# Native title

## Topic overview

- **Traditional relationship with land:** Aboriginal and Torres Strait Islander peoples held rights and interests in land under traditional law before colonisation.
- **Different juridical systems:** Traditional-law relationships with country differ from Anglo-Australian land ownership, which is primarily framed in economic and proprietary terms.
- **Effect of colonisation:** The imposition of British law did not itself divest Aboriginal or Torres Strait Islander peoples of all rights in land under traditional law.
- **Common-law recognition:** *Mabo v Queensland (No 2)* established that continuing traditional rights and interests could be recognised by the common law as native title.
- **Persistence independent of recognition:** The relationship between Indigenous peoples and country persisted whether or not Anglo-Australian law recognised native title.
- **Legislative response:** The **Native Title Act 1993 (Cth)** was the Keating Government's response to *Mabo v Queensland (No 2)* and commenced on 1 January 1994.
- **Recognition and protection:** The **Native Title Act 1993 (Cth)** recognises and protects native title and establishes regimes for validation, extinguishment, determinations and compensation.
- **Validation:** The Act validates specified grants made contrary to the **Racial Discrimination Act 1975 (Cth)** and prescribes their consequences for native title.
- **Determinations:** A determination must identify the persons or group holding native title and the nature and extent of the native title rights and interests, including whether they are exclusive or non-exclusive.
- **Administration:** Claim groups must organise and incorporate through a prescribed body corporate to hold or manage determined native title.
- **Compensation:** Native title holders are entitled to just-terms compensation for relevant formerly invalid acts validated under the statutory regime.
- **Core provisions:** The principal provisions for this topic are **Native Title Act 1993 (Cth) Div 1 ss 10, 11 and 13**, **Pt 15 ss 223 and 225**, and **Div 2 Subdivs 2, 2A and 2B**.
- **Exam relevance:** Keep recognition, extinguishment and compensation analytically separate; each depends upon a distinct statutory or common-law inquiry.

## Recognition, traditional laws and customs, society and continuity

### *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422

- **Extract supplied:** [39]–[57] and [74]–[79] (Gleeson CJ, Gummow and Hayne JJ); [98]–[125] (Gaudron and Kirby JJ dissenting).

- **Source limitation:** The attachment's heading also refers to [80]–[89], but those paragraphs are not contained in the supplied text.

Facts and Procedural History

- **Claim:** Members of the Yorta Yorta Aboriginal community claimed native title over land and waters under the **Native Title Act 1993 (Cth)**.
- **Claim area:** The claimed land and waters were situated in northern Victoria and southern New South Wales and included parts of the Murray River: Gaudron and Kirby JJ at [98].
- **Primary determination:** Olney J determined that native title did not exist in the claim area: [98].
- **Full Court result:** A Full Federal Court majority comprising Branson and Katz JJ, with Black CJ dissenting, dismissed the appeal from Olney J: [98].
- **Traditional ancestors:** The claim relied upon descent from the Indigenous people who occupied the claim area before the Crown's assertion of sovereignty.
- **Occupation and dispossession:** It was not disputed that Aboriginal people occupied the claim area in 1788 and remained until dispossessed by European settlers: Gaudron and Kirby JJ at [99].
- **Descent findings:** Olney J found that Edward Walker and Kitty Atkinson/Cooper were born in the claim area around 1830 and descended from the original inhabitants.
    - Many members of the claimant group descended from them: [99].
- **Maloga mission:** Olney J traced the establishment of the Maloga mission in 1874 and accepted that it significantly disrupted traditional Aboriginal life.
    - The disruption included suppression of Indigenous languages and traditional practices.
- **Recorded ancestors:** Edward Walker and Kitty Atkinson/Cooper were recorded as having been at Maloga mission in 1877 and 1874 respectively.
- **1881 petition:** Forty-two Aboriginal people associated with Maloga, including a son of Edward Walker and descendants of Kitty Atkinson/Cooper, petitioned the Governor of New South Wales for land on which to cultivate and raise stock.
    - The petition stated that all land within their tribal boundaries had been taken and expressed a desire to adopt more settled agricultural practices.
- **Primary decision — Olney J:** His Honour concluded that, by 1881, the ancestors through whom the claimants asserted title were no longer in possession of their tribal lands and had ceased to observe the traditional laws and customs capable of supporting the claim.
- **"Tide of history" finding:** Olney J found that the evidence did not establish continued occupation or continuous acknowledgment and observance of the ancestors' traditional laws and customs.
    - His Honour stated that "the tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs".
- **Current practices:** Olney J regarded certain contemporary beliefs and practices as recent or not proved to form part of the laws and customs of the original inhabitants.

    - Reburial practices were treated as an example.
- **Full Court majority — Branson and Katz JJ:** Their Honours upheld Olney J's decision.
    - They understood him to have found that the relevant community had ceased before the end of the nineteenth century to exist as an identifiable traditional Indigenous community living under its laws and customs.

#### Exact Statutory Definition

- **Native Title Act 1993 (Cth) s 223(1):** Gaudron and Kirby JJ reproduced the definition at [100]: "native title" and "native title rights and interests" mean:
    - "the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:"
    - "(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and"
    - "(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and"
    - "(c) the rights and interests are recognised by the common law of Australia."

### Majority — Gleeson CJ, Gummow and Hayne JJ

#### Intersection of Normative Systems — [39]–[42]

- **Normative systems:** Description of traditional laws and customs as a normative "system" does not require the system to resemble a developed European body of written law: [39].
- **Caution about "system":** The expression may distract if it causes courts to impose assumptions derived from European written legal systems: [39].
- **Premise of Mabo (No 2):** Indigenous laws and customs constituted bodies of normative rules capable of creating rights and interests in land or waters: [40].
- **Premise of the Native Title Act:** Native title rights and interests can be possessed under traditional laws and customs: [40].
- **Different conceptions of property:** Traditional rights may not correspond with interests familiar to Anglo-Australian property lawyers.
    - They may embody a different conception of "property" or "belonging": [40].
- **Normative quality:** Differences from common-law property do not deprive Indigenous laws and customs of their normative character: [40].
- **Jurisprudential classifications:** It is unnecessary to force traditional laws and customs into distinctions between habitual behaviour, moral obligation and European legal rules: [41].
- **"Laws" and "customs":** The conjunction "and" in **s 223(1)(a)** removes any need to classify a particular norm exclusively as either traditional law or traditional custom: [42].
- **Required normative content:** The rules under which claimed rights and interests are possessed must have normative content.
    - Observable behaviour without normative force does not itself generate rights or interests in relation to land or waters: [42].

- **Exam relevance:** Identify the traditional norm that gives rise to each claimed right.
    - Evidence of repeated conduct is insufficient unless the conduct reflects a rule acknowledged or observed as normatively binding.

### Consequences of Sovereignty — [43]–[44]

- **Pre-sovereignty origin:** The relevant rights and interests originate in the normative system existing before the Crown's acquisition of sovereignty: [43].
- **No parallel law-making system:** After sovereignty, the former normative system could not operate as an independent source creating new rights enforceable by the Australian legal order: [43]–[44].
- **Existing rights preserved:** Sovereignty did not necessarily deny recognition of rights and interests already existing at sovereignty: [44].
- **Rules of transmission:** Traditional rules governing transmission of existing native title rights may continue to operate where the rights themselves remain recognised: [44].
- **Post-sovereignty development:** Alterations or developments may be recognised where they are of a kind contemplated by the traditional law and custom.
    - The parties accepted that "significant adaptations" could occur: [44].
- **Controlling limit:** Rights originating outside the sovereign legal order can be recognised only if rooted in pre-sovereignty law and custom: [44].
- **Exam relevance:** Distinguish permissible transmission or adaptation of pre-sovereignty rights from creation of new rights under a later normative system.

### Statutory Native Title Is Recognised, Not Created — [45]–[46], [74]–[77]

- **First construction question:** The Court asked whether the **Native Title Act 1993 (Cth)** created new rights called native title or provided for determination of rights rooted in pre-sovereignty law and custom: [45].
- **Accepted position:** Native title rights and interests find their origin in pre-sovereignty law and custom.
    - They are not creatures of the Act: [45].
- **Appellants' argument:** The claimants alleged that Olney J and the Full Court required positive proof of continuous acknowledgment and observance as an additional common-law requirement: [74].
- **Fundamental error:** It is wrong to speak of freestanding "common law requirements" for establishing native title: [75].
- **Mabo (No 2):** The case established that rights rooted in traditional law and custom could survive the Crown's acquisition of sovereignty and radical title: [75].
- **Recognition and protection:** The **Native Title Act 1993 (Cth) s 3(a)** has the object "to provide for the recognition and protection of native title": [76].
- **Protection from extinguishment:** Once recognised and protected under the Act, native title cannot be extinguished contrary to **s 11(1)**: [75].
- **Section 223(1)(c):** The common-law-recognition limb does not incorporate a pre-existing body of common-law elements defining native title.
    - Native title does not owe its origin to the common law: [76].

- **First function of recognition:** Common law may refuse recognition to rights or interests antithetical to its fundamental tenets: [77].
- **Second function of recognition: Section 223(1)(c)** reflects the intersection between legal systems at sovereignty.
    - The rights recognised are those existing at sovereignty, surviving the change in legal regime, and now enforceable through the new legal order: [77].
- **Exam relevance:** Apply the statutory definition rather than adding an independent common-law test.
    - Use common-law recognition to examine incompatibility and survival, not as the source of native title.

### Meaning of “Traditional” — [46]–[48], [78]–[79]

- **Transmission:** A traditional law or custom is ordinarily passed from generation to generation, often orally and through common practice: [46].
- **Historical origin:** “Traditional” also requires that the content originate in the normative rules of Aboriginal or Torres Strait Islander societies existing before sovereignty: [46].
- **Continuous existence and vitality:** The normative system under which the rights and interests are possessed must have continued in existence and vitality since sovereignty: [47].
- **Cessation:** If that normative system ceased to exist, rights dependent upon it also ceased.
    - Later revival of adherence cannot reconstitute the former traditional laws and customs for **s 223(1)**: [47].
- **Adaptation question:** The statutory inquiry must accommodate modification, adaptation and interruption without losing the required roots in pre-sovereignty tradition: [78].
- **Not merely oral transmission:** The word “traditional” is not confined to transmission by word of mouth.
    - It reflects the pre-sovereignty roots of the claimed rights and interests: [79].
- **Exam relevance:** Ask both whether the law or custom originated in the pre-sovereignty normative system and whether that system has maintained continuous existence and vitality.

### Society and Laws and Customs — [49]–[55]

- **Social derivation:** Laws and customs do not exist in a vacuum.
    - They arise from and help define a society: [49].
- **Meaning of society:** A society is a body of persons united in and by acknowledgment and observance of a body of laws and customs: [49].
- **Rights as creatures of social norms:** Rights and interests possessed under laws and customs are created by the norms of the society acknowledging and observing them: [50].
- **Cessation of society:** If the society ceases to exist as a group acknowledging and observing its laws and customs, those norms cease to have continued existence and vitality: [50].

- **Knowledge alone:** Preservation of knowledge about former laws and customs does not necessarily establish continuing acknowledgment and observance: [51]–[52].
- **Factual questions:** Courts must determine whether the society ceased, whether survival of knowledge shows continuity, and whether there was continuing acknowledgment or observance: [52].
- **Later adoption:** If a new society later adopts the content of former laws and customs, the norms owe their renewed force to the later society.
    - Rights arising from them are not rooted in the original pre-sovereignty normative system: [53].
- **Rule of recognition:** Any relevant traditional rule of recognition must be located in the social structures of the Indigenous society as those structures existed at sovereignty: [54].
- **Analytical caution:** European jurisprudential tools may be ill-suited to societies without developed written languages: [55].
- **Cardinal facts:** Laws, customs and the society acknowledging them are inextricably linked.
    - Only rights existing at sovereignty could survive the change in legal order: [55].
- **Exam relevance:** Do not demand an institutional structure resembling a European State.
    - The question is whether a body of people remained united through acknowledgment and observance of the relevant normative rules.

### Required Comparative Inquiry — [56]–[57]

- **Present practice insufficient:** A court cannot confine the inquiry to laws and customs currently observed: [56].
- **Connection alone insufficient:** A court cannot examine only the connection demonstrated by contemporary laws and customs: [56].
- **Required comparison:** The court must compare the currently acknowledged laws and observed customs with those existing before sovereignty: [56].
- **Societal continuity:** The comparison asks whether the present norms can be described as the laws and customs of the society whose laws and customs are traditional: [56].

### Majority Principle

- **Principle:** Native title rights and interests must be rooted in pre-sovereignty traditional laws and customs and possessed under a normative system that has maintained continuous existence and vitality since sovereignty.
- **Adaptation:** Traditional laws and customs may adapt, but the adaptation must remain connected to the continuing pre-sovereignty normative system.
- **Loss and revival:** Once acknowledgment and observance of the normative system cease, later revival or adoption cannot recreate native title under **s 223(1)**.

## Dissent — Gaudron and Kirby JJ

### Continuous-Present Operation of s 223 — [98]–[101]

- **Statutory focus:** Their Honours treated the text of **s 223(1)** as controlling rather than imposing requirements derived from general statements in *Mabo (No 2)*.
- **Continuous present:** The definition requires present acknowledgment of traditional laws, present observance of traditional customs, present connection under those laws and customs, and present common-law recognition: [101].
- **Continuity imported by "traditional":** Although the provision speaks in the present, the word "traditional" necessarily imports continuity with the past: [101].

### Olney J's Four Requirements — [102]–[104]

- **First requirement:** Claimants must descend from the Indigenous people who occupied the claim area before sovereignty: [102].
- **Second requirement:** Claimants must prove the nature and content of the traditional laws acknowledged and customs observed in relation to their traditional land: [102].
- **Third requirement:** Olney J required proof that the ancestors' traditional connection with the land had been substantially maintained since sovereignty: [102].
- **Fourth requirement:** The claimed rights and interests must be recognised by the common law: [102].
- **Acceptance of second requirement:** Because native title is created by traditional laws and customs, claimants must prove the rights' nature and content and show possession under traditional laws presently acknowledged and customs presently observed: [103].
- **No continuous exercise requirement: Section 223(1)(a)** does not require continuous exercise of the rights in relation to the land or even their present exercise: [103].
- **Error in third requirement: Section 223(1)(b)** requires present connection by the acknowledged laws and observed customs.
    - It does not expressly require that traditional connection have been substantially maintained since sovereignty: [104].
- **Spiritual connection:** The required connection need not be physical and does not demand continuing occupation.
    - Spiritual connection under traditional laws and customs falls within **s 223(1)(b)**: [104].

### Dispossession and the Primary Judge's Findings — [105]–[107]

- **Disruption:** European dispossession and the Maloga mission disrupted traditional Aboriginal life, language and practice: [105].
- **1881 evidence:** Olney J relied upon the petition for land and its statements about dispossession and altered living practices: [106].
- **Ultimate finding:** His Honour concluded that acknowledgment and observance of the original traditional laws and customs had ceased before the end of the nineteenth century: [106]–[107].

- **Dissent's concern:** The factual conclusion was reached through a legal framework requiring continuous occupation and substantial maintenance of traditional connection not found in **s 223(1)**.

### Full Court's Reliance on s 223(1)(c) — [108]–[111]

- **Full Court approach:** Branson and Katz JJ treated continuous existence of an identifiable traditional community as required by **s 223(1)(c)**: [108]–[109].
- **Source of native title:** Gaudron and Kirby JJ emphasised that native title owes its existence and incidents to traditional laws and customs.
    - Common law only recognises and protects it: [110].
- **Yarmirr test: Section 223(1)(c)** asks whether the common law is inconsistent with continued existence of rights originating under Aboriginal law or custom: [110].
- **Full Court error: Section 223(1)(c)** does not independently require continuous existence of a traditional community: [111].
- **Continuity remains relevant:** Continuity of community bears evidentially upon whether contemporary beliefs and practices constitute acknowledgment and observance of traditional laws and customs: [111].

