Alcoota Aboriginal Corporation & Anor v Justice P R A Gray & Ors
[2002] NTSC 48

PARTIES:	ALCOOTA ABORIGINAL CORPORATION AND ARTHUR TURNER v JUSTICE P R A GRAY IN HIS CAPACITY AS ABORIGINAL LAND COMMISSIONER AND CENTRAL LAND COUNCIL AND ROBERT ALAN COPPOCK, SUZANNE KAY COPPOCK AND CRAIG ROBERT COPPOCK AND DAVE ROSS, KEN TILMOUTH, WALTER DIXON AND LINDSAY BIRD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	101 of 1996 (9612165)
DELIVERED:	16 August 2002
HEARING DATES:	10 – 13 December 2001
JUDGMENT OF:	MARTIN CJ

REPRESENTATION:

Counsel:

Plaintiffs:	J Reeves QC, R Bruxner, P McNabb
First Defendant:	Australian Government Solicitors
Second Defendant:	T Robertson SC
Third Defendants	P Ward
Fourth Defendants:	T Robertson SC

Solicitors:

Plaintiffs:	William Forster Chambers
First Defendant:	Australian Government Solicitors
Second Defendant:	Fredrick Jordan Chambers
Third Defendants:	Cridlands
Fourth Defendants:	Fredrick Jordan Chambers

Judgment category classification:	A
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Alcoota Aboriginal Corporation & Anor v Justice P R A Gray & Ors
[2002] NTSC 48
No. 101 of 1996 (9612165)

BETWEEN:

ALCOOTA ABORIGINAL CORPORATION

AND:

ARTHUR TURNER
Plaintiffs

AND:

JUSTICE P R A GRAY IN HIS CAPACITY AS ABORIGINAL LAND COMMISSIONER
First Defendant

AND:

CENTRAL LAND COUNCIL
Second Defendant

AND:

ROBERT ALAN COPPOCK, SUZANNE KAY COPPOCK AND CRAIG ROBERT COPPOCK
Third Defendants

AND:

DAVE ROSS, KEN TILMOUTH, WALTER DIXON AND LINDSAY BIRD
Fourth Defendants

CORAM: MARTIN CJ

REASONS FOR JUDGMENT

(Delivered 16 August 2002)

Background

[1] The plaintiffs claim that an area of land in the Northern Territory held from the Territory under Pastoral Lease No 1032 ("the Alcoota land") is not available to be made subject to an application under s 50(1)(a) of the Aboriginal Land Rights (Northern Territory) Act ("the Land Rights Act").

[2] It is provided in s 50(1)(a) that an Aboriginal land Commissioner has a function on an application being made to him or her

> "… by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals (i) to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land: and (ii) to report his or her findings to the Minister and to the Administrator of the Northern Territory, and where he or she finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land"

[3] If an Aboriginal Land Commissioner makes recommendation, in a report, that an area of Crown land should be granted to a land trust, and the Minister is satisfied that the land should be granted, the Minister is obliged to take certain steps such as to establish a land trust and ensure that estates and interests in the land are not held by the Crown or acquired by the Crown. A recommendation is then made to the Governor General that a grant of an estate in fee simple is made to the land trust. Land held by a land trust may not be resumed, compulsorily acquired, or forfeited under any

law of the Northern Territory and roads may not be constructed over the land without the written consent of the relevant Land Council.

[4] Alcoota Aboriginal Corporation ("the Corporation") became the registered lessee of the Alcoota land on 18 March 1993. Arthur Turner ("Turner") is a member of the Corporation and at times a member and chairperson of its Governing Committee ("the committee"). He also claims to be a traditional Aboriginal owner of the Alcoota land.

[5] The Corporation is an Aboriginal association incorporated pursuant to the provisions of part (IV) of the Aboriginal Councils and Associations Act 1976 (Cth) ("The Associations Act") on 31 July 1992.

[6] The first defendant, his Honour Justice P R A Gray is, and was at all material times, an Aboriginal Land Commissioner ("the Commissioner") appointed pursuant to the provisions of the Land Rights Act.

[7] The second defendant, Central Land Council, ("the Council") is, and was at all material times, an Aboriginal Land Council established pursuant to s 21 of the Land Rights Act.

[8] The fourth defendants, together with several other Aboriginal people including Turner, are listed as claimants in an application under the Land Rights Act dated 18 March 1993 in respect of the Alcoota land ("the applicants"). The second and fourth defendants were represented by the same solicitors and counsel in these proceedings. References hereafter to

the second defendant alone are intended to refer as well to the fourth defendants where appropriate.

[9] The Commissioner embarked upon a hearing of the application and made a number of rulings in the course of the proceedings, some of which are called into question here. Assuming it to be found in these proceedings that the Commissioner erred a question arises as to the jurisdiction of this Court in relation to the Commissioner, an officer of the Commonwealth, and the appropriate remedies, if any, which may be granted. The Commissioner has taken no part in these proceedings.

[10] The third defendants, with the exception of Craig Robert Coppock, were formerly sub-lessees of Alcoota Nominees Pty Ltd, the previous lessee of the Alcoota land, over part of the Alcoota land formerly described as Waite River Station ("Waite River")). They were parties to an agreement with the Council under s 11A of the Act and parties to an agreement called a "Grazing Licence" with the Corporation, both dated 18 March 1993. The nature and legal effect of those agreements are in issue.

[11] The Alcoota land was acquired by the Corporation from Alcoota Nominees Pty Ltd with funds provided by the Aboriginal and Torres Strait Islander Commissioner ("ATSIC"). The nature and legal effect of that transaction is also an issue. Notice was given to ATSIC of the issue and contentions as between the plaintiffs on the one hand, and second and fourth defendants on the other, but it decided not to seek to be joined in the proceedings.

[12] The plaintiffs' case may be summarised as follows:

A. The Alcoota land was not land which could be the subject of an application under the Land Rights Act because it was not unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown were held by, or on behalf of, Aboriginals at the time the application was made.

In that regard it is claimed that:

(1) (a) the land was alienated from the Crown in that a leasehold interest was held by the Corporation;

(b) but the Corporation did not hold it on behalf of Aboriginals.

(2) If the Corporation did hold that interest on behalf of Aboriginals, then either or both of ATSIC and the third defendants (a) held an estate or interest in the land (b) which was not held by or on behalf of Aboriginals.

B. If the land could be made the subject of an application under the Act then the consent in writing of the Corporation was not given until after the application had been made (s 50(2C)) and the application was thus invalid.

C. If consent could be given after the application was made then

(1) in the circumstances prevailing at the time it was not given by the Corporation, and

(2) in any event, it was later withdrawn by the Corporation.

D. If the consent was not given or, if so, it was withdrawn, s 67A of the Act does not apply so as to prevent the Corporation from dealing with its interest in the land.

Calculation of time

[13] It is necessary to deal with issues arising from the time at which and order in which various transactions referred to hereunder took place.

[14]	18 March 1993, 9am	Settlement of the transfer of the Alcoota land to the Corporation and associated dealings took place by the delivery of appropriate documents and monies as between the respective parties. The sub-lessees of the Waite River land delivered the surrender of the sublease to Alcoota Nominees, Alcoota Nominees Pty Ltd delivered the surrender together with discharges of mortgages over the Pastoral Lease and a transfer of the Pastoral Lease in favour of the Corporation to its solicitors (in exchange for the purchase price). The counterparts of the "Grazing Licence" agreement

	and s 11A agreement were exchanged as between the Corporation and the third defendants.
9.36am	The solicitor for the Corporation, engaged by the Council, lodged the discharges of mortgage, surrender of the sublease and transfer with the Registrar-General with a direction to the Registrar-General that after registration of those dealings the Pastoral Lease be delivered to the Australian Government Solicitor acting on behalf of ATSIC. The dealings were registered in the order mentioned.
10.57am	An application to the Commissioner under s 50(1)(a) of the Land Rights Act in respect of the Alcoota land, sent by facsimile transmission, was received by the Commissioner.
19 March 1993	The "Purposes Agreement" between the Corporation and ATSIC was entered into.
25 March 1993	The solicitor for ATSIC uplifted the Pastoral Lease from the Registrar-General.

[15] Lord Mansfield in *Coombe v Pitt* (1763) 3 Burr 1423 at 1434 said "though the law does not in general allow the fraction of a day, yet it admits it in

cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done: for it is not like a mathematical point, which cannot be divided" referred to by Angas Parsons J in *Beare v Ward* (1928) SASR 1. See also *Clarke v Bradlaugh* (1881) 7 QBD 151 and *Eaglehill Limited v Needham Builders Limited* (1973) AC 992. The law has regard to parts of a day where it is necessary to establish a sequence of events (p 1006B) and "it is a good rule, that when two things are done on the same day, that shall be presumed to have been done first which ought to be so" (p 1006F).

[16] The initial term of the licence was to continue "for one year from the date of this agreement". When computing a period of time from a given date or the happening of an event, the period will commence at the end of the day of that date or event. However, where a lease or licence is expressed to have commenced from a certain time there is a prima facie rule of construction that the lease or licence commences from the first moment (midnight) of the day specified and lasts during the whole anniversary of the day from which it began: *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421. However as Gibbs J makes clear at 441 the commencement of the lease or licence at midnight on the day specified is prima facie only and is subject to a different intention revealed by the document. That prima facie rule is displaced in this case by the facts revealed by the time table.

[17] The various transactions at settlement were intended to operate from the time of settlement, or registration of the registrable dealings. The

Corporation could not grant the rights under the Grazing Licence until it had completed the purchase of the Pastoral Lease and it was freed of the sub lease.

[18] The recitals to the grazing licence include an assertion that Aboriginal owners "have lodged a traditional land claim as defined by the Aboriginal Land Rights Act (Northern Territory) Act 1976, over the lease including the land and the licensees are agreeable to the claim being lodged with the Aboriginal Land Commissioner". The assertion that the land claim had been lodged was not accurate as at the time the grazing licence had been executed. The established facts show otherwise. But it was made sufficiently clear that that was at least intended and that the third defendants agreed to the claim being lodged. I am not here concerned with the questions of estoppel which may arise in relation to a recital in a deed.

A(1) Did the Corporation hold the land on behalf of Aboriginals?

[19] It is not contended that the Alcoota land was not held by the Corporation. It is not contended that if the Corporation held the Alcoota land on behalf of some persons then those persons were not Aboriginals within the meaning of the Act.

[20] The numbers at the conclusion of the following extracts from the Constitution of the Corporation are to the paragraph numbers in it.

[21] Membership of the Corporation is open to adult Aboriginal persons who are traditional owners of the Alcoota land or such other land to which the Corporation holds title (9.1). All adult members of the Corporation are eligible to attend, speak and vote at general meetings of the Corporation and are eligible for appointment as office bearers or members of the Committee (9.3).

[22] The central object of the Corporation is the relief of poverty, sickness, helplessness, serious economic disadvantage and social distress of its members (6). In furtherance of that object it is established to hold title to land for the benefit of the members of the Corporation and to assist Aboriginals claiming to have a traditional land claim to the area of land so held in pursuing the claim (6.1).

[23] Whilst the Corporation holds secure title to the land it is to advance its central object by a variety of means set out in more detail in 6.2. The Corporation is not to transfer any fee simple vested in it nor grant an estate or interest in any land vested in it except with the consent in writing of the Council (7.1 and 7.2). It is not to revoke any traditional land claim lodged by or on behalf of traditional owners over land to which it holds title without the consent in writing of the Council (7.3).

[24] It will be necessary to return to the constitution of the Corporation later in these reasons in respect of matters of internal management and control, but it should be noted that the income and property of the Corporation is to be

applied solely towards the promotion of its objects and no portion thereof shall be paid or transferred by way of profit to members (17.2). Consistent with that, upon a winding up of the Corporation, in accordance with the Act, if there remains, after satisfaction of its debts and liabilities any property the same is not to be paid or distributed amongst the members but given or transferred to some other institution having objects similar to the objects of the Association (21.2).

[25] Upon incorporation under the Associations Act such an Association may, amongst other things, acquire, hold and dispose of real and personal property, s 46(1)(c). It has power to borrow money and give securities, s 51.

[26] The question of whether an estate or interest in land is held "on behalf of" Aboriginals was the subject of the High Court's decision in *R v Toohey and Anor; Ex parte Attorney-General (NT)* (1980) 145 CLR 374. The land in that case was held to have been acquired by the Aboriginal Land Fund Commission for the purpose of transferring an interest in it to an Aboriginal Corporation or an Aboriginal Land Trust so that Aboriginals might occupy a station property. At page 387 their Honours Stephen, Mason, Murphy and Aickin JJ held that in those circumstances it involved no straining of language to describe the Commission's holding of its interest in the land as being "on behalf of" Aboriginals. Their Honours went on to observe that the phrase "on behalf of" in s 50(1)(a) "is apt to describe the position of a trustee of land; what it does deny is that that is all that the phrase can

describe." 387-388. Their Honours preferred a wider meaning to be given to the phrase to any narrower meaning "which would confine it to the case of land held on trust for Aboriginals, and this for reasons concerned with the respective consequences of these two possible meanings, viewed in the light of probable legislative intent". Earlier at 386 their Honours had reviewed the cases in which the phrase had been considered in other contexts. The plaintiffs seek to distinguish that case from this upon the basis that the Corporation is not a statutory authority of the kind considered by the Court, but is a private body corporate with charitable objects.

[27] The constitution of the Corporation is directed entirely to benefiting adult Aboriginal persons who are traditional owners of the Alcoota land. "Aboriginal" bears the same meaning in the constitution as that prescribed under s 3 of the Land Rights Act. Any alteration of the objects requires the approval either of the Registrar or of the Minister under s 52 of the Associations Act. Such a Corporation is subject to executive supervision and control as provided, for example, in s 60, s 60A, s 61 and under Part V.

[28] I do not consider that the facts in *R v Toohey; Ex parte Attorney-General* and here are sufficiently distinguished so as to support departure from that authority.

