

BETWEEN:

STATE OF QUEENSLAND
Appellant

and

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**TOM CONGOO, LAYNE MALTHOUSE
AND JOHN WATSON ON BEHALF OF
THE BAR-BARRUM PEOPLE #4**
First respondent

**ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA**
Second respondent

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**ATTORNEY-GENERAL
NORTHERN TERRITORY**
Third respondent

TABLELANDS REGIONAL COUNCIL
Fourth respondent

**ERGON ENERGY CORPORATION
LIMITED CAN 087 646 062**
Fifth respondent

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TELSTRA CORPORATION LIMITED
Sixth respondent

CONSOLIDATED TIN MINES LIMITED
Seventh respondent

MS LAURELLE URSULA GUNDERSEN
Eighth respondent

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MR GRANT HENRIK GUNDERSEN
Ninth respondent

THOMAS SAMUEL MAULONI
Tenth respondent

DIANNE CALMSDEN MAULONI
Eleventh respondent

MATHEW JOHN MAULONI
Twelfth respondent

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ROBERT THOMAS MAULONI
Thirteenth respondent

THOMAS JOHN MAULONI
Fourteenth respondent

MR ROBERT GRAHAM WHITE
Fifteenth respondent

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MS ROBYN DORIS WHITE
Sixteenth respondent

STEPHEN JOHN CROSSLAND
Seventeenth respondent

DALE ALBERT CROSSLAND
Eighteenth respondent

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ELIZABETH HAZEL DAWN CROSSLAND
Nineteenth respondent

RENATO DOVESI
Twentieth respondent

LINA DOVESI
Twenty-first respondent

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WILLIAN DAVID MCGRATH
Twenty-second respondent

SHARON LESLEY MCGRATH
Twenty-third respondent

FIRST RESPONDENT'S SUBMISSIONS

PART I: INTERNET

1. These submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The first respondent agrees with the statement of issues in paragraph 2 of the submissions filed by the appellant (**the State**) dated 16 October 2014 (**AS**).

40 **PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)**

3. The first respondent does not consider that a notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: CONTESTED FACTS

4. The facts are as stated in the Amended Special Case Stated in the Full Court of the Federal Court filed 21 March 2014 (**SC**). Terms defined therein are used with the same meanings in these submissions. The summary of facts set out in AS [5]–[21] is not contested, but requires supplementation.
5. The nature and extent of the native title rights that the Bar Barrum People hold in relation to the special case land (unless extinguished by the Military Orders) involve non-exclusive rights to access and live on the land, to take and use its natural resources, to protect places of traditional significance, and to derive physical and spiritual sustenance from the land: SC [41] (Appeal Book (**AB**) 9–10).
6. The five Military Orders made under reg 54 of the *National Security (General) Regulations 1939* (Cth) (**the Regulations**) between 20 December 1943 and 1 June 1945 covered areas (ranging between 153 to 254 sq km) that included the special case land. Each order described the relevant land as that piece of land edged on a plan attached to the order, situated in the State of Queensland and “owned by the Crown” or “being property of the Crown”.¹ The Crown land covered by the orders was subject to a number of interests, including a mineral lease and (subject to any extinguishing effect of the orders) the native title rights of the Bar Barrum People: SC [36] (**AB8**).

PART V: LEGISLATIVE PROVISIONS

7. The applicable legislative provisions are as set out in the annexure to AS. The first respondent adds (and annexes):
- (1) *National Security (General) Regulations 1939* (Cth) regs 71–74, 79–79B;
 - (2) *National Security (Supplementary) Regulations 1940* (Cth) regs 72–72A; and
 - (3) *National Security (Hirings Administration) Regulations 1942* (Cth) regs 2–6, 12–17, 19–21.

PART VI: ARGUMENT

Summary

8. The State’s case depends upon the proposition that native title was extinguished because the Commonwealth took exclusive possession of the special case land (AS [29], [38]–[44]) involving a right to exclude any and everyone from the land for any

¹ Annexures D (map of areas covered) and F–J (Military Orders) to the SC at AB91–106.

or no reason at all.² The proposition depends upon two presuppositions. One is that the existence of the Commonwealth's power necessarily implied the non-existence of native title rights in relation to the land.³ The other is that the native title rights of the Bar Barrum People are to be treated differently from the rights of others in relation to the land which, on the authority of the *Minister of State for the Army v Dalziel*,⁴ were impaired or diminished but continued to exist: cf AS [59].

9. The consequence of the State's argument is that, after the war, other rights holders were able to resume their use of the land, and the State regained its control of the land as Crown land, but it was freed of the native title rights of the Bar Barrum People. That extinguishment would be to the benefit of the underlying title of the State, but liability to compensate for that clearing of State title would fall upon the Commonwealth: see Regulations, reg 60D; Full Court (2014) 218 FCR 358 (FC) at [67]–[70] North and Jagot JJ, and [117] Logan J.
10. This in itself suggests unsoundness in the State's argument. It misfires for two related reasons. *First*, the powers conferred upon the Commonwealth were directed to prohibiting or restricting the exercise of rights of others to the land, but assumed the continued existence of those other rights. The text, structure and context of the statutory scheme indicate that, although impaired while the Commonwealth was in possession, those other rights would continue, unless compulsorily acquired under another law. *Secondly*, consistent with the nature of the defence power in s 51(vi) of the Constitution and the terms of the *National Security Act 1939* (Cth) (**the Act**), the Commonwealth's powers to possess and use land under the Regulations were conditioned and limited to defence purposes. There may have been an ability to exclude any and everyone from the land, but not for any or no reason at all.
11. The State contends that a detailed comparison between the Commonwealth's powers and the relevant native title rights is not required as it is well established that a right to exclusive possession is inconsistent with native title: AS [29]. This attracts the criticism made by Toohey J in *Wik Peoples v Queensland* of the argument that the grant of pastoral leases conferred exclusive possession inconsistent with the continuance of

² *Western Australia v Brown* (2014) 88 ALJR 461 at [36], [45]–[46], [55].

³ *Brown* (2014) 88 ALJR 461 at [38].

⁴ (1944) 68 CLR 261 esp 301 Williams J; see also *Minister for Interior v Brisbane Amateur Turf Club* (1949) 80 CLR 123 at 148 Latham CJ, 162 Dixon J, 163 McTiernan J agreeing.

native title: “*the proposition tends to conceal the nuances that are involved*”.⁵ As in *Wik*, those nuances require close attention to the statutory scheme. In a setting where special statutory powers were created for the central government to secure the safety and defence of the nation to meet the exigencies of war, to fasten upon use of the term “possession” without further analysis is apt to invite error.

Extinguishment of native title: applicable principle

12. In *Mabo v Queensland*⁶ and *Mabo v Queensland [No 2]*,⁷ the Court explained that the question whether native title had been extinguished by legislative or executive action focused upon the intention imputed to the legislature or the executive: a plain and clear imputed intention to extinguish was required. As French CJ and Crennan J observed in *Akiba v Commonwealth*,⁸ in this, as in other, areas: “*Imputed legislative intention is, and always was, a matter of the construction of the statute.*” Thus, as Brennan CJ said in *Wik*, the “clear and plain intention” required to extinguish native title:⁹

... is not to be collected by enquiry into the state of mind of the legislators or of the executive officer but from the words of the relevant law or from the nature of the executive act and of the power supporting it. The test of intention to extinguish is an objective test.

13. In the case of legislative or executive action prior to the declaration of the content of the common law in *Mabo [No 2]* recognising native title, there was no prospect that the action concerned would expressly state how it was to affect native title. As Gummow J noted in *Wik*, the declaratory theory of the common law has the consequence that courts are called upon to construe statutes enacted at times when the existing state of the law was perceived to be opposite of that which it since has been held to have been.¹⁰ Accordingly, in respect of such prior legislative or executive action, it is necessary to consider whether (and what) effect upon native title is implied.

14. The requirement that there be a plain and clear intention that native title be extinguished¹¹ is consistent with the presumption — which now may be seen as an

⁵ (1996) 187 CLR 1 at 108, quoted in *Western Australia v Ward* (2002) 213 CLR 1 at [177] Gleeson CJ, Gaudron, Gummow and Hayne JJ.

⁶ (1988) 166 CLR 186 at 213 Brennan, Toohey and Gaudron JJ (Mason CJ and Wilson J agreeing).

⁷ (1992) 175 CLR 1 at 64 Brennan J (Mason CJ and McHugh J agreeing); see also at 111 Deane and Gaudron JJ, 195 Toohey J.

⁸ (2013) 250 CLR 209 at [30].

⁹ (1996) 187 CLR 1 at 85.

¹⁰ (1996) 187 CLR 1 at 179, 184.

¹¹ To the same effect, that the extinguishment of native title must be “clearly established”: *Yanner v Eaton* (1999) 201 CLR 351 at [35] Gleeson CJ, Gaudron, Kirby and Hayne JJ.

aspect of the “principle of legality” — against the interference with common law rights.¹² That presumption applies to native title rights recognised by the common law.¹³ It was to identify the requisite implication that the notion of inconsistency of rights was employed. That is clear, for instance, in the reasons of Gummow J in *Wik*:¹⁴

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The expression “clearly and distinctly” emphasises the burden borne by a party seeking to establish the extinguishment of subsisting rights not by express legislative provision but by necessary implication from the provisions of a statute. ... [i]t requires a comparison between the legal nature and incidents of the existing right and of the statutory right. The question is whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing right.

This was emphasised recently by the Court in *Western Australia v Brown*:¹⁵

... inconsistency is that state of affairs where “the existence of one right necessarily implies the non-existence of the other”. And one right necessarily implies the non-existence of the other when there is logical antinomy between them: that is, when a statement asserting the existence of one right cannot, without logical contradiction, stand at the same time as a statement asserting the existence of the other right.