### Adaptation of Traditional Laws and Customs — [112]–[116]

- **Ordinary meaning:** "Traditional" does not require rigid adherence to past practice.
    - It ordinarily describes something handed down from generation to generation, often orally: [112].
- **Effect of dispossession:** European settlement made many traditional practices impracticable.
    - The **Native Title Act 1993 (Cth) Preamble** acknowledges progressive dispossession: [113].
- **Permissible difference:** Laws and customs may remain traditional even where they do not correspond exactly with pre-European practices: [113].
- **Required origin:** Present laws and customs must originate in the past: [114].
- **Permissible change:** Differences may be adaptations, alterations, modifications or extensions made according to the shared values, customs and practices of the people acknowledging and observing them: [114].
- **Reburial practices:** Olney J should have considered whether contemporary reburial practices evolved from or adapted earlier practices.
    - The question was whether sufficient continuity with the past made them traditional under **s 223(1)(a)**: [115].
- **Organised society:** A society must be sufficiently organised and cohesive to sustain beliefs and practices with normative influence: [116].
- **Capacity to adapt:** Cohesion must also permit adaptation, alteration, modification or extension of rights and duties within the continuing traditional normative framework: [116].

### Continuity of Community — [117]–[119]

- **Ordinary inference:** Lack of community continuity may support a conclusion that current practices are not traditional or that traditional laws and customs are no longer acknowledged and observed: [117].
- **Not solely external:** Whether a community ceased cannot be decided only through external indicia or observations of outsiders: [117].
- **Internal identification:** The primary question is whether people throughout the relevant period identified themselves and one another as members of the community: [117].
- **No continuous physical presence:** Community continuity does not require physical presence in a particular place.
    - Communities may disperse and later regroup: [118].
- **Continuity through dispersal:** Individuals may continue acknowledging traditional laws and observing traditional customs while dispersed.
    - On regrouping, the community may still possess continuity: [118].
- **Unanswered questions:** Neither the Full Court majority nor Olney J properly determined whether persons of Aboriginal descent continuously identified themselves and others as Yorta Yorta people united by ancestry, shared beliefs and practices: [119].

### Connection and Error of Law — [120]–[124]

- **Section 223(1)(a) consequence:** A supported factual finding that real acknowledgment and observance had ceased would prevent native title from existing: [120].
- **Context of finding:** Olney J's "tide of history" conclusion focused on continued utilisation or occupation of land and waters: [121]–[122].
- **Incorrect requirement:** His Honour required substantial maintenance of traditional connection since sovereignty: [122].
- **Actual statutory requirements: Section 223(1)(a)–(b)** requires present acknowledgment and observance of traditional laws and customs under which claimants possess rights and interests and have connection with the claimed land or waters: [123].
- **No substantial-maintenance element:** The statutory definition does not require proof that traditional connection has been substantially maintained throughout the period since sovereignty: [123].
- **Material error:** The additional requirement affected the reasoning leading to the "tide of history" finding and therefore constituted an error of law: [123].
- **Correct question:** The inquiry is whether the Yorta Yorta people now acknowledge and observe traditional laws and customs by which they have connection with the claimed land and waters: [124].

### Dissenting Outcome — [125]

- **Orders proposed:** Gaudron and Kirby JJ would have allowed the appeal with costs, set aside the Full Court's order and allowed the appeal to that Court.
- **Remittal:** Their Honours would have remitted the matter to Olney J for redetermination according to their reasons.
- **First-instance costs:** Costs at first instance would abide the outcome of the further determination.

### Dissenting Principle

- **Principle: Section 223(1)** requires present acknowledgment and observance of traditional laws and customs and present connection by those laws and customs, but does not impose a separate requirement of continuous physical occupation or substantially maintained traditional connection since sovereignty.
- **Continuity:** Continuity remains relevant to whether present laws and customs are genuinely traditional, but it is not an independent element supplied by **s 223(1)(c)**.
- **Adaptation:** Laws and customs may remain traditional where change is an adaptation, alteration, modification or extension grounded in the group's shared traditional values and practices.

### Majority and Dissent Compared

| **Issue** | **Gleeson CJ, Gummow and Hayne JJ** | **Gaudron and Kirby JJ** |
|---|---|---|
| Source of native title | Pre-sovereignty traditional laws and customs, recognised rather than created by the Act | Traditional laws and customs; common law recognises and protects rather than creates |
| Meaning of "traditional" | Pre-sovereignty origin plus continuous existence and vitality of the normative system | Past origin and generational transmission; permits adaptations grounded in shared values and practices |
| Role of society | Laws and customs cannot continue without a society united through acknowledgment and observance | Community continuity is evidentially important but not a separate statutory element |
| Interruption | Cessation of the normative system cannot be cured by later revival | Dispersal does not necessarily terminate the community; acknowledgment and observance may continue through individuals |
| Connection | Present connection must arise under currently acknowledged traditional laws and observed customs rooted in the continuing system | Present connection under traditional laws and customs is required; continuous occupation and substantial maintenance since sovereignty are not |

| **Issue** | **Gleeson CJ, Gummow and Hayne JJ** | **Gaudron and Kirby JJ** |
|---|---|---|
| Section 223(1)(c) | Recognition concerns survival through the change in sovereignty and compatibility with fundamental common-law tenets | Recognition concerns whether common law is inconsistent with continued existence; it does not impose continuous community as an element |
| Result on supplied reasoning | Majority approach imposed the stricter continuity requirement | Appeal should be allowed and remitted because the primary judge applied an erroneous legal requirement |

### Exam Use

- **Step 1 — Identify the right:** State each claimed native title right or interest precisely.
- **Step 2 — Identify the normative source:** Prove the traditional law or custom under which the right or interest is possessed.
- **Step 3 — Pre-sovereignty roots:** Show that the law or custom originates in the normative system existing before sovereignty.
- **Step 4 — Present acknowledgment and observance:** Establish that the relevant laws are presently acknowledged and customs presently observed.
- **Step 5 — Continuity:** Under the majority, determine whether the normative system has maintained continuous existence and vitality since sovereignty.
    - Distinguish permissible adaptation from cessation followed by revival.
- **Step 6 — Society:** Identify the society united through acknowledgment and observance of the normative rules.
    - Do not demand European governmental or written-law structures.
- **Step 7 — Connection:** Prove present connection with the claimed land or waters "by those laws and customs" under **s 223(1)(b)**.
- **Step 8 — Common-law recognition:** Ask whether the claimed right survived extinguishment and is compatible with fundamental common-law principles under **s 223(1)(c)**.
- **Exam warning:** Do not describe native title as created by common law or by the **Native Title Act 1993 (Cth)**.
- **Exam warning:** Do not equate connection with continuous physical occupation.
- **Exam warning:** Do not assume that any cultural revival establishes continuity.
    - The majority requires continued existence and vitality of the relevant normative system.
- **Exam warning:** Separate the binding majority from Gaudron and Kirby JJ's dissent.

# Statutory pastoral leases and exclusive possession

## *Wilson v Anderson* [2002] HCA 29; 213 CLR 401

- **Extract supplied:** [18]–[20] (Gleeson CJ); [109]–[119] (Gaudron, Gummow and Hayne JJ); [163]–[168] (Kirby J); [200]–[205] (Callinan J, with McHugh J agreeing).
- **Central issue:** Whether a statutory "lease in perpetuity" granted under the **Western Lands Act** conferred exclusive possession and therefore constituted a "previous exclusive possession act" extinguishing native title under the **Native Title Act 1993 (Cth)**.

### Material Features of the Lease

- **Statutory source:** The interest was granted under **Western Lands Act s 23(1)(a)** and described as a "lease in perpetuity".
- **Purpose:** The legislative tenure was designed to strengthen settlers' position in the Western District and provide an asset capable of attracting and maintaining finance: Gaudron, Gummow and Hayne JJ at [110].
- **Duration:** The tenure was intended to last "for ever", like freehold, while continued retention remained conditional upon performance of statutory and grant obligations: [112].
- **Residence:** Clause 2 required residence upon the leased land: [113].
- **Grazing:** Clauses 3 and 4 regulated use of the land for grazing stock.
    - Clause 4 stated that "the Lessee will not use or permit to be used the said land for any purpose other than grazing": Gaudron, Gummow and Hayne JJ at [113]; Kirby J at [166].
- **Alienation restrictions:** Clause 14 prohibited transfer, conveyance, assignment, subletting or mortgage without the Minister's written consent: [113].
- **Initial transfer restriction:** Clause 20 restricted transfer, except by mortgage, for ten years after commencement subject to an exception for certain members of the armed forces: [113].
- **Reservations:** The lease permitted proclamation of travelling stock routes, camping places and other reserves without compensation and allowed withdrawal of land for those reserves: [114].
- **Public purposes:** Clause 23(d) subjected the lease to withdrawal of land for public purposes specified in the applicable Crown lands legislation: [114].
- **Land-management obligations:** The lessee had duties concerning fencing, vermin destruction, improvements and stocking levels: [114].
- **Authorised entry:** The lessee had to permit entry to inspect improvements, search for and remove minerals, and undertake soil-conservation and erosion-mitigation functions: [114].

## Gleeson CJ — [18]–[20]

### Statutory Lease Incidents

- **Earlier authority:** *Minister for Lands and Forests v McPherson* concerned whether a perpetual statutory lessee could obtain equitable relief against forfeiture: [18].
- **Self-contained-code argument:** It was argued that the statutory scheme was exhaustive and that every incident of the lease had to be found within the statute: [18].
- **Kirby P in McPherson:** A statutory interest called a lease is not necessarily confined to incidents expressly stated in the statute.
    - Kirby P said: "In the case of an interest called a 'lease', long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute": [18].
- **Continuing leasehold character:** Kirby P also said that, although the statutory leasehold had particular incidents, "it remained a 'leasehold'": [18].
- **Mahoney JA:** His Honour considered that rights described as a lease in the earlier 1884 legislation were essentially those given to a lessee under a common-law lease: [18].
- **Post-Wik caution:** Gleeson CJ held that general statements equating statutory and common-law leases must be approached cautiously after *Wik Peoples v Queensland*: [19].
- **Common-law supplementation:** A statutory lease's incidents need not be exhaustively defined by statute.
    - Common-law incidents may supplement the statute where consistent with the statutory scheme: [19].

### *Southern Centre of Theosophy Inc v South Australia*

- **Facts:** The case concerned a perpetual lease granted under South Australian Crown lands legislation.
    - About 20 acres were added beside an inland lake through soil and sand deposition, retreating water and wind-blown sand: [19].
- **Issue:** South Australia argued that the common-law doctrine of accretion could not apply to an interest created under a statutory land scheme.
- **Reasoning — Lord Wilberforce:** The Privy Council saw no reason why accretion should not apply to the statutory leasehold.
- **Principle:** Statutory creation does not necessarily exclude compatible common-law incidents.

### Application to the Western Lands Lease

- **Strong freehold affinity:** The history of New South Wales perpetual Crown leases demonstrated a strong affinity between those interests and freehold estates: [19].
- **Section 23 power: Western Lands Act s 23** authorised the Minister to grant Crown land as a lease in perpetuity or for a term: [20].
- **Extension: Section 18E** allowed a term lease to be extended into a lease in perpetuity: [20].

- **Permitted purposes:** Leases could concern land set apart for grazing under **s 19B**, or agriculture, combined agriculture and grazing, mixed farming or similar purposes under **s 19C**: [20].
- **Juristic character:** Gleeson CJ doubted that exclusive-possession characterisation would vary merely because a lease was perpetual rather than for a term or because the land was used for grazing, agriculture or mixed farming: [20].
- **Distinction from Wik:** The statutory possibilities demonstrated that the tenure was materially different from the Queensland pastoral leases considered in *Wik*: [20].
- **Principle:** Determine a statutory lease's incidents from the statute, grant and historical context, while allowing compatible common-law incidents where the legislation is not exhaustive.

### Gaudron, Gummow and Hayne JJ — [109]–[119]

#### Statutory and Historical Character

- **Creature of statute:** The lease in perpetuity was a statutory interest forming part of the special Crown-land regime: [109].
- **Legislative history:** Comparable perpetual tenures under the Consolidation Act predated their introduction into the **Western Lands Act** by the 1932 and 1934 legislation: [109].
- **Financing objective:** The purpose was to strengthen settlers' security and provide an asset attractive to financiers: [110].
- **Conditional Crown grants:** Colonial New South Wales had used freehold grants carrying annual quit-rents and conditions of residence and improvement enforceable by cancellation, revocation or determination of the fee simple: [111].
- **Policy tension:** Legislators sought to provide freehold-like security while retaining Crown controls needed to achieve settlement and development objectives: [111].
- **Common-law inspiration:** The statutory scheme used old tenurial concepts to create perpetual but conditional interests: [112].
- **Meaning of "lease":** The label indicated that continued retention depended upon compliance with tenurial incidents imposed to advance legislative land-development objectives: [112].

#### Conditions Consistent with Freehold

- **Determinable-fee analogy:** The lease's conditions and obligations were not inconsistent with a determinable fee simple: [115].
- **Forfeiture:** Forfeiture for non-payment of rent or breach of condition was equivalent to a right of re-entry for breach of a condition subsequent attached to a determinable fee simple: [115].
- **"Essence of a freehold":** The legislative tenure was intended to confer "all the advantages and essence of a freehold" except where statute provided otherwise: [116].
- **Exclusionary essence:** That freehold essence denied others enjoyment of rights or interests in the land.

    - For the **Native Title Act 1993 (Cth)**, it included a right of exclusive possession: [116].
- **Reservations:** Restrictions on alienation, official-entry rights and other controls were conditions attached to an interest substantively equivalent to freehold.
    - They did not negate the otherwise comprehensive grant or its right of exclusive possession: [118].
- **Distinction from Wik:** The Queensland pastoral leases lacked the historical and conveyancing background from which the NSW lease in perpetuity evolved as a substitute for a determinable fee simple: [117].

#### Native Title Act Classification and Extinguishment

- **No need to decide freehold classification:** Their Honours did not determine whether the interest was formally a "freehold estate" under the **Native Title Act 1993 (Cth)**: [119].
- **Statutory lease definition:** The grant was a "lease" under **Native Title Act 1993 (Cth) s 242**: [119].
- **Exclusive pastoral lease:** Its freehold essence and exclusive possession brought it within **s 23B(2)(c)(iv)** read with **s 248A** and within **s 23B(2)(c)(viii)**: [119].
- **State consequence: State Act s 20** mandated extinguishment of native title from the date of the lease grant: [119].
- **Outcome:** The lease was a previous exclusive possession act that completely extinguished native title.
- **Principle:** A statutory lease in perpetuity may confer exclusive possession where its history, purpose, terms and incidents reveal a freehold-like tenure, despite forfeiture provisions, alienation controls and reserved entry rights.

### Kirby J — [163]–[168]

#### No Right of Exclusive Possession

- **Conclusion:** Kirby J held that the lease did not confer exclusive possession and was not a previous exclusive possession act causing complete extinguishment: [163].
- **Wik analogy:** Nothing in the statute or grant totally excluded Indigenous inhabitants or conferred possession exclusive of rights derived from traditional title: [163].
- **Presumption:** The conclusion reflected the proper statutory meaning of exclusive possession and the applicable presumption against total exclusion: [163].
- **Separate questions:** The questions reserved for decision had not been framed with the operation of the **Native Title Act 1993 (Cth)** in mind: [164].

#### Previous Non-Exclusive Possession Act

- **No necessary total extinguishment:** Absence of exclusive possession meant native title rights involving presence on the land were not necessarily extinguished: [165].
- **Next statutory question:** The court then had to determine whether the lease was a "previous non-exclusive possession act": [165].
- **Possible consequence:** If it was, native title rights would be extinguished or suspended only to the extent of inconsistency with the leaseholder's rights: [165].

- **Non-exclusive pastoral lease:** The Act expressly recognises a non-exclusive pastoral lease as a previous non-exclusive possession act: [166].
- **Pastoral purpose:** A pastoral lease includes an interest permitting land to be used solely or primarily for maintaining or breeding livestock: [166].
- **Clause 4:** The lease's grazing restriction made it likely to fall within the statutory definition of a previous non-exclusive possession act: [166].