[29] Upon consideration of its constitution, I find that the Corporation held the Alcoota land on behalf of Aboriginals within the meaning of the Land Rights Act. If there is any ambiguity about the phrase then in the opinion of

Gibbs CJ in *R v Kearney; Ex Parte Jurlama* (1984) 158 CLR 426 at 433 it should "be given a broad construction, so as to effectuate the beneficial purpose which it is intended to serve" (see also *Jungarrayi v Olney, Aboriginal Land Commissioner* (1992) 34 FCR 496 at 506; *Attorney-General (NT) v Hand* (1989) 25 FCR 345 per Lockhart J at 357 and Von Dousa J at 395 and *Northern Land Council v Olney, Aboriginal Land Commissioner* (1992) 34 FCR 470 at 479.)

[30] Amendment to the Land Rights Act in 1986 introduced s 50(2C). It provides that where an application has been made to a Commissioner and it appears to a Commissioner that an estate or interest in the land is held by or on behalf of Aboriginals, the Commissioner shall not perform, or continue to perform, a function in relation to the application unless the Aboriginals who hold that estate or interest have, or the body which holds that estate or interest on their behalf has, consented, in writing to the making of the application. It will be necessary to consider the application of that provision later.

A(2) Did ATSIC hold an estate or interest in the Alcoota land by way of an equitable mortgage?

[31] This question raises for consideration three separate issues:

(a) Whether or not ATSIC held any estate or interest in the land. The plaintiffs direct their attention to what they submit was an equitable mortgage held by that statutory corporation.

(b) Whether any such estate or interest was held on behalf of Aboriginals, and

(c) Whether ATSIC is the Crown for these purposes.

[32] The Aboriginal and Torres Strait Islander Commission (ATSIC) is constituted pursuant to a Commonwealth statute bearing its name ("the ATSIC Act). The recitals to the Act are reflected in its objects as set out in s 3 which are expressed to be "in recognition of the past disposition and dispersal of Aboriginal and Torres Strait Islander peoples and their present disadvantaged position in Australian society". Amongst the objects are those to promote the development of self management and self sufficiency amongst Aboriginal persons and to further the economic social and cultural development of Aboriginal persons. (I will omit further reference to Torres Strait Islanders since this case is not about any of those people).

[33] Amongst the powers of the Commission is that of making grants of money to Aboriginal Corporations for the acquisition of interests in land or land and such personal property as the Commission considers appropriate (s 15). The Corporation is an Aboriginal Corporation within the meaning of that Act. Further, the Commission may, for the purposes of enabling or assisting Aboriginal persons to engage in business enterprises, make loans to Aboriginal Corporations or grants of money, and in either case on such terms and conditions are determined by it (s 17).

[34] Where the conditions upon which a grant has been made has been breached, the Commission may give notice of the breach and the person to whom a grant has been made is liable to pay the Commission an amount equal to the amount of the grant or so much of it as the Commission specifies in the notice (s 20).

[35] Where a body has acquired an interest in land as a result of a grant the body is not to dispose of it without the written consent of the Commission and if it purports to dispose of such an interest without that consent then the purported disposition is of no effect (s 21).

[36] The powers of the Commission also include the making of loans for the same purposes as those for which grants may be made, but the consequences following upon breach are different.

[37] On 16 September 1992 ATSIC approved a grant to the Corporation, pursuant to s 15, of the Act of $2,760.000 for the purchase of the Alcoota land and, pursuant to s 17(1)(c) approved a further grant of $3,240,000, being $3,000,040 for the purchase of livestock, plant and equipment and $200,000 for initial operating costs. By that same decision it directed that the usual terms and conditions relating to grants apply to both grants "including the requirement to enter a purposes agreement, and the recipient of the grant for the purchase of livestock, plant and equipment and initial operating costs shall give security over its assets for the enforcement of s 21".

[38] By letter of 28 September 1992 addressed to the Chairperson of the Corporation the Commission conveyed the offer of the grants and said that if the Corporation accepts the offer it was agreeing to:

> "1. Carry out the approved project to meet the following project objectives
>
> (a) The protection of several dreaming tracks and preservation of the Aboriginal culture and ceremonial rituals.
>
> (b) To operate a viable pastoral enterprise in order to create employment and training opportunities for Aboriginal and Torres Strait Islander people."

Acceptance of the offer also carried with it agreement to comply with terms and conditions set out as attachment to the letter of offer and an obligation to enter into a purposes agreement relating to the land and stock plant and equipment.

[39] The grants were clearly sought and made for the purposes of enabling the Corporation to purchase the Alcoota land, stock, plant and equipment and to provide initial operating costs.

[40] The only mention of security in the offer was that contained in par 9 "security in a form to be approved by the Commission's solicitors will be provided by you over the plant and equipment as identified under the contract of sale". (The contract of sale referred to is that between Alcoota Nominees Pty Ltd and the Corporation). The assets, the subject of the

security sought by the offer, appear not to be as all embracing as that suggested by the decision referred to above.

[41] The offer was accepted by the Corporation on 2 October 1992. The documents bear the common seal of the Corporation and the signatures of two members of the committee identified as Dick Purvis and Alby Tilmouth.

[42] The standard terms and conditions incorporated an undertaking by the Corporation not to use the grant monies for any purpose other than those contained in the letter of offer. The Corporation acknowledged that the written approval of the Commission must be obtained prior to disposal of any interest in the land. There are numerous provisions relating to the application of grant funds and accounting for their use.

[43] The Commission could require the Corporation to provide security over the assets in whatever form the Commission required, but there is no evidence of any specific requirement beyond that contained in the offer, that is, for security over the plant and equipment.

[44] Contracts for the sale and purchase of the Alcoota land as between the vendor Alcoota Nominees Pty Ltd and the Corporation were exchanged on 24 December 1992 and settlement took place on 18 March 1993 at which time ATSIC provided the funds.

[45] At settlement the Council, on behalf of the Corporation, directed that the instruments of title to the pastoral lease be delivered to ATSIC's solicitors

upon registration of the transfer. There is no evidence of any instructions given by the Corporation to the Council in that regard. Registration was effected at 9.36 am on 18 March of 1993.

[46] The day after registration of the transfer the Commission and Corporation entered into a deed called a "Purposes Agreement", as envisaged in the accepted offer of the grants. Amongst other things the Corporation agreed that it would use the land for "the sole purpose of a pastoral enterprise to benefit the Aboriginal people" (the designated use) and would not change that use without the prior written consent of the Commission, nor would it in any manner dispose of the land or any part of it without that consent. By that agreement it undertook to place the title documents to the land in the custody of the Commission within 30 days of the signing of the deed. The Pastoral Lease was uplifted from the Lands Title Office by ATSIC's solicitors on 25 March 1993 presumably in accordance with the direction given by the Council at the time of settlement. It seems to me that theoretically, at least, the Corporation could have revoked that direction to the Lands Title Office, but not having done so, it complied with its undertaking to see that the title document went into the custody of the Commission as envisaged by the Purposes Agreement.

[47] By that agreement the Corporation also agreed that the Commission could "to protect the interest hereby created in the land lodge a caveat with the Registrar General forbidding the registration of any dealing with the land, and further agrees not to take or cause or prevent or allow to be taken any

action to have such caveat removed". Those covenants and undertakings on the part of the Corporation were to be read with and form part of the terms and conditions of the grants.

[48] On 21 April 1993 there was lodged at the Registrar General's Office a caveat signed by a solicitor as agent of the Commission, claiming an "interest as equitable mortgagee" in the Alcoota land. The grounds of the claim were stated as being "equitable mortgage created pursuant to deed made 19 March 1993 between the Caveator and Alcoota Aboriginal Corporation and by deposit of pastoral lease 1032". The extent of the prohibition claimed was "absolutely".

[49] In *UTC Limited (in liquidation) v NZI Securities Australia Limited and Anor* (1991) 4 WAR 351 at 349 Ipp J referred to what he called the classic description of a mortgage given by Lindley MR in *Santley v Wilde* (1899) 2 Ch 474 "a mortgage is a conveyance of land or an assignment of chattels as security for the payment of a debt or the discharge of some other obligation for which it was given". A mortgage over land subject to the provisions of the Real Property Act is not by way of conveyance of land (s 132). At p 351 Malcolm CJ said "it is well settled that a mere deposit of title deeds as security for a loan constitutes an equitable charge over the subject matter to which the title deeds relate see *Matthews v Goodday* (1861) 31 LJ Ch 282". What is envisaged is the delivery of the deeds with intent to create a security; *Bank of New South Wales v O'Connor* (1889) 14 App Cas 273 at 282. Such a deposit of title deeds is said to give an interest in the land by

way of charge, in the sense of a mortgage. See the observations of Ipp J at 354.

[50] I am not satisfied that the plaintiffs have made out their case that ATSIC had an estate or interest in the Alcoota land. There was no loan to the Corporation calling for security to be given. Nor do I accept that there was any obligation on the Corporation to ATSIC, the discharge of which was intended to be secured by the giving of a mortgage. The documents evidencing the agreement between ATSIC and the Corporation do not require the giving of security over the pastoral lease. No purpose is specified in the documents for the delivery of the title to ATSIC. The delivery of custody of the pastoral lease to ATSIC is not evidence tending to establish that there was an agreement to mortgage per Ipp J in *UTC* at p 353.

[51] It may be that the Commission took custody of the pastoral lease for some other purpose, for example, to inhibit the Corporation from disposing of any interest in the land. There is no evidence to that effect, and, in any event, it does not seem to me to amount to the taking of security to enforce an obligation to ATSIC.

[52] As at the date upon which the title to the Pastoral Lease was lodged with the Registrar General with instructions to deliver it to the solicitors for ATSIC, s 128 of the Real Property Act provided that wherever land was intended to be charged or made security in favour of any person, the registered

proprietor shall execute a mortgage in the prescribed form. That Form, No 23 as prescribed by Regulation No 2 of 1990, referred to:

> "The consideration for which the mortgage is stamped being lent or agreed to be lent to the owner … by the lender for better securing the payment of the monies hereby mortgages …".

Although there is no statutory definition of mortgage in the Territory legislation the form of mortgage as prescribed restricts the meaning of the word to cases in which security is taken for a debt for a loan. See the remarks of Barwick CJ, Mason and Jacobs JJ in *Cambridge Credit Corporation v Lombard Australia* (1977) 136 CLR 608 and 615.

[53] The plaintiffs rely on s 247 of the Real Property Act, but there being no document purporting to create an estate or interest in land within the meaning of that provision it does not apply. Reference was also made to s 149 providing that an equitable mortgage may be granted by deposit of the certificate of title, but, as the authorities show that must be accompanied by the required intent. Nor do I consider that the transaction falls within the parameters of s 249 since no equities were created.

A(2)(b) If ATSIC held an estate or interest in the Alcoota land did it do so on behalf of Aboriginals?

[54] I should look at this issue in the event that it should be found that I erred in finding that ATSIC did not hold any estate or interest in the Alcoota land. The plaintiffs submit that examination of the provisions of the ATSIC Act, and the documents relating to the transaction here under consideration show

that any such estate or interest was not held on behalf of Aboriginals, but by ATSIC in its own right. The grants of money were for the acquisition of the Alcoota land and the stock and plant, and to enable or assist Aboriginals to engage in business enterprise. The Commission must be satisfied that the enterprise is likely to become, or continue to be, commercially successful before making such a grant (s 17(3)). The making of a grant for those purposes is to be distinguished from those which can be made under s 18 for the purpose of furthering the social, economic or cultural development of Aboriginal persons. In either case the Commission may make the grant on such terms and conditions as it determines and the grant falls to be repaid in the circumstances set out in s 20.

[55] The plaintiffs submit that the grant was for the purpose of enabling the Corporation to engage in a business enterprise and that it would be incongruous to hold that the Commission, as provider of the monies and the holder of an equitable mortgage, held that mortgage on behalf of the Corporation which was the receiver of the monies.

[56] For the defendants it was put that the question to be asked is for what purpose did ATSIC hold the estate or interest and since it was not to secure monies lent by it then it could only have arisen to facilitate compliance with the terms and conditions of the grant. Attention is directed to the recitals to the Act which show that the Act is designed to ensure, inter alia, the promotion and development of self management and self sufficiency amongst Aboriginal persons, and the furtherance of economic, social and

cultural development of Aboriginal persons (s 3). In this case, consistent with those objects and the functions of the Commission, the objectives were set out in the letter of offer (see above) and, by the Purposes Agreement, the Corporation agreed that the land and chattels would be used for the sole purpose of a pastoral enterprise to benefit Aboriginals. The argument advanced is that taking all that into account the equitable mortgage could only have been required for the purpose of implementing the objectives and enforcing the agreement entered into by the Corporation and that therefore it was held for the benefit of Aboriginal persons. In other words, as I understand it, the Commission took the title into its possession to ensure the grant was applied for the benefit of the Aboriginals and thus it held the title on their behalf.

[57] I remind myself of the High Court authority in relation to the application of the words "on behalf of" in this context.

[58] I do not consider that the Commission was in any way standing as an auxiliary to or representative of Aboriginals whether members of the association or not, (*R v Toohey; Ex parte Attorney-General (NT)* at 386) nor do I think that the Commission was under a statutory duty "to make the land available exclusively for occupation by them" (387). It does not appear to have had any statutory duty to enforce the undertakings and agreements made by Corporation, or power to stand in its place for those purposes. Rather, upon being satisfied that the Corporation failed to fulfill a term or condition of the grant the only remedy available to ATSIC is to give notice

to the Corporation rendering it liable to pay to the Commission the amount specified by the Commission.

[59] I find that if the Commission held any estate or interest in the land as a result of the transaction with the Corporation it did not hold that interest for or on behalf of Aboriginals.

If there was any such interest and it was not held on behalf of Aboriginals, was it held by the Crown?

[60] Again I venture upon this issue should it be found that I have erred in my findings in relation to the foregoing.

[61] The functions of the Commissioner under s 50(1)(a) of the Land Rights Act relate in part to applications made in respect of "alienated Crown land in which all estates and interest not held by the Crown are held by, or on behalf of, Aboriginals." The question now is whether any estate or interest in the land held by ATSIC was held by the Crown. If ATSIC was the Crown for these purposes then any estate or interest held by it was held by the Crown and would not debar an application. If not, then it would.

[62] In their submissions the plaintiffs note that whether the Aboriginal Land Fund Commission, a distant predecessor to ATSIC, was the Crown in right of the Commonwealth was an issue that was left open in *R v Toohey; Ex parte Attorney-General (NT)* (supra) at 392. The Aboriginal Land Fund Act (1974) was repealed by the Aboriginal Development Commission Act (1980) which came into effect on 1 January 1980. The Aboriginal Development

Commission Act (1980) was then repealed by the Aboriginal and Torres Strait Islander Commission Act (1989) which came into effect on 5 March 1990.

