IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY No. C5 of 2018

BETWEEN: **GLEN RICHARD WILLIAMS**
Appellant
and

WRECK BAY ABORIGINAL COMMUNITY COUNCIL
First Respondent
and

ATTORNEY-GENERAL FOR THE AUSTRALIAN CAPITAL TERRITORY
Second Respondent

SECOND RESPONDENT'S SUBMISSIONS

Part I: Publication

1. I certify that this submission is in a form suitable for publication on the internet.

Part II: Issue

2. The second respondent contends that the appeal presents the following issue: The extent to which the *Residential Tenancies Act 1997* (ACT) as a law in force in the Jervis Bay Territory (**JBT**) under s 4A of the *Jervis Bay Territory Acceptance Act 1915* (Cth) (**JBT Acceptance Act**) (**Tenancies Act**) applies to Aboriginal Land under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) (**Land Grant Act**) over which the first respondent has granted a lease.

Part III: Notice of constitutional matter

3. The second respondent certifies that he has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and,

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notwithstanding the first respondent has filed a notice on 21 May 2018, has formed the view no notice of constitutional matter is required.

Part IV: Contested material facts

4. The second respondent does not contest any material facts set out in the appellant's narrative of facts or chronology aside from the following:

(1) Reference made in the appellant's submissions (at [5a] and [5c]) to the "respondent" (which the second respondent contends should be references to the first respondent); and

(2) Description made in the appellant's submissions (at [5b]) of the address of the tenanted premises to include the first respondent "Wreck Bay Aboriginal Community Council" (which the second respondent contends should be described as 10 Dhugan Close, Wreck Bay Village, Jervis Bay Territory, 2540) (CAB 7 at [6])).

Part V: Argument

Relevant test

5. The extent to which the Tenancies Act applies to Aboriginal Land under the Land Grant Act over which the first respondent has granted a lease is primarily resolved by s 46 of the Land Grant Act.

6. Section 46 of the Land Grant Act provides:

> **46 Application of laws of [JBT] to Aboriginal Land**
>
> This Act does not affect the application to Aboriginal Land of a law in force in the [JBT] to the extent that that law is capable of operating concurrently with this Act.

7. To apply s 46 therefore requires determining whether the Tenancies Act:

(1) is a law in force in the JBT;

(2) can apply to Aboriginal Land under the Land Grant Act; and

(3) is capable of operating concurrently with the Land Grant Act.

8. The second respondent contends that, properly construed, s 46 does not require application of any conflict of laws test derived from other legislation or contexts in order to resolve the issue in this appeal.

Is the Tenancies Act a law in force in the JBT?

Laws in force in the JBT

9. Laws in force in the JBT include:

(1) Laws made by the Commonwealth Parliament of geographic application throughout the whole of Australia or to the JBT (***original* Commonwealth laws**);

(2) JBT Ordinances made by the Governor-General as delegate of the Commonwealth Parliament (***delegated* Commonwealth laws**);[1]

(3) Those provisions of two laws made by the Commonwealth Parliament of geographic application to that part of the ACT in which the Seat of Government is located as referred to in s 4A(2) of the JBT Acceptance Act (**Seat of Government laws**) that the Commonwealth Parliament adopts in the JBT through s 4A(1) of the JBT Acceptance Act (***applied* Commonwealth laws**);[2] and

(4) Laws made by the Australian Capital Territory (**ACT**) Legislative Assembly under s 22(1) of the *Australian Capital Territory Self-Government Act 1988* (Cth) (**ACT Self-Government Act**) "for the peace, order and good government of the [ACT]" (**ACT laws**)[3] that the Commonwealth Parliament

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1 JBT Ordinances are made by the Governor-General under s 4F of the JBT Acceptance Act "for the peace, order and good government of the [JBT]". Because they are made by the Governor-General as a delegate of the Commonwealth Parliament and subject to disallowance by that Parliament (see JBT Acceptance Act, ss 4G, 4H, 4J and 4K) JBT Ordinances may be characterised as *delegated* Commonwealth laws.

2 Apart from certain provisions of the Seat of Government laws and contrary to what the first respondent *might* be taken to suggest in its notice of constitutional matter (at [2(a)]), the laws adopted by the Commonwealth Parliament to be in force in the JBT do not include the ACT Self-Government Act amongst the *applied* Commonwealth laws.

3 Unlike JBT Ordinances, ACT laws are not *delegated* Commonwealth laws: see *Capital Duplicators Pty Ltd v ACT* (1992) 172 CLR 248 at 281 to 283 per Brennan, Deane and Toohey JJ; and at 284 per Gaudron J.

adopts in the JBT through s 4A(1) of the JBT Acceptance Act (***surrogate* Commonwealth laws**).[4]

10. In relation to the last of the categories listed above, s 4A of the JBT Acceptance Act provides:

> **4A Laws of [ACT] to be in force**
>
> (1) Subject to this Act, the laws (including the principles and rules of common law and equity) in force from time to time in the [ACT] are, so far as they are applicable to the [JBT] and are not inconsistent with an Ordinance, in force in the [JBT] as if the [JBT] formed part of the [ACT].
>
> (2) Subsection (1) extends to:
>
> (a) sections 6 and 7 of the *Seat of Government Acceptance Act 1909*; and
>
> (b) the whole of the *Seat of Government (Administration) Act 1910* except sections 9 and 12 of that Act;
>
> but does not extend to any other Act or provision of an Act.