#### Inconsistency of Incidents

- **Required analysis:** The court had to determine the extent of inconsistency between the lease and each native title right claimed by Mr Anderson: [167].
- **Legal and factual incidents:** The inconsistency-of-incidents test required detailed examination of the legal and factual incidents of the competing interests: [167].
- **Partial consequences:** Only identified inconsistencies could establish extinguishment or suspension of particular native title rights.
- **Wik approach retained:** This painstaking right-by-right inquiry was required by *Wik* and preserved by the statutory regime for previous non-exclusive possession acts: [167]–[168].
- **Wilson's application:** Mr Wilson's attempt to establish total extinguishment without that detailed analysis had to fail: [168].
- **Kirby J's principle:** A statutory pastoral lease that does not expressly or necessarily confer total exclusion should be treated as non-exclusive, with native title affected only to the extent demonstrated by a right-by-right inconsistency analysis.

### Callinan J — McHugh J Agreeing — [200]–[205]

#### Forfeiture and Statutory Reversion

- **Wik legislation:** Gaudron J had characterised the Queensland forfeiture provision as creating a statutory reversion under which forfeited land returned to Crown land subject to radical title rather than beneficial Crown ownership: [200].
- **Inference in Wik:** Departure from common-law reversionary principles supported the conclusion that the Queensland pastoral lease did not confer exclusive possession: [200].
- **NSW distinction:** The NSW legislation had no corresponding statutory-reversion provision.
    - Forfeiture carried the incidents attending forfeiture of a common-law lease: [200].

#### Vesting and Reservations

- **Interesse termini:** The Queensland Acts in *Wik* provided for statutory vesting on grant rather than common-law vesting upon entry into possession: [201].
- **NSW position:** The NSW Act did not distinguish statutory pastoral leases from common-law leases in that way: [201].
- **Competing views in Wik:** Some majority judges treated extensive entry reservations as inconsistent with exclusive possession.

  - Brennan CJ, Dawson and McHugh JJ treated them as exceptions to an otherwise general right of exclusive possession: [202].
- **Preferred view:** Callinan J preferred Brennan CJ, Dawson and McHugh JJ's approach: [203].
- **Compatibility:** Extensive reservations of official and other entry rights are compatible with ordinary leaseholds and freehold titles: [203].
- **General application:** The statutory reservations applied to all leases granted under the relevant provision, including leases undoubtedly conferring exclusive possession: [203].

### Perpetual Duration

- **No negative inference:** Perpetual duration did not indicate absence of exclusive possession: [204].
- **Reversion:** Although a perpetual lease lacks the obvious reversion associated with an ordinary term lease, Dixon J in *Hawkins v Minister for Lands (NSW)* described the Crown's reversionary interest as "slight" and "technical": [204].
- **Adapted statutory lease:** Australian conditions could justify a special statutory lease adapted from the common-law form while retaining exclusive possession: [204].
- **Crown advantages:** Perpetual leasehold enabled greater control over land use and collection of rent rather than land tax or another tax: [204].
- **Anomaly avoided:** It would be anomalous if a perpetual lessee could not exclude others while a short-term lessee could: [204].
- **Conclusion:** The lease was distinguishable from those in *Wik* and conferred exclusive possession within the **Native Title Act 1993 (Cth)** and its State analogue: [205].
- **Principle:** Neither perpetual duration nor extensive reservations prevents exclusive possession where the statute and grant otherwise preserve the incidents of a common-law lease.

## Ratio and Result

- **Majority result:** The Court held that the statutory lease in perpetuity conferred exclusive possession and operated as a previous exclusive possession act extinguishing native title.
- **Controlling approach:** The tenure's character depended upon construction of the complete statutory and historical scheme rather than the label "lease" alone.
- **Freehold-like substance:** Conditions, forfeiture, alienation restrictions and reserved entry rights were compatible with an exclusive, freehold-like statutory tenure.
- **Kirby J dissent:** Kirby J would have classified the lease as non-exclusive and required a right-by-right inconsistency analysis.

## Comparison of Judicial Approaches

| **Issue** | **Gleeson CJ** | **Gaudron, Gummow and Hayne JJ** | **Kirby J** | **Callinan J and McHugh J** |
|---|---|---|---|---|
| Source of incidents | Statute may be supplemented by compatible common-law incidents | Statute, history, purpose and grant created a freehold-like tenure | Statute and grant did not authorise total exclusion | Statute retained ordinary lease incidents subject to modification |
| Effect of Wik | Requires caution but does not make every statutory lease non-exclusive | Queensland leases lacked the NSW tenure's freehold history | Strong analogy supporting non-exclusive character | Queensland statutory features distinguished |
| Perpetual duration | Not determinative of the juristic character | Reflected intended freehold-like permanence | Did not establish total exclusion | Compatible with exclusive possession |
| Restrictions and entry rights | Must be construed in context | Conditions attached to what was substantively freehold | Supported absence of total exclusion | Compatible with exclusive leasehold and freehold |
| Native title consequence | Supported the majority's statutory construction | Complete extinguishment as previous exclusive possession act | Only right-by-right extinguishment or suspension if inconsistent | Exclusive possession and complete extinguishment |

## Exam Use

- **Step 1 — Identify the statutory tenure:** Do not assume that an interest called a lease has every common-law lease incident.
- **Step 2 — Read the complete scheme:** Examine the enabling Act, historical predecessors, purpose, grant terms, duration, forfeiture, alienation controls, reservations and entry rights.
- **Step 3 — Consider common-law incidents:** Ask whether the legislation exhaustively defines the interest or permits compatible common-law incidents to supplement it.
- **Step 4 — Determine exclusive possession:** Ask whether the grantee can exclude others generally, subject to identified statutory reservations.

- **Step 5 — Apply s 23B:** If exclusive possession exists and the other requirements are met, classify the grant under **Native Title Act 1993 (Cth) s 23B(2)(c)**.
- **Step 6 — Apply State legislation:** Identify the complementary State provision prescribing the extinguishing consequence.
- **Step 7 — Non-exclusive alternative:** If exclusive possession is absent, consider whether the grant is a previous non-exclusive possession act.
- **Step 8 — Compare incidents:** For a non-exclusive grant, compare each leasehold incident with each claimed native title right and determine extinguishment or suspension only to the extent of inconsistency.
- **Exam warning:** Neither the statutory label "lease" nor perpetual duration resolves the exclusive-possession issue.
- **Exam warning:** Extensive Crown entry rights and alienation restrictions may remain compatible with exclusive possession.
- **Exam warning:** Distinguish *Wilson v Anderson* from *Wik* through the precise statutory history and incidents of the grant.

# Extinguishment, inconsistency and native title determinations

## *Western Australia v Ward* [2002] HCA 28; 213 CLR 1

- **Extract supplied:** [42]–[53], [82] and [336]–[342].
- **Judgment:** Joint reasons of Gleeson CJ, Gaudron, Gummow and Hayne JJ.
- **Central issues:** The extracts address statutory suspension and extinguishment, the right-by-right inconsistency analysis, required precision in native title determinations, and the effect of a general-purpose mining lease.

### Statutory Suspension, Extinguishment and Compensation — [42]–[45]

- **Division 2B: Native Title Act 1993 (Cth) Part 2 Div 2B** distinguishes statutory suspension from extinguishment of native title rights and interests: [42].
- **Compensation consequence:** Under **s 23J**, compensation arises only to the extent that native title is extinguished.
    - Legislative treatment of inconsistency as suspension rather than extinguishment reduces the compensation obligation that would otherwise arise: [42].

### Exact Wording of s 11

- **1998 amendment:** The 1998 Act amended **Native Title Act 1993 (Cth) s 11**, a central protection against extinguishment: [43].
- **Section 11(1):** "Native title is not able to be extinguished contrary to this Act."
- **Section 11(2):** "An act that consists of the making, amendment or repeal of legislation on or after 1 July 1993 by the Commonwealth, a State or a Territory is only able to extinguish native title:"

  - "(a) in accordance with Division 2B (which deals with confirmation of past extinguishment of native title) or Division 3 (which deals with future acts etc and native title) of Part 2; or"
  - "(b) by validating past acts, or intermediate period acts, in relation to the native title."
- **Meaning:** Legislation made, amended or repealed on or after 1 July 1993 can extinguish native title only through the pathways authorised by the Act: [43].

#### Application of Div 2B

- **Ord River submission:** Western Australia argued at trial that the **Western Australia Agreement (Ord River Irrigation) Act 1968 (Cth)** made construction of the project's main dam and associated works a Commonwealth act engaging **Div 2B**: [44].
- **Lee J:** His Honour rejected that submission.
  - It was no longer a live issue before the High Court: [44].
- **Commonwealth acts before Wik: Div 2B** still had to be considered for Commonwealth acts done on or before 23 December 1996 and alleged to have wholly or partly extinguished native title: [44].
- **State and Territory legislation: Section 23A(4)** permits States and Territories to legislate consistently with **Div 2B** for State and Territory acts: [45].
- **Specific authorisations: Sections 23E and 23I** permit confirmation of complete or partial extinguishment by previous exclusive possession acts and previous non-exclusive possession acts respectively: [45].
- **Western Australia:** No corresponding Western Australian legislation was in force at the time of the trial decision: [45].
- **Northern Territory:** The **Validation of Titles and Actions Amendment Act 1998 (NT)** commenced on 1 October 1998 and amended the **Validation of Titles and Actions Act 1994 (NT)**.
  - The amended principal Act was renamed the **Validation (Native Title) Act** and described in the reasons as the Territory Validation Act: [45].
- **Trial omission:** The parties apparently did not rely on the Territory Validation Act when responding to Lee J's invitation for submissions about the 1998 NT legislation: [45].
- **Exam relevance:** Before applying common-law extinguishment, identify whether Commonwealth, State or Territory validation or confirmation provisions prescribe extinguishment, partial extinguishment or suspension.

### Full Court Determination — [46]–[50]

#### Procedural History

- **Trial:** Lee J made a native title determination from which several parties appealed: [46].
- **Full Court:** Beaumont and von Doussa JJ, with North J dissenting, delivered judgment on 3 March 2000 and set aside Lee J's orders: [46].
- **Substituted determination:** The Full Court entered a substitute determination on 13 July 2000.

    - It became an approved determination of native title under **Native Title Act 1993 (Cth) s 13(6)**: [46].

### Holders and Areas

- **Existence:** Native title was declared to exist throughout the determination area except land and waters listed in the Second Schedule: [47].
- **Holders:** The Miriuwung and Gajerrong people held native title.
    - The Balangarra peoples also held native title in Booroongoong or Lacrosse Island: [47].
- **Exclusive areas:** In specified areas, the determination recognised an entitlement against the whole world to possession, occupation, use and enjoyment: [47].
- **Section 47A reserves:** Specified Aboriginal-use, arts, historical and native-painting reserves attracted exclusive rights under **Native Title Act 1993 (Cth) s 47A**, subject to public works comprising the project: [47].

### Non-Exclusive Rights

- **Balance of area:** For the remaining determination area, the Full Court listed:
    - A right to possess, occupy, use and enjoy the land.
    - A right to make decisions about use and enjoyment.
    - A right of access.
    - A right to use and enjoy traditional resources.
    - A right to maintain and protect places of importance under traditional laws, customs and practices: [47].
- **Other interests:** Crown-created and other interests were identified in the Third Schedule: [47].
- **Minerals and petroleum:** The Full Court declared that no native title right or interest existed in minerals and petroleum as defined by the listed Western Australian and Northern Territory legislation: [47].
- **Fauna:** Native title to take fauna was wholly extinguished in nature reserves or wildlife sanctuaries created before the **Racial Discrimination Act 1975 (Cth)** commenced: [47].
- **Inconsistency:** Native title rights had to yield to other interests to the extent of inconsistency: [47].
- **Non-exclusivity:** The listed rights over the balance of the area were declared non-exclusive of other persons' rights and interests: [47].
- **Regulation:** Native title remained subject to regulation, control, curtailment or restriction by valid Australian laws: [47].
- **Prescribed body corporate:** The common-law holders had three months to nominate a prescribed body corporate to perform the functions in **s 57(3)**: [47].

### Rights Originally Claimed

- **Area-by-area statement:** Before trial, the Ward claimants identified asserted rights separately for each area of claimed land or waters: [48].
- **Number of rights:** More than 20 rights were commonly asserted for each area.

- **Broadest claim:** The widest formulation was a right to possession, occupation, use and enjoyment: [48].
- **Specific claims:** Narrower formulations included:
    - Deriving sustenance from the land.
    - Hunting and gathering food.
    - Holding ceremonies on or concerning the land.
    - Caring for land according to environmental requirements, including burning.
    - Regulating access: [48].
- **Trial focus:** Argument concentrated mainly on the broad possession, occupation, use and enjoyment claim and claims to control access or use: [48].

#### Problems in the Determination

- **Decision-making tension:** A non-exclusive right to make decisions about use and enjoyment is difficult to define where others also possess decision-making rights: [49].
- **Yielding clause insufficient:** Saying that native title yields to inconsistent other rights does not identify the content of a non-exclusive decision-making right: [49].
- **Uncertain interest holders:** It might be difficult to identify persons entitled to use broadly described Crown reserves: [50].
- **Uncertain public interests:** The expression “other interests held by members of the public arising under the common law” lacked clear content: [50].

### Requirements of a Native Title Determination — [51]–[53]

- **Section 225 compliance:** A determination must satisfy **Native Title Act 1993 (Cth) s 225**: [51].
- **Nature and extent:** Under **s 225(b)**, it must state the nature and extent of the native title rights and interests in the determination area: [51].
- **Non-exclusive title:** Where title does not confer a right against the whole world to possession, occupation, use and enjoyment, those broad expressions will seldom sufficiently describe the rights: [51].
- **Exclusive possession consequences:** A right against the world to possession ordinarily carries power to control access and decide how land is used: [52].
- **Non-exclusive title consequences:** Without that possessory right, it is doubtful that holders have a general power to control access or make binding land-use decisions: [52].
- **Misleading formulations:** Using control and decision-making language for non-exclusive native title may obscure the rights’ actual content: [52].
- **Activity-based expression:** Non-exclusive rights should ordinarily be stated by reference to activities that may be conducted as of right on or in relation to the land or waters: [52].
- **Unresolved extinguishment:** Describing a right to control access or decide use as non-exclusive may conceal an unresolved extinguishment issue: [53].
- **Relationship with other interests:** A precise determination requires close attention to the relationship between native title rights and other interests under **s 225(d)**: [53].
- **Exam relevance:** Draft or analyse a determination right by right.

    - Avoid fee-simple-style language unless the title genuinely includes exclusive possession against the whole world.

### Extinguishment and Inconsistency — [82]

- **Rejected approach:** The Court rejected an approach requiring inconsistency to be "total", "fundamental" or "absolute".
- **Binary inconsistency:** Two rights are inconsistent or they are not.
    - If inconsistent, extinguishment occurs to the extent of inconsistency; if consistent, there is no extinguishment.
- **No common-law suspension:** Absent a statutory provision, inconsistency does not merely suspend one set of rights in favour of another.
- **Bundle of rights:** Native title rights and interests are not necessarily a single title analogous to fee simple.
- **Required comparison:** The court must identify and compare:
    - Rights derived from traditional law and custom.
    - Rights derived from the exercise of sovereign authority after settlement.
- **Statutory suspension: Native Title Act 1993 (Cth) s 23G(1)(b)(ii)** and **State Validation Act s 12M(1)(b)(ii)** expressly provide for suspension in specified circumstances.
- **Underlying inconsistent grant:** Statutory suspension assumes a grant inconsistent with native title which, apart from those statutes, would not extinguish it.
- **Post-1975 example:** A post-1975 grant rendered ineffective to extinguish native title by the **Racial Discrimination Act 1975 (Cth)** may attract the statutory suspension regime.
- **Principle:** Common-law extinguishment is determined by comparing the legal incidents of each asserted native title right with the rights created by the Crown.
- **Exam warning:** Do not ask whether a grant is broadly or fundamentally inconsistent with native title as a whole.
    - Identify the precise competing rights and the extent of their legal inconsistency.

### General-Purpose Mining Lease — [336]–[342]

#### Lease Terms

- **Statutory source:** General-purpose lease G80/5 was granted under **Mining Act 1978 (WA) s 86** on 2 August 1989: [336].
- **Holder:** Mr J L Woodhead, a party to Alligator Airways' appeal, held the lease: [336].
- **Location:** The lease lay within the claim area and within land resumed or acquired for the project: [336].
- **Use:** The land contained crushing and screening plants and associated stockpiles: [336].
- **Area:** The lease covered 4.5 hectares and was granted under **Mining Act 1978 (WA) Part IV Div 4**: [337].
- **Term:** Under **s 88**, its term was 21 years with a right of renewal for a further 21 years: [337].
- **Maximum area: Section 86(3)** prescribed a maximum of 250 hectares, later reduced to 10 hectares: [337].