[63] The preamble to the ATSIC Act relevantly discloses that the Australian Government is to maintain and develop policies that will overcome the disadvantages of Aboriginal persons; that that objective is to be furthered in a manner that is consistent with the aims of self management and self sufficiency for Aboriginal persons and it is appropriate to involve Aboriginal persons in the formulation and implementation of programs and provide an effective voice within the Australian Government.

[64] Recourse to the preamble may throw light on the statutory purpose and object of a particular section of the statute (per Mason J in *Wocando v The Commonwealth* (1981) 37 ALR 317 at 333).

[65] The objects section (s 3) reflects the ideals of the preamble especially in declaring that one of the objects of legislation is to ensure maximum participation by Aboriginal persons in *the formulation and implementation of government policies that affect them* (emphasis added, note especially the reference to "government"). Again, recourse to the objects specified may throw a light on an ambiguous or uncertain provision of the Act.

[66] ATSIC is established under s 6 as a body corporate with the usual attributes. It consists of a Chairperson and 18 other members appointed by the Minister (s 27). Seventeen of those appointees are to be persons elected as

representatives of several zones established by the Act, as to which see later [73]. A Commissioner must be an Aboriginal person.

[67] The Minister and other agencies of the Commonwealth have significant powers in regard to setting the boundaries of regions and zones from which representatives are elected. The Commission is entitled to be consulted.

[68] The Commission's functions are prescribed in s 7, and beyond the particular matters there referred to, it may perform other functions, but only such as are conferred either by a Commonwealth Act, the Prime Minister or by the law of State or of an internal Territory with the written approval of the Minister.

[69] The carrying out of functions are necessarily dependent upon the availability of funds. The monies of the Commission are to be appropriated by the Commonwealth Parliament. The Minister for Finance may give directions as to the amounts in which and the time at which that money is to be paid to the Commission (s 57). There are elaborate provisions regarding the preparation of estimates by the Commission and, in regard to the administration and accountability for its budget, much of which is under the control of the Minister. The Minister may give to the Commission written directions about the administration of the Commission's finances and the Commission is obliged to comply with those directions (s 74). At the relevant time the Commission was a public authority for the purposes of the

Audit Act (s 73). In addition the Minister had powers of direction in relation to internal audit of the operations of the Commission (s 76).

[70] The Commission is not subject to taxation under any law of the Commonwealth or of a State or Territory, and excise duty is not payable by the Commission, or by any other person, on goods that are for use by the Commission (s 71).

[71] The administrative role of the Commission is undertaken by the Chief Executive officer who is appointed by the Minister, subject to the agreement of the Commission (s 46). The staff of the Commission is appointed or approved under the Public Service Act and the Chief Executive Officer has all the powers of a Secretary under that Act (s 55).

[72] Internal audit of the Commission's functions is carried out by the Office of Evaluation and Audit established within the Commission (s 75). It is required to evaluate or audit aspects of the operations of the Commission and other related entities at the request of the Minister or at the request of the Commission. The Director of the Office is appointed by the Minister after consultation with the Commission (s 77).

[73] Each of the 17 elected Commissioners represents a zone established by reference to regions described in Division 7 and Schedule 1 of the Act (s 130). The Minister may by written determination amend the Schedule so as to remove a region from one zone and include it in another. That power is constrained by reference to recommendations made by a Review Panel

constituted by the Commission Chairperson (who is appointed by the Minister s 27(4)), the Electoral Commissioner or a nominated representative of the Australian Electoral Commission, 2 qualified persons appointed by the Minister and the General Manager of the Australian Surveying and Land Information Group.

[74] The Commonwealth Treasurer may approve a bank for the purposes of the Act (s 193). Remuneration and allowances payable to the holder of an office under the Act is determined by the Commonwealth Remuneration Tribunal or the Minister.

[75] A number of specified decisions of the Commission may be reviewed by the Commonwealth Administrative Appeals Tribunal (s 196).

[76] The Governor General may make regulations, prescribing matters required or permitted by the Act or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

[77] The transitional provisions – Part VII – enabled the Minister, inter alia, to transfer to the Commission assets and liabilities of the former Department of Aboriginal Affairs and of the Aboriginal Development Commission ("ADC"). Other provisions indicate that the Commission was to carry out functions previously carried out by ADC and the Commonwealth Department.

[78] The Aboriginal Development Commission was held to represent the Crown in right of the Commonwealth in *Aboriginal Development Commission and Anor v Treka Aboriginal Arts & Crafts Ltd and Anor* (1984) 3 NSWLR 502 at 518. It was held by Hutley JA, with whom Glass and Priestley JJA agreed, that the Commission was an instrument of government policy to assist the Aboriginal community in various financial ways. Although its members must be Aboriginal it was subject to the general direction of the Minister.

[79] Division 2 of Part 2 of the ATSIC Act is headed "Functions of the Commission". Reference has already been made to some of those functions but there are others such as making of grants of money to Aboriginal corporations for the acquisition of interest in land and personal property on such terms and conditions as the Commission determines. Similarly it may make loans to Aboriginal persons for a variety of specified purposes and may make loans for the purposes of enabling or assisting Aboriginal persons to engage in business enterprises (s 15, s 16 and s 17). It may also make loans or grants of money to the States, internal Territories, local government bodies, Aboriginal or Torres Strait Islander Corporations or any other incorporated bodies for the purpose of furthering social, economic or cultural development of Aboriginal persons. A loan or grant to any such other incorporated body is not to be made without the Minister's written consent.

[80] It is provided in s 12 that the Commission shall perform its functions and exercise its powers in accordance with such general directions as are given to it by the Minister in writing. There are some exceptions to that ministerial power but to my mind they are immaterial for present purposes.

[81] The Full Court of the Federal Court in *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565 has considered the meaning of the expression "general directions". The court was there considering directions given by the Minister in purported exercise of the power under s 12. Chief Justice Black observed at 567 that the subsection contained no limitation as to the functions and powers to which a general direction by the Minister can relate, but, "the power to give directions is subject to an important limitation resulting from the use of the word 'general'". He referred to the decision of Davies J in *Aboriginal Development Commission v Hand* (1988) 15 ALD 410. In reviewing the scope of the power the Chief Justice referred, at 568, to the preamble and one of the express objects of the Act set out in s 3(b). The Court held that one of the directions in question in that case to the effect that ATSIC not grant or lend money to a body which a "Special Auditor" had determined was not a fit and proper body, was not a general direction because it effectively gave to the Special Auditor a power of veto, thus detracting from the general discretionary power of ATSIC in relation to those matters.

[82] Commencing at the foot of 576 Tamberlin J said:

> "Generally, but provided due regard is paid to the nature, scope and purpose of the Act and the context in which the power is placed, it would be open for the Minister under s 12(1) to give a direction as to matters which must be taken into account by ATSIC. Also, subject to these qualifications it would be open to the Minister to set up a procedural process which should be followed before a decision is made. Indeed, although perhaps more arguably, it may be within power to give directions as to priorities to be considered or applied when allocating funds. However, the section would not extend to issuing a command to ATSIC as to how it must determine the outcome of the particular application by a specific body."

Sackville J at 579 said that:

> "… the power to make general directions, which s 12(1) implicitly confers on the Minister, necessarily requires the Commission to exercise its own powers and perform its own functions in conformity with those general directions. To that extent the Commission's decision – making autonomy is circumscribed."

His Honour also referred to a submission that the Act provided other mechanisms for ministerial controls over expenditure of the Commission.

[83] With respect, I would not differ from any of those observations. But, I am not here concerned with any particular direction but rather with the power of the Minister to give general directions as part of my consideration of the question of whether the Commission is the Crown for the purposes of the Land Rights Act.

[84] There are no hard and fast rules by which a decision might be made concerning that question. Although the functions of the Commission are cast in wide terms they are limited to the objects as defined in the legislation. Reference to the various provisions of the Act to which I have drawn attention demonstrates that the Commonwealth exercises a significant

degree of control over the activities of the Commission, which control may be enhanced by the Minister exercising the power to give general directions. In my view the Commission could not be said to operate entirely independent of government (per Stephen J in *Superannuation Fund Investment Trust v Commissioner of Stamps of the State of South Australia* (1979) 145 CLR 330 at 341).

[85] The funds of the Commission come from the Commonwealth and its functions are inherently of a governmental character falling within the legislative powers of the Commonwealth Parliament under placitum (xxvi) s 51 of the Constitution "the people of any race for whom it is deemed necessary to make special laws". The restriction on making such laws in respect of Aboriginals was removed by Constitutional amendment in 1967. The transition from the former Commonwealth Department of Aboriginal Affairs to the Commission is a further indication of that character.

[86] Although 17 members of the Commission are appointed by the Minister, as a consequence of their having been elected to represent the zones established under the Act, the Minister may exercise the power of removal of a Commissioner from office on specified grounds. As already indicated the functions of the Commission, and thus the power which may be exercised by each of the Commissioners is subject to any general directions which the Minister may give and to that extent the independence of the Commissioners as individuals is diminished. There are numerous provisions in the Act which call for consultation between the Minister and the Commission. In the

words of Mason J with whom Barwick CJ agreed at 354 in the *Superannuation Fund Investment Trust* case although the Commission is a separate corporate entity "the control which the Crown has over its membership and its activities shows that it is an alter-ego of the Crown".

[87] As to the indicators which may be usefully applied in considering this question reference may also be made to *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639.

[88] I find that any estate or interest in the Alcoota land held by ATSIC was held by the Crown in right of the Commowealth.

A(2)(a) Did the third defendants hold an estate or interest in the Alcoota land?

[89] Prior to 18 March 1993 Alcoota Nominees Pty Ltd was the registered proprietor of the Alcoota land. Robert Alan Coppock and Suzanne Kaye Coppock were sub-lessees from Alcoota Nominees Pty Ltd over part of the land known as Waite River. The sub lease was to expire on 31 December 2000. There was no right of renewal. At the settlement of the transfer of the Alcoota land to the Corporation that sublease was surrendered and there was exchanged between the Corporation and the third defendants an agreement headed "Grazing Licence". The issue is whether or not the third defendants, including two of the former sub lessees, held an estate or interest in the land by operation of the provisions of that agreement.

[90] The recitals go to the proprietorship of the Corporation in the Alcoota land, and express the wishes of the third defendants to graze livestock on Waite River. They also assert that the Aboriginal traditional owners had lodged a traditional land claim over the Alcoota land and that the licensees are agreeable to the claim being lodged with the Aboriginal Land Commissioner. "It is intended by the parties that this licence shall not impede or preclude the Commissioner from performing any of his functions pursuant to s 50(1)" of the Land Rights Act.

[91] The clear inference arising from the arrangement for the surrender of the sub lease in the context of the circumstances at the time, was to rid the title of the Pastoral Lease of the estate or interest constituted by the sub lease and thus facilitate an application under the Land Rights Act.

[92] Paragraph (1) of the agreement reads:

> "(a) The Corporation grants to the Licensees the right to use the land for the purpose only of grazing cattle and horses and on such other area or areas as are approved by the Corporation in writing, together with a licence to operate a general store, but not for any other purpose.
>
> (b) In addition to the above licence the Corporation grants to the Licensees the exclusive use of the plant and equipment set forth in the first schedule hereto.
>
> (c) The rights of the Licensees are contractual only and nothing contained in this Licence shall be construed as granting or shall be deemed to grant to the Licensees any estate, interest or other proprietary right whatsoever in the land.

(d) The licence hereby created is personal to the Licensees and may not be assigned or sub-licenced to any other person.

(e) The Corporation shall not during the life of this Licence depasture or graze any livestock on the Land nor permit the livestock of any other person, firm or corporation to be depastured or grazed thereon, except as provided herein."

[93] The term of the grant was for one year from the date of the agreement, but the licensees had the right to exercise an option of nine further terms of one year each by giving notice to the Corporation (par (2)). Those options were exercised.

[94] There was payable to the Corporation by the third defendants "as licence fee and in consideration of this agreement" the sum of $20,000, and for each year thereafter that sum adjusted in accordance with the Consumer Price Index.

[95] It was provided that the third defendants would not, without the written consent of the Corporation, graze more than a total of 2000 head of livestock on the land (par 4(a)(i)). That they would have the right to burn off the land with the written consent of the Corporation and to lay down fencing for purposes of entering adjoining land to recover stray stock.

[96] The licensees could request the permission of the Corporation to make or erect specified improvements on the land (par 6(a)). It was agreed that certain described improvements would be carried out on the land by the third defendants and that in the event that the licence was terminated by the Corporation the third defendants would be entitled to be paid $500,000 for

the improvements made or erected with the permission of the Corporation (6(b)). The second defendant submits that the improvements there referred to extends to improvements for which permission had been given by Alcoota Nominees Pty Ltd, but I do not accept that the words of the agreement admit of such a construction. That amount would not be payable if the licence was terminated by the third defendants, or in the event that they entered into a lease agreement over the land with an Aboriginal Land Trust as defined in the Land Rights Act or by natural effluxion of the licence period including any options.

[97] The word "lessee" is occasionally used in the document, but in my view it does not carry any weight, no more than is the description of the agreement as a "Grazing Licence". In any event it would seem that looking at the document as a whole that word crept in by mistake.

[98] At the same time another document termed "Agreement under s 11A of the Aboriginal Land Rights Act (Northern Territory) Act 1976" was entered into between the second and third defendants. The plaintiffs contend that that agreement would be invalid if it took effect prior to the application being made under s 50(1)(a) - see s 11A(1). That may be so, but it makes no difference to the evidentiary effect which the document has as to the intention of the parties to the Grazing Licence. I have been unable to find any evidence which shows that a proposed letter from the Council to the third defendants acknowledging that the agreement would not take effect

until after the application had been lodged with the Commissioner was delivered to them.

[99] Section 11A enables a land council to enter into agreements with a person, concerning land which was under claim under the Land Rights Act, that it would, if the land was granted to a land trust, direct the land trust to grant an estate or interest in the land to that person. The agreement required the second defendant to direct the land trust to grant a lease of the Waite River land to the third defendants on the terms and conditions set forth in a draft memorandum of lease attached to the agreement. The lease was to have been for a period of ten years commencing on the day on which the second defendant directed the land trust to enter into it.