11. The text of s 4A of the JBT Acceptance Act reveals that most of the laws adopted by the Commonwealth Parliament in the JBT are ACT laws (which are in force in the JBT as *surrogate* Commonwealth laws) but also include certain provisions of the Seat of Government laws (which are in force in the JBT as *applied* Commonwealth laws).

12. Neither the ACT laws nor the provisions of the Seat of Government laws the Commonwealth Parliament adopts in the JBT can be characterised as *original* Commonwealth laws, because the term, ***law of the Commonwealth***, in Commonwealth Acts is defined in s 2B of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**) by reference to s 2H of that Act, which provides:

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[4] See *Ruhani v Director of Police* (2005) 222 CLR 489 at [8] per Gleeson CJ; and *Crosby v Kelly* (2012) 203 FCR 451 at [37] per Robertson J, with Bennett and Perram JJ agreeing.

2H References to law of the Commonwealth

> In any Act, a reference to the law of the Commonwealth, or to a law of the Commonwealth, does not include, and is taken never to have included, a reference to a law in force in a Territory so far as the law is so in force because of an Act providing for the acceptance, administration or government of that Territory.

13. While not all laws in force in the JBT are able to be characterised as *original* Commonwealth laws, all laws in force in the JBT are properly characterised as either *original*, *delegated*, *applied* or *surrogate* Commonwealth laws (or should be properly characterised in some other way as Commonwealth laws) because the JBT is "subject to the exclusive jurisdiction of the Commonwealth".[5]

14. So, despite most laws in force in the JBT not being "a law of the Commonwealth", all laws in force in the JBT are a type of Commonwealth law.

The Tenancies Act is such a surrogate Commonwealth law

15. It is not disputed in this appeal that the Tenancies Act satisfies the requirements of s 4A(1) of the JBT Acceptance Act to qualify as a surrogate Commonwealth law.

16. That is, the Tenancies Act was at the time the appellant applied to the ACAT for relief (CAB 7-8, [10]-[13]) and remains:

(1) in force in the ACT;

(2) capable of geographic application to the JBT; and

(3) not inconsistent with a JBT Ordinance that deals with the same subject matter.[6]

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[5] Constitution, s 111, read with JBT Acceptance Act, ss 3 & 4 and Schedule and further read with *Seat of Government Surrender Act 1915* (NSW) ss 4 (definition of ***The agreement***) 5 & 6 and Schedule.

[6] The application of the Tenancies Act and ACAT's jurisdiction to leases (other than on Aboriginal Land) in the JBT has been the subject of amendments to the *Leases Ordinance 1992* (JBT). The *Leases Amendment Ordinance 2009* (No 1) amended the *Leases Ordinance 1992* (JBT) with the effect of excluding specific land with residential tenancies leases from the *Leases Ordinance 1992* (JBT) and allowing the Tenancies Act to fully apply to the excluded land. In 2015, the *Leases Ordinance 1992* (JBT) was amended by the *Jervis Bay Territory Leases Amendment Ordinance 2015* (No 1) to ensure that where one of the parties to the tenancy dispute in the JBT is the Commonwealth; such a dispute is now heard by the Federal Circuit Court rather than ACAT: see s 23AA(2).

Can the Tenancies Act apply to Aboriginal Land under the Land Grant Act?

17. In broad terms, the Tenancies Act deals with rights and responsibilities arising from the granting of a right of occupation under a residential tenancy agreement[7] which involves:

    (1) giving a person a right to occupy stated premises;

    (2) the premises are for the person to use as a home; and

    (3) the right is given for value.[8]

18. For these purposes, 'premises' is defined to include:

    (1) any habitable structure, whether it is fixed to the land or not; and

    (2) part of any premises; and

    (3) any land, buildings or structures belonging to the premises.[9]

19. Under the Land Grant Act, Aboriginal Land was granted to the first respondent under s 8 and, by virtue of s 10, the land became vested in the first respondent including all rights, titles and interests.

20. It is not disputed in this appeal that the Tenancies Act, being a law that deals with the granting of leases over 'premises' which includes 'land', may therefore apply to Aboriginal Land under the Land Grant Act.

Is the Tenancies Act capable of operating concurrently with the Land Grant Act?

21. It is in dispute in this appeal the extent to which the Tenancies Act is capable of operating concurrently with the Land Grant Act.