### Exact Purposes Under s 87(1)

- **Exclusive occupation: Mining Act 1978 (WA) s 87(1)** entitled the lessee to exclusive occupation for one or more of the following purposes: [337].
    - "(a) for erecting, placing and operating machinery thereon in connection with the mining operations carried on by the lessee in relation to which the general purpose lease was granted;"
    - "(b) for depositing or treating thereon minerals or tailings obtained from any land in accordance with this Act;"
    - "(c) for using the land for any other specified purpose directly connected with mining operations."
- **Conditions:** The lease was subject to conditions not materially different from those governing the mining leases considered earlier in the judgment: [338].

### Full Court Reasoning

- **Complete extinguishment:** The Full Court majority held that the lease extinguished all native title rights and interests over its area: [339].
- **Express exclusivity:** It relied upon the express grant of exclusive possession for specified purposes.
- **Ministerial control:** It also relied upon the strict ministerial control imposed by the statute and lease conditions.
- **Small area:** The limited area available for concurrent activity reinforced the Full Court's conclusion: [339].

### High Court Reasoning

- **Rejection of total extinguishment:** The High Court held that the grant was not necessarily inconsistent with every native title right and interest: [340].
- **Insufficient findings:** The High Court could not identify the rights extinguished by the mining grants without further factual findings and a more precise statement of the native title rights asserted: [341].
- **Access control:** A native title right to control access was inconsistent with access rights arising under the mining grants.
    - That native title right had, however, already been extinguished by the pastoral leases: [341].
- **Racial Discrimination Act issue:** Any finding that a mining interest extinguished native title might engage the **Racial Discrimination Act 1975 (Cth)** and require further statutory analysis: [342].
- **Principle:** Exclusive occupation for defined mining purposes does not automatically extinguish every native title right.
    - Each asserted right must be compared with the precise incidents and purposes of the statutory lease.

## Core Principles from Ward

- **Right-by-right methodology:** Native title is treated as a collection of identifiable rights and interests rather than necessarily as a single fee-simple-like title.
- **Inconsistency of incidents:** Extinguishment occurs only where the legal incidents of a Crown-created right are inconsistent with a particular native title right.
- **Extent:** Extinguishment occurs to the extent of the inconsistency.
- **No degrees:** Common law does not distinguish total, fundamental or absolute inconsistency from lesser inconsistency.
- **No revival:** Common-law extinguishment is permanent unless a statute prescribes a non-extinguishment or suspension consequence.
- **Statutory suspension:** Suspension exists only where legislation, including **s 23G**, expressly provides for it.
- **Determination precision: Section 225** requires exact identification of the content of native title and its relationship with other interests.
- **Non-exclusive rights:** Non-exclusive rights should generally be expressed as authorised activities rather than broad rights to possess, control or decide.
- **Mining interests:** A mining lease may extinguish some native title rights without extinguishing all rights.
- **Compensation:** Statutory characterisation as suspension rather than extinguishment may reduce compensation under **s 23J**.

## Exam Use

- **Step 1 — Identify the statutory regime:** Determine whether validation, confirmation or non-extinguishment provisions govern the act.
- **Step 2 — Identify each native title right:** Avoid treating native title as one undifferentiated interest.
- **Step 3 — Identify each granted right:** Extract the legal incidents of the lease, licence, reservation, public work or other Crown act.
- **Step 4 — Compare incidents:** Ask whether exercise or existence of each granted right is legally inconsistent with each native title right.
- **Step 5 — State the consequence:** Apply permanent common-law extinguishment unless legislation provides suspension or non-extinguishment.
- **Step 6 — Quantify extent:** Identify precisely which rights are extinguished, suspended, subordinated or unaffected.
- **Step 7 — Draft the determination:** State surviving rights as concrete activities where title is non-exclusive.
- **Step 8 — Relate other interests:** Record the relationship between native title and other interests under **s 225(d)**.
- **Step 9 — Check discrimination:** Consider whether the **Racial Discrimination Act 1975 (Cth)** affects the validity or extinguishing operation of the act.
- **Step 10 — Compensation:** Link compensation to actual statutory extinguishment rather than mere suspension.

- **Exam warning:** An express right of exclusive occupation for a confined purpose is not automatically equivalent to exclusive possession against the world.
- **Exam warning:** A lack of evidence identifying precise native title rights may prevent the court from determining the extent of extinguishment.

# Objective inconsistency, priority and suppression

## *Western Australia v Brown* [2014] HCA 8; 253 CLR 507

- **Subject:** Land Law — Native Title and Extinguishment.

### Facts

- **State Agreement:** In 1964, Western Australia agreed with joint venturers to develop iron ore at Mount Goldsworthy.
  - The agreement was approved by the **Iron Ore (Mount Goldsworthy) Agreement Act 1964 (WA)**.
- **Mineral leases:** Western Australia granted:
  - Mineral lease ML 235 in 1966.
  - Mineral lease ML 249 in 1974.
- **Applicable law:** Both leases pre-dated the **Racial Discrimination Act 1975 (Cth)** and the **Native Title Act 1993 (Cth)**.
  - Their alleged extinguishing effect was therefore governed by common law only.
- **Native title holders:** The Ngarla People held agreed non-exclusive native title rights and interests.
- **Agreed rights:** These included rights to:
  - Access and camp on the land.
  - Take resources other than minerals.
  - Conduct ritual and ceremony.
  - Care for sites.
- **Lease-use obligation:** The leases required the joint venturers to use the land “bona fide exclusively” for State Agreement purposes.
- **Access qualification:** The State Agreement expressly required the joint venturers to permit access by the State and third parties.
  - Access was permitted provided it did not “unduly prejudice” the joint venturers’ operations.
- **Development:** The joint venturers constructed a mine, town and related infrastructure over approximately one-third of ML 235.
- **Town population:** At its peak, the town had approximately 1,400 residents.
- **Closure:** The mine closed in 1982.
  - The town was removed by 1992.

## Procedural History

- **Primary judge — Bennett J:** Her Honour held that the mineral leases did not confer exclusive possession.
- **Developed-area finding:** Bennett J nevertheless held that native title had been extinguished over the developed part of the lease.
- **Reliance on De Rose No 2:** Her Honour relied upon *De Rose v South Australia (No 2)*, which permitted extinguishment to result from later exercise of granted rights through construction of improvements.
- **Full Federal Court:** Mansfield, Greenwood and Barker JJ reversed the extinguishment finding.
    - Their differing reasons concerned the legal significance of the actual exercise of lease rights.
- **High Court appeal:** Western Australia appealed the Full Court's conclusion that native title had not been extinguished.

## Issues

- **Exclusive possession:** Did the mineral leases confer a right of exclusive possession that wholly extinguished native title?
- **Inconsistency:** If exclusive possession was absent, were any rights granted by the mineral leases legally inconsistent with the agreed native title rights?
- **Time of assessment:** Is inconsistency determined when the rights are granted or when the grantee later exercises them?
- **Physical development:** Can construction of a mine, town and infrastructure extinguish native title where the rights granted at the outset were not legally inconsistent?

## Reasoning

### Objective Legal Comparison

- **Test:** Inconsistency is determined objectively by comparing the nature and content of the granted rights with the native title rights.
- **Time:** The comparison is made when the statutory rights are granted.
- **Later conduct irrelevant:** The manner in which the grantee later exercises its rights does not determine whether extinguishment occurred.
- **Legal rights rather than facts:** The inquiry concerns the legal incidents of the competing rights.
    - It is not an assessment of whether simultaneous physical exercise later became difficult or impossible.

### No Exclusive Possession

- **Fejo standard:** Exclusive possession requires an unqualified right to exclude "any and everyone … for any reason or no reason".
- **Qualification in the leases:** The joint venturers did not possess an unqualified power to exclude.

    - The State Agreement protected access by the State and third parties unless access would unduly prejudice operations.
- **Result:** The mineral leases did not confer exclusive possession.
- **Native title consequence:** Absence of an unqualified exclusionary right meant the leases did not wholly extinguish the Ngarla People's non-exclusive native title rights.

### Rejection of Potential or Contingent Inconsistency

- **De Rose No 2 approach:** *De Rose v South Australia (No 2)* treated some granted rights as potentially inconsistent and allowed extinguishment to arise when those rights were later exercised.
- **High Court rejection:** The Court rejected extinguishment depending upon later construction or development.
- **Practical inconsistency:** An exercise-based test reproduces the "practical inconsistency" analysis rejected in *Wik Peoples v Queensland*.
- **No deferred extinguishment:** A grant cannot remain merely potentially extinguishing and later extinguish native title when development occurs.
- **Overruling:** *De Rose v South Australia (No 2)* was overruled to the extent that it supported potential, contingent or exercise-based extinguishment.

### No Degrees of Inconsistency

- **Binary inquiry:** Two legal rights are inconsistent or they are not.
- **Logical incompatibility:** Inconsistency exists where the existence of one right necessarily denies the existence of the other.
- **No lesser categories:** The common law does not recognise degrees of inconsistency based upon the practical intensity of competing uses.
- **Ward affirmed:** This approach confirms the inconsistency-of-incidents analysis in *Western Australia v Ward*.

### Priority Without Extinguishment

- **Conflicting exercise:** Statutory and native title rights may coexist even though their exercise cannot occur simultaneously in a particular place.
- **Priority:** During an actual conflict, the rights granted under the mineral lease prevail.
- **Suppression:** The native title right cannot be exercised for the duration and extent of the conflicting statutory use.
- **No extinguishment:** Priority during conflict does not permanently destroy the underlying native title right.
- **After conflict:** When the inconsistent activity ceases, the native title right may again be exercised.
    - The title does not legally "revive" because it never ceased to exist.

### Brennan CJ's Statement in Wik

- **Statement:** Brennan CJ stated in *Wik* that "the law cannot recognise … two rights that cannot both be exercised at the same time".

- **Correct context:** The statement concerned the content and legal effect of a right of exclusive possession.
- **Incorrect use:** It does not authorise courts to determine extinguishment by examining how otherwise coexisting rights are later exercised.

### Effect of the Mine and Town

- **Substantial physical use:** The mine, town and infrastructure occupied a substantial portion of the lease and greatly restricted exercise of native title rights during operations.
- **No legal extinguishment:** Those physical developments did not retrospectively alter the legal content of the rights granted under the mineral leases.
- **Closure confirms distinction:** Removal of the town and cessation of mining demonstrated why temporary practical incompatibility must be distinguished from permanent extinguishment.

## Outcome

- **Appeal:** Western Australia's appeal was dismissed with costs.
- **Full Court determination:** The Full Federal Court's conclusion that the mineral leases did not extinguish native title remained in force.
- **Development:** Substantial mining and town development did not extinguish the agreed native title rights.

## Key Principles

- **Assessment date:** Inconsistency is assessed objectively at the date of grant.
- **Relevant material:** Compare the legal nature and content of the granted rights with each native title right.
- **Irrelevant material:** Do not determine extinguishment from the grantee's later conduct or physical development of the land.
- **Exclusive possession:** A grant lacks exclusive possession unless it includes an unqualified power to exclude any and everyone for any reason or no reason.
- **No contingent extinguishment:** Native title cannot be extinguished later merely because a granted right is exercised through construction, mining or development.
- **No degrees:** Rights are legally inconsistent or they are not.
- **Logical antinomy:** Inconsistency exists where recognition of one right necessarily denies the other right's existence.
- **Priority:** A statutory right may prevail during an actual conflict without extinguishing the native title right.
- **Suppression:** Temporary inability to exercise native title is not extinguishment.
- **Resumed exercise:** When the competing use ends, exercise of the native title right resumes because the underlying right continued to exist.

## Relationship with Other Authorities

### *Fejo v Northern Territory*

- **Exclusive possession:** *Fejo* describes exclusive possession as an unqualified right to exclude any and everyone for any reason or no reason.
- **Application:** The protected State and third-party access rights prevented the mineral leases from satisfying that standard.

### *Wik Peoples v Queensland*

- **Legal incidents:** *Wik* requires attention to the statute and grant rather than the label attached to an interest.
- **Practical inconsistency rejected:** Physical inability to exercise rights simultaneously does not alone establish extinguishment.

### *Western Australia v Ward*

- **Right-by-right analysis:** *Ward* requires identification and comparison of the incidents of each native title and statutory right.
- **No degrees:** Inconsistency extinguishes only where the rights are legally incompatible.

### *De Rose v South Australia (No 2)*

- **Disapproved approach:** The case allowed later exercise of granted rights, including construction of improvements, to trigger extinguishment.
- **Overruling:** *Brown* rejected that potential or contingent inconsistency analysis.

## Exam Use

- **Step 1 — Identify the date:** Determine whether the grant pre-dates the **Racial Discrimination Act 1975 (Cth)** and the **Native Title Act 1993 (Cth)**.
- **Step 2 — Identify every right:** State each granted right and each claimed native title right precisely.
- **Step 3 — Test exclusive possession:** Ask whether the grantee possesses an unqualified right to exclude any and everyone for any reason or no reason.
- **Step 4 — Compare legal incidents:** Determine whether recognition of a granted right necessarily denies the existence of a native title right.
- **Step 5 — Ignore later exercise:** Do not rely upon buildings, mining activity, roads, infrastructure or intensity of occupation to create extinguishment.
- **Step 6 — Distinguish priority:** If rights coexist but cannot be exercised simultaneously, the statutory right may prevail during the conflict without extinguishing native title.
- **Step 7 — State the temporal consequence:** Explain that native title continues while its exercise is suppressed and becomes exercisable again when the conflict ends.
- **Exam warning:** Do not describe extensive physical development as proof of exclusive possession.
- **Exam warning:** Do not use “potential inconsistency”, “contingent inconsistency” or “practical inconsistency” as a basis for common-law extinguishment.

- **Exam warning:** Do not say that native title legally revives after suppression.
    - Say that the right continued to exist and its exercise resumed.
- **Essay use:** *Brown* is the central authority clarifying *Ward* and explaining why exercise-based extinguishment is inconsistent with the common-law test.

# Compensation for extinguishment and cultural loss

## *Northern Territory v Griffiths* [2019] HCA 7; 269 CLR 1

### Subject: Native title — compensation for extinguishment

### Court and judges

- **High Court of Australia:** Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ.
- The assigned extracts at **[19]–[54], [177]–[184] and [213]–[220]** are from the joint reasons of **Kiefel CJ, Bell, Keane, Nettle and Gordon JJ**.

### Facts and procedural background

- The claim concerned compensation for acts attributable to the **Northern Territory** which extinguished or impaired the **non-exclusive native title rights and interests** of the **Ngaliwurru and Nungali Peoples** in land in and around Timber Creek.
- The compensable acts included grants and public works affecting particular lots. They occurred at different times and therefore fell into different statutory categories under the **Native Title Act 1993 (Cth) (NTA)**.
- The claim required separate assessment of:
    - the **economic value** of the extinguished native title rights and interests;
    - **interest** for the delay between extinguishment and payment; and
    - **cultural loss**, meaning the non-economic effect of the compensable acts on the Claim Group's connection with country.
- The trial judge awarded compensation for economic loss, interest and cultural loss. The Full Federal Court altered the economic valuation. The Northern Territory, the Commonwealth and the Claim Group appealed to the High Court.

### Issues

- What is the statutory source and measure of compensation for acts extinguishing or impairing native title?
- How do the physical or material and cultural or spiritual aspects of native title inform compensation under **NTA s 51(1)**?
- Must the detrimental consequence arise directly from an individual compensable act?
- Should cultural loss be assessed lot-by-lot and act-by-act, or globally by considering the acts' inter-related, incremental and cumulative effects on the Claim Group's connection with the whole country?

- How should the economic value of non-exclusive native title rights be compared with freehold value?