[100] The intention of the parties to those various transactions, determined by reference to the documents, was to free the land of the estate or interest held by the sub-lessees from Alcoota Nominees Pty Ltd so that the Alcoota land could be transferred to the Corporation free of that encumbrance. That is, the estate or interest held by the sub-lessees would be extinguished. The third defendants would then have the right to graze stock on the same land pending the application under the Land Rights Act. Subject to the success of that application, then a lease would be granted by the Land Trust to the third defendants over the Waite River land.

[101] The Pastoral Lease in respect of the Alcoota land was granted for "Pastoral Purposes", and contains a reservation in favour of the Aboriginal inhabitants

of the Northern Territory which, inter alia, permitted those of them who ordinarily reside on the land and who by Aboriginal tradition were entitled to use or occupy the land to enter and be on it and exercise other specified rights (Pastoral Land Act s 38(2)).

[102] The nature of the holding by the third defendants is further complicated by the fact that the agreement extended to "a license to operate a general store". In *Radaich v Smith and Anor* (1959) 101 CLR 209 it was held that an agreement granting occupancy for a five year term on a suburban lock-up shop for use as a milk bar, although described as a licence was, in law, a grant of exclusive possession and thus held to be classified as a lease. See also *KJRR Pty Ltd v Commissioner of State Revenue* (1999) 2 VR 174. In the latter case it was held that the following clause in the agreement should not be taken to mean other than what it said:

> "This licence shall confer no right of exclusive occupation of the premises to the Licensee and the Licensor may at any time and at all times from time to time exercise all its rights as Lessee including (but without in any way limiting the generality of this provision) its right to use, possess and enjoy the whole or any part of the Premises saving only insofar as such rights shall prevent the operation of the Licence hereby granted."

[103] There was no such provision in the agreement under consideration here, but I note that the grant to use the plant and equipment was expressed to be "exclusive" and that that word was not expressed in the grant to use the land. Further, par (1)(c) provides that the rights of the licensees were contractual only and nothing contained in the licence should be construed as

granting or deemed to grant to the licensees any estate, interest or other proprietary right whatsoever in the land.

[104] The second defendant's submissions point to there being no right of quiet possession of the land expressed in the agreement and that it does not bind the Corporation not to enter the land or not to enter it except upon notice to the third defendants. It is therefore submitted that the Corporation had an unfettered right of entry at any time, a significant derogation of rights conferred by the sublease which limited the right of entry to that related to inspection and subject to 7 days notice. However, such a covenant is implied in a lease by the common law as is the covenant not to derogate from the grant.

[105] The second defendant also draws attention to the provision in the agreement denying the power of transfer or assignment of the rights granted to the third defendants. It submits that the licence to operate the general store was merely a licence to conduct the business and did not confer right of exclusive possession to particular premises on the land. The submission goes on that the Corporation and Aboriginal persons retained the right to enter and remain on the land where the business was conducted. The agreement conferred a right by way of licence to conduct a business not to exclusive possession of the land in the premises where the business was conducted.

[106] It will be noted that the use to which the land might be put pursuant to the pastoral lease was that of "pastoral purposes" and consistent with that limitation the Corporation granted to the licensee the right to use the land for grazing cattle and horses only. The Corporation undertook that it would not depasture or graze any livestock on the land nor permit the livestock of any other person to be depastured or grazed on the land. It therefore granted to the third defendants the exclusive right to depasture livestock on the land and the Corporation would have been in breach of its pastoral lease had it ventured upon the land for any other purpose or granted the right to anyone else to enter for any other purpose. That does not, however, deny its access to the land.

[107] Another issue which has been raised on behalf of the second defendant goes to the provisions of s 67(1) of the Pastoral Land Act. It provides, in effect, that a pastoral lessee shall not without the consent of the Minister sublet land the subject of a Pastoral Lease or otherwise part with possession of the land or part of it. Compliance with the subsection is expressed to be a condition of the lease.

[108] Prior to settlement of the transfer of the Alcoota land to the Corporation the second defendant wrote to the Minister's department on behalf of the Corporation. Attention was directed to the sublease held by the former sub-lessees and it was stated that "it is the intention of all parties that the Coppocks be able to continue running their cattle on Waite River".

Reference was made to the "grazing licence" between the Corporation and the Coppocks and the letter went on:

> "The parties have agreed that in exchange for the Coppocks surrendering their current sub-lease they will be granted a grazing licence and a further agreement for lease in the event that the land becomes Aboriginal freehold. The parties have reached this agreement freely and with the advice of independent legal counsel. I request that the Departments give consideration to the grazing licence and advise of any requirements that you may have in respect of the same."

The reply included the following:

> "The licence proposed between the Alcoota Aboriginal Corporation and (the Coppocks) and it's [*sic*] conditions, would appear to require the consent of the Minister for Lands, Housing and Local Government under s 67 of the *Pastoral Land Act* 1992. The Department recognises the circumstances in this instance, and also the requirements of the contract for sale between Alcoota Nominees Pty Ltd and the Alcoota Aboriginal Corporation. As such it is proposed to formally recognise the existence of the "grazing licence" subject of the outcome of the land claim which is to be lodged by the traditional owners over the area of pastoral lease number 1032 on transfer of the lease to the Alcoota Aboriginal Corporation. In the event that the land claim is not granted over the area of the grazing licence, or part thereof, this Department will require that a formal sub-lease arrangement is put into place between the two parties and consent for the sub-lease be sought from the Minister …".

[109] The following day, 12 March, the departmental officer again wrote to the second defendant saying that the department had sought the opinion of the Solicitor for the Northern Territory and had been advised that the "grazing licence" is viewed as a contractual agreement only and as such did not require the consent of the Minister. "This Department is now of the opinion

that all the requirements of s 67 of the Pastoral Lands Act have been satisfied".

[110] The second defendant submits that in view of the provisions of s 67 of the Pastoral Lands Act and the correspondence referred to the transaction envisaged by the licence agreement was prohibited and did not pass any legal or equitable interest in the land. It seems to me that the Minister's department ultimately took the view that s 67 of the Pastoral Land Act did not apply to the transaction. Whether that view be correct or not is not binding on this Court and does not much matter. The circumstances were brought to the attention of the Minister's department and it made a ruling. The failure to obtain any necessary consent could lead to a breach of the lease but where such a breach is alleged then the procedures provided for in the Pastoral Land Act require that notice be given to the lessee to explain the breach and a process is provided for dealing with the same (s 40). Penalties may be imposed for the breach; the ultimate penalty being forfeiture. The scheme does not contain a provision to the effect that the parting with possession of land without consent of the Minister renders the transaction invalid, illegal or void.

[111] I do not accept the submissions made on behalf of the second defendant that the failure to obtain Ministerial consent to the transaction envisaged by the Grazing License meant there was no concluded or enforceable agreement between the parties.

[112] Both sides made submissions concerning the effect of the High Court decision in *R v Toohey and Anor; Ex parte Meneling Station Pty Ltd* (1983) 158 CLR 327. There the Court was considering whether or not a grazing licence granted pursuant to s 107 of the Crown Lands Act (the predecessor to the Pastoral Land Act) amounted to an estate or interest in land the subject of the licence within the meaning of the Land Rights Act.

[113] At p 351 Wilson J referred to the opinion of Aickin J in *Stow v Mineral Holdings (Aust) Pty Ltd* (1977) 51 ALJR 672 at 679:

> "In my opinion the ordinary meaning of the compound expression 'estate or interest in land' is an estate or interest of a proprietary nature in the land. This would include legal and equitable estates and interests, for example, a freehold or a leasehold estate, or incorporeal interests such as easements, profits à prendre, all such interests being held by persons in their individual capacity."

[114] His Honour said that that was the sense in which the term was to be construed in the Land Rights Act and referred to a profit à prendre being a right:

> "to enter another's land to take some portion of the soil or of its nature or produce. The grant may confer an exclusive rights, or it may be a right enjoyed in common with others. It may be granted either in perpetuity or for a fixed term and presumably it may by agreement be terminable on specified notice *Unimin Pty Ltd v The Commonwealth* (1974) 22 FLR 299 the right of pasture may be the subject of a profit à prendre; the taking and carrying away is affected by the means of the mouths and stomachs of the cattle in question (references omitted). Profits are classed as incorporeal hereditaments and may be assigned. They may be properly described as interest in land".

[115] His Honour considered the rights conferred by a profit à prendre at common law as against the statutory creation and noted that the statutory licence conferred a right of a licensee to graze a specified number of and type of stock on the land and "this necessarily implies a right to remove certain of the natural produce of the land. The fact that it does not confer an exclusive right to possession in the land, essential as that is to distinguish a tenancy from a licence (*Radaich v Smith*) is not essential in the case of a licence of this kind. The concept of forfeiture for breach of conditions of the licence is language appropriate to an interest in land. The right of the licensee, with the permission of the Minister, to erect improvements on the land and to be secured in compensation for their value on termination of the licence emphasizes its significance yet without making a decisive contribution to the question whether it confers an estate or interest in land. Again, the grant of a licence for a period not exceeding one year is equivocal. All these features are consistent with the conclusion that a grazing licence confers an interest in the land".

[116] However, at 353 his Honour held that the discretion in the Minister to terminate the licence unilaterally and more or less summarily without compensation (save as to improvements erected with the permission of the Minister), "tends strongly to deny to the licence the character of an interest in land". His Honour also drew attention to the fact that the Crown Lands Act did not contemplate any assignment of the licence although leases under the Act were transferable with the permission of the Minister:

> "It would be extraordinary if the legislation placed such a control on the assignment of leases while allowing grazing licences to be freely transferable without permission or even notice to the Minister".

Those considerations outweighed those tending in favour of the grazing licence amounting to a profit à prendre. The fact that a different result would make the conduct of enquiries by the Commissioner pursuant to s 50 of the Lands Right Act much more difficult added weight to that conclusion.

[117] Gibbs CJ in agreeing with Wilson J that the holder of a grazing licence under the Crown Lands Act does not have an estate or interest in land did not differ from his reasons in reaching that conclusion. The Chief Justice also agreed with Mason J.

[118] At p 342 Mason J referred to what was said by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* (1965) AC 1175 at 1247-1248:

> "Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability."

His Honour went on to distinguish the rights under the Crown Lands Act when measured against that criteria and noted that the Minister was able to cancel a licence, the only precondition being that he give three months notice in writing of his intention to do so. No default on the part of the licensee was necessary. That regulation suggested to his Honour that the licensee had no interest in the land at all, the future of his right to graze

stock being in the hands of the Minister. That told against the degree of permanence of which his Lordship spoke.

[119] His Honour turned to assignability saying that it was not in all circumstances an essential characteristic of a right of property and that there was nothing in the Crown Lands Act to indicate that a grazing licence was assignable, all indications being to the contrary taking into account the provisions for transfer of a lease granted under that Act and the Minister's discretion to grant applications. Furthermore the provision that a licensee must apply for permission if he wishes to make or erect improvements on the land amounted to a very strong indication that property in the land remained in the Crown and it did not pass to the licensee. The nature of the grazing licence, a creature of statute, had to be categorised in the light of the statutory provisions. Brennan J at 364 agreed with Mason J.

[120] At p 344 Mason J said:

> "The applicants contend the grazing licensee is given exclusive possession of the interest granted in the sense that a grazing licence can not be granted to another which would interfere with the exercise of the original licence. Even if the applicants are correct … I do not think that it follows that a grazing licence confers on the licensee a right to exclusive possession. The terms and conditions of the licence do not suggest that it confers such a right."

[121] The agreement between the Corporation and the third defendants was not entered into as a consequence of a statutory discretion exercisable by the Corporation. It arose in the context of interrelated transactions to do with its acquisition of the Alcoota land. The right granted was to use the land for

the purpose of grazing cattle and horses and to operate a general store, the licence could not be assigned or sub-licensed to any other person but the Corporation could not depasture or graze any livestock on the land nor permit the livestock of any other person to be depastured or grazed thereon. The term of the licence was for one year but either party might terminate it by three months notice to the other without reason. The term was renewable for up to nine successive terms of one year each on the same condition. Entry upon the land by Aboriginal people was to be permitted for particular purposes, a right reserved unto them by the legislation.

[122] Notwithstanding the distinctions which may be made between the statutory grazing licence and the agreement between the Corporation and the third defendants I am of the view that the plaintiffs' case is confronted with the same obstacles as that outlined by Mason J in relation to the statutory licence.

[123] The Corporation could cancel the licence upon notice without default on the part of the third defendants. There is a specific prohibition on assignment and the licensees had to apply for permission if they wished to make or erect improvements on the land (save for the specific agreement in that regard).

[124] The provisions for compensation do not assist either party in my view. The amount is fixed without obvious reference to the value of the third defendant's labour nor the condition or value of improvements at the time of termination of the agreement. A number of documents were submitted going

to antecedent negotiations and expectations on the parties, but I reject reference to them since they would appear to be evidence of the subjective intention of the parties.

[125] The second defendant referred to *Anderson v Wilson and Others* (2000) 97 FCR 453 but, it had to do with the provisions of the Western Lands Act of New South Wales and the question of the extinguishment of any accessorial native title rights which otherwise might have existed over or in respect of the leased land. It is in that context that the majority, Black CJ and Sackville J at the foot of 463 said that:

> "… [T]he exclusive possession of land does not necessarily connote rights good against all the world. It follows that to say a person has rights to exclusive possession does not necessarily demonstrate that the person is able to exclude all third parties from access to his or her land."

I do not think that there is anything in that case which assists in answering the present question. The issue which it addresses does not arise, but it must be acknowledged, as the case demonstrates, that possessory rights granted to a statutory pastoral lessee are somewhat constrained. The lessee has no right to use the land for any activity other than that permitted by the lease, there are reservations, inconsistent with the lessee's right of exclusive possession, including the right of Aborigines to enter and be on the land as provided for in the reservation.