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15. Thus, the majority of the Full Court below was correct to say that the criterion of inconsistency is “an analytical tool” enabling objective legislative intention to be ascertained that native title rights no longer be recognised by the common law: FC [50]. Ascertaining the legal nature and content of rights that owe their existence to statute will, as a matter of construction, be bound up with matters of legislative intention (purpose).¹⁶ Precision in definition of the legal nature and content of the statutory powers or rights said to be inconsistent with native title is an integral step in the process of identification and comparison in application of the criterion of inconsistency.¹⁷ For a grant of a fee simple or leasehold interest, as known to the general law, detailed identification and comparison may not be required because the

¹² *Clissold v Perry* (1904) 1 CLR 363 at 373 Griffith CJ (Barton and O’Connor JJ agreeing); *Greville v Williams* (1906) 4 CLR 694; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682–3 Mason J (Gibbs CJ, Murphy, Aickin and Brennan JJ agreeing); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 199–200 Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ; *R & R Fazzolari Pty Ltd v Parramatta CC* (2009) 237 CLR 603 at [42]–[43] French CJ.

¹³ *Akiba* (2013) 250 CLR 209 at [24] French CJ and Crennan J. See also *Wik* at 249–250 Kirby J.

¹⁴ (1996) 187 CLR 1 at 185. See also at 125–126, 130 Toohey J, 247 Kirby J.

¹⁵ (2014) 88 ALJR 461 at [38].

¹⁶ *Wilson v Anderson* (2002) 213 CLR 401 at [7] Gleeson CJ.

¹⁷ *Brown* (2014) 88 ALJR 461 at [33]–[34].

comprehensiveness of the grant precludes anything but total extinguishment.¹⁸ But unless the power asserted or right granted said to be inconsistent with the continued existence of native title is of that quality, further and detailed examination is required.

16. In particular, that the exercise of native title rights is to some extent prevented or impaired may not demonstrate inconsistency of the kind which reveals an objective legislative intention to extinguish. For the assertion of power or grant of rights to extinguish native title, they must not merely be inconsistent with the exercise of native title to some extent, but rather, must be "*inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title*".¹⁹

10 The distinction between, on the one hand, the "continued enjoyment or unimpaired enjoyment" of native title, and on the other, impairment of that enjoyment but with continued existence, was noted early in the *Native Title Act Case*,²⁰ and examined more recently in *Akiba*²¹ and *Brown*.²²

17. One circumstance in which the exercise of statutory powers that affect the exercise of native title is not inconsistent with the continued existence of native title is where the statute expressly preserves native title.²³ In such a case, native title and the subsequent rights are not, in truth, inconsistent: to adopt the language in *Brown*, statements asserting the existence of each can stand without "logical contradiction".²⁴

20 18. So too, it should be accepted that a legislative provision providing for the exercise of power or the grant of rights in respect of land which in express terms preserves prior rights in respect of the land in general, without express mention of native title, is effective to preserve native title rights. The general reference to rights in respect of the land would, on orthodox principles of construction, be construed so as to encompass rights of that kind which are subsequently recognised though they were unknown at the

¹⁸ *Yanner v Eaton* (1999) 201 CLR 351 at [108] Gummow J.

¹⁹ *Fejo v Northern Territory* (1998) 195 CLR 96 at [43] Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See also *Yanner v Eaton* (1999) 201 CLR 351 at [35] Gleeson CJ, Gaudron, Kirby and Hayne JJ.

²⁰ *Western Australia v Commonwealth* (1995) 183 CLR 373 at 468.5 Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

²¹ (2013) 250 CLR 209 at [29] French CJ and Crennan J, [64] Hayne, Kiefel and Bell JJ.

²² (2014) 88 ALJR 461 at [64].

²³ *Ward* (2002) 213 CLR 1 at [82] Gleeson CJ, Gaudron, Gummow and Hayne JJ: "Absent particular statutory provision to the contrary, questions of suspension of one set of rights in favour of another do not arise" (emphasis added). The *Native Title Act 1993* (Cth) so provides: *Ward* (2002) 213 CLR 1 at [468] Gleeson CJ, Gaudron, Gummow and Hayne JJ, quoted in *Akiba* (2013) 250 CLR 209 at [51] Hayne, Kiefel and Bell JJ.

²⁴ (2014) 88 ALJR 461 at [38].

time of enactment.²⁵ A law of general effect on any and every kind of existing interest in relation to land will, as a matter of construction, embrace native title interests.²⁶

19. Once it is appreciated that so much can be achieved by express preservation of prior rights generally, it should be accepted that it can likewise be achieved, without express words, but as a matter of the proper construction of the legislation at issue. As Gleeson CJ said in *Wilson v Anderson*:²⁷

10 *A decision as to whether an act, such as the grant of an estate in land, creates rights inconsistent with native title rights and interests, may turn upon a question of construction of an instrument or of a statute pursuant to which an instrument was made. Questions of construction and interpretation are bound up with the matter of intention.*

20. None of this is to fall into the error of relying on the subjective state of mind of those whose acts are alleged to have extinguished native title. In this field,²⁸ as for all exercises in statutory construction,²⁹ such matters are irrelevant. Nor is it to doubt the central place of inconsistency of rights in the assessment of extinguishment.³⁰ Absent inconsistency, there is no foundation for a conclusion that the extinguishment of native title is necessarily implied. But whether rights are in truth inconsistent depends on more than whether the concurrent exercise of the rights at a particular time is impossible.

The exercise of power under the Regulations did not extinguish native title

- 20 21. The conclusion of the Full Court majority, that the exercise of power under the Regulations in respect of the special case land did not extinguish the native title rights of the Bar Barrum People is, for the following reasons, correct. For present purposes, it may be assumed, favourably to the State, that the Commonwealth took possession of the whole of the land the subject of each Military Order simply by its making.

²⁵ See, eg, *Lake Macquarie SC v Aberdare CC* (1970) 123 CLR 327 at 331 Barwick CJ (Menzies J agreeing). See recently *Chubb Insurance Co of Australia Ltd v Moore* (2013) 302 ALR 101 (NSWCA) at [81]–[86] Emmett JA and Ball J (Bathurst CJ, Beazley P and Macfarlan JA agreeing). See further Herzfeld, Prince and Tulley, *Interpretation and Use of Legal Sources* (2013) at [25.1.900]–[25.1.960].

²⁶ See, eg, *Ward* (2012) 313 CLR 1 at [278] Gleeson CJ, Gaudron, Gummow and Hayne JJ.

²⁷ (2002) 213 CLR 401 at [7].

²⁸ *Ward* (2002) 213 CLR 1 at [78] Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Akiba* (2013) 250 CLR 209 at [62] Hayne, Kiefel and Bell JJ; *Brown* (2014) 88 ALJR 461 at [33].

²⁹ See, eg, *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 Mason CJ, Wilson and Dawson JJ; *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at [31]–[32] French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

³⁰ *Akiba* (2013) 250 CLR 209 at [35] French CJ and Crennan J, [52] Hayne, Kiefel and Bell JJ; *Brown* (2014) 88 ALJR 461 at [33].

The Regulations acknowledged the continued existence of other rights

22. The Act made provision for the safety and defence of the Commonwealth during the then present state of war (long title). The Act could operate no longer than six months after the war (s 19).³¹ The effect of the Act was therefore necessarily temporary, albeit of indefinite duration. It was thus always in contemplation that things affected by the Act would in the future cease to be so affected.
23. That is unsurprising, given the nature of the defence power in s 51(vi) of the Constitution as a legislative power described not by reference to a subject matter or activity, but by reference to purpose or object.³² The power is at its broadest during a time of war, but both the occasion for such extraordinary measures, and the constitutional power that supported them, would diminish after the cessation of hostilities, a point illustrated by the “winding up” cases in post-war transition.³³
24. Thus, the power to make regulations was for the purposes of securing the public safety and defence of the Commonwealth, and for the more effectual prosecution of the war (s 5). As detailed further below, exercise of the powers in reg 54 to take possession of and use land, and to prohibit or restrict others from using land, were similarly conditioned as to these defence purposes. The purposive nature of the defence power constrained both laws made in reliance on s 51(vi) of the Constitution and the exercise of administrative powers under such laws.³⁴
25. In terms, the regulation making power excepted the acquisition of interests in land from the reach of the regulations (s 5(1)(b)). Power to compulsorily acquire land remained governed by the *Lands Acquisition Act 1906* (Cth). Upon exercise of that power, interests in acquired land would be discharged, that is, extinguished (s 16).³⁵
26. That was not so for land which the Commonwealth did not acquire but in respect of which it simply took possession pursuant to the Regulations. Treatment of pre-existing rights during the pendency of the Commonwealth’s possession of land, and afterwards,

³¹ Section 19 so provided following its amendment by the *National Security Act 1940* (Cth).

³² *Stenhouse v Coleman* (1944) 69 CLR 457 at 471 Dixon J.

³³ See generally *Collins v Hunter* (1949) 79 CLR 43 at 81–83; *Queensland Newspapers v McTavish* (1951) 85 CLR 30 at 47–48; Sawyer, “Defence Power of the Commonwealth in Time of Peace” (1946) *Res Judicata* 214.

³⁴ *Murphyores Inc v Commonwealth* (1976) 136 CLR 1 at 11–12 Stephen J. See also Zines, *The High Court and the Constitution* (5th ed, 2008) at 305, citing *Dawson v Commonwealth* (1946) 73 CLR 157.

³⁵ Section 15 of the *Lands Acquisition Act* was modified by other regulations made under s 18 of the *National Security Act* dealing with notification of the purposes of an acquisition: *National Security (Supplementary) Regulations 1940* (Cth) reg 72A considered in *Grace Bros v Commonwealth* (1946) 72 CLR 269.

was thus a component of the scheme. The Regulations made it clear that the taking of possession of land did not destroy any prior rights in relation to the land. For example:

- (1) reg 54(2)(b) expressly permitted the Minister to prohibit or restrict "the exercise of rights" relating to the land enjoyed by any person in connexion with the taking of possession or use of the land pursuant to reg 54(2);
- (2) reg 54(3) required the provision of information on request by the owner or occupier of land — the better construction being that this generally expressed obligation continued after the Commonwealth assumed possession;
- (3) reg 60D(1)(a) referred to the payment of compensation to any person "who has suffered or suffers" loss or damage in relation to any property "in which he has, or has had, any legal interest or in respect of which he has, or has had, any legal right"; and
- (4) the proviso to reg 60D(1) dealt with compensation for interference with rights "of a continuing nature", and enabled a claim to be made after "the interference ceases".