### Joint reasoning — Kiefel CJ, Bell, Keane, Nettle and Gordon JJ

#### Legislative framework: [19]–[54]

- The **NTA** recognises and protects native title and provides that native title cannot be extinguished contrary to the Act. Any extinction or impairment must occur in accordance with the Act's specific and detailed exceptions.
- The statutory scheme operates against the background that native title was defeasible at common law but, from **31 October 1975**, was substantially protected from discriminatory extinguishment by **Racial Discrimination Act 1975 (Cth) s 10(1)**.
- **NTA s 223(1)** defines native title or native title rights and interests as communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:
    - **s 223(1)(a):** the rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the peoples;
    - **s 223(1)(b):** by those laws and customs, the peoples have a connection with the land or waters; and
    - **s 223(1)(c):** the rights and interests are recognised by the common law of Australia.
- All elements of **s 223** must be given effect. Native title rights and interests may be **communal, group or individual**, but must be in relation to land or waters and satisfy each of the three statutory characteristics.
- Drawing on *Western Australia v Ward*, the joint reasons distinguished two inquiries:
    - identifying the rights and interests in relation to land or waters possessed under traditional laws and customs; and
    - identifying the peoples' connection with the land or waters by those laws and customs.
- These inquiries may depend on the same evidence, but they remain distinct statutory inquiries.
- Native title consequently has two connected aspects:
    - a **physical or material aspect**: the right to do something in relation to land or waters; and
    - a **cultural or spiritual aspect**: the connection with the land or waters under traditional laws and customs.
- The **NTA Preamble** recognises the progressive dispossession of Aboriginal peoples and Torres Strait Islanders, largely without compensation, and records that justice requires compensation on just terms where extinguishing acts are validated or allowed.
- The NTA's scheme is complex because it addresses concepts that are ancient and new, developed and developing, and retrospective and prospective. It seeks to recognise native title, validate or permit specified acts, preserve or revive native title where the non-extinguishment principle applies, and provide just-terms compensation where native title is extinguished.

### Categories and validation of acts

- The statutory source of compensation and the effect of validation depend upon both the **category** and **timing** of the act.
- A **past act** under **Div 2 of Pt 2**, relevantly, occurred before **1 January 1994**, affected land where native title existed, was invalid apart from the NTA, and would have been valid if native title had not existed.
- The four categories of past act have different effects:
    - **category A:** relevantly extinguishes native title;
    - **category B:** extinguishes native title to the extent of inconsistency;
    - **categories C and D:** attract the **non-extinguishment principle**.
- Where the non-extinguishment principle applies, native title is not extinguished, although its exercise may be wholly or partly suspended while the act operates.
- All but five acts in the appeals were past acts attributable to the Northern Territory. They were validated on **10 March 1994** by **NTA s 19** and **Validation (Native Title) Act (NT) s 4**, and were taken always to have been valid. Validation perfected the acts and removed the native title restrictions upon their validity.
- The remaining five acts were **intermediate period acts**, relevantly occurring between **1 January 1994 and 23 December 1996**. They were validated on **1 October 1998** by **NTA s 22F** and **Validation (Native Title) Act (NT) s 4A**.
- **Division 2B of Pt 2** confirms past extinguishment by certain valid or validated **previous exclusive possession acts**.
- Under **NTA s 23B**, a previous exclusive possession act relevantly includes a pre-23 December 1996 grant validated under Div 2 or Div 2A. Both past acts and intermediate period acts may therefore fall within this category.
- Acts to which the non-extinguishment principle applies are not previous exclusive possession acts.
- Most compensable acts were previous exclusive possession acts. Their validation extinguished native title.
- The exceptions were category D past acts attracting the non-extinguishment principle. All but three of those were later followed by previous exclusive possession acts over the same lots which extinguished native title.

### Entitlement and measure of compensation

- **NTA s 23J** entitles native title holders to compensation under **Div 5** for extinguishment under Div 2B. The Claim Group was therefore entitled to Div 5 compensation for each compensable previous exclusive possession act.
- For the three category D past acts not followed by previous exclusive possession acts, compensation arose through **NTA s 20**, which applies **s 17(1) or (2)** as though s 17 covered acts attributable to the Northern Territory.
- **NTA s 17(2)** provides compensation in a non-extinguishment case where the stated ordinary-title comparison is satisfied.
- The appeals proceeded on the basis that all acts were validated on **10 March 1994**.
- Once an entitlement is established under Div 2, 2A, 2B, 3 or 4 of Pt 2, compensation is payable only in accordance with **Div 5**.

- **NTA s 51(1)** is the core compensation provision. Subject to s 51(3), it gives native title holders an entitlement **“on just terms”** for **“any loss, diminution, impairment or other effect of the act on their native title rights and interests”**.
- Compensation belongs to the persons holding the native title and responds to the effect of the relevant act upon their native title rights and interests.
- Because the entitlement is compensation for the **act**, and validation deems the extinguishing act valid and always to have been valid from its occurrence, compensation is assessed as at the **date of the act**.
- The breadth of **“any loss, diminution, impairment or other effect”** recognises both the physical or material and the cultural or spiritual aspects of native title, and recognises that a compensable act can affect those aspects differently.
- The consequences cannot be assumed to be uniform. Both the act and its effect must be examined.
- The assessment is necessarily fact-specific. It depends upon:
    - the rights and interests affected;
    - the identity of the native title holders;
    - their connection with the affected country; and
    - the evidence as a whole.
- **Section 51(1) does not require the detrimental consequence to arise directly from the compensable act.**
- **NTA s 51(2)** concerns compulsory acquisition of native title rights and interests.
- **NTA s 51(3)** concerns an act satisfying the **similar compensable interest test**, which uses an assumed ordinary-title comparison for an onshore place.
- Neither **s 51(2)** nor **s 51(3)** applied to the compensable acts in these appeals.
- Under **NTA s 51(4)**, where neither s 51(2) nor s 51(3) applies, the decision-maker assessing just terms may, subject to ss 51(5)–(8), have regard to compensation principles or criteria in the applicable Commonwealth, State or Territory compulsory-acquisition law. Here, the relevant law was the **Lands Acquisition Act (NT)**.
- **NTA s 51A**, subject to **s 53**, caps total Div 5 compensation for an act extinguishing all native title in relation to particular land or waters at the amount payable if the act were instead a compulsory acquisition of a freehold estate.
- **NTA s 53** is a constitutional **“shipwrecks clause”**: where applying the NTA would produce an acquisition of property otherwise than on **Constitution s 51(xxxi) just terms**, the person is entitled to the additional compensation necessary to ensure just terms.
- The statutory recognition that both the economic and non-economic aspects of native title are compensable informs **s 51A**. The freehold cap concerns the **total** compensation and does not erase cultural loss.
- Under general compulsory-acquisition law, compensation may encompass market value and additional heads such as severance, injurious affection, disturbance, special value, solatium or other non-economic loss.
- Labels such as **“solatium”**, developed for rights originating in English common law, must not distract from the NTA’s distinct task: assessing just terms for the acquisition of

native title rights and interests arising under traditional laws and customs grounded in a different belief system.

### Effects under traditional laws and customs when country is harmed: [177]–[184]

- Four non-compensable events were relevant evidentially because they illustrated the effects under Ngaliwurru and Nungali traditional laws and customs when country is harmed. They helped explain the nature, breadth and depth of the connection affected by the compensable acts.
- **Wirip ngalur katpan — Dingo Dreaming site 32:**
    - A European man constructed a large concrete causeway across Timber Creek without permission, creating a swimming pool and interfering with the site.
    - Wirip travelled through the area, brought the **Winan** and set out its route; his spiritual presence lay under the rocks.
    - Claimants believed the interference caused the builder's later death in a car accident.
    - The causeway submerged the rocks. The claimants said this made them feel bad because the rock should be visible above the water.
    - JJ said the causeway **"blocked the tunnel and cut the life out of the Dreaming"**. The damage impaired the elders' ability to show the Dreaming to younger men and communicate the full story needed for initiation and adulthood.
    - Development across the Winan track and Wirip's path caused shame, hurt and a sense that custodians had failed the old people and other Aboriginal groups connected along the Dreaming and trade routes.
- This evidence demonstrated that:
    - the Claim Group's spiritual connection to country was broad and deep;
    - loss of connection was **incremental and cumulative**;
    - Dreamings and significant sites were pervasive and inter-connected;
    - damage at or near one place could affect responsibilities, relationships and spiritual integrity extending beyond that lot;
    - the holders experienced a failed sense of responsibility to protect land; and
    - the effect of a compensable act was not one-dimensional.
- **Army Bridge:**
    - The Commonwealth Department of Defence proposed a bridge across the Victoria River.
    - The first location was near the Dingo Dreaming site at Palawa. AG objected and the location was moved.
    - Although consultation occurred and compensation was paid in 2003, some claimants continued to regard the bridge as harming the Dreaming's spiritual essentialities and as cutting the body of the barramundi associated with the Fish Dreaming.
- **Removal of gravel from the Dingo Dreaming:**
    - Gravel was scraped without permission.
    - AG said it was cutting Wirip's body and the removal stopped.

    - AG and JJ explained their responsibility to keep the site safe, their exposure to blame from others if it were damaged, and their continuing guilt, shame and internal distress.
- **Proposed diamond mining at Japajani:**
    - Japajani was a dangerous site under traditional laws and customs.
    - AG's evidence was that people did not go to the hill because doing so would cause death.
- The trial judge also accepted JJ's evidence that non-Indigenous people should not enter or fish at significant places such as **Tilwarni, site 49**, a Wuguru or Humpyback Dreaming site.
- These examples were not converted into compensation as independent non-compensable acts. Their relevance was explanatory: they revealed how traditional law, custodial obligation, Dreaming, country and harm operated, enabling the effects of the actual compensable acts to be understood.

### Assessment of cultural loss: [213]–[220]

- Several matters were not disputed:
    - an award for cultural loss was appropriate;
    - it should be made **in globo** to the Claim Group;
    - apportionment or distribution among members was an **intramural matter**;
    - the amount should not be calculated by counting native title holders at the time native title existed, because cultural loss was suffered by the holders as a whole and reflected relationships within and between related country groups; and
    - the effects of the compensable acts could not be assessed apart from the content of the Claim Group's traditional laws and customs.
- The trial judge's findings depended substantially upon the claimants' oral evidence, his visit to country, and his assessment of the nature of their connection and of the effects of the harm.
- The statutory task was difficult because it required the Court to identify compensable acts, determine the essentially spiritual relationship between the Ngaliwurru and Nungali Peoples and their country, and translate the resulting spiritual hurt into monetary compensation.
- The Commonwealth and Northern Territory wrongly contended that **s 51(1)** imposed strict temporal and physical boundaries which excluded collateral detrimental effects.
- Section 51(1) contains no such limitation. It compensates **any loss, diminution, impairment or other effect** of the act on native title rights and interests.
- The assessment varies with:
    - the compensable act;
    - the identity of the native title holders;
    - their connection with land or waters under their laws and customs; and
    - the act's effects upon that connection.
- The amount of cultural-loss compensation is therefore context-dependent. For example, loss of connection in an already developed area may be less than in remote, less-developed country if earlier encroaching developments had already reduced the

relevant sense of connection before the compensable extinguishment. This is a factual possibility, not a fixed rule.

- The required steps are separate but inter-related:
    1. identify the compensable acts;
    2. identify the native title holders' connection with the land or waters by their laws and customs; and
    3. consider the particular and inter-related effects of the compensable acts upon that connection.
- Although each act affected rights and interests in a particular parcel, each act also had to be understood against the whole area over which the relevant rights and interests had been claimed.
- The joint reasons adopted the trial judge's **painting analogy**: country and belief formed **"a single and coherent pattern"** over a much wider area; each compensable act punched a hole in that single painting. Damage was not measured merely by the size of each hole, but by its effect upon the entire work.
- It was therefore wrong to assess each compensable act in isolation. Cultural loss could include **collateral, inter-related, incremental and cumulative effects** extending beyond the precise lot or immediate date of the act, provided they were effects of the act upon the native title rights and interests.

### Outcome

- The Northern Territory's and Commonwealth's appeals were allowed only in part.
- The Claim Group's appeal was dismissed.
- The final compensation was:
    - **economic loss: $320,250**;
    - **interest: $910,100**;
    - **cultural loss: $1,300,000**;
    - **total: $2,530,350**, plus applicable post-judgment interest.
- The High Court thereby upheld the availability and broad, holistic assessment of cultural-loss compensation, while altering the economic component.

### **Ratio and key principles **

- **NTA s 51(1)** requires just-terms compensation for **any loss, diminution, impairment or other effect** of a compensable act on native title rights and interests.
- Native title has inseparable **physical/material** and **cultural/spiritual** aspects. A valid compensation assessment must recognise both.
- Cultural loss is not conventional solatium. It compensates effects upon rights and interests arising under traditional laws and customs and upon the holders' connection with country.
- Cultural loss is assessed through the specific traditional laws and customs, the holders' connection with country, the compensable acts and the whole of the evidence.
- Section 51(1) does **not** demand that every detrimental consequence arise directly, immediately or only within the physical boundaries of the affected lot.

- Cultural loss may be experienced communally and awarded **in globo**. It is not multiplied or divided according to the number of individual native title holders.
- Compensable acts must be identified, but their cultural effects cannot necessarily be isolated. The court may assess their **inter-related, incremental, cumulative and collateral effects** on a coherent system of country, Dreaming and responsibility.
- The **painting analogy** explains the holistic method: the legal act may concern one parcel, but the cultural damage caused by the hole must be evaluated by its effect on the whole interconnected work.
- Non-compensable events may provide evidence explaining the nature of connection, custodial responsibility and the way harm is experienced, but are not themselves treated as additional compensable acts.
- **NTA s 51A** caps the total payable for complete extinguishment by reference to compulsory acquisition of freehold, subject to **s 53**, but does not confine compensation to economic value.

### Exam use

- Start with the statutory source of entitlement: identify whether the act is a past act, intermediate period act, previous exclusive possession act or another compensable act, and identify the applicable route into **Div 5**.
- State **s 51(1)** precisely: the holders receive just-terms compensation for **any loss, diminution, impairment or other effect** of the act on their native title rights and interests.
- Separate the heads of compensation into **economic loss**, **interest** and **cultural loss**.
- For cultural loss, apply the three linked inquiries from **[213]–[220]**: compensable acts; connection by traditional laws and customs; effects of the acts upon that connection.
- Reject a rigid lot-by-lot or direct-consequence-only approach. Use the **single painting / holes in the painting** analogy where the evidence shows an integrated cultural and spiritual relationship with the wider country.
- Explain causation carefully: the act must affect native title rights and interests, but the resulting effect may be indirect, collateral, cumulative or extend beyond the parcel.
- Use the examples at **[177]–[184]** to show why damage to a site may also produce shame, guilt, failed custodial responsibility, impaired teaching, disruption of Dreaming pathways and harm to relations with other country groups.
- Do not use ordinary compulsory-acquisition labels such as “solatium” as substitutes for analysing the content of the traditional laws and customs and the actual effect upon connection.

### One-sentence exam proposition

- Under *Northern Territory v Griffiths*, **NTA s 51(1)** compensates both the material and cultural-spiritual effects of an act on native title, and cultural loss must be assessed contextually and holistically by reference to the holders’ traditional laws, customs and connection with the whole country rather than by isolating each affected lot.

# Highlighted Sections

## Native Title Act 1993 — Recognition, Extinguishment and Determinations

- **s 10 Recognition and Protection**
  - **s 10:** Native title is recognised and protected in accordance with the **Native Title Act 1993**.
  - **Exam use:** Start here for the statutory recognition principle.
- **s 11 Extinguishment of Native Title**
  - **s 11(1):** Native title cannot be extinguished contrary to the **Native Title Act 1993**.
  - **s 11(2)(a)–(b):** Legislation made, amended, or repealed on or after **1 July 1993** can extinguish native title only through **Part 2 Div 2B**, **Part 2 Div 3**, or by validating past/intermediate period acts.
  - **Exam use:** Extinguishment must fit within the Act. Do not assume ordinary legislation can extinguish native title outside the statutory scheme.
- **s 13 Approved Determinations of Native Title**
  - **s 13(1)(a)–(b):** An application may be made to the Federal Court for a native title determination where there is no approved determination, or to revoke/vary an approved determination on **s 13(5)** grounds.
  - **s 13(2)(a)–(b):** When determining compensation, the Federal Court must also make a current native title determination if no approved determination already exists for the whole or relevant part of the area.
  - **s 13(3)(a)–(b):** Approved determinations include Federal Court determinations and recognised State/Territory body decisions determining native title.
  - **s 13(4)(a)–(d):** If varied, the varied determination replaces the original; if revoked, it ceases to be an approved determination.
  - **s 13(5)(a)–(c):** Variation/revocation grounds are later events making the determination incorrect, interests of justice, or a **s 47C(1)(b)** agreement for certain areas such as national parks.
  - **s 13(6)–(7):** Determinations subject to appeal/review are treated as finally affected by that process; High Court native title determinations are approved determinations.
  - **Exam use:** Use **s 13** for when native title can be determined, varied, revoked, or recognised as an approved determination.
- **s 223 Meaning of Native Title**
  - **s 223(1)(a)–(c):** Native title means communal, group, or individual rights/interests of Aboriginal peoples or Torres Strait Islanders in land or waters, possessed under traditional laws/customs, connected to land/waters by those laws/customs, and recognised by the common law of Australia.
  - **s 223(2):** Native title rights/interests include hunting, gathering, and fishing rights.
  - **s 223(3):** Where native title rights have been compulsorily converted into or replaced by statutory rights over the same land/waters held by or for Aboriginal peoples or Torres Strait Islanders, those statutory rights are also native title rights/interests.