[126] Given the circumstances surrounding the making of the "Grazing Licence" and its terms I find that the rights conferred by it upon the third defendants

do not amount to an estate or interest in the Waite River land, or any proprietary interest. To my mind there is nothing to suggest that the parties by this written agreement did not mean what they said, or did not say what they meant (*Associated Alloys Pty Limited v ACN 001 452 106 Pty Limited (in Liquidation) and Anor* (2000) 202 CLR 588 at 605). Each of the Corporation and the third defendants had something to gain by the agreement in particular the Corporation was enabled to facilitate one of its major objects and the third defendants were able to secure a right to graze stock beyond the term available under the sublease or receive compensation.

[127] I find that the third defendants did not hold any estate or interest in the land the subject of the agreement called a "Grazing Licence".

Severance of the Wait River land from the land in respect of which the application was made

[128] The application under the Land Rights Act was made in respect of the Alcoota land, including Waite River. Should I be wrong about that last issue, then the plaintiffs submit that the application must fail because part of the land included in the application is not available to be made the subject of an application.

[129] It is submitted on behalf of the second defendant that even if an application may not be made in respect of the Waite River land, it is easily identifiable parcel of land formerly being Northern Territory Portion 2070 and it "requires nothing more than a blue pencil to sever (it)" from the land the

subject of the application. A Commissioner may do all things necessary or convenient to be done for or in connection with the performance of his or her functions (s 51).

[130] The second defendant draws attention to *Attorney-General (NT) v Maurice and Others* (1987) 73 ALR 326, but I derive no assistance from it. That was a case to do with whether the description of a large area of land appearing in a traditional land claim application was sufficiently certain to enable the land to be identified. The land was a large area of vacant unalienated Crown land bounded almost entirely by land the subject of Pastoral Leases. The issue concerned delineation of the boundaries of the land, not whether the land fell within the compass of land which could be made the subject of an application. In this case there is no lack of clarity as to the area or boundaries of the land the subject of the application.

[131] The second defendant also submits that it would be absurd if a square metre of land alienated to a scientist to erect an anemometer within a claim area of two thousand square kilometres should collapse the whole area of the claim (*Dunkley v Evans and Anor* (1981) 1 WLR 1522).

[132] As this case demonstrates there may be dealings with land which could take it out of the description of land in respect of which application can be made, but the determination of the jurisdictional question may not be able to be finally resolved until sometime after the application has been made. The customary publicity given to the making of an application may result in the

discovery of dealings which may relate to the whole or any part or parts of it, such as to take it out of the category of land in respect of which the Commissioner may exercise his or her functions.

[133] On the plaintiff's submissions an application fails in limine unless the whole of the land the subject of it falls within the description at the time of the application. I do not accept that. I see no reason why an application can not be amended in respect of the description of the area of land over which it is made to take account of mistakes or circumstances later discovered which deny the Commissioner's jurisdiction. The general powers of the Commissioner under s 51 are wide enough to enable the amendment, or if the status of the land is disputed, to resolve it. That is what Turner attempted to do in the course of proceedings before the Commissioner at the commencement of the inquiry in this case. As was pointed out in *Attorney-General v Maurice* at p 329, not all boundaries of areas of land are fixed by reference to metes and bounds, but rather by reference to plans which may or may not be entirely accurate. Sometimes surveys are required to fix boundaries and it is not difficult to envisage a situation where an application is made in respect of an area of land delineated on a map which is found to be inaccurate upon a survey being undertaken. I see no reason why necessary adjustments should not be made in the proceedings before the Commissioner.

[134] I find that in the event that any part of the land the subject of the application does not fall within the description of land in respect of which the

Commissioner has jurisdiction, the application does not fail in respect of the other part of the land for that reason.

***Land Rights Act* s 67A**

[135] Both parties made submissions concerning the effect of s 67A of the Land Rights Act. The relevant portion is subsection (2) which provides:

> "Where an application referred to in par 50(1)(a) in respect of an area of land is made on or after the day of commencement of this section, any grant of an estate or interest in that area of land, or in a part of that area of land, that is purportedly effected on a day before that traditional land claim, insofar as it relates to the area of land to which the grant relates, is finally disposed of, being the day on which the application is made or a later day, shall be of no effect."

[136] A traditional land claim shall be taken not to be finally disposed of insofar as it relates to a particular area of land until,

(a) the claim is withdrawn;

(b) the Governor-General executes a deed of grant;

(c) the Commissioner informs the Minister that the Commissioner finds that there are no Aboriginals who are traditional Aboriginal owners of the land, or

(d) where the Commissioner finds there are such Aboriginals and the Minister determines that the Minister does not propose to recommend to the Governor-General that a grant of an estate in fee simple be made to a land trust (s 67A(5)).

[137] Section 67A was added to the Land Rights Act in 1987 at the same time as s 11A. The application under par 50(1)(a) in respect of the Alcoota land was made after the date of commencement of s 67A. I consider s67A(2) takes effect where there is any grant of an estate or interest in the area or part of the area of land the subject of an application made on the day on which the application is made or a later day, but purporting to have effect on a day before the application is finally disposed of. If a grant of an estate or interest in an area of land is made before an application is made then s 67A(2) does not operate in respect of it. However, if there is any such grant purportedly taking effect on or after the date on which the application is made it will be of no effect.

[138] In its application to the facts of this case, had there been the grant of an estate or interest in the Alcoota land by way of an equitable mortgage or the Waite River land by way of a sublease, they having taken effect on the day on which the application for the traditional land claim was made, they then would be of no effect.

[139] The plaintiffs submit that s 67A(2) has the effect of nullifying the transfer to the Corporation itself. I think not, it was not until the transfer was registered that the Corporation came to hold the title to the land, and no grant of any estate or interest in the land could be made until that time at the earliest.

B Did the Corporation consent to the application under s 50(1)(a) as required by s 50(2C)?

[140] It is provided in s 50(2C) as follows. Where:

(a) an application referred to in par (1)(a) has been made to the Commissioner; and

(b) it appears to the Commissioner that an estate or interest in the land is held by or on behalf of Aboriginals;

(c) the Commissioner shall not perform, or continue to perform, a function under that paragraph in relation to the application as it relates to that land unless the Aboriginals who hold that estate or interest have, or the body which holds that estate or interest on their behalf has, consented, in writing, to the making of the application.

[141] Two issues arise under this heading:

(a) whether such consent must be obtained before the application is made so as to enable the Commissioner to perform his function, and

(b) if the consent could be given after the application was made, was the consent propounded a valid consent in the circumstances prevailing at the time it was said to have been given.

(a) When must the consent be given?

[142] The application was lodged on 18 March 1993 and the consent of the Corporation was dated 6 March 1996. If it be relevant, a consent by ATSIC was dated 21 September 1995.

[143] The plaintiffs submit that the ordinary meaning of the words, requiring consent in writing "to the making of the application", is that consent must be given to the application before it is made. To hold otherwise, they submit, would involve a substantial interference with the property rights of Aboriginals holding any such estate or interest because of the operation of s 67A(2) (see above), (*The Commonwealth v Hazeldell Limited* (1918) 25 CLR 552 at 563). For example, an application can be made, as it was in this case, and if the Corporation did not wish to consent, it would nevertheless be effectively debarred from granting any estate or interest in the pastoral lease until there had been a final disposition of the application.

[144] Unless the applicants withdrew the claim (s 67A(5)(a)), there could not be any such finalisation because the Commissioner is, by operation of s 50(2C), prohibited from performing his functions under s 50(1)(a). Accordingly there could be no final disposition of the application. It is submitted that that would be an absurd result since it does not appear that the Commissioner has power to dismiss an application. There is none expressed in the Act.

[145] As a further aid to construction, the plaintiffs rely on s 15AB(2)(b) of the Acts Interpretation Act (Cwth) to introduce reference to recommendations made in 1983 by the Hon Justice Toohey upon a review of the Land Rights Act. That report was tabled in the House of Representatives on 5 March 1984. Attention is directed to the following passages in the report:

> "222. There is however one aspect of para 50(1)(a) that calls for attention now. Where alienated Crown land is held by, or on behalf of, Aboriginals who are not the traditional owners, those Aboriginals will lose title to the land in the event of a successful land claim by the traditional owners.
>
> 223. This matter first arose during the hearing of the Borroloola land claim in relation to the occupation by the Johnston family of a special purposes lease on Vanderlin Island. At para 131 of the report on that claim I commented:
>
> > A curious situation arises here. A special purposes lease is ordinarily alienated land but s 50(1)(a) permits an application to be made for alienated Crown land in which all estates and interests are held by Aboriginals. 'Aboriginal' is defined by s 3(1) to mean 'a person who is a member of the aboriginal race of Australia'. The Johnstons, I think, answer this description, hence their special purposes lease may be claimed. It is unlikely that Parliament had such a situation in mind when framing the terms of s 50(1)(a), nevertheless the language of the statute is clear enough.
>
> 224. The matter has arisen, I understand, in the Beetaloo land claim presently before the Aboriginal Land Commissioner.
>
> 225. This is an anomaly which should be corrected. It can be done by amending para 50(1)(a) to make it clear that no claim may be made to alienated Crown land held by, or on behalf of, Aboriginals without the consent in writing of the registered proprietor.

> 226. Where that consent is given, para 11(1)(d) will require the Minister to ensure that all estates and interests are acquired by the Crown by surrender or otherwise. Acquisition must be on just terms and that is appropriate where the registered proprietor is not a traditional owner and will lose the benefit of the land. Where however the land is held by or on behalf of Aboriginals who, whether identified by name or more generally, are the traditional owners and will therefore continue to be the beneficiaries of the land, compensation is not appropriate. …
>
> 238 In summary I recommend that:
>
> where alienated Crown land is held by or on behalf of Aboriginals who are not the traditional owners, that land should not be able to be claimed without their written consent; where consent is given, and the claim succeeds, the registered proprietor should be compensated unless the land is held by or on behalf of the traditional owners; …"

[146] I am not assisted by reference to that extract from the report. It was made four years prior to the amendment and was followed by negotiations to which reference was made by the Minister when the Bill was introduced. With respect, the recommendations made by his Honour do not help in resolving the question as to when any necessary consent must be given to an application.

[147] The second defendant points to the opening words of the subsection. They commence by reference to circumstances where an application has been made and it then appearing to the Commissioner that an estate or interest is held by or on behalf of Aboriginals. There is then a prohibition on the Commissioner performing his functions absent the required consent. That would indicate that the consent is filed with the application or at the latest

prior to the Commissioner embarking on the enquiry envisaged in s 50(1)(a). However, the words "continue to perform" indicate that the Commissioner has entered upon the enquiry and it has then appeared that there is such an estate or interest as enlivens the requirement for consent. Once such consent is obtained, then the Commissioner may resume the performance of his or her functions. That tells against the submission that the necessary consent must be given before the application is made, or at the latest, before the Commissioner embarks upon the enquiry. I accept those submissions.

[148] As to the requirement that the consent be "to the making of the application" I see no reason why those words should be narrowly construed so as to require the consent to be given before the making of the application. It could operate retrospectively in my view.

[149] The problem to which the plaintiffs refer, that is, the prohibition contained in s 67A operating where an application has been made under s 50(1)(a) and no consent given under s 50(2C), appears to be real. It seems to me that the same problem could arise in circumstances such as s 50(2A) and (2B). Similar problems may arise for the Crown in the event of an application being made over unalienated Crown land, for example, and it not being properly prosecuted. There is no readily apparent solution appearing to the problems raised by the plaintiffs. Perhaps it is to be found in the powers of the Commissioner under s 51 or there may be other remedies. The theoretical result of the operation of the various provisions of the Act put

forward by the plaintiffs may well not have been within the contemplation of the Parliament.

[150] I find that a consent required by s 50(2C) may be given before, at the time of or after the application is made under s 50(1)(a).

C1 Did the Corporation consent to the application?

[151] The conduct of the affairs of the Corporation came to be under the control of one, Christopher Reginald Marshall ("Marshall"). He was appointed Administrator of the Corporation under the provisions of the Aboriginal Councils and Associations Act (Cwth) on 3 August 1995 (see s 71 and s 75 of that Act).

[152] On 16 February 1996 the Registrar, appointed under that Act, certified that he was satisfied that it was no longer necessary for an Administrator to conduct the affairs of the Corporation. Noting that he was required by s 77D of the Act to conduct an election for membership of the "Governing Committee" to assume control of the Corporation when the appointment of the Administrator was cancelled, he gave notice that a meeting of members would be held for that purpose at 9am on 6 March 1996 at a place specified on Alcoota station.

[153] By letter dated the same day the Registrar informed Marshall that his appointment as Administrator would be extended to 8 March 1996. It was

not terminated prior to that date. Marshall was informed that his main responsibility would be to continue:

> "to manage the affairs of the Corporation, to assist with arrangements for a meeting of the Corporation on 6 March 1996 to elect a new governing committee and chairperson, to conduct an annual general meeting on the same date, and to facilitate the transfer of the control of the Corporation's affairs to the newly elected governing committee."

[154] The Minutes of the meeting to elect the new chairperson and committee discloses that it was held on 6 March commencing at about 10.15am, that Turner was nominated as Chairperson and the Registrar confirmed that nomination and announced that he was elected. Eight nominations were received for the Governing Committee of the Corporation, namely:

Kevin Bloomfield

Joy Tilmouth

Albie Tilmouth

Paddy Webb

Barbara Cox

Dick Purvis

Lindsay Bird

Dave Ross

They were proclaimed elected.

[155] By notice to members of 20 February 1996 Marshall called an Annual General Meeting for 6 March to follow the election of the new committee. Amongst the business of the meeting, specified in the notice, was an item

"Decide whether consent should be given for the land claim to go ahead".

The Minutes of the meeting include the following:

> "The ATSIC Regional Manager, Richard Preece, addressed the meeting and reminded members that the original ATSIC decision to provide funds for the purchase of Alcoota had been on the understanding that a land claim under the *Land Rights Act* would be lodged and the land holding body would always be separate from the trading entity conducting the cattle operation.
>
> It was unanimously resolved that consent should be given for the land claim over the pastoral lease known as Alcoota/Waite River to proceed and that the consent document read to the meeting by the ATSIC Regional Manager, Richard Preece, should be executed forthwith, (moved: Herbert Bloomfield, seconded Dick Purvis. All in favour)."

[156] The minutes indicate that there were approximately one hundred people present, "most of whom were members of the Corporation".