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27. More generally, reg 55AA envisaged that after the exercise of the powers conferred by regs 53 (work on land), 54 (possession of land) and 55 (use of land), the land concerned might later be compulsorily acquired under another law of the Commonwealth. This was facilitated by the *National Security (Hirings Administration) Regulations 1942* (Cth) conferring power on a "Hirings Committee" to recommend when land the subject of a "hiring" should be compulsorily acquired (regs 14(b), 17(b)). Those Regulations defined a "hiring" to mean the exercise of any power under regs 53, 54 or 55. The term is apt to describe what was involved, that is, the requisition of land temporarily for defence purposes, the requisition of property other than land being covered by reg 57. Powers of that kind have a long history, some of which was mentioned by Latham CJ in *Dalziel*, involving the taking of possession of land without acquisition of any interest apart from possession and the right to use the land so taken for specified emergency purposes.³⁶

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³⁶ (1944) 68 CLR 261 at 279–282. In Australia, see eg *War Precautions Act 1914* (Cth); *War Precautions Regulations 1915* (Cth). Regulation 4(a) and (b) gave power to take possession of land and buildings for certain military purposes and reg 4(f) authorised the doing of any other act involving "interference with private rights of property" for those purposes. It is not presently necessary to chart the history of the prerogative in this regard, but see generally, Renfree, *The Executive Power of the Commonwealth of Australia* (1984) at 463–5. In the United Kingdom, see *Halsbury's Laws of England* Third Edition Vol 10 [433] dealing with the *Defence (General) Regulations 1939* (UK) mentioned further below.

28. In this light, in *Dalziel* Williams J observed that the effect of reg 54 was that:³⁷

*The Commonwealth entered into possession of the land, not at the invitation of any such person, but in invitos all persons by virtue of a statutory right which overrides any rights to possession vested in any of them.*³⁸

And:

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It is true that the entry into possession by the Commonwealth does not determine any estate or interest in the land, so that in the present case the Bank of New South Wales continues to be the owner of the land in fee simple and the respondent continues to be a tenant of the Bank of New South Wales from week to week, but the rights of the bank and of the respondent only continued to exist subject to the statutory right of the Commonwealth to take possession of the land and to use it for the purpose authorised by the regulations.

As later held in *Minister for Interior v Brisbane Amateur Turf Club*,³⁹ the consequence was that, during the pendency of the Commonwealth's possession pursuant to reg 54(1), the owner of the land could grant a new lease and the tenant was entitled to compensation from the Commonwealth for being kept out of possession.⁴⁰

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29. The point is not simply that the Commonwealth's rights were temporary (cf AS [49]), although in *Dalziel* Starke and Williams JJ correctly described what was involved as "temporary" possession.⁴¹ What presently matters is that the fact that the powers asserted by the Commonwealth would not last longer than the war meant that pre-existing rights had to be addressed, so that their position was known once the war ended — and they were dealt with in terms which made it clear that they were to be preserved. The Full Court majority was thus correct to characterise the scheme as disclosing an objective intention wholly to the contrary of that required to establish the extinguishment of native title (FC [52]). As the majority said (FC [52]):

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It is apparent that the objective intention of the Commonwealth was that all rights and interests in the land should yield to the Commonwealth's exclusive possession for the duration of the Commonwealth's exercise of power under reg 54 but should otherwise continue and found rights of compensation for the interference of those rights thereby resulting.

³⁷ (1944) 68 CLR 261 at 300.

³⁸ Citing *Minister of Health v Bellotti* [1944] 1 All ER 238 at 240–241 dealing with the taking of possession under regulations in like terms made under the *Emergency Powers (Defence) Act 1939* (UK).

³⁹ (1949) 80 CLR 123. See esp at 148 Latham CJ, 161–2 Dixon J.

⁴⁰ As Barwick KC said in argument in this Court, possession under reg 54(1) "operates in effect as a restriction on the title": *Minister for the Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 at 466.

⁴¹ (1944) 68 CLR 261 at 290.5 Starke J, 298.7 Williams J.

30. It was in this context that the majority observed, correctly, that the Commonwealth was not the holder of “radical title” to the special case land (FC [51]). Criticism of this observation by the State (AS [46]–[47]) is misplaced. It did not suggest that the position as to extinguishment differed as between land in respect of which the Commonwealth held radical title (ie in the Territories) and that in respect of which it did not (cf AS [47]). Rather, the observation emphasised that the Commonwealth’s exercise of power was “indifferent to the nature and extent of pre-existing interests which might be held in relation to the land”, i.e. the pre-existing interests which may have been granted by the holder of radical title, in this case the State of Queensland,⁴² and pre-existing interests not derived from the Crown, being the native title rights of the Bar Barrum People.
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31. The context that the Commonwealth was not the holder of radical title to much of the land in Australia in respect of which the Regulations might operate, points up another way in which the preservation of existing rights was consistent with previous principle and practice. A change in sovereign control over territory is presumed not to extinguish pre-existing rights.⁴³ Likewise, absent particular statutory provision, the acquisition by the Commonwealth of Crown land within a State or Territory is presumed to be concerned with taking the title of that other polity and would not be read as destroying third party rights.⁴⁴ The assumption of possession by the Commonwealth was, in substance, akin to these matters, in taking control of land described in the Military Orders as land “owned by the Crown” or “being property of the Crown”.
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32. The contextual point, that the Commonwealth was not the holder of radical title to much of the land in respect of which the Regulations might operate including the special case land, is related to the rejection of a further argument made by the State. The State seeks to distinguish the effect of the Regulations on native title rights and other pre-existing rights by arguing that the latter are subject to the “non-derogation principle” whereas native title is not, and that, in accordance with that principle and in contrast to native title, the taking of possession by the Commonwealth “would be presumed” not to have extinguished existing interests in the land, such as the tenancy of Mr Dalziel (AS [60]). The argument, as stated, demonstrates the irrelevance of the

⁴² In the case of the special case land, a pastoral holding lease had been granted pursuant to the *Pastoral Leases Act 1869* (Qld) and mineral leases had been granted under the *Mining Act 1862* (Qld) and the *Mining Act 1898* (Qld) (SC [17] at AB6).

⁴³ *Native Title Act Case* (1995) 183 CLR 373 at 422, 433 Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

⁴⁴ *Newcrest Mining v Commonwealth* (1997) 190 CLR 513 at 628–629 fn (360) Gummow J, comparing *Commonwealth v Maddalozzo* (1980) 54 ALJR 289 at 290; 29 ALR 161 at 165 Mason J.

principle; there could be no presumption as against the Commonwealth given it was not the grantor of any interest. The principle that the Crown is not competent to derogate from a grant once made absent statutory authority⁴⁵ depends on grant by that grantor.⁴⁶ Pre-existing interests granted by the State were in no different position to native title: each was a pre-existing right not granted by the Commonwealth. The non-derogation principle provides no basis to distinguish the position of native title.

- 10 33. These contextual points are neither irrelevant nor unimportant given that the inquiry is about the legal nature and content of the power to “take possession” created by reg 54(1). After all, if one searched for general law analogues, OW Holmes reasoned that to gain possession, one must stand in a certain physical relation to an object and to the rest of the world, and have a certain intent. The physical relation to others is simply “a relation of manifested power co-extensive with the intent”. The certain intent is “self-regarding”, to hold and assert control for one’s own benefit in furtherance of self-interest.⁴⁷ These attributes are lacking in a scheme for the temporary intrusion on the rights of individuals for the purposes of national defence and public safety to meet the exigencies of war. The object is actually protective, rather than destructive, of property rights, including native title.⁴⁸
- 20 34. In the end, the State’s argument is reduced to the proposition (advanced by the Full Court minority) that there is “nothing on the face” of the Act, the Regulations or the Military Orders which “manifested any intention to preserve any native title”: AS [62]; FC [115]. The argument is curious given the criticism by the State of the majority’s reference to legislative intention; and it is contrary to the proposition that a statute ought not be construed as extinguishing common law property rights, including native title rights recognised by the common law, unless no other construction is reasonably open.⁴⁹ That aside, what was apparent (and on the face) of the statutory text and structure was that rights generally in relation to land were preserved. “[T]he equality of all Australian citizens before the law”⁵⁰ demands that, absent a true basis to distinguish

⁴⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64 Brennan J; *Native Title Act Case* (1995) 183 CLR 373 at 439 Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

⁴⁶ *Nelson v Walker* (1910) 10 CLR 560 at 572 Griffith CJ, 591–592 Higgins J. See generally *North Charterland Exploration Co (1910) Ltd v The King* [1931] 1 Ch 169; *Singh v United Provinces* [1946] AC 327 (PC).

⁴⁷ OW Holmes, “Possession Note” (1878) 12 *American Law Review* 688 at 699, 701; Gray and Gray, *Elements of Land Law* (5th ed, 2008) at [2.1.17], [2.1.20].

⁴⁸ *Hayes v Northern Territory* (1999) 97 FCR 32 at 139 re declaring a place to be prohibited under reg 4.

⁴⁹ *Akiba* (2013) 250 CLR 1 at [24] French CJ and Crennan J.

⁵⁰ *Mabo [No 2]* (1992) 175 CLR 1 at 58 Brennan J; see also *Wurridjal v Commonwealth* (2009) 237 CLR 309 at [122] Gummow and Hayne JJ.

native title, it is to be treated as other rights in relation to land. No true basis for distinction has been identified by the State.

The "possession" asserted

35. The State relies heavily upon the proposition that the effect of the Military Orders was to confer upon the Commonwealth a right of "exclusive possession" in respect of the special case land (AS [29], [38]), and seeks to rely on cases involving the conferral of exclusive possession on the holder of an estate in fee simple⁵¹ or a lease⁵² to support the contention that native title was extinguished. These submissions fail to pay sufficient regard to the particular statutory scheme. As Starke J said in *Dalziel*:⁵³

10 *Nothing is gained by comparing the right given by reg 54 to the Commonwealth with various estates or interests in land of limited duration or with rights over the land of another recognized by the law, for it is a right created by a statutory regulation and dependent upon that regulation for its operation and effect.*

36. The State seeks to extract from *Dalziel* propositions that the rights conferred by reg 54 were "proprietary" (AS [37])⁵⁴ and that the possession taken by the Commonwealth was "exclusive of the rights of all others": AS [38].⁵⁵ However, in *Dalziel* these notions were bound up with rejection of the Minister's submission that because Mr Dalziel retained his weekly tenancy and the Bank its fee simple, there had been no taking of any recognised interests in the land, and therefore no acquisition of property for the purposes of s 51(xxxi) of the Constitution. The submission was rejected, in part, because the Commonwealth seized Mr Dalziel's right to possession under his lease while leaving him with the "empty husk" of tenancy.⁵⁶ Hence, in the *Bank Nationalisation Case*, Dixon J took *Dalziel* to mean that s 51(xxxi) extends to "innominate and anomalous" interests, and is not confined to property as understood by the general law.⁵⁷
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⁵¹ *Fejo v Northern Territory* (1998) 195 CLR 96.