  - **s 223(3A):** Statutory access rights for native title claimants under **Part 2 Div 3 Subdiv Q** are excluded from **s 223(3)**.
  - **s 223(4)(a)–(b): s 223(3)** does not apply to non-native title rights created by reservations/conditions in pre-1994 pastoral leases or pre-1 July 1993 legislation tied to those pastoral leases.
  - **Exam use:** The core test is traditional laws/customs, connection, and common law recognition.
- **s 225 Determination of Native Title**
  - **s 225:** A determination decides whether native title exists in the determination area.
  - **s 225(a)–(e):** If native title exists, the determination identifies the holders, native title rights/interests, other interests, the relationship between native title and other interests, and whether native title gives exclusive possession, occupation, use, and enjoyment, except where land/waters are covered by non-exclusive agricultural or pastoral leases.
  - **Exam use:** Use **s 225** to state what the court must determine once native title existence is in issue.

## Scaffold Anchor

- **Recognition:** Start with **s 10**.
- **Extinguishment issue:** Apply **s 11**.
- **Definition of native title:** Apply **s 223(1)(a)–(c)**.
- **Specific rights:** Check **s 223(2)–(4)**.
- **Need a determination?** Apply **s 13**.
- **Contents of determination:** Apply **s 225(a)–(e)**.
- **Variation/revocation:** Apply **s 13(4)–(5)**.

# Torrens Title: The Register, Indefeasibility and Unregistered Interests

## The Register

- **Purpose of Torrens title:** Torrens replaced proof through a chain of deeds with a state-maintained Register from which title is created and ascertained.
- **Curtain principle:** A person dealing with a registered proprietor ordinarily investigates the current Register rather than the history behind the registered title.
- **Mirror principle:** The Register should disclose the registered proprietor, the registered estate or interest and registered burdens affecting it, subject to statutory exceptions.
- **Insurance principle:** The Assurance Fund compensates specified losses caused by operation of the system where restoration of the interest is unavailable.
- **Old-system contrast:** Registration under **Conveyancing Act 1919 (NSW) Pt 23 Div 1** may affect validity where another statute requires registration, evidentiary use and priority.
- **Old-system priority: Conveyancing Act 1919 (NSW) s 184G(1)** gives qualifying instruments priority by registration order rather than execution date and does not distinguish legal and equitable interests.
- **Limit of deeds registration:** Registration affects priority but does not cure an instrument void for forgery, fraud, mistake or another inherent defect.
- **Deeds:** Under **Conveyancing Act 1919 (NSW) s 23B(1)**, an assurance of old-system land does not pass a legal interest unless made by deed.
- **Common-law deed:** A deed traditionally requires writing, sealing and delivery; statutory rules add signing and attestation requirements.
- **Execution by individuals: Conveyancing Act 1919 (NSW) s 38(1)** requires signing, sealing and attestation by at least one witness who is not a party.
- **Witnessing:** The witness must be present when the deed is executed; each executing party's signature must be attested by a non-party witness.
- **Final form:** A signature must be applied to the completed deed rather than an execution page to which substantive pages are later attached without proper authority.
- **Delegated execution:** An agent's authority to execute a deed is conventionally conferred by deed, while **s 38(1A)** permits signing at another person's direction subject to statutory formalities.
- **Corporate execution: Corporations Act 2001 (Cth) s 127** permits execution with or without a common seal through the prescribed officers and does not exhaust every valid method of corporate execution.
- **Delivery:** Delivery is an objectively manifested intention that the deed be presently binding, not necessarily physical handover.
- **Escrow:** A conditionally delivered deed operates when the condition is fulfilled and may relate back to the delivery date where necessary to give effect to the transaction.

- **Torrens history:** Sir Robert Torrens sought to eliminate the complexity, delay and expense produced by dependent chains of title and professional monopolisation of conveyancing.
- **Introduction:** The Torrens system began in South Australia and was adopted throughout Australia despite early professional and judicial resistance.
- **Electronic transition:** Computerised folios and electronic lodgment networks changed the medium and process of registration without changing registration's constitutive legal effect.
- **Register composition: Real Property Act 1900 (NSW) s 31B** makes the Register broader than the folio alone; it includes folios, registered dealings and prescribed instruments or records.
- **Folio function:** A folio identifies the land, estate or interest, registered proprietor and recorded interests affecting the title.
- **Information notices:** An information notice is administrative or evidentiary and does not itself confer or alter an estate or interest.
- **Dealing:** A dealing is the statutory instrument used to create, transfer or affect a Torrens estate or interest and becomes legally operative as a registered interest through registration.
- **Lodgment:** Acceptance and allocation of a distinctive reference constitute lodgment; lodgment is distinct from registration.
- **Registrable form:** A dealing must be in an approved form and require no substantive correction before it is treated as lodged in registrable form.
- **Order:** Where party intentions conflict, dealings awaiting registration are ordinarily registered by their order of lodgment in registrable form.
- **Registration:** Registration occurs when the Registrar-General records the dealing; registered dealings affecting the same estate or interest take priority by registration order.
- **Effect as deed:** A registered dealing has the effect of a duly executed deed even if the unregistered form did not independently constitute a deed.
- **Approved forms:** The Registrar-General may reject a dealing that does not comply with approved forms or required execution, witnessing, certification and lodgment procedures.
- **Title by registration:** The registered proprietor's title derives from registration and not from the validity of an anterior chain of title.
- **Registered instrument content:** Registration protects the estate or interest disclosed by the registered instrument and terms sufficiently connected with or defining that interest.
- **Not every term protected:** Collateral personal covenants do not acquire indefeasibility merely because they appear in the same document as a registered interest.
- **Register search:** A person must inspect a registered instrument expressly incorporated by the current folio to understand the registered interest's full content.
- **No open-ended inquiry:** A purchaser need not search cancelled titles, historical plans, archived dockets or external documents not incorporated into the operative Register.

- **Electronic records qualification:** A document does not become part of the operative Register merely because an electronic copy remains accessible in the Lands Titles Office.
- **Correction: Real Property Act 1900 (NSW) s 12(1)(d)** permits correction of errors and omissions but cannot be used administratively to destroy an otherwise indefeasible registered estate.
- **Meaning of error:** Correction requires disconformity between the Register and the legal position the Register should record; it is not a general power to reverse protected title.
- **Possessory title:** NSW legislation permits acquisition of Torrens title by adverse possession only through the statutory scheme and its prescribed requirements.
- **Primary application: Real Property Act 1900 (NSW) Pt 4** permits old-system land to be brought under the Act after title investigation, notification and opportunity for caveats.
- **Qualified title:** A qualified folio carries a caution preserving statutory "subsisting interests" from the former old-system title until the caution lapses or is cancelled.
- **Subsisting interests:** Their enforceability depends upon the statutory definition, priority and notice circumstances existing when the qualified folio was created.
- **Limited title: Real Property Act 1900 (NSW) Pt 4B** permits title limited as to boundaries where the Registrar-General has not fully investigated boundary location.
- **Writs:** Writs affecting land may be recorded under the statutory scheme and affect execution dealings according to the Act.
- **Exam use:** Identify the current folio, every registered dealing incorporated by reference and the precise registered interest before considering notice, exceptions or external material.

## *Bursill Enterprises Pty Ltd v Berger Bros Trading Pty Ltd* (1971) 124 CLR 73

- **Facts:**
  - An 1872 memorandum of transfer affected adjoining Sydney properties and extended an earlier right of way.
  - It also transferred the airspace occupied by an existing building above the right of way and granted demolition and rebuilding rights.
  - The memorial on the certificate identified a memorandum of transfer but incompletely described its legal effect as an extension of a right of way.
  - The appellant claimed rights to retain the building, obtain support from the adjoining wall and rebuild above the right of way.
  - The trial judge granted relief concerning retention and support but refused the claimed unrestricted rebuilding declaration.
- **Reasoning — Barwick CJ at 75-79:**
  - The statutory requirement to state the instrument's "nature" was satisfied by identifying its juridical kind as a transfer, lease, mortgage or encumbrance.
  - A memorial did not need to reproduce every legal consequence of the registered instrument.

    - Once registered, the complete memorandum formed part of the Register Book and was available for public inspection.
    - The certificate of title was not intended to reproduce all information needed to understand the registered proprietor's estate.
    - A purchaser was required to inspect the registered transfer expressly referred to on the certificate.
    - The inadequate description of the transfer's effect was surplusage and did not invalidate registration.
    - The airspace estate was therefore a registered interest, and **Real Property Act 1900 (NSW) s 43** did not free a purchaser from it.
- **Outcome:** The appeal and cross-appeal were dismissed, with the decretal order varied consistently with the Court's reasons.
- **Principle:** A folio reference incorporates the registered instrument, whose complete terms determine the registered interest despite an incomplete memorial description.
- **Exam use:** Read the registered instrument expressly identified on the folio, but do not extend the search to external documents not incorporated into the Register.

### *Deguisa v Lynn* [2020] HCA 39; 268 CLR 638

- **Facts:**
    - Restrictive covenants were said to form part of a common building scheme affecting Lot 3.
    - The current title did not identify all land said to benefit from the covenants.
    - The respondents argued that a prudent conveyancer would trace references through cancelled parent and grandparent certificates, subdivision plans, dockets and other records retained by the Lands Titles Office.
    - Some historical documents remained physically or electronically accessible but no longer formed part of the operative Register.
- **Reasoning at [58]-[88]:**
    - *Bursill* requires inspection of a registered instrument expressly referred to by the operative title; it does not impose an open-ended search outside the Register.
    - Windeyer J's prudent-conveyancer observations in *Bursill* concerned reading the transfer expressly recorded on the certificate.
    - A cancelled parent or grandparent certificate ceases to be the operative certificate, because only one certificate can operate for a lot at a given time.
    - Continued storage or electronic accessibility does not restore a cancelled instrument to the Register.
    - Requiring searches based on historical ownership, unusual surnames or archival clues would restore the complexity Torrens title was enacted to eliminate.
    - A common building scheme binds later proprietors only if the current title or a registered instrument incorporated by reference identifies the restriction and benefited land.
    - Electronic-recording provisions did not revive previously unenforceable interests or alter the statutory notification rule.

- **Outcome:** The appeal succeeded because the current title disclosed no registered instrument identifying the lots benefited by the restrictive covenants.
- **Principle:** Notification is confined to the operative folio and registered instruments expressly incorporated by reference, not cancelled titles or external archival material.
- **Exam use:** Ask whether the current folio itself, or a registered instrument it expressly identifies, supplies the information necessary to ascertain the asserted interest.

### *Mercantile Credits Ltd v Shell Co of Australia Ltd* [1976] HCA 9; 136 CLR 326

- **Facts:**
    - Shell held a registered 10-year lease containing covenants for three successive five-year renewals.
    - Shell exercised and registered the first renewal, extending the term to 1 March 1974.
    - Celtic Agencies later became registered proprietor subject to the lease and granted Mercantile Credits a registered mortgage.
    - Shell exercised the second renewal before expiry and executed a registrable extension with Celtic, but the extension was never registered and Mercantile did not consent.
    - After Celtic defaulted, Mercantile sought to sell free of Shell's renewed lease, and Shell lodged a caveat.
- **Reasoning:**
    - The legislation registered the memorandum of lease as an instrument rather than requiring separate registration of every interest arising from it.
    - A renewal covenant was intimately connected with and adjectival to the lease term, forming part of the registered leasehold estate.
    - It differed from an option to purchase, which concerns acquisition of the reversion rather than definition of the existing lease.
    - Registration gave the entire lease, including the renewal covenant, its statutory priority and indefeasibility.
    - Exercise of the registered renewal right did not require separate registration to preserve its priority over the later mortgage.
    - Mortgagee-consent provisions for extensions applied to consensual extensions outside an already registered renewal entitlement.
- **Outcome:** Shell's renewed lease prevailed over Mercantile's later mortgage, so Mercantile could not sell the land free of Shell's leasehold interest.
- **Principle:** A renewal covenant integral to a registered lease shares the lease's registration, priority and indefeasibility.
- **Exam use:** Determine whether a term qualifies or defines the registered estate or is merely a collateral personal right.

### *Ippin Textiles Pty Ltd v Winau Aust Pty Ltd* [2021] NSWCA 9

- **Facts:**

- Mr Chan falsely arranged to be recorded as sole director and secretary of 183 Eastwood Pty Ltd, the registered proprietor of three parcels.
- Without authority, he obtained replacement certificates of title and applied in the company's name for a $4.5 million loan secured by registered mortgages.
- The mortgagees paid about $3.79 million into a company-named account controlled solely by Chan rather than to the company.
- The registered mortgage contained a redacted Schedule A naming only 183 Eastwood as mortgagor.
- An unregistered schedule named Chan as debtor, mortgagor and guarantor.
- A registered special condition provided that the redacted schedule would govern if the unregistered schedule was void, voidable or unenforceable.
- After default and sale, the issue was whether the mortgage secured anything against the proceeds.

- **Reasoning:**
  - **Real Property Act 1900 (NSW) ss 41, 42 and 57** protected the existence of the registered mortgage despite the fraudulent execution.
  - Indefeasibility did not determine the mortgage's content; construction of the registered instrument remained necessary.
  - Macfarlan JA held that payment into Chan's fraudulently controlled account was not an advance to 183 Eastwood.
  - Leeming JA held that a person inspecting the Register could not be expected to rely upon an unregistered schedule to enlarge the mortgage.
  - The registered special condition independently made the redacted schedule controlling when the other schedule was invalid or unenforceable.
  - Chan's personal liability, appearing only in the unregistered document, was therefore not secured against the land.
- **Outcome:** Leave to appeal was granted but the appeal was dismissed because the registered mortgage secured nothing and the sale proceeds were payable to 183 Eastwood.
- **Principle:** Indefeasibility validates the registered interest against defects but does not enlarge its content beyond the registered instrument properly construed.
- **Exam use:** Separate whether a mortgage exists indefeasibly from what debt or obligation the registered mortgage actually secures.

## Indefeasibility

- **Statutory foundation: Real Property Act 1900 (NSW) s 41** makes registration the operative event by which a dealing passes an estate or interest or makes land security for money.
- **Paramount title: Section 42(1)** gives the registered proprietor the recorded estate or interest subject to recorded interests, fraud and listed statutory exceptions.
- **Notice: Section 43** relieves a person dealing with the registered proprietor from investigating unregistered trusts and interests; notice alone is not fraud.