[157] A meeting of those elected to the committee followed and the minutes record:

> "The formal consent document in relation to the land claim was executed by Arthur Turner and Dick Purvis, in the presence of the full committee and pursuant to the unanimous decision of the members in the AGM earlier the same day. It was also signed by the Administrator, Chris Marshall."

I note that at that stage the committee had no powers, they remained with the Administrator.

[158] The document was appropriately expressed to constitute the required consent on the part of the Corporation. At the foot of the operative part of it appears a clause relating to the fixing of the common seal said to have been affixed

on 6 March 1996 “pursuant to a resolution of the Annual General Meeting held on 6 March 1996”. As originally prepared that document expressed the seal as having been affixed pursuant to a resolution of the committee, but that word has been scored through and the words “Annual General Meeting held on 6 March 1996” hand written. The common seal was affixed to the document. Arthur Turner and Dick Purvis appeared to have signed the same over the typed script “Committee Member” indicating they were present at the affixing of the seal.

[159] Underneath the seal and those signatures appears Marshall’s signature over a line dotted by hand and the word “Administrator” also hand written.

[160] It is necessary to make findings of fact in relation to the circumstances surrounding the affixing of the seal and the signatures appearing on the document relied upon as evidence of the consent to the application.

[161] The incontrovertible fact is that as at 6 March 1996 Marshall was the Administrator of the Corporation and was responsible for the conduct of its affairs. He stood in the place of the committee which was charged with the management of the affairs of the Association and had the powers of the Association to carry out its objects and purposes (rule par 12.1).

[162] The Association was required to have a common seal by s 46(1)(b) of the Act and r 8.1. It was to be kept in safe custody as directed by the Council or by the committee, r 8.2. Provision is made in r 8.3 as to the affixing of the

seal and countersigning by two committee members appointed for that purpose, r 8.3. The form prescribed by r 8.3 reads:

> "The Common Seal of Alcoota Aboriginal Corporation was affixed hereto this day of 19 in our presence pursuant to a resolution of the Committee."

[163] It will be noted that that form is not followed on the consent in question.

[164] No directions are given in the Act or the Rules of the Association as to the circumstances in which the Common Seal is required to be affixed to any document. But it is provided in s 46(4) that all judges and persons acting judicially shall take judicial notice of the seal of an incorporated Aboriginal Association affixed to a document and shall presume that it was duly affixed.

[165] A General Meeting of the Association to be known as the "Annual General Meeting" was required by r 11.2 to be held within three months after each 30 June at such time or place as the committee appointed. The business of that meeting was prescribed under r 11.3:

(a) to hear from the committee of the Association's affairs and activities since the last Annual General Meeting;

(b) to hear from the committee on the finances of the Association for the year ending on the preceding 30 June;

(c) to choose the committee for the next year and a chairperson of that committee;

(d) to appoint auditors for the next year;

(e) such other items of business as the members may wish to deal with.

[166] The business referred to in the notice of meeting and as conducted at the Annual General Meeting appears to fall within the requirements of that rule.

[167] Provision is made in the Rules of the Association for the calling of other general meetings (r 11.5). The Registrar is empowered by s 58B(4) to call a "Special General Meeting" at any time, if in the opinion of the Registrar, there is a need to do so. There is no definition of "Special General Meeting" in the Act or the Rules, but I consider that any general meeting of the members of the Association which is not an Annual General Meeting falls within the meaning of those words. The meeting of members called to elect the new committee was such a meeting.

[168] A question related to the issue now under consideration was considered by the Full Court of the Federal Court of Australia on a question of law reserved for its consideration by the Commissioner, *Re Alcoota Land Claim No 146* (1998) 82 FCR 391 at 405. The question was:

> "Was the document dated 6 March 1996, which expressed the consent of the Alcoota Aboriginal Corporation to the making of the land claim application dated 18 March 1993 over all the land comprised in Pastoral Lease No 1032, a valid consent in writing to the making of the application in the Alcoota Land Claim No 146, for the purposes of s 50(2C) of the *Aboriginal Land Rights (Northern Territory) Act* 1976?"

[169] At p 413 of the reported decision the Court said:

> "If it be that the consent was signed by the Administrator in his capacity as having conduct of the affairs of Alcoota and was intended by him to operate as a consent under s 50(2C) of the Land Rights Act on behalf of Alcoota and subject to a finding that the consent was given for a proper purpose, the question could be answered "yes" without the necessity of dealing with what occurred at the meetings on 6 March 1996 or the circumstances of the affixing of the common seal. Absent a finding of fact or the availability of an inference of fact to be drawn in those terms, it is not appropriate to give an answer. We should say that the way in which the Commissioner dealt with the matter suggests that he did not consider that to have been the case. That he dealt with what occurred at the meetings on 6 March 1996 and applied the rule in *Turquand's* case to the document under seal suggests that the Commissioner was concerned with a consent given pursuant to a resolution in general meeting and a common seal affixed under the authority of the governing committee or two members of it appointed for that purpose.
>
> If those circumstances form the basis of the conclusion reached that a valid consent was given, question eight must be answered, "No". As at 6 March 1996, the conduct of the affairs of Alcoota was vested in the administrator and not the corporation in general meeting or in the governing committee. The only proper function of the general meeting held on 6 March 1996 was the election of a governing committee in accordance with s 77D of the ACA Act."

[170] I find that the consent of the Corporation to the application could only be validly given for the purposes of the Aboriginal Land Rights (Northern Territory) Act on 6 March 1996 if it was in writing and signed by Marshall in his capacity as Administrator of the Corporation.

[171] I now turn to consider the question in the light of the evidence before this Court. The document bearing Marshall's signature has been described above. During the course of evidence I ruled inadmissible that part of his affidavit in which he asserted, "When I signed the consent and applied the seal I did so in my capacity as Administrator and not as witness to the

signatures of Turner and Purvis". For reasons which I then gave (transcript p 160) I considered that the question could only properly be resolved by reference to objective circumstances.

[172] Marshall's affidavit discloses that Austin Sweeney, an employee of the Council, provided the consent document to him at some time on 6 March 1996 in the course of meetings with members of the Corporation at Alcoota Station. He knew that the consent of the Corporation was required to enable the land claim to proceed and it was an important issue for the Council. He was aware of tension between some members of the Corporation in relation to the land claim.

[173] Marshall says that the consent form was signed in his presence by Turner and Dick Purvis at the meeting of the newly elected committee on 6 March 1996. That was held just after the meeting of members at which it had been indicated unanimously that the Corporation should give its consent to the claim. Marshall deposes that he was keen to have the committee members, particularly Turner, sign the consent document as that would be a powerful indication that his opposition to the land claim was at an end. Marshall wanted all those present to see Turner sign the consent document. He wanted Turner to sign it because he considered his consent to be very important. However, he did not stress to the committee at the time that the consent document was signed that he alone had the capacity to give that consent. He believed that he could execute the document at any time in his capacity as Administrator and that, although Arthur Turner and Dick Purvis

had signed the consent document, he needed to sign it because their signatures were not effective in law to bind the Corporation. He believed the term of his own administration was not to expire until 8 March.

[174] Marshall says he did not have custody of the common seal. So far as he was aware it was kept at the offices of the Council. He had a recollection of meeting Sweeney at his home in Alice Springs on the evening of 6 March 1996 to deal with a matter relating to the meetings earlier that day, but he did not recall whether he applied the seal to the consent document at that meeting with Sweeney. He noted that in the minutes, which he had prepared shortly after the meeting, he had recorded that the consent was executed by Mr Turner and Mr Purvis in the presence of the full committee, and he also noted that according to the minutes, "It was also signed by the Administrator, Chris Marshall". He did not have any specific recollection.

[175] Cross-examined, Marshall confirmed his signature at the foot of the consent document, but said his recollection did not serve him very well about when he signed it. It was his assumption, and his best recollection, that he did so at the meeting. He agreed that the word "Administrator" appearing under his signature was not in his handwriting and he thought it quite possible that it was there when he signed, "In fact I think it was".

[176] Austin Sweeney, a legal practitioner, was employed by the Council in its Native Title Unit. He attended at Alcoota Station on 6 March when a

number of meetings were held. He did not observe or listen to the proceedings of the meeting of the newly elected committee.

[177] Sweeney had drafted the form of consent in preparation for the meetings, and with reference to records said that that was done on or about 4 March 1996. He said he gave the consent document to Marshall either in Alice Springs before the meetings or at Alcoota on that day.

[178] Sweeney deposed that at the time he prepared the document he believed that the appointment of the Administrator would have terminated at the conclusion of the meeting at which the election of the committee was to occur, before the Annual General Meeting and committee meeting were to take place. The draft consent he prepared did not make provision for the Administrator to sign because it was his belief that the appointment would have been cancelled on 6 March. It was not until some time on that date that he became aware that the Administrator's appointment was not to conclude until 8 March. At the conclusion of the committee meeting, Marshall showed him the consent form signed by Turner and Dick Purvis and asked him for the common seal, but he did not have it (another seal had been taken by others to Alcoota in error).

[179] Sweeney then told Marshall that the consent would have to be sealed back in Alice Springs and Marshall gave the document to him. By the time Sweeney arrived in Alice Springs he had formed the view that the execution of the consent document by members of the committee may have been ineffective

because the appointment of the Administrator was to continue until 8 March and he realised it would be necessary for the Administrator to sign and seal it. No provision had been made for that on the draft form he had prepared.

[180] Sweeney said he then located the common seal at the office of the Council, contacted Marshall at his home, amended the consent form by adding a dotted line under which he wrote the word "Administrator" and took it and the seal to Marshall's house. There was a brief discussion concerning Marshall's continuing role as Administrator, and Marshall proceeded to sign the document and to personally affix the seal to the document in Sweeney's presence. The alterations to the execution clause by crossing out committee and inserting "Annual General Meeting held on 6 March 1996" were made by Sweeney.

[181] In cross-examination Sweeney's attention was drawn to a report he made to superiors at the Council, including that the consent was "under common seal by Arthur Turner, Dick Purvis, and the Administrator". He said that that was simply a summary and that he did not believe that the director of the Council would be interested in the detail. Sweeney conceded that he had seen the minutes and that if there was something in them which he knew to be inaccurate, he would have done something about it, but as at the time he was giving his evidence, said he could not be certain as to how carefully he had read the minutes. Taxed with the apparent inconsistency, he said that his recollection of going around to Marshall's house for him to affix the seal and sign the document was extremely clear. He said that he did not report

that detail to the Director of the Council because he was concerned that staff of the Native Title Unit might find themselves in hot water for not having taken the Common Seal to the meeting.

[182] Sweeney's evidence continued, however, to refer to a meeting he held with Avery that same evening in which he reported that the wrong common seal had been taken to Alcoota and he thought it was necessary for him to go round and have Marshall affix the seal and sign the document as Administrator. According to Sweeney, Avery directed him to make sure he did just that.

[183] Avery was recalled after Sweeney's evidence had concluded in relation to that matter. (He had earlier given evidence on another subject referred to hereunder). Avery said he recalled the conversation, it was brief. Sweeney had the consent form with him, but it did not bear the common seal. As to Marshall's signature, Avery was only able to say that he did not think it was on the document. According to Avery, Sweeney said he was on his way to Marshall's place and that he, Avery, had told him to make sure he got it done that day, "signed and sealed that day". He said he remembers that clearly because he was emphatic in what he had said on that occasion. What he says he said to Sweeney does not fit well with his uncertainty regarding the absence of Marshall's signature, but the inconsistency such as there is does not lead me to reject Avery's evidence.

[184] It was part of the plaintiffs' case that the consent document had been executed by having the common seal affixed and countersigned by the two committee members at Alcoota. It was also put that the minutes were accurate including the reference to Marshall's signing the document. However, the submission was that he had done so at Alcoota not as Administrator, but as a witness of some kind to the other signatures.

[185] In the course of the cross-examination of Avery, his attention was drawn to passages of transcript of an exchange between the Commissioner and counsel then instructed by the Council which took place about two months after the Alcoota meetings. It is reasonably clear that the Commissioner made reference to the minutes indicating that the seal had been affixed at the meeting. It is unclear as to whether Avery was in fact present during the exchange. But it was put to him that he should have then and there instructed counsel that the minutes did not reflect what happened, that is, that the seal had not been affixed at that time. Avery responded that if it had come to his mind then he would have done that.

[186] The inference sought to be established is that since Avery did not act so as to have the Commissioner informed that the minutes were inaccurate, he must have then been satisfied that they were accurate. Avery's answer to this line of questioning was that he did not at the time of that exchange with the Commissioner appreciate the significance of the issue (referring I take it to the issue then being discussed before the Commissioner) and he could not recall the exchange detailed in the transcript. I am not satisfied that Avery's

lack of action at the time of that exchange should cause me to reject his evidence regarding his discussion with Sweeney. The evidence is not strong enough to satisfy me that Avery was present when the matter was raised by the Commissioner, or, if he was, that he appreciated its significance or his responsibility to correct the impression conveyed.

[187] I return to the documentary evidence. At the Annual General Meeting it was resolved that consent should be given for the land claim and the document read to the meeting should be executed forthwith. That was the wish of the members. The document made provision for the affixing of the seal, which as drafted was to have been done pursuant to a resolution of the committee in accordance with the rules, but that was later changed by Sweeney to refer to the Annual General Meeting, in accordance with a view of the facts. The minutes of the committee meeting show that:

> "The formal consent document in relation to the land claim was executed by Arthur Turner and Dick Purvis, in the presence of the full committee and pursuant to the unanimous decision of the members in the AGM earlier the same day. It was also signed by the Administrator Chris Marshall."

Those minutes bear the signature of Turner as Chairperson and Chris Marshall "Administrator (Appointed)".

[188] Sweeney's memorandum to his superiors the day after the meeting includes reference to the proceedings of the Annual General Meeting wherein he reported it was:

> "resolved by consensus: (i) to consent to the land claim to the area covered by the Alcoota Pastoral Lease (which included Waite River Station). The consent was subsequently executed under common seal by Arthur Turner, Dick Purvis, and the Administrator."

A document under Sweeney's hand of 19 March shows that he sent a copy of the minutes to others in the Council "… for your comments. (They look okay to me)".