⁵² See, eg, *Ward* (2002) 213 CLR 1 at [355]–[357] Gleeson CJ, Gaudron, Gummow and Hayne JJ.

⁵³ (1944) 68 CLR 261 at 290. So, in *Minister of Agriculture and Fisheries v Matthews* [1950] 1 KB 148 it was held in relation to the equivalent British regulation (discussed further below) that the Minister had no power to create a tenancy, as apart from possession he had no interest in the land. He could only pass on what he had, use of the land, or part with possession, or make a contract for the statutory occupation or use of the land: see [1950] 1 KB 148 at 151–153 Cassels J.

⁵⁴ Citing (1944) 68 CLR 261 at 286.5, 289 Rich J, 290 Starke J, 299 and 305 Williams J.

⁵⁵ Citing (1944) 68 CLR 261 at 285–286, 289 Rich J, 290 Starke J, 301–302, 305 Williams J.

⁵⁶ (1944) 68 CLR 261 at 286.5 Rich J. To like effect Williams J at 305.4.

⁵⁷ *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349; see the account of the two cases in *JT International v Commonwealth* (2012) 250 CLR 1 at [120]–[126] Gummow J.

37. Be that as it may, a close analysis of the statutory scheme here does not support the analogy sought to be drawn by the State. *First*, for the reasons above, a proper construction of the statutory provisions reveals that they were objectively intended to preserve pre-existing rights. Whether, during the pendency of the Commonwealth's possession, it was properly to be described as "exclusive possession" is therefore something of a distraction. Although "possession" generally denotes more than mere occupancy in fact, and by its nature implies exclusion, nevertheless, what is always involved in use of the term is a conclusion of law defining a particular relationship of control that may have variable content. In a general law sense, the adjective "exclusive" may add nothing.⁵⁸ However, a legislature may create a power to "take possession" that has different qualities. The creation of such a power does not necessarily imply the non-existence of other rights to the land.
- 10
38. *Secondly*, while reg 54(2)(a) confers upon the Minister power to do things as if the holder of an unencumbered interest in fee simple, that notional or fictional ("as if") device is, contrary to the State's submission (AS [50]), conditioned and limited by purpose. Also, the very presence of the device in reg 54(2)(a) confirms that the possession taken under reg 54(1) is not the same as a general law right to exclusive possession. This part of the State's argument recognises that to make good the proposition that the Commonwealth asserted a right of "exclusive possession", it is necessary to demonstrate that there was power to exclude any and every one from the land for any or no reason at all: AS [51].⁵⁹ Regulation 54(2)(a) simply does not achieve that. The legal fiction it incorporated, conditioned by purpose, ought not be construed as having a legal operation beyond that required to achieve the object of its incorporation⁶⁰ which, as Williams J noted in *Dalziel*, was to confer upon the Commonwealth "for purposes of defence" the right to do in relation to the land what a fee simple holder could do by virtue of that interest.⁶¹
- 20
39. It may well be accepted that under reg 54 rights holders other than the Commonwealth (native title and non-native title) could be excluded from the land irrespective of what might be their purpose in seeking to enter it: cf AS [51] last sentence. In that sense, the position of the Commonwealth was different to the position of the holders of mineral
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⁵⁸ See generally, Gray and Gray, *Elements of Land Law* (5th ed, 2008) at [2.1.6]-[2.1.10].

⁵⁹ Citing *Brown* (2014) 88 ALJR 461 at [46].

⁶⁰ *Wellington Capital Limited v ASIC* [2014] HCA 43 at [51] Gageler J.

⁶¹ (1944) 68 CLR 261 at 301.4

leases considered in *Ward and Brown*, where the right which they held was to exclude others from using the land for mining purposes.

40. That, however, does not demonstrate that reg 54 conferred power on the Commonwealth to exclude others for any or no reason at all, being the requisite quality of an interest that carries with it a right on the part of the holder of the interest to exclusive possession of land.⁶² As already noted above, given their constitutional underpinnings, both the Act and the Regulations permitted the exercise of power only for defence purposes. Thus:

- 10
- (1) reg 54(1) permitted the taking of possession of land if the Minister considered it "necessary or expedient so to do in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community";
 - (2) reg 54(2) permitted the use of land while in the possession of the Commonwealth pursuant to reg 54 for a purpose the Minister "thinks expedient in the interests of the public safety or the defence of the Commonwealth, or for maintaining supplies and services essential to the life of the community"; and
 - (3) the power of the Minister to do, or authorise the doing of, things in reg 54(2)(a) and to prohibit or restrict the exercise of rights relating to the land in reg 54(2)(b) could only be exercised "as far as appears to him to be necessary or expedient in connexion with the taking of possession or use of the land in pursuance of this sub-regulation", and hence was subject to the limitation as to purpose specified in reg 54(2).
- 20

41. Thus, the exercise of rights as if the holder of an estate in fee simple pursuant to reg 54(2)(a), and the prohibition of the exercise of rights by others, were both limited and conditioned as to purpose. As Latham CJ put it in *Dalziel*:⁶³

The rights of the Commonwealth are to take and remain in possession of the land and to use it for the purposes of defence. In such use, but only for the purposes of such use, the Commonwealth has the rights of an owner in fee simple.

⁶² *Fejo v Northern Territory* (1998) 195 CLR 96 at [47].

⁶³ (1944) 68 CLR 261 at 278; to like effect Williams J at 301.7. Although a challenge to the validity of taking possession under the British equivalent by reference to purpose failed in *Metropolitan Borough and Town Clerk of Lewisham v Roberts*, the case proceeded on the basis that the powers were so limited and reviewable: see [1949] 2 KB 608 at 620 Bucknill LJ and 630–631 Jenkins LJ holding the authority had not mistaken its powers, 624–626 Denning LJ in dissent.

42. There is therefore a fundamental difference between the powers created by reg 54 and rights conferred on the holder of an estate in fee simple or a common law lease. The Minister did not have “*the unqualified right to exclude any and every one from access to the land, for any reason or no reason*”.⁶⁴ The Military Orders could not validly operate beyond the Regulations.⁶⁵

10 43. The State’s submissions to the contrary (AS [50]–[51]) should therefore be rejected. So too its reliance (at AS [54]) upon the quoted observations in *Brown*⁶⁶ to contend that, at the moment the Military Orders were made, none of the native title rights of the Bar Barrum People could be exercised. For one thing, nothing in those observations should be taken to suggest that the preclusion of the exercise of native title rights demonstrates their non-existence: for the reasons above, that is not so. In any event, the reason that the mineral leases in *Brown* did not preclude the exercise of the native title rights was because the mineral lease did not entail the grant of a right to exclude anyone from the land for any or no reason. Thus, the existence of the rights granted to use the land for particular purposes (whether pastoral, mining or other purposes) did not necessarily imply that the native title rights could no longer exist.⁶⁷ No different state of affairs is involved here.

The Commonwealth did not take possession of the special case land merely by the making of the Military Orders

20 44. If, contrary to the submissions above, the Court concludes that the Commonwealth’s taking possession of land pursuant to the Military Orders would extinguish native title, it is necessary to determine whether the mere making of an order constituted taking possession of the land which it described. For the following reasons, the Full Court majority was correct to conclude (FC [64]) that it did not.

45. *First*, reg 54(1) confers a power to “take possession” and refers to directions being given “in connexion with the taking of possession of the land”. It does not refer to directions being given “to effect” the taking of possession or possession being taken

⁶⁴ *Brown* (2014) 88 ALJR 461 at [46].

⁶⁵ *Shrimpton v The Commonwealth* (1945) 69 CLR 613 at 629–630 Dixon J; *Dawson v The Commonwealth* (1946) 73 CLR 157 at 181–182 Dixon J.

⁶⁶ (2014) 88 ALJR 461 at [57].

⁶⁷ (2014) 88 ALJR 461 at [55]–[57].

"by the directions". The formulation is different from other regulations, which refer to steps being taken "by order".⁶⁸

46. *Secondly*, reg 54(2) refers to land being in possession of the Commonwealth "in pursuance of a direction given under" reg 54. It does not speak of land being in possession of the Commonwealth "by reason of" or "by" such a direction. Rather, it contemplates that, after the direction, further action must be taken "in pursuance" of the direction for the Commonwealth to take possession of the land. The taking of possession in pursuance of such direction was facilitated by the conferral of rights to enter and inspect land for the purpose of exercising any of the powers conferred by reg 54 (see reg 56), together with powers to affix notices on and enter premises for the purpose of exercising any power conferred by the Regulations (reg 72) and to compel information from owners or occupiers (regs 54(3), 71, 73–73A), as well as search and entry powers for suspected offences under the Act (regs 79–79B).⁶⁹
- 10
47. *Thirdly*, a construction of reg 54(1) requiring more than simply the making of an order interferes less with the interests of individual rights, consistent with an expressed object of the Act.⁷⁰ Failure to comply with the Regulations or orders made under them was an offence under s 10 of the Act.⁷¹ That presupposed an ability to comply, which in turn required some act by the Commonwealth that manifested (or communicated) the taking of possession to affected persons, such as the affixing of notices and entry onto premises under reg 72. That is more readily achieved if the Commonwealth was required to take some step beyond the mere making of an order to assert its possession of the land. The contrary construction put by the State would mean that the mere making of an order, without more, would make use or occupation by the holder of an interest in the land a criminal offence. In the absence of unmistakable and unambiguous language,⁷² the majority construction should be preferred.⁷³
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⁶⁸ See regs 53, 55, 57, 59, 60, 61, 62, 64 and 66.

⁶⁹ A "war offence" within the search and entry provisions included an offence under the Act – reg 3(1).