- **Downstream protection: Section 45** protects a bona fide registered purchaser or mortgagee for value despite defects or fraud in a predecessor's registration, unless the Act provides otherwise.
- **Recovery proceedings: Section 118** bars possession or recovery proceedings against a registered proprietor except in its specified categories.
- **Immediate indefeasibility:** A person registered through a forged, void or voidable dealing ordinarily obtains an immediately indefeasible title unless an exception applies to that registered proprietor.
- **Deferred theory rejected:** Deferred indefeasibility would protect only the next registered transferee from the person registered through the defective dealing.
- **Modern position:** *Frazer v Walker* and *Breskvar v Wall* establish immediate indefeasibility; *Gibbs v Messer* is confined to its unusual fictitious-proprietor facts.
- **Old-system comparison:** A forged deed passes no title under nemo dat, and deeds registration does not cure the defect.
- **Effect of registration:** Registration can cure voidness in the instrument for the purpose of creating the registered estate, but does not validate an interest unknown to law or inherently uncertain.
- **Overriding statute:** Registration cannot validate an interest where another statute, properly construed, overrides the Torrens indefeasibility provisions.
- **Constitutional limit:** State registration cannot validate an interest created under State legislation invalid through inconsistency with Commonwealth law.
- **Natural rights:** Indefeasibility does not remove natural rights or obligations merely because they are absent from the folio.
- **Ancillary rights:** A registered easement includes legal incidents necessary for its exercise even if every incident is not separately recorded.
- **Boundaries:** Registration does not invariably guarantee every measurement; statutory misdescription and boundary provisions qualify the position.
- **Later registration:** A later inconsistent registered dealing can extinguish or modify an earlier registered interest.
- **Indefeasibility umbrella:** Protection extends to terms inherent in, qualifying or defining the registered estate or interest.
- **Collateral terms:** A third-party guarantee or independent personal covenant does not become indefeasible merely because it appears in the registered document.
- **Forged mortgage:** Registration creates the mortgage interest, but whether a personal repayment covenant survives depends on construction and incorporation of the secured obligation.
- **Construction:** The court asks what obligation the registered mortgage secures, whether external terms are incorporated and whether the obligation is sufficiently connected with the registered interest.
- **Multiple mortgagors:** A forged signature by one mortgagor may affect personal obligations differently from the registered security; the precise instrument and statutory estate must be analysed.

- **Mortgagee verification: Real Property Act 1900 (NSW) s 56C** requires reasonable identity-verification steps before lodgment and permits cancellation where fraud and statutory non-compliance coincide.
- **Lease terms:** A covenant in a registered lease attracts indefeasibility where it qualifies or defines the leasehold estate.
- **Renewal covenant:** A renewal right is ordinarily integral to the term and may bind later registered interests.
- **Invalid terms:** Registration does not save a lease option expressly declared illegal or void by statute or an independently invalid restraint of trade.
- **Volunteers:** NSW authority generally gives a registered volunteer the protection of immediate indefeasibility, subject to specific statutory exceptions.
- **Interstate difference:** Some jurisdictions historically denied volunteers a better title than their predecessors; always identify the applicable statutory scheme.
- **Gift at law:** A gift of Torrens land passes legal title only upon registration of the donee.
- **Gift in equity:** An unregistered gift is complete only if the donor has done everything necessary on the donor's part and placed the transfer beyond recall.
- **Donatio mortis causa:** Australian authority generally rejects applying deathbed gifts to land, although English authority has treated the doctrine as trust-based.
- **Strong v Bird:** An imperfect immediate gift may be perfected if the intended donee becomes executor and the donor's intention continued until death.
- **Fraud exception:** Torrens fraud means actual dishonesty or moral turpitude, not constructive fraud, equitable fraud, notice or mere carelessness.
- **Current title:** Fraud by a predecessor is cut off by registration unless brought home to the present registered proprietor personally or through a responsible agent.
- **Wilful blindness:** Deliberately avoiding inquiry for fear of learning the truth may constitute fraud; failure to be diligent or meticulous does not.
- **Timing:** Fraud ordinarily occurs before or in obtaining registration, although later conduct may prove an earlier dishonest intention.
- **Known interest:** Knowledge of an unregistered interest is not fraud unless accompanied by a dishonest design to use registration to defeat the known right.
- **Agency:** Fraud is attributed only through ordinary agency principles, including authority, responsibility and legally imputable knowledge.
- **Consequence:** Fraud makes the title defeasible only to the extent required to remedy the fraud and may support recovery, trust or personal relief.
- **Recorded interests:** The opening words of **s 42(1)** subject the proprietor to estates and interests recorded on the folio.
- **Omitted easements: Section 42(1)(a1)** preserves specified omitted or misdescribed easements and profits à prendre through its two statutory limbs.
- **Implied easements:** Whether an implied easement binds depends upon the statutory exception and the legal basis of implication.
- **Prescription:** Easements generally cannot be acquired by prescription against Torrens land, subject to transitional and jurisdiction-specific provisions.
- **Adverse possession: Section 42(1)(b)** preserves a qualifying possessory title within the statutory adverse-possession scheme.

- **Wrong parcel: Section 42(1)(c)** qualifies title for wrong parcel or boundary descriptions under its stated conditions.
- **Short tenancies: Section 42(1)(d)** protects qualifying unregistered tenancies of up to three years where the statutory notice and possession conditions are satisfied.
- **Renewal options:** A renewal option may fall within the protected tenancy where it is part of the tenant's interest and the registered proprietor has the required notice.
- **Rights in personam:** Indefeasibility does not prevent enforcement of a recognised legal or equitable cause of action arising from the registered proprietor's own conduct.
- **No free-standing fairness:** “Personal equity” is not an independent exception; the claimant must plead and prove contract, trust, estoppel, restitution or another established doctrine.
- **Mistake:** Knowledge of another's mistake does not alone establish an in personam claim; the elements of the asserted doctrine and unconscientious conduct must be shown.
- **Successors:** Whether an in personam obligation binds a successor depends upon assumption, transmission and the nature of the recognised cause of action.
- **Overriding statutes:** A later or specific statute displaces indefeasibility only where its text and purpose reveal the necessary inconsistency.
- **Exam sequence:** Apply **ss 41 and 42**, identify the registered interest's content, then separately test fraud, statutory exceptions, in personam liability and overriding legislation.

### *Breskvar v Wall* (1972) 126 CLR 376

- **Facts:**
  - Emilie and Franc Breskvar were registered fee-simple proprietors of unencumbered Acacia Ridge land.
  - To secure a $1,200 loan from George Pettie, they signed a transfer of the whole land on 5 March 1968 with the transferee's name left blank.
  - **Stamp Act of 1894 (Qld) s 53(5)** declared such a transfer absolutely void unless the transferee's name was written in ink at execution.
  - In September, Pettie fraudulently inserted his grandson George Wall's name and procured Wall's registration on 15 October.
  - Wall contracted on 31 October to sell to Alban Pty Ltd and executed its transfer on 7 November.
  - Pettie acted as Wall's agent, and Wall was affected by Pettie's fraud.
  - Alban was a bona fide purchaser for value without notice but had not yet obtained the decisive protection of registration when the competing claims arose.
- **Reasoning — Barwick CJ at 381:**
  - Torrens is a system of title by registration, not registration of an independently existing title.
  - Registration may confer a statutory estate despite the transfer's invalidity under another statute.
  - The result depends upon the Torrens provisions prevailing over the statute producing the voidness.

  - Immediate indefeasibility must be separated from priority between competing unregistered equitable claims.
  - Where neither claimant has obtained registration, the court compares the equities and considers whether the earlier holder's conduct enabled the later dealing.
- **Outcome:** The High Court treated the registered title as created by registration but resolved the remaining competition by applying equitable priority principles to the unregistered claims.
- **Principle:** A void dealing may create a registered estate because registration is constitutive, while unregistered competitors remain governed by priority rules.
- **Exam use:** Ask first who is registered; if the later claimant is not registered, do not apply indefeasibility as though registration had occurred.

## *Frazer v Walker* [1967] 1 AC 569

- **Facts from the supplied textbook:**
  - A registered proprietor's signature was forged on a mortgage.
  - The mortgagee took without fraud and became registered.
  - The former proprietor sought to defeat the mortgage because the underlying instrument was void.
- **Reasoning:**
  - Registration conferred immediate indefeasibility on the innocent registered mortgagee despite forgery.
  - The legislation protects the registered estate or interest, not the invalid instrument as an independently effective source of title.
  - Deferred indefeasibility was rejected because it would postpone protection until a later registered dealing.
  - *Gibbs v Messer* was confined to the exceptional use of a fictitious registered proprietor.
  - The registered proprietor remained subject to fraud brought home personally, statutory exceptions and recognised in personam claims.
- **Outcome:** The innocent registered mortgagee retained the registered mortgage despite the forgery.
- **Principle:** An innocent proprietor obtains immediate indefeasibility upon registration through a forged or void dealing.
- **Exam use:** State the rule, identify the registered interest and then test exceptions rather than treating forgery as automatically defeating registration.

## *Cassegrain v Gerard Cassegrain & Co Pty Ltd* [2015] HCA 2; 254 CLR 425

- **Facts:**
  - Gerard Cassegrain & Co Pty Ltd transferred the Dairy Farm to director Claude Cassegrain and his wife Felicity as joint tenants.
  - The price was supposedly satisfied by debiting Claude's loan account, although Claude knew the company did not owe him that amount.

  - Claude thereby defrauded the company; Felicity was not alleged to know of or participate in the fraud.
  - The first transfer was registered in March 1997, while the false accounting entry was made in June.
  - In 2000, Claude transferred his joint-tenancy interest to Felicity for nominal consideration of $1, making her sole registered proprietor.
  - The company sought recovery of the whole property under **Real Property Act 1900 (NSW) ss 42, 100 and 118(1)(d)**.
- **Reasoning — majority:**
  - Fraud must be brought home personally to the registered proprietor or a true agent.
  - Claude's assistance with documents and registration did not establish authority to act as Felicity's agent.
  - **Section 100(1)** deems co-proprietors joint tenants but does not attribute one tenant's fraud automatically to the other.
  - The *per my et per tout* description could not override the statutory fraud inquiry because each joint tenant retained an alienable interest.
  - Felicity's originally acquired half was therefore indefeasible.
  - Felicity later derived Claude's fraudulently acquired half "from or through" him and was not a bona fide purchaser for value.
  - **Section 118(1)(d)(ii)** therefore permitted recovery of the later-acquired half without requiring proof that Felicity personally committed fraud.
- **Reasoning — Keane J:**
  - Keane J treated the joint registration as acquisition by one single owner and would have attributed the fraudulent procurement to the whole joint title.
- **Outcome:** Felicity retained her original half but held the half later acquired from Claude on trust for the company and was ordered to transfer it back.
- **Principle:** Fraud is personal to the proprietor or true agent, but a non-value transferee may lose an interest derived through a fraudulently registered proprietor under **s 118(1)(d)(ii)**.
- **Exam use:** Analyse each proprietor and each acquired share separately, distinguishing personal fraud under **s 42** from derivative recovery under **s 118**.

## Unregistered Interests, Caveats and Priorities

- **Existence:** Torrens legislation recognises legal and equitable interests before registration even though registration is required to create the registered legal estate.
- **Vulnerability:** An unregistered interest remains liable to defeat by a later registered dealing unless protected by an exception or statutory mechanism.
- **Equitable enforcement:** An unregistered interest may be enforced against persons bound under ordinary equitable doctrines, including the registered proprietor through an in personam claim where its elements are satisfied.
- **Caveat function:** A caveat gives notice of a claimed estate or interest and prevents registration of inconsistent dealings without notice to the caveator.

- **No creation:** A caveat does not create, enlarge or improve the underlying proprietary interest.
- **Caveatable interest: Real Property Act 1900 (NSW) s 74F(1)** requires a presently existing legal or equitable estate or interest in land.
- **Call option:** An option to purchase creates an equitable interest and is caveatable.
- **Put option:** A put option may be caveatable where it creates a proprietary obligation capable of compelling purchase.
- **Pre-emption:** A right of pre-emption is ordinarily contractual until the owner decides to sell, when it may crystallise into an option and equitable interest.
- **Co-ownership:** A caveat by one joint tenant may protect the joint interest, while a caveat directed only to one co-owner's interest affects that share alone.
- **Subdivision:** A caveat over land ordinarily continues over subdivided parts.
- **Unstamped instrument:** Enforceability depends upon the applicable duties legislation; an expressly unenforceable mortgage cannot support a caveat.
- **Cause of action:** A claim under family-property or relationship legislation is not itself caveatable unless supported by an existing proprietary interest.
- **Constructive trust:** A spouse's sufficiently established constructive-trust interest arising from contributions may support a caveat.
- **Mere equity:** A mere right to seek equitable relief is not ordinarily caveatable unless elevated by statute into an interest in land.
- **Contractual charge:** A contract can expressly or impliedly create a charge over land securing contractual obligations.
- **Permission to caveat:** An agreement allowing a caveat does not by itself create an interest; construction must reveal an intended proprietary security.
- **Implied grant:** Courts may infer a charge where a contractual caveat right would otherwise be legally ineffective, but surrounding circumstances remain controlling.
- **Default unnecessary:** A charge may arise immediately rather than only on default if the instrument's wording so provides.
- **Termination:** Termination usually ends future contractual rights but does not necessarily discharge accrued secured obligations or an existing charge.
- **No-caveat clause:** Contracting not to lodge does not remove statutory power, but lodgment may breach contract and influence discretionary extension.
- **Registrability unnecessary:** A caveat may protect an interest even though no registrable instrument presently exists.
- **Formal requirements: Section 74F(5)** requires the caveat to identify the interest claimed, its source and affected land with sufficient clarity.
- **Substance over technicality:** NSW does not demand perfect formal compliance where the claim is adequately identified and no injustice results, but material defects remain significant.
- **Effect on Registrar-General:** While effective, the caveat prevents registration of inconsistent dealings except as the Act permits.
- **Withdrawal:** The caveator may withdraw the caveat.
- **Lapsing notice:** A registered proprietor or dealing holder may use the statutory lapsing process, requiring the caveator to obtain a court extension within the prescribed period.

- **Court removal:** The Supreme Court may order removal, providing an expedited route against an unsupported or vexatious caveat.
- **Further caveat: Section 74O** restricts a later caveat based on the same interest and facts unless the court grants leave.
- **Extension test:** The caveator must show a serious question to be tried and that the balance of convenience favours maintaining the caveat.
- **Serious question:** The asserted facts and law must disclose an arguable proprietary interest rather than a merely personal claim.
- **Balance of convenience:** The court compares prejudice, proposed dealings, preservation of property, adequacy of damages, delay and the caveator's undertaking.
- **Ancillary power:** The court may impose terms, permit dealings subject to security or modify the restraint to protect both parties.
- **Undertaking:** A caveator seeking continuation ordinarily undertakes to compensate damage caused by the restraint.
- **Financial capacity:** Inability to meet the undertaking may weigh against extension.
- **Wrongful caveat: Section 74P** creates liability where a person lodges or maintains a caveat without reasonable cause and thereby causes attributable loss.
- **Reasonable cause:** The caveator ordinarily needs both an honest belief in the interest and objectively reasonable grounds.
- **Legal advice:** Reliance on competent professional advice may support reasonableness but is not automatically conclusive.
- **Actual interest debate:** Authority differs on whether possession of a valid interest necessarily establishes reasonable cause where the caveat is materially defective or excessive.
- **Causation:** Compensation is confined to loss attributable to the wrongful lodgment or maintenance.
- **Mitigation:** The claimant must take reasonable steps to reduce loss, including using available removal procedures.
- **Injunction:** A threatened caveat may be restrained where its lodgment would be wrongful and cause harm.
- **Competing equitable interests:** The first in time prevails where the equities are equal; otherwise the claimant with the better equity prevails.
- **Legal versus equitable:** An exceptional unregistered legal interest may compete with an equitable interest under general-law priority principles until registration intervenes.
- **Postponing conduct:** An earlier interest may be postponed where its holder's conduct enabled, induced or contributed to the later interest.
- **Causal connection:** The later claimant must connect the earlier holder's conduct with acquisition of the later interest.
- **Mere failure to caveat:** Failure alone does not postpone an earlier interest.
- **Failure plus circumstances:** Non-lodgment may contribute to postponement where conveyancing practice, representations or control of title documents made the later dealing reasonably possible.
- **Notice:** A later unregistered interest-holder with notice of the earlier interest generally cannot obtain the better equity.