[189] The reference to the signature by Marshall on the consent contained in the minutes could be regarded as ambiguous on the question as to when it was so signed, although the record purports to be a record of what happened at the meeting. I note that there is no reference in the minutes to the affixing of the common seal, notwithstanding that the consent document refers very plainly to that feature and the evidence of Marshall does not resolve whether the seal was then affixed or not. The evidence of Sweeney that the wrong seal had been taken to Alcoota and that he visited Marshall at his home so as to rectify the error, is plausible. I accept what Sweeney says about his mistake as to when Marshall's appointment as Administrator would come to an end and his realisation that the consent should be signed by Marshall. I also accept that there was a discussion between Sweeney and Avery regarding the mistake about the seal, and the need to have it affixed to the document. In Sweeney's mind, at least, there was also the late realisation that Marshall was still the Administrator.

[190] On balance I find that the evidence of Sweeney describes what occurred. He had the responsibility of advising the committee, he prepared the consent

form under a false impression as to Marshall's position. The common seal was not affixed at Alcoota because it had not been taken there. The combination of those two errors gave rise to Sweeney's visit to Marshall on the night of 6 March. Sweeney wanted to protect others concerning the absence of the seal at Alcoota, and it was natural that he should also wish to correct his own mistake. Marshall's evidence is unclear. It does not contradict Sweeney. Sweeney is supported by Avery to some extent. The dotted line and the word Administrator were added by Sweeney as he said, and he presented the document to Marshall at Marshall's home where Marshall signed it as appears on the document, in his capacity as Administrator. The reference in the minutes is ambiguous and does not prevail over the other evidence. Sweeney's report to the Director of the Council and memorandum to others are to be seen as part of his endeavours to protect others and himself from the mistakes which had been made.

[191] I am satisfied that Marshall, Sweeney and Avery each did his best to assist the Court, and I accept the thrust of their evidence.

[192] In any event by the time the document reached the office of the Commissioner it was in the form now before this Court, it bore Marshall's signature as Administrator. In the event that it was required, Marshall had the authority of the members of the Association by resolution at the Annual General Meeting.

[193] The signature by the two committee members was superfluous and did not invalidate the consent. Whether or not the common seal required to be affixed to the document when it was executed under the hand of the Administrator has not been the subject of submission, but I do not think it matters. If it was required, then it is there. If it was not required, it can be disregarded. At common law the power to use a seal was considered a procedural necessity as a means of indicating corporate intent. Today, corporate intention may be determined through the principles of agency law as well as statutory presumption (Halsburys Law of Australia – Corporations – par 120-45). See also *195 Crown Street Pty Ltd v Hoare; Ivermee and Anor* (1969) 1 NSWR 193 and *MYT Engineering Pty Limited and Others v Mulcon Pty Ltd* (1999) 195 CLR 636.

[194] Turner was present at the meetings, he signed the document. He did not give evidence, although available to do so. The principle in *Jones v Dunkel* applies and assists in accepting the evidence that when Sweeney received the document it had not been signed by Marshall.

[195] An attack made upon the convening of the Annual General Meeting and the business conducted thereat is without foundation. The Administrator had the powers of the committee and it was the responsibility of the committee to call the Annual General Meeting. There is nothing in the Act to suggest that the requirements for the holding of an Annual General Meeting are suspended during a period of Administration. If that were the case, then an Administrator would not be accountable to the members of the Corporation.

Furthermore, s 60A of the Act empowers the Registrar to require the committee to take action to comply with the provisions of the Act and the Rules, and thus the letter to Marshall requiring him to hold the Annual General Meeting was within that power.

C2 May a consent given for the purposes of s 50(1)(a) of the Land Rights Act be withdrawn?

[196] The consent to the application was given on 6 March 1996, the hearing before the Commissioner commenced on 13 May 1996 at Alice Springs . After hearing submissions the Commissioner ruled, on 15 May, that the consent was effective for the purposes of s 50(2C) of the Act. The following day the hearing resumed at Alcoota Station.

[197] On that same day a meeting of the committee of the Corporation was called for 20 May. Whether that meeting was validly convened is in dispute, but the committee met and resolved to withdraw the consent. The Commissioner ruled that the consent remained effective notwithstanding the resolution of 20 May.

[198] A notice convened the meeting at 10am on 20 May 1996 at Engawala Community Office, a place on Alcoota Station. The purpose of the meeting, inter alia, was to consider:

> "Whether the committee considers that the consent to the CLC land claim was properly given and if not, to consider whether or not the committee should rectify or withdraw the consent."

The notice was dated 16 May and was signed by Paddy Webb, Alby Tilmouth and Turner.

[199] Three of the committee members, Lindsay Bird, David Ross and Barbara Cox did not attend the meeting, and it is put on behalf of the Council that proper notice of the meeting was not given, in the sense that the time at which it was proposed to be held was unreasonable bearing in mind the position of those three committee members as claimants in the application.

[200] A letter composed by Avery, addressed to Turner, signed by the three committee member claimants and others, complained that the notices were not as required by the Rules of the Association because of a number of circumstances, including that they were handed out at the start of the land claim hearing, and Turner was aware that a number of committee members would not be able to come to a committee meeting on the day appointed because of prior commitments to attend the land claim and give evidence before the Commissioner. The letter goes on to put forward arguments as to why the proposed motion to withdraw the consent should not be passed. No alternative date, time or place was proposed.

[201] The minutes of the committee meeting disclose that it was attended by all members of the committee, other than the three claimants, and an interpreter together with senior counsel for the plaintiffs and solicitor instructing him.

[202] The letter referred to above was read to the meeting in Aboriginal language by the interpreter, and the minutes disclose that the discussion which ensued

related to circumstances surrounding the meeting and resolutions following which the consent was given. No reference is made in those minutes to any discussion regarding whether the committee meeting should proceed in the absence of the other three members.

[203] The minutes disclose that:

> "After all this discussion the committee decided by consensus to sign a document under the seal of the Corporation to say that:
>
> 1. The so called consent dated 6 March 1996 was not a proper consent of the Corporation.
>
> 2. If the so called consent dated 6 March 1996 was a proper consent of the Corporation, it is hereby withdrawn.
>
> 3. The Corporation does not consent to a land claim dated 18 March 1993 lodged by the Central Land Council."

[204] The minutes deal with other incidental matters. Although the commencement time of the meeting is not recorded, it is noted that it did not conclude until 1.05pm. The resolutions of the committee were prepared in writing, as directed by it, the seal of the Corporation was affixed and countersigned by the nine members of the committee present at the meeting.

[205] The two issues which arise are (a) whether the resolution of the committee validly withdrew the consent previously given, and (b) is the Commissioner deprived of jurisdiction to continue a hearing where a consent given pursuant to s 50(2C) is withdrawn.

[206] There is nothing in the ATSIC Act or the Rules of the Corporation relating to the convening of a meeting of the committee beyond the requirement of r 13.1. It provided that the committee shall meet for business as often as is necessary and at least once every three months, "at such time and place as it may fix provided due notice has been given to all committee members". What is due notice falls to be considered by application of the common law, a subject dealt with extensively by Wells J in *Myer Queenstown Garden Plaza Pty Ltd & Anor v Corporation of the City of Port Adelaide and the Attorney-General* (1975) 11 SASR 504 at p 527 and p 528. From the rules referred to by his Honour I extract the following which are of particular application to the circumstances of this case:

1. Where a meeting of a governing body has been convened in breach of rules with respect to the giving of notice in due time the meeting is null and void to all intents and purposes and no business can be validly transacted at the meeting.

2. It is immaterial to the requirement of notice that the member has expressed an intention not to attend or would almost inevitably be outvoted if he did:

> "A member who has expressed an intention not to attend, may change his mind (especially where he is concerned about the matters to be discussed). He may appear likely to be in the minority at the proposed meeting, but his powers of debate and reasoning may produce a change of opinion in others".

3. A notice is not a proper summons to a meeting unless it is received at a time that affords the member a reasonable opportunity of reaching the place of the meeting at or before its commencement, and of adequately preparing himself for the business to be transacted.

[207] Cases such as *Winter v McAdam & Ors* (1957) 1 FLR 211 and *Campbell & Ors v Higgins & Ors* (1957) 3 FLR 317, and others to which reference was made on behalf of the defendants, turned on adequacy of the period of notice. That does not arise in this case. The objection here is as to the time fixed for the meeting to take place.

[208] More to the point was the decision of Young J in *Smith v Sadler* (1997) 25 ASCR 672 to do with the calling of an Annual General Meeting of a Corporation and thus the rights of owners of stock in the Corporation. It was there held that holding such a meeting at a time and place where members were unlikely to be able to attend is tantamount to not holding a meeting at all (per Von Doussa J in *Coombs v Dynasty Pty Ltd* (1994) 14 ASCR 60 at p 93.) The case was related to the fiduciary duty of directors. Speaking in that context, Young J held at p 674 that:

> "… it is ordinarily a fraud on the power to convene a meeting at a time or place when or where at least one member can not lawfully attend. Obviously this proposition does not apply where a member is in gaol or overseas or merely finds it inconvenient to attend at the specified time and place."

As to the question of fixing of a time and place of a meeting said to be unreasonable, see *Howard and Others v Mechtler and Others* (1999) 30 ASCR 434.

[209] There was no evidence from anyone concerning the making of the decision to hold the meeting at the time and place specified. It is possible it may have been dictated by circumstances that have not been brought to the attention of the court. The court is invited to infer, however, that it was fixed in the knowledge that those who challenge its validity would not be able to attend or, would choose not to attend, because of their commitments to the hearing of the land claim then proceeding. Although the defendants' submissions talk about the remoteness of the places on Alcoota where the land claims were being heard, the evidence is that the objectors could have attended the place of meeting at the time fixed by travelling about 18 kilometres. That would create no insurmountable difficulty.

[210] There is no evidence as to why the three objectors chose to remain away from the committee meeting, apart from the fact that the land claim hearing was in progress. A programme, flexible as it may have been, had been fixed for the conduct of that hearing at various places on Alcoota Station over a period of days including that chosen for the committee meeting. The objectors conveyed their views about the holding of the meeting, at the time and place appointed, by the letter of 19 May, which each of them signed, referring to their commitments to attend the land claim and give evidence

before the Commissioner. The surrounding evidence before this Court does not support that contention.

[211] For the plaintiffs, it is put that because the land claim hearing was proceeding at great expense and the withdrawal of consent would probably affect the continuation of the hearing, it was urgent for the committee to decide the matter as soon as possible. I do not accept that those contentions required the meeting to be held at the time it was held. It could have been held at a time outside the time during which the hearing was likely to take place. Although it is true that there is evidence that the three objectors could have been taken to the meeting had they wanted to attend, the evidence contained in the letter signed by them was that they did not want to attend. They say they had other commitments which overrode their responsibility as committee members.

[212] The evidence of Avery, who appeared as counsel for the applicants on the hearing of the application, is that he would not have anticipated it would have been necessary for Mr Bird to give evidence on 20 May. As to Mr Ross, Avery's evidence was that he was not required to give evidence on 20 May, although he would have expected him to be present because of an interest in country immediately adjacent to that. Barbara Cox, according to Avery, was an employee of the Council who was driving people around. There is no evidence of anything done by any of the three objectors with a view to ensuring that the attendance of any of them at the committee

meeting would not be prejudicial to any interest they claimed to have or may have had in the enquiry being conducted by the Commissioner.

[213] On balance, I am of the view that the Committee meeting was validly convened. The three objectors could have attended. They apparently decided not to do so, but I do not find that they were unable to attend the committee meeting because of the competing interest which they advanced. I am not satisfied that the committee meeting was convened by Turner in the knowledge that the three objectors could not attend.

[214] I find the committee meeting of 16 May 1996 was validly convened.

Did the resolution of the committee deprive the Commissioner of jurisdiction to continue with the enquiry?

[215] This question is answered, I consider, by reference to the terms of the statute. The terms of s 50(2C) do not operate, on their face, so as to confer upon the Commissioner a jurisdiction to perform, or continue to perform, his functions under s 50(1)(a) dependent upon the alternating views of Aboriginals who hold an estate or interest in land, the subject of the enquiry.

[216] In the *New South Wales Trotting Club Limited v The Council of the Municipality of The Glebe* (1937) 37 SR NSW 288 at pp 305-306 Jordan CJ (in dissent in the result) reviewed the principles relating to whether a consent once given can be retracted. Amongst those principles, all of which depended upon the circumstances of the particular case, was that described by his Honour in the following terms:

> "Where the necessity to obtain the consent of some person in order to validate an act arises from the fact that the person's ordinary legal rights would be infringed if the act were done without his consent, any consent given by him may be retracted at any time before something has occurred to make it irrevocable. This may occur where, for example, there has been a binding agreement not to revoke the consent, or where the consent has been acted on."

[217] I consider that that statement of principle covers the circumstances in this case. The purpose of s 50(2C) is to enable an application under s 50(1)(a) in respect of land in relation to which Aboriginals hold an estate or interest to be investigated by the Commissioner. It can not be said that their ordinary legal rights "*would* be infringed", but they could be, depending upon the outcome of the enquiry, the Commissioner's report to the Minister and the Minister's decision thereon.

[218] The Commissioner's report is required to include his comments about detriment to persons or communities, including other Aboriginal groups, that might result if the claim were acceded to either in whole or in part (s 50(3)(b)). I see no reason why Aboriginals having an estate or interest in land subject to an application should not consent to the application being made, but nevertheless advance a case in opposition to the merits of the claim, or based upon detriment. It might not have been recognised and understood by them prior to giving consent or there may have been a change of heart thereafter. The giving of consent to the making of an application does not amount to a consent to the merits of the application or end the matter so far as the functions of the Commissioner are concerned nor the responsibilities of the Minister. It is notorious that the process of such

applications may take many years and there may be changes in circumstances in the period between the time at which the application is made and the Minister making his recommendation to the Governor General. In my opinion, the giving of consent, not a statutory power, enables the Commissioner to perform or continue to perform his functions in the circumstances prescribed.

[219] I see no reason why Aboriginals having an estate or interest in land, the subject of a land claim, by consenting to the land claim should thereby have abandoned all rights which are available to them, or any of them, under the terms of the Act.

[220] In the circumstances of this case, there is the added factor that the Commissioner embarked upon the performance of his functions after the consent was given.