⁷⁰ Second Reading Speech to the National Security Bill 1939 (Cth), Commonwealth, *Parliamentary Debates* (Hansard), House of Representatives, 7 September 1939, p 164: "whatever may be the extent of the power that may be taken to govern, to direct, and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort."

⁷¹ The circumstance that the Act contains a penal provision is part of the context and therefore relevant to construction: *Alcan (NT) v Commissioner of Revenue (NT)* (2009) 239 CLR 27 at [57] Hayne, Heydon, Crennan and Kiefel JJ.

⁷² *Coco v The Queen* (1994) 179 CLR 427 at 437–438 Mason CJ, Brennan, Gaudron and McHugh JJ.

⁷³ *Beckwith v The Queen* (1976) 135 CLR 569 at 576 Gibbs J; *Waugh v Kippen* (1986) 160 CLR 156 at 164–165 Gibbs CJ, Mason, Wilson and Dawson JJ.

48. *Fourthly*, the Full Court majority conclusion is consistent with Australian authority. In *Dalziel*, Williams J distinguished between the "notice in writing" — the order — dated 5 May 1942, and the date the Commonwealth "entered into possession of the land" on 12 May 1942.⁷⁴ Philp J in the Supreme Court of Queensland in *Re Fish Steam Laundry Pty Ltd* appears likewise to have thought that the mere making of an order did not constitute taking possession:⁷⁵ his Honour referred to an order under reg 54 dated 18 February 1943 by which the Minister's delegate "purported to take possession" and the agreement of the parties that "actual possession" was not taken until 1 March 1943. It was from the latter date that his Honour fixed compensation.⁷⁶

10 49. *Fifthly*, the Full Court majority conclusion is consistent with British authority. In *James Macara Ltd v Barclay*,⁷⁷ which concerned a provision equivalent to reg 54,⁷⁸ the Court of Appeal rejected the contention that actual entry into the land was required to exercise the power, but did not suggest that the mere making of an order was sufficient. Rather what was required was:⁷⁹

... notice which fairly brings to the mind of the person affected that the power is being exercised. A present intention stated to be exercised and communicated to the persons concerned is sufficient.

20 Denning LJ subsequently explained in *Metropolitan Borough and Town Clerk of Lewisham v Roberts*⁸⁰ that whether the giving of notice of itself puts the Crown in possession will depend on the circumstances, such as whether the land is occupied.

50. *Sixthly*, as the Full Court majority observed, power under reg 54(1) might be exercised in relation to all types of land: urban, rural, occupied, unoccupied and so forth FC [64]. As Lord O'Hagan noted in *The Lord Advocate v Lord Lovat*, what is involved in assuming (taking) the possession of a piece of land:⁸¹

...must be considered in every case with reference to the peculiar circumstances ... the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might

⁷⁴ (1944) 68 CLR 261 at 297; see also Latham CJ at 270.8.

⁷⁵ [1945] St R Qd 96 at 98–99.

⁷⁶ [1945] St R Qd 96 at 100, 103.

⁷⁷ [1945] 1 KB 148 (CA).

⁷⁸ *Defence (General) Regulations 1939* (UK), reg 51, the text of which is set out in the headnote.

⁷⁹ [1945] 1 KB 148 (CA) at 154 Uthwatt J (for the Court). See also *Cook v Taylor* [1942] 1 Ch 349 at 352–353 Simonds J (possession of land taken under reg 51 when notice served and keys taken by requisitioning authority).

⁸⁰ [1949] 2 KB 608 (CA) at 623.

⁸¹ (1886) 5 App Cas 273 at 288 quoted and applied in *Kirby v Dowderoy* [1912] AC 599 at 603 (PC) regarding a mortgagee "obtaining possession" in the case of "wild land" in British Columbia.

reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession.

To obtain (or take) possession is usually understood as involving an act that manifests physical exclusion.⁸² Thus, everything depends on the nature of the property and the nature of the acts. Precisely what is required to take possession of land will depend on the facts, which are lacking in the special case: see SC [34]–[35] (AB8).

Orders

- 10 51. As the Full Court majority was correct to conclude that the taking of possession by the Commonwealth of the special case land pursuant to the Military Orders did not extinguish native title, both questions 3(a) and (b) of the special case were rightly answered "no" and the appeal should thus be dismissed.
52. Alternatively, if taking possession in pursuance of the Military Orders could extinguish native title, their mere making did not constitute possession, and question 3(a) was thus still correctly answered "no". There would remain an issue as to the extent of special case land of which the Commonwealth in fact took possession but that cannot be determined on the facts in the special case. Accordingly, the appeal would be allowed to the extent that question 3(b) would be answered "inappropriate to answer".
- 20 53. The grant of special leave was on terms that the costs orders below should not be disturbed and that the appellant pay the first respondent's costs in any event.

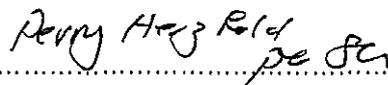
PART VII: ESTIMATE

54. The first respondent estimates that it requires 1.5 hours to present its oral argument.

6 November 2014



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⁸² *Tattersall's Hotel Penrith Pty Ltd v Permanent Trustee Co of NSW Ltd* (1942) 42 SR (NSW) 104; *Consolidated Development Pty Ltd v Holt* (1986) 6 NSWLR 607 at 619–20 Young CJ in Eq on re-entry to a lease. See also *Powell v McFarlane* (1979) 38 P & CR 452 at 471, 475 Slade J regarding a claim for adverse possession.

BETWEEN:

STATE OF QUEENSLAND
Appellant

and

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**TOM CONGOO, LAYNE MALTHOUSE
AND JOHN WATSON ON BEHALF OF
THE BAR-BARRUM PEOPLE #4**
First respondent

**ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA**
Second respondent

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**ATTORNEY-GENERAL
NORTHERN TERRITORY**
Third respondent

TABLELANDS REGIONAL COUNCIL
Fourth respondent

**ERGON ENERGY CORPORATION
LIMITED CAN 087 646 062**
Fifth respondent

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TELSTRA CORPORATION LIMITED
Sixth respondent

CONSOLIDATED TIN MINES LIMITED
Seventh respondent

MS LAURELLE URSULA GUNDERSEN
Eighth respondent

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MR GRANT HENRIK GUNDERSEN
Ninth respondent

THOMAS SAMUEL MAULONI
Tenth respondent

DIANNE CALMSDEN MAULONI
Eleventh respondent

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MATHEW JOHN MAULONI
Twelfth respondent

	ROBERT THOMAS MAULONI Thirteenth respondent
	THOMAS JOHN MAULONI Fourteenth respondent
	MR ROBERT GRAHAM WHITE Fifteenth respondent
10	MS ROBYN DORIS WHITE Sixteenth respondent
	STEPHEN JOHN CROSSLAND Seventeenth respondent
	DALE ALBERT CROSSLAND Eighteenth respondent
20	ELIZABETH HAZEL DAWN CROSSLAND Nineteenth respondent
	RENATO DOVESI Twentieth respondent
	LINA DOVESI Twenty-first respondent
	WILLIAN DAVID MCGRATH Twenty-second respondent
30	SHARON LESLEY MCGRATH Twenty-third respondent

ANNEXURE TO FIRST RESPONDENT'S SUBMISSIONS

1. *National Security (General) Regulations 1939* (Cth) regs 71–74, 79–79B (as at 15 November 1943)
2. *National Security (Supplementary) Regulations 1940* (Cth) regs 72–72A (as at 2 September 1945)
3. *National Security (Hirings Administration) Regulations 1942* (Cth) regs 2–6, 12–17, 19–21 (as made)

National Security (General) Regulations 1939 (Cth)

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regs 71–74, 79–79B

(as at 15 November 1943)

(2.) Where any premises have been closed in pursuance of this regulation, the occupier or other person having control of the premises shall not, during the period of such closure, occupy or control any other premises for the purpose for which he occupied or controlled the premises which have been closed, except with the consent of the Minister or a person thereto authorized by the Minister.

(3.) A person shall not, except with the consent of the Minister or a person thereto authorized by the Minister, enter any premises which have been closed in pursuance of this regulation.

Power to
obtain
information.
Amended by
1941, No. 116.

71.—(1.) Notwithstanding anything contained in any law of the Commonwealth, or of any State or Territory of the Commonwealth and without prejudice to any special provisions contained in these Regulations, any person shall, on being required by a Minister* or a person thereto authorized by a Minister so to do, furnish or produce to that Minister or the person specified in the requirement any information or article in his possession as is so specified, being information or an article which the authority or person making the requirement considers it necessary or expedient in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war to obtain or examine.

Inserted by
1942, No. 259.

(1A.) In any prosecution for a contravention of the last preceding sub-regulation in respect of the failure of the defendant to furnish information or to produce an article in accordance with a requirement by the Minister or other person, the averment of the prosecution contained in the information or complaint that, at the time of making the requirement, the Minister or the person who made the requirement considered it necessary or expedient in the interests of public safety, the defence of the Commonwealth or the efficient prosecution of the war to obtain the information or examine the article shall be *prima facie* evidence of the matter averred.

Inserted by
1941, No. 116;
amended by
1942, No. 327.

(1A.) Notwithstanding any oath or declaration made by him, a person shall not, by reason of anything done in pursuance of sub-regulation (1.) of this regulation, be guilty of any offence.

(2.) Any person authorized in that behalf by a Minister shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of these Regulations, and for that purpose may make extracts from or copies of any such books, documents and papers.

Affixing of
notices.

72. Any constable, any Commonwealth officer, or any person thereto authorized by a local governing authority, may, for any purpose connected with the defence of the Commonwealth, the prosecution of the war, the securing of the public safety, or the maintenance of supplies and services essential to the life of the community, affix any notice to, or cause any notice to be displayed on, any premises, vehicle or vessel, and may, for the purpose of exercising any power conferred by the preceding provisions of this regulation, enter any premises at any time: and where any constable or any such officer or person affixes a notice, or causes a notice to be displayed, in pursuance of this regulation, a person other than a constable or such an officer or person, as the case may be, shall not remove, alter, deface or obliterate the notice.

* See requirement relating to heating and cooking appliances (*Gazette*, 3rd May, 1943, p. 920).