- **Search failure:** Failure to search may matter where a search would reveal a caveat or warning and the later claimant nevertheless asserts superior merits.
- **Other protection:** Retaining title documents, taking possession or notifying relevant parties may prevent the registered proprietor from appearing unencumbered.
- **Electronic titles:** Possession of a paper certificate no longer provides the same protection after abolition of paper certificates.
- **Derivative interest:** A caveat may protect a presently enforceable interest derived from another unregistered proprietary interest.
- **Section 43A purpose: Real Property Act 1900 (NSW) s 43A(1)** protects a purchaser or mortgagee holding a dealing registrable for value without notice during the period between completion and registration.
- **Effect:** For protection against notice, the holder is treated as though registered, but **s 43A** does not itself complete registration.
- **Immediate registrability:** The dealing must be in approved registrable form and accompanied by required documents, consents and authorities.
- **Caveat obstruction:** A dealing blocked by a caveat asserting a competing interest may not be immediately registrable.
- **Prompt lodgment:** Unreasonable delay may prevent or terminate **s 43A** protection.
- **Successive effect:** The *Wilkes v Spooner* doctrine may allow a successor to rely on a predecessor's immunity from an equity, subject to statutory and equitable limits.
- **Risk:** Protection may fail where a dealing cannot be lodged immediately, intervening interests arise or the predecessor lacked the asserted immunity.
- **Exam sequence:** Identify each unregistered interest, apply caveat protection and the better-equity test, then consider **s 43A** and eventual registration.

## Assurance Fund

- **Function:** Compensation is the correlative of immediate indefeasibility where the system protects registered title instead of restoring the claimant's land interest.
- **Statutory scheme: Real Property Act 1900 (NSW) s 120** and **Pt 14 ss 128-135** govern entitlement, exclusions, administration, litigation and recoupment.
- **Causal requirement:** Loss must occur “as a result of” or “as a consequence of” operation of the Act, not merely during a transaction involving Torrens land.
- **Registration loss:** Compensable loss may arise where registration of another interest defeats the claimant through statutory indefeasibility.
- **Registrar-General error:** Erroneous registration, omission, correction or exercise of statutory functions may support compensation where the statutory causal test is met.
- **Unregistered interest:** An unregistered interest can constitute an “interest in land” capable of compensable loss.
- **Exclusions: Section 129(2)** excludes specified losses involving claimant fraud, negligence, unauthorised powers of attorney and other statutory categories.
- **Mitigation and contribution:** A claimant's conduct may reduce or defeat recovery where the Act or ordinary compensation principles so provide.

- **Administrative claim:** A claimant may first seek administrative payment or settlement through the statutory process.
- **Proceedings:** Court proceedings are subject to procedural preconditions and limitation provisions in the Act.
- **Measure:** Recoverable loss is controlled by statutory caps and ordinary principles of causation, valuation, mitigation and avoidance of double recovery.
- **Recovery of land:** Successfully recovering the land does not necessarily eliminate every compensable consequential loss, but double recovery is prohibited.
- **Subrogation or recoupment:** After payment, the State may obtain statutory rights to recover from responsible wrongdoers.
- **Exam use:** Identify the lost interest, the precise operation of the Act causing its loss, applicable exclusions, recoverable heads and mitigation.

## Consolidated Cases by Topic

- **The Register**
  - *Bursill Enterprises Pty Ltd v Berger Bros Trading Pty Ltd* — inspect a registered instrument expressly incorporated by the folio for the complete registered interest.
  - *Deguisa v Lynn* — no inquiry is required into cancelled titles or external archival material not incorporated into the operative Register.
  - *Mercantile Credits Ltd v Shell Co of Australia Ltd* — a renewal covenant integral to a registered lease shares its priority and indefeasibility.
  - *Ippin Textiles Pty Ltd v Winau Aust Pty Ltd* — indefeasibility protects existence, while construction determines the registered interest's content.
- **Immediate indefeasibility**
  - *Frazer v Walker* — an innocent registered proprietor takes an immediately indefeasible interest despite forgery.
  - *Breskvar v Wall* — Torrens is title by registration, but unregistered competitors remain subject to priority principles.
- **Fraud**
  - *Assets Co Ltd v Mere Roihi* — actual dishonesty must be brought home to the registered proprietor or responsible agent.
  - *Cassegrain v Gerard Cassegrain & Co Pty Ltd* — fraud is not automatically attributed between joint tenants; derivative recovery under **s 118** is distinct.
- **Rights in personam**
  - *Bahr v Nicolay (No 2)* — an obligation assumed by the registered proprietor may be enforced through a recognised personal equity.
  - *Grgic v Australian and New Zealand Banking Group Ltd* — a claimant must establish an existing legal or equitable cause of action rather than general unfairness.
- **Unregistered priorities**
  - *Rice v Rice* — first in time prevails where competing equitable merits are equal.

  - *Abigail v Lapin* — postponing conduct can give a later equitable interest the better equity.
  - *Heid v Reliance Finance Corporation Pty Ltd* — assess failure to caveat as part of the whole conduct affecting relative merits.
  - *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* — mere failure to caveat does not postpone an earlier equitable interest.
- **Section 43A**
  - *IAC (Finance) Pty Ltd v Courtenay* — a holder of an immediately registrable dealing for value may receive protection against notice before registration.
  - *Black v Garnock* — a purchaser remains exposed to intervening registration risks between settlement and registration.
- **Assurance Fund**
  - *Diemasters Pty Ltd v Meadowcorp Pty Ltd* — the claimant's loss must result from operation of the Act and satisfy the statutory compensation scheme.

## Highlighted Sections

- **Real Property Act 1900 (NSW) — Torrens Registration and Indefeasibility**
- **s 41 Dealings Not Effectual Until Registered**
  - **s 41(1):** A dealing does not pass an estate or interest in Torrens land, or make land security for money, until it is registered.
  - **s 41(1):** Once registered, the estate/interest passes, or the land becomes liable as security, according to the dealing and any covenants, conditions, contingencies, or implied statutory terms.
  - **Exam use:** Registration is the operative act for passing legal title or creating registered security interests in Torrens land.
- **s 42 Estate of Registered Proprietor Paramount**
  - **s 42(1):** The registered proprietor holds the recorded estate or interest subject only to interests recorded on the folio and listed statutory exceptions, except in cases of fraud.
  - **s 42(1)(a)–(d):** Exceptions include prior folio claims to the same land, omitted/misdescribed easements, omitted/misdescribed profits à prendre, wrong parcel/boundary descriptions affecting non-value purchasers/mortgagees, and certain short tenancies up to 3 years where notice existed.
  - **s 42(2):** Interests recorded in a registered mortgage, charge, or lease identifiable from the folio are treated as recorded in the folio.
  - **s 42(3): s 42** prevails over inconsistent laws unless the other law expressly says it operates despite **s 42**.
  - **Exam use:** This is the core indefeasibility provision. Start with the register, then test fraud and the statutory exceptions.
- **s 43 Purchaser Not Affected by Notice**
  - **s 43(1):** Except for fraud, a person dealing with a registered proprietor need not investigate how that proprietor became registered, the consideration, application of purchase money, or any trust/unregistered interest.

  - **s 43(1):** Mere knowledge of a trust or unregistered interest is not itself fraud.
  - **s 43(2):** This does not defeat claims based on a subsisting interest affecting land in a qualified folio.
  - **Exam use:** Notice of an unregistered interest does not, by itself, defeat a registered dealing. You need fraud or another recognised exception.
- **s 45 Bona Fide Purchasers and Mortgagees Protected**
  - **s 45(1):** The Act does not deprive a bona fide purchaser or mortgagee for value of a registered estate or interest unless the Act expressly provides otherwise.
  - **s 45(2)(a)–(c):** Damages, possession, or recovery proceedings do not lie against a bona fide purchaser/mortgagee for value merely because the vendor/mortgagor was registered through fraud/error/void or voidable instrument, procured the transfer/mortgage through such means, or derived title through someone so registered.
  - **s 45(3):** This protection applies whether the fraud/error involves land or boundary misdescription or otherwise.
  - **Exam use:** Protects downstream bona fide registered purchasers/mortgagees for value, even where earlier title was tainted.
- **s 56C Mortgagee Identity Verification**
  - **s 56C(1):** Before lodging a mortgage, the mortgagee must take reasonable steps to confirm the mortgagor is the same person as the registered proprietor, or person about to become registered proprietor, of the secured land.
  - **s 56C(2):** Compliance with prescribed conveyancing rules counts as reasonable steps.
  - **s 56C(3)(a)–(b):** The mortgagee must keep written records or copies of identity documents for 7 years from registration, or another prescribed period.
  - **s 56C(4)–(5):** The Registrar-General may require answers/documents and may record non-compliance, refuse registration, reject the mortgage, or refuse other register action.
  - **s 56C(6)(a)–(b):** The Registrar-General may cancel a mortgage recording if execution involved fraud against the registered proprietor and the mortgagee failed to verify identity or had actual/constructive notice of the mismatch.
  - **s 56C(7):** Notice must be given before cancellation.
  - **s 56C(8)(a)–(c):** The same identity verification obligations apply to transferees of mortgages.
  - **Exam use:** In forged mortgage problems, check mortgagee verification steps. Non-compliance can expose the mortgage recording to cancellation.
- **s 118 Registered Proprietor Protected Except in Certain Cases**
  - **s 118(1):** Proceedings for possession or recovery of land do not lie against a registered proprietor except in listed cases.
  - **s 118(1)(a)–(c):** Exceptions include mortgagee, chargee/covenant chargee, and lessor proceedings against a defaulting mortgagor, charger, or lessee.
  - **s 118(1)(d):** A person deprived of land by fraud may sue the fraudulent registered proprietor, or a person deriving from them other than as a bona fide transferee for value.

  - **s 118(1)(e)–(f):** Exceptions also cover misdescription/boundary inclusion claims against non-bona fide value transferees, and earlier folio proprietor claims against later folio proprietors for the same land.
  - **s 118(2)–(3):** Production of the relevant manual or computer folio is an absolute bar/estoppel to proceedings, except for the listed **s 118(1)(a)–(f)** proceedings.
  - **s 118(4)(a)–(b):** The section does not affect proceedings based on subsisting interests in qualified folios or certain misdescription claims involving limited folios.
  - **Exam use:** Use **s 118** for actions seeking possession/recovery from a registered proprietor. It reinforces indefeasibility but preserves specific exceptions. **Scaffold Anchor**
- **Has the dealing passed legal title/security?** Apply **s 41**.
- **Registered proprietor's title:** Apply **s 42**.
- **Notice of unregistered interest?** Apply **s 43**.
- **Bona fide purchaser/mortgagee for value?** Apply **s 45**.
- **Forged/fraudulent mortgage?** Apply **s 56C**.
- **Proceedings to recover land:** Apply **s 118**.
- **Core sequence:** registration under **s 41** → indefeasibility under **s 42** → notice protection under **s 43** → fraud/statutory exceptions.
- **Real Property Act 1900 (NSW) — Register, Lodgment and Electronic Conveyancing**
- **s 3A Electronic Plans and Documents**
  - **s 3A(1)–(2):** References to plans/documents and lodgment include electronic data files and electronic lodgment in a form approved by the Registrar-General.
  - **s 3A(3):** If a plan is lodged electronically, supporting documents must also be lodged electronically unless excepted by regulations or the Registrar-General.
  - **s 3A(4):** Required signatures, seals, certificates, consents or approvals for electronic plans must be endorsed on an approved signature form and lodged electronically.
  - **s 3A(5):** The Act applies to electronic plans/documents the same way as paper documents, subject to statutory or regulatory modifications.
  - **Exam use:** Electronic lodgment is legally equivalent where approved forms/processes are followed.
- **s 31B The Register**
  - **s 31B(1)–(2):** The Registrar-General must maintain the Register, comprising folios, registered dealings, computer folio records, prescribed instruments, and prescribed records.
  - **s 31B(3)–(4):** The Register may be kept in any medium and the Registrar-General may vary its form.
  - **Exam use:** The Register is not just folios; it includes dealings and prescribed records.
- **s 32 Folios of the Register**
  - **s 32(1)(a)–(c):** A folio is created by recording the land, estate/interest, proprietor, and relevant affected estates/interests or statutory information, then allocating a distinctive reference.

- **s 32(2)–(2A):** The general folio creation rule does not apply to certain strata folios and is modified for qualified folios.
- **s 32(3):** The Registrar-General may create folios for registered leasehold interests and require plans, including survey plans.
- **s 32(4)–(5):** The Registrar-General may create new folios for land in existing folios and cancel previous folios.
- **s 32(6):** The Registrar-General may cancel recordings that do not affect the land they purport to affect.
- **s 32(7):** The Registrar-General must maintain records of dealings/actions for computer folios.
- **Exam use:** A folio records the title, proprietor and affecting interests; the Registrar-General controls creation, replacement, correction, and cancellation of non-affecting recordings.

- **s 33 Information Notice**
  - **s 33(1)–(3):** On registration of a dealing, the Registrar-General may issue an information notice, but it does not confer or affect any land interest and cannot substitute for a computer folio certificate or Conveyancing Act document.
  - **Exam use:** An information notice is evidentiary/administrative only, not title.
- **s 36 Lodgment and Registration of Documents**
  - **s 36(1A)–(1B):** A dealing, memorandum, caveat or priority notice is lodged only when the Registrar-General accepts it and allocates a distinctive reference.
  - **s 36(1C)–(1E):** The Registrar-General may refuse lodgment for non-compliance, missing folio/dealing references, improper witnessing, non-approved lodgment method, or doubtful execution/attestation.
  - **s 36(1F):** Supporting documents are not invalid merely because executed electronically.
  - **s 36(2)–(3):** If execution is under power of attorney, the Registrar-General may require the power to be registered, but may assume sufficient authority for execution.
  - **s 36(4)–(5):** Where multiple dealings affect the same land and await registration, the Registrar-General may register them to give effect to party intentions; if intentions conflict, registration order follows lodgment in registrable form.
  - **s 36(6):** A dealing is lodged in registrable form only if it is in approved form and needs no correction/amendment other than Registrar-General correction.
  - **s 36(6AA):** An uplifted caveat is ineffective to stop dealings or applications until relodged.
  - **s 36(6A)–(9):** Registration occurs when the Registrar-General records the dealing; priority between registered dealings affecting the same estate/interest is by order of registration, despite notice.
  - **s 36(11)–(12):** On registration, a dealing has effect as a deed; if electronic registration is refused, parties must lodge in the form required by the Registrar-General.

  - **Exam use:** Distinguish lodgment, lodgment in registrable form, and registration. Priority turns on registration order, but lodgment order matters where party intentions conflict.
- **s 117 Certificate of Correctness**
  - **s 117(1)–(2):** The Registrar-General may reject or refuse action on applications, dealings, caveats or priority notices unless certified as required by conveyancing rules.
  - **s 117(4):** A person must not falsely or negligently certify correctness.
  - **s 117(5):** Conviction for false/negligent certification does not prevent an affected person from suing the certifier for resulting loss.
  - **Exam use:** Certification is a gatekeeping requirement for registration and can create liability for negligent or false certification.
- **NSW Participation Rules Sch 3 Certification Rules**
  - **Sch 3:** The certifier must verify identity, hold client authorisation, retain supporting evidence, take reasonable steps to ensure correctness/compliance, satisfy mortgage-specific identity/mortgage requirements, and retrieve/destroy or invalidate duplicate certificates of title where required.
  - **Exam use:** Use Sch 3 to show what a certifier warrants when lodging electronically.
- **NSW Participation Rules Sch 8 Verification of Identity**
  - **Sch 8 rr 2–3:** Verification generally requires a face-to-face interview, reasonable likeness check for photo ID, original ID documents, category-based document hierarchy, and retention of copies.
  - **Sch 8 r 4:** Identifier declarations can be used only where higher ID categories cannot be met, with both persons attending, identity declarant verification, and statutory declaration requirements.
  - **Sch 8 rr 5–7:** For body corporates and attorneys, the verifier must confirm corporate existence/authority or power of attorney authority, and verify the individuals signing.
  - **Sch 8 r 10:** Further checks are required where documents or likeness appear doubtful, or where reasonable.
  - **Exam use:** VOI compliance is practical evidence of reasonable steps, especially in fraud/forged mortgage or electronic lodgment problems. **Scaffold Anchor**
- **Electronic plan/document?** Apply **RPA s 3A**.
- **What is the Register?** Apply **s 31B**.
- **Folio creation/correction:** Apply **s 32**.
- **Information notice only?** Apply **s 33**.
- **Lodgment accepted?** Apply **s 36(1A)–(1B)**.
- **Registrable form?** Apply **s 36(6)**.
- **Registration and priority:** Apply **s 36(6A)–(9)**.
- **Certification required?** Apply **s 117** and **Participation Rules Sch 3**.
- **Verification of identity:** Apply **Participation Rules Sch 8**.