non-exclusive pastoral lease, that is a pastoral lease which does not confer a right of exclusive possession: ss 248A and 248B.

191 *Supplementary Explanatory Memorandum*, Native Title Amendment Bill 1997 [No 2], July 1998 at 7-8.

concurrently with native title rights and interests. It is submitted that the only sensible construction to be put on the subsection[192] is that the doing of an activity in giving effect to the rights and interests granted will prevail over native title rights and interests. The alternative construction, that the rights and interests granted will *per se* prevail over native title rights and interests, would seem to lead to the result that native title rights and interests which are not inconsistent with granted rights and interests and which are capable of co-existing and being exercised concurrently with those rights, could not be exercised. There would be no utility in adding the words, "and the doing of any act in giving effect to them".[193] In any event, it is suggested that this construction is not open, because subsections (1)(a) and (1)(b)(ii) distinguish between the suspension of native title rights and interests and those rights and interests being prevailed over. Rights which are suspended may not be exercised at all while the lease is in force. By contrast, where the rights and interests granted are not inconsistent with native title rights and interests (and co-exist), surely the latter can be exercised until an activity is performed in giving effect to the granted rights and interests which gives rise to practical inconsistency and therefore prevails over native title.

Subsection (1)(a) purports to reflect the position at common law,[194] that is, that the rights granted prevail over native title to the extent of any inconsistency. Where the respective rights are not in themselves inconsistent – the premise of subsection (1)(a) – it can only be the doing of an activity in giving effect to the granted rights and interests which results in those rights and interests prevailing over the relevant native title rights and interests.

Notwithstanding this analysis, it is suggested that the proper construction of subsection (1)(a) is that it is not intended to cover leases containing a reservation, as its effect would be to frustrate the intended operation of the grant, at least to the extent that the rights reserved to Aborigines and withheld from the grant by the reservation clause coincide with claimed native title rights and interests. Section 23G is not intended to override (or render ineffectual) the express terms of a non-exclusive possession lease.

It is suggested that the same construction is appropriate in relation to s 44H of the *Native Title Act*, which provides that where a valid lease requires or permits the doing of an activity and the activity is done, the requirement or permission and the doing of the activity prevail over any native title rights and interests and any exercise of those rights and interests. It might be added, though, that it is

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192 There seem to be three possibilities:–
(a) the rights and interests granted prevail over native title rights and interests, irrespective of whether any activity is done in giving effect to them; or
(b) the doing of an activity in giving effect to the rights and interests granted will prevail over native title rights and interests; or
(c) the rights and interests granted *and* the doing of an activity in giving effect to them will prevail over native title rights and interests.

193 Another view is that the words "and the doing of any activity in giving effect to them" were only added to clarify that neither the rights or interests granted, nor the doing of any act in giving effect to them, extinguish native title.

194 *Explanatory Memorandum*, Native Title Amendment Bill 1997 at [5.25].

doubtful whether a lease which contains a reservation clause could be construed as requiring or permitting an activity which would attract the application of the section at least in circumstances where the rights reserved to Aborigines and withheld from the grant under the reservation clause coincide with claimed native title rights and interests.

## D. Conclusion

Although the first Commonwealth Ordinance governing Crown lands in the Northern Territory did not make provision for the inclusion of a reservation in pastoral leases, that omission cannot be interpreted as an indication that the Commonwealth intended that Aboriginal people should not be entitled to exercise native title rights in relation to pastoral lands in the Territory. When provision was subsequently made for a reservation to be included in pastoral leases, under the *Crown Lands Ordinance* 1924, it was expressed in substantially the same terms as the reservation which appeared in Territory pastoral leases granted under the South Australian Land Acts. That clause in turn had, as its source, the reservation drafted by Commissioner Bonney in 1851.

The objectives in drafting the original clause were threefold: to

(a) give notice to lessees that Aboriginal people could continue to exercise rights over lands held under lease;

(b) preserve the existing rights of Aboriginal people "to dwell on lands held under lease" and "to follow their *usual* customs in searching for food",[195] including the right to access the springs and surface waters on the land; and

(c) afford protection to these rights by providing that a pastoral lease could be determined for breach of any covenant, reservation, exception, condition, provision or agreement, as well as reserving to the Crown the right to resume possession of all or part of the leased lands "for the making of reserves for the aboriginal inhabitants of the said province".

The clause did not purport to do any more than describe the already existing rights of Aboriginal people. The underlying premise was that the reserved rights were existing rights, which the Aboriginal people could continue to exercise and enjoy during the term of a lease. In fact the right to hunt for food and to live on the land are expressed in language which obviously contemplates the continuation of existing practices – "as they have heretofore been accustomed to make and erect" and "in such manner as they would have been entitled to if this demise had not been made" – which today would be recognised as native title rights and interests. Commissioner Bonney decided not to take the course contemplated by Archdeacon Hale of trying to define the scope of Aboriginal rights or in some way curtail the customary use of the land. He preferred to draft a lease containing a reservation and other clauses that would make lessees "rather desirous of conciliating the natives".

195 Note 35 *supra*.