73. A person shall not—

- (a) in answer to any question asked in pursuance of any regulation made under the Act or of any order made under any such regulation; or
- (b) in any account, claim, declaration, estimate, return or other document made or submitted by him in pursuance of any such regulation or order,

False statements.
Substituted by
1943, No. 137.

make any statement, or furnish any information, which he knows or has reasonable cause to believe to be false in a material particular.

73A.—(1.) A person shall not knowingly produce or present to any person any document containing any false statement or from which any material omission has been made, or knowingly make or connive at the making of any false statement, whether oral or in writing, or any omission, for the purpose of obtaining for any person or of assisting any person to obtain—

Production of documents containing false statements, &c.
Inserted by
1942, No. 475.

- (a) exemption from service in or leave of absence from any part of the Defence Force;
- (b) a transfer from one unit, service, department, corps or arm of the Defence Force to another or from any place at which he is serving as a member of the Defence Force to any other place;
- (c) the transfer from any place of detention to any other place, or the release, whether temporarily or permanently, of any person detained in pursuance of any instrument made or issued under any regulation made in pursuance of the Act, or any benefit or special treatment for any person so detained.

(2.) In any prosecution for a contravention of sub-regulation (1.) of this regulation, any document purporting to be signed by the accused person, or to be authorized by him—

- (a) shall be admissible in evidence against him without proof that the signature therein is his signature or that the document was authorized by him; and
- (b) shall be *prima facie* evidence that any statements contained therein were made, and that the document was produced or presented, by him or with his authority.

(3.) In any proceedings under this regulation against any person, the onus shall be upon that person of satisfying the court that the statement or representation which is the subject-matter of the prosecution was true.

74. A person shall not obstruct any person in the service of the Crown, or member of a fire brigade acting in the course of his duty as such, or any person exercising any powers, or performing any duties, conferred or imposed on him by or under any of these Regulations or otherwise discharging any lawful functions in connexion with the defence of the Commonwealth or the securing of the public safety.

Obstruction.

Restrictions
on disclosing
information.

75. A person who obtains any information in pursuance of these Regulations shall not, otherwise than in connexion with the execution of these Regulations or of an order, rule or by-law made under these Regulations, disclose that information except with permission granted by a Minister or person thereto authorized by a Minister.

Administrative Provisions.

Licences,
permits, &c.
Amended by
1943, No. 137.

76.—(1.) Any person claiming to be the holder of any permit, licence, certificate or written permission granted or issued for the purposes of any regulation made under the Act or of any order made under any such regulation shall, on demand made in that behalf by any constable or by any Commonwealth officer, produce the permit, licence, certificate or permission, as the case may be, to the person making the demand.

Amended by
1943, No. 137.

(2.) If, with intent to deceive, any person alters or uses, or lends to, or allows to be used by any other person, a permit, licence, certificate or written permission granted or issued for the purposes of any regulation made under the Act or of any order made under any such regulation, or makes or has in his possession any document so closely resembling such a permit, licence, certificate or permission as to be calculated to deceive, he shall be guilty of an offence against the Act.

Substituted by
1942, No. 236 ;
and amended
by 1943, No. 137.

(3.) Any licence, permit or permission granted for the purposes of any regulation made under the Act or of any order made under any such regulation may be granted subject to conditions and may be revoked or varied at any time by the authority or person empowered to grant it.

Fees for
licences, &c.

77. There may be charged in respect of the grant, renewal or issue of any licence, permit, certificate or other document for the purposes of any of these Regulations, or any order made under any of these Regulations, such fee, not exceeding Five pounds, as a Minister by order determines.

Billeting.

78.—(1.) The Minister may by order* provide for the billeting or quartering of any persons as being either persons in the service of the King or the Commonwealth or persons who are in the service of a local governing authority and are engaged in the performance of essential services.

Inserted by
1941, No. 301.

(1A.) The Minister may, in any order made under sub-regulation (1.) of this regulation, or by a separate order,† make provision for the billeting or quartering of any persons being members of the armed forces of the United Kingdom or of any of His Majesty's Dominions or Colonies or of any Power which is allied or associated with His Majesty in any war in which His Majesty is engaged.

(2.) Any order under this regulation may provide for the provision of accommodation for and feeding of animals or accommodation for vehicles or stores in the possession or under the control of any person billeted or quartered.

(3.) Nothing in this regulation shall authorize the billeting of any male person in premises solely occupied by women or by women and children.

* See Defence Quartering Order (published in Vol. 2).

† See Defence Quartering (Allied Forces) Order (published in Vol. 2).

79.—(1.) If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that a war offence has been or is being committed, or is about to be committed, and that evidence of the commission, or intended commission, of the offence is to be found at any premises specified in the information, or in or upon a vehicle, vessel or aircraft so specified, he may grant a search warrant authorizing any constable or member of the Defence Force together with any other persons specified in the warrant and any other constables or members of the Defence Force to enter the premises, vehicle, vessel or aircraft specified in the information, and any premises upon which any vehicle, vessel or aircraft so specified may be, at any time or times within one month after the date of the warrant, if necessary by force, and to search the premises, vehicle, vessel or aircraft.

Entry and search of premises, &c., to obtain evidence of offences. Substituted by 1942, No. 302.

(2.) If any police officer not below the rank of sergeant or any commissioned officer of the Defence Force has reasonable ground for suspecting that a war offence has been or is being committed, or is about to be committed, and that evidence of the commission, or intended commission, of the offence is to be found at any premises or in or upon any vehicle, vessel or aircraft, and is satisfied that it is expedient in the interests of the Commonwealth that the premises; vehicle, vessel or aircraft, or any person therein or thereon, should be searched for the purpose of obtaining evidence, but that, by reason of urgency or other good cause, it is impracticable to apply for a warrant under the provisions of sub-regulation (1.) of this regulation, the officer may, by written order under his hand, confer the like powers of entry and search in relation to the premises, vehicle, vessel or aircraft as might be conferred under that sub-regulation by the warrant of a justice.

(3.) A person authorized by any such warrant or order to search any premises or any vehicle, vessel or aircraft may search every person who is found on, or who he has reasonable grounds to believe to have recently left, or to be about to enter, those premises or that vehicle, vessel or aircraft, as the case may be, and may seize any article found on the premises or in or on the vehicle, vessel or aircraft, or on any person searched in pursuance of the power conferred by this sub-regulation, which he has reasonable ground for believing to be evidence of the commission, or intended commission, of any war offence.

(4.) No woman shall, in pursuance of a warrant issued or order made under this regulation, be searched except by a woman.

79A. If any officer of police, not below the rank of Inspector, is satisfied that there are reasonable grounds for suspecting that there is in any premises—

Special power of search. Inserted by 1940, No. 113.

- (a) anything with respect to which any war offence has been, or is suspected on reasonable grounds to have been, committed;
- (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or

- (c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence,

he may grant a search warrant authorizing any constable or officer of police named therein, with such assistants as he thinks necessary, to enter those premises at any time, if necessary by force, and to seize any such thing which he may find in those premises.

Power of search of person. Inserted by 1940, No. 187.

79n.—(1.) Where any person who is found committing, a war offence, or who is suspected of having committed, or of being about to commit, such an offence, is arrested by any constable or Commonwealth officer acting in the course of his duty as such, or any person thereto authorized by a Minister, the constable, Commonwealth officer or person so authorized may search the person arrested and may seize any article, book, letter or other document which he has reasonable ground for believing to be evidence of the commission of the offence or the possession of which gives ground for such suspicion.

(2.) No woman shall, in the pursuance of the power conferred by this regulation, be searched except by a woman.

Power to stop and search vehicles.

80.—(1.) The person driving, or in control of, any road vehicle in motion shall stop the vehicle on being required so to do by any constable in uniform or by any member of the Defence Force being in uniform and on duty.

Amended by 1942, No. 308.

(2.) If—

(a) with respect to any road vehicle being on a public road or in a place to which the public have access; or

(b) upon the overtaking of a road vehicle on any occasion on which the person driving, or in control of, the vehicle has been lawfully required to stop it but has failed to do so,

any constable or member of the Defence Force has reasonable ground for suspecting that there is to be found in or on the vehicle evidence of the commission of a war offence, he may search the vehicle and may seize any article found therein or thereon which he has reasonable ground for believing to be evidence of the commission of such an offence.

Amended by 1940, No. 34.

(3.) The powers conferred by this regulation shall be in addition to, and not in derogation of, any of the powers conferred by regulation 79 of these Regulations.

(4.) In this regulation, the expression "road vehicle" means any vehicle designed or adapted for use on roads.

Identification of persons in custody.

81.—(1.) The Minister may make rules authorizing the taking, in relation to any person in custody whom the proper officer of police has reasonable grounds for suspecting to have committed a war offence, of all steps reasonably necessary for photographing, measuring and otherwise identifying that person in the manner prescribed by the rules.

(2.) In this regulation, the expression "the proper officer of police" means any officer of police in charge of a police station.

National Security (Supplementary) Regulations 1940 (Cth)

10

regs 72–72A

(as at 2 September 1945)

- (b) the redistribution of coal under the control of any person or persons;
- (c) the cancellation or variation of any contracts relating to coal; or
- (d) the limitation or fixation of the hours and days during or on which, the extent to which, and the conditions under which—
 - (i) trade may be conducted or work performed in any shops or other business premises;
 - (ii) work may be performed in any industrial premises or in any premises used in connexion with any undertaking or public utility;
 - (iii) any public transport facilities may operate;
 - (iv) gas or electricity services, or any other services, may be provided; or
 - (v) any entertainments may be held.

(4.) Any such order may—

- (a) be made so as to apply either throughout the State or to any area therein;
- (b) make different provision with respect to different persons, premises, undertakings, utilities, transport facilities, services or entertainments;
- (c) provide for exemptions (either absolute or conditional) from the provisions of the order; or
- (d) contain such incidental and supplementary provisions as appear to the Premier to be necessary or expedient for the purposes of the order.

(5.) Any such order may declare or direct that any matter or thing shall or may, from time to time, be done, determined, applied, regulated, required, directed or prohibited for the purposes of the order either generally or in any particular case or class of cases, by a person authorized by the order for the purposes thereof, and thereupon the matter or thing shall or may be done, determined, applied, regulated, required, directed or prohibited accordingly.

(6.) An order under this regulation, unless it is published in the Government Gazette of the State, shall not be binding on any person unless it has been served on that person by delivering a copy thereof to him by hand or by sending it to him by registered post addressed to his last-known place of abode or business.