[221] In coming to this view I have not been assisted by the many cases referred to relating to the power of an administrative body established by statute to reopen or reconsider a substantive decision it had made of matters dealt with in the context of judicial review of administrative actions. I am, however, assisted by s 67A(5) of the Land Rights Act which makes exhaustive provision for the final disposition of traditional land claims. It does not include a situation where a consent once given has been withdrawn.

[222] The plaintiffs have relied heavily in this issue upon the question of what is encompassed by Chief Justice Jordan when referring to “where the consent

has been acted on" as a factor which may make it irrevocable. In that regard the plaintiffs have referred to *Walton Stores (Interstate) Limited v Maher and Anor* (1988) 164 CLR 387 per Brennan J at p 428-429 in regard to equitable estoppel. I do not equate the question which arises for decision under the Land Rights Act with the elements of equitable estoppel. Nor do I think that cases to do with the withdrawal of parties from proceedings before a tribunal or court are persuasive. For example see *Re Isherwood* (1991) 1 Qd R 13, *Lange v Croxton and Others* (1952) SASR 91 and *Re Queensland Nickel Management v Great Barrier Reef Marine Park Authority* (1992) 28 ALD 368.

[223] I am assisted by the view taken by the High Court in *The Queen v Kearney and Anor ex parte Northern Land Council* (1984) 158 CLR 365, where it was held that the Commissioner retained jurisdiction where the land answered the required description at the time the application was made, but the description changed thereafter. See also *The Queen v Kearney ex parte Japanangka* (1984) 158 CLR 395.

[224] The Council has raised the question as to whether the resolutions at the meeting were valid, given the object of the Corporation and the responsibilities of the committee. They also point to r 7.3 which provides that the, "Association shall not revoke any land claim lodged by or on behalf of the traditional owners over land to which it holds title without the consent of the Central Land Council". There may be many reasons why whose who give a consent may wish to withdraw it. There may be argument about

whether any such reason is a good one or not, but the possibility of a change of mind remains. Such a change of attitude may not necessarily operate contrary to the objects of the Corporation. It has not been established in this case that it does so.

[225] Rule 7.3 poses its own problems in this context. It is not elegantly expressed, but on its face it does not go to the withdrawal of consent. Assuming it does, however, it seems a little odd that the Association should be restrained in taking that course without the consent of the Council which acts on behalf of applicants, not the Corporation. The potential for conflict, as demonstrated in this case, is clear. I do not find it necessary to resolve this question. I have found that the committee meeting was called upon due notice and that the resolution did not have the effect of removing the jurisdiction from the Commissioner.

Beneficial Construction

[226] During the course of submissions each of the principal parties have contended that the construction of the Act relied upon by the other would in some cases lead to absurdity. Such a possible result can be properly avoided by construing the legislation beneficially in favour of the person for whose benefit it was enacted. It so far as it has been necessary to do so, I have adopted that approach (*Jungarrayi and Others v Olney and Anor* (1992) 34 FCR 496 at 506 and per Gibbs J in *The Queen v Kearney ex parte Jurlana* (1984) 158 CLR 426 at 473). (See above [29]).

Remedies sought

[227] There are two parts to these proceedings. The first being an action in which the plaintiffs seek declarations against one or more of the defendants.

[228] The declarations sought are as follows:

1. at and from 18 March 1993 ATSIC held an estate or interest in the land as an equitable mortgagee;

2. at and from 18 March 1993 the Coppocks held an estate or interest in the land;

3. in the premises, the land was alienated Crown Land, in which estates or interests not held by the Crown was held by ATSIC or the Coppocks and was therefore not available for claim pursuant to the provisions of the Act;

4. in the alternative to the above, the land was alienated Crown land in which all estates and interests not held by the Crown were held by the Corporation and was therefore not available for claim pursuant to the provisions of the Act;

5. in the alternative, if the land was available for claim pursuant to the provisions of the Act on 18 March 1993, the prior written consent of the Corporation was required before a valid claim could be lodged with the Commissioner;

6. further in the alternative, the Corporation had not given its prior written consent to the making of the land claim;

7. further in the alternative, the land claim was not a valid land claim pursuant to the provisions of the Act;

8. further in the alternative, the land claim is not an application to which s 67A(2) of the Act applies.

9. Against the Council and the fourth defendants:

an order that they forthwith take all steps and do all things necessary to withdraw the land claim.

10. In relation to the Council and the fourth defendants:

(a) the 1996 Annual General Meeting was not a valid Annual General Meeting of the Corporation

(i) in the alternative, no resolution was passed or validly passed at the 1996 Annual General Meeting to the effect that the Corporation consented to the land claim;

(ii) in the alternative, Marshall did not execute or purport to execute the consent as Administrator of the Corporation;

(iii) in the alternative, Turner and Dick Purvis did not have the power on 6 March 1996 to execute the consent as committee

members of the Corporation and affix the seal of the Corporation to the consent.

11. further, the consent was void ab initio;

12. in the alternative, the consent was voided by the 20 May resolutions;

13. in the alternative, the consent is void.

14. An order prohibiting the Commissioner from performing or continuing to perform any function in relation to the land claim;

15. Against the Commissioner: declarations setting aside the first rulings and/or the second rulings;

16. Against all defendants: costs and such further or other relief or orders as the Court may consider appropriate.

[229] The jurisdiction of this Court in relation to declarations is to be found in s 18 of the Supreme Court Act which provides that the court may, in relation to any matter in which it has jurisdiction, make binding declarations of right, whether or not any consequential relief is or could be claimed. A proceeding is not open to objection on the ground that a declaratory order only is sought.

[230] I do not take that statutory power to have modified the inherent power of superior courts to grant such relief. Mason CJ, Dawson, Toohey and Gaudron JJ in *Ainsworth and Anor v Criminal Justice Commission* (1992)

175 CLR 564 at 581 confirmed the discretionary power which in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437 by Gibbs J said it is "neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise". The Court went on at 582:

> "However, it is confined by considerations which mark out the jurisdiction of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have a real interest and relief will not be granted if the question is purely hypothetical, if relief is claimed in relation to circumstances that [have] not occurred and might never happen or if the Court's declaration will produce no foreseeable consequences for the parties" (citations omitted).

[231] I am satisfied that in this case the conditions precedent to consideration of the exercise of the power have been established. I decline to make the declarations sought in numbered paragraphs 1 to 8 and refuse the order sought in par 9. As to par 10, I refuse to declare that the Annual General Meeting was not a valid Annual General Meeting of the Corporation. It is unnecessary to make any declaration in relation to par 10(a)(i). The declaration sought in par 10(a)(ii) is refused. There will be a declaration in terms sought in par 10(a)(iii). The declaration sought in par 11 is refused. The import of the declaration sought in par 12 is unclear, but if it was intended to import that the Commissioner was deprived of jurisdiction to continue the hearing as a consequence of the resolutions passed on 20 May, I decline to make a declaration. The declaration sought in par 13 is refused.

[232] The other part of the proceedings leads to requests for relief by way of an order prohibiting the Commissioner from performing or continuing to perform any function in relation to the land claim and a declaration setting aside the ruling or rulings which he has made.

[233] In marked contrast to the position in the States, the Northern Territory has been invested with jurisdiction under the Judiciary Act (Cwth), s 67C(b) to grant writs of mandamus or prohibition or an injunction against the Commonwealth or an officer of the Commonwealth in matters arising in, or under the laws in force in the Northern Territory. A like power is also to be found in s 14(1)(d) of the Supreme Court Act and in both cases comprise a re-enactment of a power the Supreme Court has possessed since the enactment of the Northern Territory Supreme Court Act 1961 (Cwth), s 15(1)(c).

[234] The introduction of s 67C into the Judiciary Act can be seen in the light of the contemporaneous enactment of the Northern Territory Supreme Court (Repealed) Act (Cwth) and the enactment by the Territory parliament of the Supreme Court Act 1979. That latter Act, similar to the repealed Act, contained the provision conferring jurisdiction over an officer of the Commonwealth. In my opinion it is not necessary to decide whether this Court's jurisdiction in respect of an officer of the Commonwealth arises under the Commonwealth or Territory statute or both. Recent cases such as *Northern Territory of Australia v GPAO and Others* (1999) 196 CLR 553

indicate that the legislative power of the Commonwealth under s 122 of the Constitution supports the Judiciary Act provision.

[235] The Australian Law Reform Commission in its Discussion Paper 64 "The Judicial Power of the Commonwealth" observed that:

> "The power to grant writs of mandamus or prohibition was clearly appropriate prior to Self Government, when Commonwealth officials undertook the administration of the Territory. Although there remain significant numbers of Commonwealth officers in the Territory after Self Government, the bulk of the administration is now carried out by officers of the Territory.

The Commission went on to assert that that raised questions about the continued relevance or appropriateness of s 67C(d). In my opinion the power remains and is available to be exercised in the circumstances of this case, the Commissioner being an officer of the Commonwealth.

The Commissioner's rulings

[236] In his first rulings the Commissioner dealt with submissions made on behalf of the plaintiff, Turner. That was done by letter from Turner's solicitors in which it was asserted that Turner and other Aboriginals, having an estate or interest in the land, did not consent to the land claim being lodged and do not consent to it being heard. The estate or interests were said to arise under statute, at common law and/or in equity. Further, it was said that instructions had been received that any consent allegedly given by the Corporation was not properly obtained and was invalid, but, even if it were valid, it was not sufficient for the purposes of s 50(2C) of the Land Rights

Act. It was submitted that his Honour did not have jurisdiction to proceed to hear and determine the claim. It was acknowledged by the solicitor that the Commissioner would be expected to require Turner to expand upon the nature and extent of the estate or interests to which reference was made. The Commissioner accepted the request that the hearing be convened in Alice Springs to deal with those matters, and after hearing submissions from interested parties, his Honour identified two issues. That first, whether there were persons other than the Crown and the Corporation who had an estate or interest in the land claim, and the second, has the Corporation consented in writing to the making of the application.

[237] As to the first issue, the Commissioner identified two classes of interest in dispute. The first being native title rights and interests asserted by Turner under traditional law and custom. It was also put that those persons had statutory interests in the land by virtue of reservation in the pastoral lease in favour of the Aboriginal inhabitants. His Honour rejected those propositions for detailed reasons he gave. His rulings in that regard are not pursued here. It was also put that the Corporation held the pastoral lease in trust for its members who thereby acquired equitable estates or interests in the land claimed, but counsel for Turner conceded that even if such a trust existed, then the consent of the body holding the estate or interest on behalf of the Aboriginal persons concerned is the consent required by s 50(2C).

[238] The Commissioner identified the remaining issue then arising before him as to whether the Corporation had consented in writing to the making of the

application. He had before him the consent document which he described by reference to the common seal, the signatures thereto and the signature of Marshall. The Commissioner said that in those circumstances he would ordinarily be entitled to accept that the Corporation had consented to the making of the application by reason of the indoor management rule in *Royal British Bank v Turquand* (1856) 6 E&B 327, which would excuse him from enquiring as to whether all necessary formalities associated with the affixing of the common seal had been carried out. In that regard reference was also made to s 46(4) of the Aboriginal Councils and Associations Act.

[239] His Honour then passed to consider the evidence before him, which was not before this Court, in the form of affidavits from Turner and others. The Commissioner dealt with the history leading up to the convening of the meetings for the members of the Corporation and the Committee leading to the execution of the consent document on 6 March 1996. Having reviewed the factual material before him, which did not include the material before this Court going to the signing of the consent document by Marshall, the Commissioner concluded that Marshall remained Administrator until 8 March 1996, was responsible for the conduct of the affairs of the Corporation, and that responsibility carried with it the power to affix the common seal to the document expressing the consent of the Corporation to the application. In my opinion, with respect, the Commissioner did not err in so finding. The Commissioner went on to find that the fact that the Administrator took steps to involve the members in the process which led to

the giving of the consent did not derogate from the power of the Administrator to bring about the giving of that consent on his own, observing that it was no doubt prudent of him to satisfy himself that he was doing what the members, and the incoming governing committee, then wanted. The Commissioner held that the signature of the Administrator beneath the common seal of the Corporation on the document dated 6 March 1996 was sufficient to evidence the consent in writing of the Corporation to the making of the application. Upon the basis of the evidence then available to the Commissioner, I would not disagree with his conclusion.

[240] The Commissioner then turned to the evidence of Turner and others which called in question his own understanding of the nature and purpose of the document he was signing, and, having considered the issue, held that no ground existed for holding that the consent was invalidated on the basis of what Turner had to say. It was in those circumstances that the Commissioner held that:

(a) the land the subject of pastoral lease no 1032 is alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginal people;

(b) that the only estate or interest so held is the interest of the Alcoota Aboriginal Corporation in pastoral lease no 1032; and

(c) that the Alcoota Aboriginal Corporation has consented in writing to the making of the application in the Alcoota Land Claim no 146.

[241] The second ruling was made on 22 May 1996 when legal advisers for Turner presented the resolution of the committee of 20 May 1996 under the common seal of the Corporation. It was then submitted that as a consequence of that document the Commissioner was unable to proceed by reason of the operation of s 50(2C) of the Land Rights Act because any consent which may have been previously given had been withdrawn. The Commissioner rejected the submission for detailed reasons which he then gave including reference to what fell from Jordan CJ in *The New South Wales Trotting Club Limited v The Council of the Municipality of The Glebe* (1937) 37 SR NSW 288 at p 305 and p306. The Commissioner concluded that a consent once given could not effectively be retracted. He also made rulings on other matters raised by the plaintiff, Turner and the Corporation, which was then also represented before him in the same camp, with regard to the conduct of the hearing upon the land, the subject of the claim, and rejected those submissions which are no longer in dispute.

[242] I have agreed with par (a) of the first ruling made by his Honour, as to (b), further evidence before me has raised the question of other estates and interests, but in the end I have agreed with the ruling made by his Honour, and as to (c), I have also agreed with his Honour's ruling, albeit it upon different grounds.

[243] In the second ruling his Honour ruled:

(a) that a consent once given can not effectively be retracted, and

(b) that the document to which the common seal of the Corporation was affixed on 21 May 1996 had no effect in relation to the consent in writing referred to earlier.

I find that his Honour made no error in the decisions to which he came in either of those issues upon the material then before him.

[244] I refuse to grant any relief against the Commissioner.

[245] I will hear the parties as to costs.