(7.) A person shall not fail to observe or comply with any prohibition, requirement or direction made on him or applicable to him, or to premises or things under his control, under or in pursuance of any order under this regulation.

72.—(1.) Notwithstanding anything contained in any law of the Commonwealth or of any Territory of the Commonwealth, the Minister may, where it appears to him to be necessary in the interests of the defence of the Commonwealth or the efficient prosecution of the war so to do, by order, make provision for varying the manner in which or the purposes for which any land in the Commonwealth or any

Acquisition of land for purposes connected with defence. Substituted by 1943, No. 221.

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REGULATIONS—

Territory of the Commonwealth may be acquired or resumed by compulsory process by or on behalf of the Crown or the Commonwealth and any matters arising out of or incidental to such acquisition.

(2.) Notwithstanding anything contained in section 15 of the *Lands Acquisition Act 1906-1936*, where the Governor-General is of opinion that the publication of the fact that any particular land has been acquired by compulsory process under that Act, or of the purpose for which any particular land is proposed to be so acquired, would or might be prejudicial to the defence of the Commonwealth or the efficient prosecution of the war, the Governor-General may, instead of directing, in pursuance of sub-section (1.) of that section, that that land may be acquired, by order direct that that land is acquired by the Commonwealth from the owner by compulsory process for the purposes of the Commonwealth.

(3.) Upon the making of an order under sub-regulation (2.) of this regulation, the land specified in the order shall, for all purposes, be deemed to be land acquired by compulsory process in pursuance of the *Lands Acquisition Act 1906-1936* but, in the application of that Act to or in relation to any such land—

(a) sub-section (2.) of section 15 shall not apply;

(b) the references in Division 3 of Part II. (other than section 18), and in section 33, to publication of the notification of acquisition in the *Gazette* shall be read as references to the making of the order under sub-regulation (2.) of this regulation, and the other references in that Division to the notification or to a copy of the notification shall be read as references to that order or to a copy of that order, as the case may be; and

(c) section 18 shall be deemed to read as follows:—

“18.—(1.) Forthwith after the making of the order directing that the land is acquired, the Minister shall cause a notification that the land has been so acquired, together with a plan or description of the land, to be served upon the owners of the land or such of them as can with reasonable diligence be ascertained, either personally or by registered letter posted to their last known places of abode:

Provided that where different portions of the land were owned by different owners, the notification and plan or description served on any owner may relate only to the portion of the land which was owned by that owner.

(2.) If any owner cannot after diligent inquiry be found, the notification, together with the plan or description, shall be left with the occupier of the land, or if there is no occupier, shall be fixed upon some conspicuous part of the land.”

(4.) In this regulation, “The Minister” means—

(a) in relation to land in any of the Territories of Papua, New Guinea and Norfolk Island—the Minister of State for External Territories; and

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(b) in relation to land in any other part of Australia—the Minister of State for the Interior.

72A. Notwithstanding* anything contained in section 15 of the *Lands Acquisition Act 1906-1936*, the public purpose for which any land has been acquired shall be deemed to be expressed sufficiently if the notification declares that the land has been acquired under that Act for the purposes of the Commonwealth.

Notification of purpose for which lands are acquired under *Lands Acquisition Act*.

Inserted by 1944, No. 74.

Minimum charge for admission to entertainments.

Added by 1942, No. 411.

73.—(1.) Where—

(a) on the fourth day of September, 1942; or

(b) if the proprietor did not hold an entertainment on that date, on the last day preceding that date on which he held an entertainment,

the payment for admission to any entertainment, or to any place or part of any place where the entertainment was held, or for the right to participate in any entertainment (excluding the amount of any entertainments tax imposed by or under any law of a State), was One shilling, the proprietor of the entertainment shall not, without the previous consent in writing of the Commonwealth Prices Commissioner, admit any person to any entertainment of the same character, or to any such place or part of any such place where any entertainment is being or is to be held, or give to any person any such right to participate in the entertainment, as the case may be, for a payment of less than One shilling.

(2.) In this regulation—

“entertainment” includes any exhibition, performance, lecture, amusement, game, sport or exercise;

“proprietor”, in relation to any entertainment, includes any person responsible for the management thereof.

74.—(1.) A person shall not lodge for transmission as a telegram (otherwise than as a press telegram or a broadcasting telegram within the meaning of the *Telegraph Regulations*) a message containing matter relating either directly or indirectly to the probable result of any future sporting event or to any wager or bet concerning the result of any sporting event, and any person employed under the authority of the Postmaster-General may refuse to receive or transmit a telegram (not being a press telegram or a broadcasting telegram within the meaning of the *Telegraph Regulations*) containing any such message.

Certain telegrams prohibited.

Added by 1942, No. 420.

(2.) Subject to the next succeeding sub-regulation, any person employed under the authority of the Postmaster-General may refuse to accept for transmission as a telegram any message the text of which contains or includes a Mothers' Day greeting or felicitation or a Christmas or New Year greeting or felicitation.

Substituted by 1943, No. 115.

Amended by 1943, No. 289.

* The validity of regulation 72A was upheld by the High Court: *Grace Bros. Pty. Ltd. v. Commonwealth* (1946) A.L.R. 209.

† Statutory Rules 1945, No. 188 provides as follows:—

1. Regulation 74 of the *National Security (Supplementary) Regulations* is amended—

(a) by omitting sub-regulations (2.) and (3.); and

(b) by omitting sub-regulations (1.) and (4.).

2. The amendment effected by paragraph (b) of the last preceding regulation shall come into operation on the first day of January, 1946.”

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National Security (Hirings Administration) Regulations 1942 (Cth)

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(as made)

STATUTORY RULES.

1942. No. 407

REGULATIONS UNDER THE NATIONAL SECURITY ACT 1939-1940.*

I, THE GOVERNOR-GENERAL, in and over the Commonwealth of Australia, acting with the advice of the Federal Executive Council, hereby make the following Regulations under the *National Security Act 1939-1940*.

Dated this *eighteenth*
day of *September*, 1942.

(Sd.) *GODFREY*
Governor-General.

By His Excellency's Command,

P. W. Poole

for and on behalf of the Minister of
State for Defence.

NATIONAL SECURITY (HIRINGS ADMINISTRATION) REGULATIONS.

PART I.—PRELIMINARY.

1. These Regulations may be cited as the National Security ^{Citation.}
(Hirings Administration) Regulations.
2. The object of these Regulations is to control, facilitate and guide ^{Object and basis.}
the exercise of the powers of the Commonwealth under regulations 53, 54 and 55 of the National Security (General) Regulations and to facilitate and expedite the assessment and payment of compensation to persons suffering loss or damage by reason of the exercise of any of those powers. These Regulations recognize the current practice whereby the exercise of such powers for the purpose of all Services and Departments is in general carried out on their behalf by the Hirings Section, Quartermaster-General's Branch, Department of the Army.
3. These Regulations shall be administered by the Minister of State ^{Administration.}
for the Army.
- 4.—(1.) Subject to sub-regulations (2.) and (3.) of this regulation, ^{Application of Regulations.}
these Regulations shall apply throughout the whole of Australia except in those parts to which the National Security (Emergency Control) Regulations apply.

(2.) The Minister may, by order, direct that the whole or any part of these Regulations shall apply to any part of Australia to which the National Security (Emergency Control) Regulations apply and these Regulations shall apply accordingly.

(3.) The Minister may, by order, exclude any part of Australia from the operation of all or any of these Regulations.

5. These Regulations are divided into Parts, as follows:— Parts.

Part I.—Preliminary.

Part II.—Hirings Committees.

Division 1.—Constitution, Procedure and Remuneration of Members.

Division 2.—Powers and Functions in relation to Matters other than Compensation.

Division 3.—Powers and Functions in relation to Compensation.

6. In these Regulations, unless the contrary intention appears— Definitions.

“authorized person” means a person to whom the powers of the Minister under regulation 53, 54 or 55 of the National Security (General) Regulations have been delegated;

“Department” means any Department of the Public Service (not being a Department which is a Service) and includes any authority of the Commonwealth;

“hiring” means the exercise on behalf of or for the purposes of or at the request of any Department or Service of any power under regulation 53, 54 or 55 of the National Security (General) Regulations;

“Hirings Service” means the staff of an authorized person, charged with the duty of assisting him in carrying out his duties in relation to hirings;

“Quartermaster-General” means the officer for the time being holding that office in the Department of the Army;

“Service” means the Department of the Navy, the Department of the Army, the Department of Air, the United States Forces in Australia, and such other forces as the Minister, by order, declares to be Services for the purposes of these Regulations.

PART II.—HIRINGS COMMITTEES.

Division 1.—Constitution, Procedure and Remuneration of Members.

7.—(1.) There shall be a Central Hirings Committee. Central Hirings
Committee.

(2.) The Central Hirings Committee shall in the first place consist of—

(a) a Chairman;

(b) a representative of the Department of the Treasury or, in his absence from any meeting, such person as is appointed by the Minister to attend in his stead;

(c) the person for the time being holding the office of Director of Hirings, Quartermaster-General's Branch, Department of the Army or, in his absence from any meeting, such person as is appointed by the Quartermaster-General to attend in his stead.

(3.) When the business of any meeting includes the consideration of a hiring or proposed hiring by or for any Service or Department, or of an order or proposed order prescribing the standards of accommodation which may be provided by way of hirings for Services or Departments, the Central Hirings Committee shall have added to it as a member for the whole of that meeting (other than any portion of the meeting at which any question under Division 3 of this Part is to be considered or determined) a representative of and appointed by the Service or Department or the Services or Departments concerned.

(4.) The Central Hirings Committee may co-opt as a member for any meeting a representative of any Service or Department which the Committee considers to be concerned in or affected by any matter included in the business of the meeting, but any representative so co-opted may not take part in any portion of the meeting at which any question under Division 3 of this Part is to be considered or determined.

(5.) The Chairman and the representative of the Department of the Treasury shall be appointed by the Minister and shall hold office during the pleasure of the Minister.

(6.) The Chairman shall preside at meetings of the Central Hirings Committee, and, in his absence from any meeting, the members present at that meeting may elect one of their number to preside at that meeting.

(7.) A statement in writing under the hand of the Secretary or other like executive officer of any Service or Department that a person is the representative of, and appointed by, that Service or Department under any of the provisions of this regulation, shall for all purposes be sufficient evidence of the facts so stated.

8.—(1.) There shall be a Local Hirings Committee in and for each such area of Australia as the Minister by order specifies. Local Hirings
Committees.

(2.) Each Local Hirings Committee shall in the first place consist of—

- (a) the Chairman of the Central Hirings Committee;
- (b) a Deputy Chairman;
- (c) a representative of the Department of the Treasury or, in his absence from any meeting, such person as is appointed by the Minister to attend in his stead; and
- (d) an officer of the Hirings Section, Quartermaster-General's Branch, Department of the Army, appointed by the Quartermaster-General or, in his absence from any meeting, such person as is appointed by the Quartermaster-General to attend in his stead.

(3.) When the business of any meeting includes the consideration of a hiring or proposed hiring by or for any Service or Department, the Local Hirings Committee shall have added to it as a member for the whole of that meeting (other than any portion of the meeting at which any question under Division 3 of this Part is to be considered or determined) a representative of and appointed by that Service or Department.

(4.) The Local Hirings Committee may co-opt as a member for any meeting a representative of any Service or Department which the Committee considers to be concerned in or affected by any matter included in the business of the meeting, but any representative so co-opted may not take part in any portion of the meeting at which any question under Division 3 of this Part is to be considered or determined.

(5.) The Deputy Chairman and the representative of the Department of the Treasury shall be appointed by the Minister and shall hold office during the pleasure of the Minister.

(6.) The Chairman of the Central Hirings Committee, or, in his absence the Deputy Chairman, shall preside at meetings of a Local Hirings Committee and, in the absence of both the Chairman of the Central Hirings Committee and the Deputy Chairman from any meeting, the members present at that meeting may elect one of their number to preside at that meeting.

(7.) A statement in writing under the hand of the Secretary or other like executive officer of any Service or Department that a person is the representative of, and appointed by that Service or Department under any of the provisions of this regulation, shall for all purposes be sufficient evidence of the facts so stated.

9.—(1.) The Central Hirings Committee shall meet at such times ^{Meetings.} and places as the Chairman directs.

(2.) A Local Hirings Committee shall, subject to any direction by the Chairman of the Central Hirings Committee, meet at such times and places as the Deputy Chairman directs.

(3.) Three members present at any meeting of a Hirings Committee, of which all members entitled to be present at that meeting have had notice, shall form a quorum.

(4.) All questions before any Hirings Committee shall be decided by a majority of votes.

(5.) The person presiding at any meeting of a Hirings Committee shall have a deliberative vote, and, in the event of an equality of votes, shall have a casting vote.

10. The Director of Hirings shall, subject to the superintendence ^{Secretarial and executive arrangements.} of the Quartermaster-General, arrange for the carrying out of the necessary secretarial work for and the implementation of the decisions of the Central Hirings Committee and Local Hirings Committees.

11. There shall be payable to any member of the Central Hirings ^{Remuneration.} Committee or a Local Hirings Committee such remuneration (if any) for his services and such travelling allowances (if any) as the Minister determines.

Division 2.—Powers and Functions in relation to Matters other than Compensation.

12. The Central Hirings Committee may advise the Minister, any ^{Advisory functions of Central Hirings Committee.} Local Hirings Committee, any authorized person, and any member of the Hirings Service with respect to any matter in connexion with hirings.

13.—(1.) The Central Hirings Committee shall have power, subject to disallowance by the Minister, to make general orders in relation to hirings, and, without prejudice to the generality of the foregoing, any such general order may make provision in relation to—

Executive functions of Central Hirings Committee.

- (a) the classes of premises which shall not be the subject of hirings without the approval of the Minister or some other authority specified in the order;
- (b) the conditions to apply to the hiring of any particular classes of premises;
- (c) standards of accommodation which may be provided by way of hirings for Services or Departments;
- (d) the circumstances in which and the conditions under which such general orders may be departed from;
- (e) the procedure to be followed and the forms to be used in any hiring;
- (f) the making by Local Hirings Committees or authorized persons of reports with regard to any matters in relation to hirings in their respective areas; and
- (g) the inspection of premises the subject of hirings and reports of such inspections.

(2.) No hiring shall be invalidated by reason only of non-compliance with any general order.

14. Where any matter is referred to the Central Hirings Committee under these Regulations that Committee may—

Other powers and functions of Central Hirings Committee.

- (a) subject to any order by the Minister to the contrary, but notwithstanding any previous determination of a Local Hirings Committee, determine—
 - (i) whether a request from any Service or Department for any hiring shall or shall not be satisfied in whole or in part;
 - (ii) in any case where more than one Service or Department, or a Service and a Department, are in competition for the hiring of the same premises, which request (if any) shall be satisfied;
- (b) recommend to the Minister—
 - (i) that any premises which are the subject of any hiring or proposed hiring should be compulsorily acquired under the *Lands Acquisition Act 1906-1936*;
 - (ii) that any existing hiring should be terminated immediately or from any future date; and
- (c) report to the Minister or to any authorized person that any general order or direction applicable to a matter has not been complied with and to recommend what action (if any) should be taken with respect thereto.

15.—(1.) Except in a case of operational urgency, an authorized person shall refer to the Central Hirings Committee—

References to Central Hirings Committee.

- (a) any matter arising in any area for which there is no Local Hirings Committee, which, if there were such a Local Hirings Committee, would be referred to the Local Hirings Committee; and

(b) any matter which the Minister or the Central Hirings Committee directs him so to refer.

(2.) A Local Hirings Committee shall refer to the Central Hirings Committee any matter which the Minister or the Central Hirings Committee directs it so to refer.

16. Subject to direction by the Central Hirings Committee, each Local Hirings Committee may advise any authorized person and any members of the Hirings Service with respect to any matter in connexion with hirings arising in its area. Advisory functions of Local Hirings Committees.

17. Where any case or matter is referred to a Local Hirings Committee under these Regulations, that Committee may— Other powers and functions of Local Hirings Committees.

(a) subject to any order by the Minister or any determination by the Central Hirings Committee to the contrary, determine—

(i) whether a request from any Service or Department for any hiring shall or shall not be satisfied in whole or in part;

(ii) in any case where more than one Service or Department, or a Service and a Department, are in competition for the hiring of the same premises, which request (if any) shall be satisfied;

(b) recommend to the Central Hirings Committee that any premises which are the subject of any hiring or proposed hiring should be compulsorily acquired under the *Lands Acquisition Act 1906-1936*;

(c) report to the Central Hirings Committee or to any authorized person that any general order or direction applicable to a matter has not been complied with, and recommend what action (if any) should be taken with respect thereto; and

(d) refer to the Central Hirings Committee, with or without any recommendation thereon, any matter or any question in relation to any matter which in its opinion should be determined by the Central Hirings Committee.

18. An authorized person shall, except in a case of operational urgency, refer to the Local Hirings Committee in any area the following matters arising in that area:— References to Local Hirings Committees.

(a) Any case in which more than one Service or Department, or a Service and a Department, are in competition for the hiring of the same premises;

(b) Any matter which the Minister, the Central Hirings Committee, or the Local Hirings Committee required to be referred to the Local Hirings Committee;

(c) Any matter which in the opinion of the Quartermaster-General or such authorized person should be determined by the Local Hirings Committee; and

(d) Any class of matters which the Minister, on the advice of the Central Hirings Committee, from time to time directs to be referred to Local Hirings Committees generally or to a Local Hirings Committee in a particular area.

Division 3.—Powers and Functions in Relation to Compensation.

19. The Central Hirings Committee may advise the Minister that any order under regulation 60H of the National Security (General) Regulations in respect of hirings should, in its opinion, be made, or amended, or rescinded.

Advisory
powers of
Central Hirings
Committee.

20. Claims made in pursuance of regulation 60D of the National Security (General) Regulations for compensation in respect of hirings may be addressed to the Minister at such address as the Central Hirings Committee by notice published in the *Gazette* specifies.

Address at
which claims
may be made.

21.—(1.) Sub-regulation (1.) of regulation 60E of the National Security (General) Regulations shall not apply to claims for compensation in respect of hirings.

Determinations
by Central
Hirings
Committee.

(2.) Where a claim for compensation in respect of a hiring is made in pursuance of regulation 60D of the National Security (General) Regulations, the Central Hirings Committee or its delegate acting under sub-regulation (3.) of this regulation shall determine—

- (a) the amount of compensation in the form of a lump sum, or in the form of a periodical payment, or both, which it considers just and reasonable, or
- (b) that no compensation be paid,

as the case may be, and shall, as soon as practicable, serve on the claimant personally, or by post at the address given in the claims, a notice stating the effect of the determination.

(3.) The Central Hirings Committee may, by resolution—

- (a) delegate to one of its members or to a member of a Local Hirings Committee or to a Local Hirings Committee or an authorized person or any member of the Hirings Service all or any of its powers under sub-regulation (2.) of this regulation;
- (b) vary or revoke any such delegation;
- (c) prescribe the procedure to be followed and the forms to be used with respect to determinations and notices under sub-regulation (2.) of this regulation;
- (d) make rules for the guidance of Committees or persons to whom it has made a delegation under this regulation as to the basis upon which determinations under sub-regulation (2.) of this regulation should be made.

Delegation by
Central Hirings
Committee of
powers with
relation to
compensation.

(4.) The provisions of sub-regulations (2.), (3.) and (4.) of regulation 60E of the National Security (General) Regulations shall, in their application to claims for compensation in respect of hirings, be read as if—

- (a) in sub-regulation (2.) of regulation 60E, after the words "paragraph (a) of sub-regulation (1.) of this regulation", there were inserted the words "or paragraph (a) of sub-regulation (2.) of regulation 21 of the National Security (Hirings Administration) Regulations";

- (b) in sub-regulation (3.) of regulation 60E, after the words "paragraph (b) of sub-regulation (1.) of this regulation", there were inserted the words "or paragraph (b) of sub-regulation (2.) of regulation 21 of the National Security (Hirings Administration) Regulations"; and
- (c) in sub-regulation (4.) of regulation 60E, after the words "sub-regulation (1.) of this regulation", there were inserted the words "or sub-regulation (2.) of regulation 21 of the National Security (Hirings Administration) Regulations".