22. The task is to resolve whether there is a conflict between a *surrogate* Commonwealth law (the Tenancies Act) and an *original* Commonwealth law (the Land Grant Act) where both are laws in force in the JBT by command of the Commonwealth Parliament as a type of Commonwealth law. If there is a conflict, then s 46 expressly resolves that conflict in favour of the Land Grant Act. In fact, s 46 will resolve any

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7 Tenancies Act, s 5.
8 Tenancies Act, s 6A(1).
9 Tenancies Act, Dictionary.

conflict that way regardless of whether the other law be an *original*, *delegated*, *applied* or *surrogate* Commonwealth law.

23. In that regard, there is no need to resort to any general rule in resolving a conflict between two laws having the same source.[10]

24. In contrast to the generic tests for resolving inconsistency between State laws and Commonwealth laws,[11] and between ACT laws and Commonwealth laws,[12] it is implicit in s 46 of the Land Grant Act that the Commonwealth Parliament did not intend the Land Grant Act to exhaustively or exclusively regulate Aboriginal Land in the JBT. Put another way, s 46 plainly envisages that other laws applicable in the JBT may apply to Aboriginal Land.

25. This meaning is confirmed by the explanatory memorandum to the Bill for the Land Grant Act,[13] which provides (at [74]):

> Any law in force in the [JBT] will apply to Aboriginal Land to the extent that that law is capable of operating concurrently with this Act. This provision is inserted to make it clear that the granting of the Aboriginal Land to the [first respondent] has no other effect on the applicability of the general law of the [JBT] than as provided by specific legislative enactment in this Act.

26. To apply the test in the context of this appeal, one may properly interpolate and read the words of s 46 of the Land Grant Act as follows:

> [The Land Grant] Act does not affect the application to Aboriginal Land of [the Tenancies Act] to the extent that [the Tenancies Act] is capable of operating concurrently with [the Land Grant Act].

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[10] The general rule is that a later statute is taken to have, by implication, repealed the earlier statute to the extent of the conflict between them: *University of Wollongong v Metwally* (1984) 158 CLR 447 at 462 per Mason J and at 467 per Murphy J.

[11] Constitution, s 109.

[12] ACT Self-Government Act, s 28.

[13] Under the Acts Interpretation Act it is permissible under s 15AB(1)(a) to resort to extrinsic material to confirm the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act.

27. Read in this way, it is clear that "to the extent that" the Tenancies Act is capable of operating concurrently with the Land Grant Act, then the Tenancies Act applies to Aboriginal Land under the Land Grant Act.

28. It is also clear that "to the extent that" the Tenancies Act is not capable of operating concurrently with the Land Grant Act, then the Tenancies Act does not apply to Aboriginal Land under the Land Grant Act.

29. The critical question becomes the extent to which the Tenancies Act is capable of operating concurrently with the Land Grant Act.

To what extent is the Tenancies Act capable of operating concurrently with the Land Grant Act?

30. Should one answer that question in the way the intermediate appellate court did in *Wreck Bay Aboriginal Community Council v Williams* (2017) 12 ACTLR 207, or in the way the primary court did in *Wreck Bay Aboriginal Community Council v Williams* (2016) 212 FLR 60, or in some other way?

Primary court's approach

31. Questions 3 and 4 of the amended special case that was before the primary court provide:

> 3. … is the [Tenancies Act], in whole or in part, a law which is not capable of operating concurrently with the [Land Grant Act] within the meaning of [s] 46 of the [Land Grant Act]?
>
> 4. If the answer to Question 3 is "yes", to what extent does the Tenancies Act not apply to Aboriginal Land for the purposes of [s] 46 of the [Land Grant Act] (CAB 6 & 12; (2016) 212 FLR 60 at [3])?

32. In relation to the answers to be given to those questions, the primary court stated:

> The parties agreed that if I answered 'Yes' to Question 3 then it would follow that my answer to Question 4 would extend to the whole of the [Tenancies Act] (CAB 12; (2016) 212 FLR 60 at [4]).

33. Before considering the answers to those questions, the primary court further stated:

> [T]here was one aspect on which the parties were united. They agreed that the respective sections of the [Land Grant Act] and [Tenancies Act] dealing with sub-letting were inconsistent with each other. Neither side suggested the inconsistency had any bearing on the balance of the dispute before me. Any conclusion that I reach assumes the existence of this just stated inconsistency (CAB 14; (2016) 212 FLR 60 at [23]).

34. The second last sentence in the passage above is why, despite it immediately appearing that the Tenancies Act provisions prohibiting subletting or operating on that prohibition[14] are not capable of concurrent operation with Land Grant Act provisions that permit sub-leasing,[15] the primary court was nevertheless able to answer "No" to Question 3 and not address Question 4 (see CAB 17; (2016) 212 FLR 60 at [52] and [53]).

35. However, the second respondent contends that in the face of that conflict between the two Acts in relation to subletting, the primary court ought to have given answers along the following lines:

Answer 3: Yes, the Tenancies Act, in part, is a law that is not capable of operating concurrently with the Land Grant Act within the meaning of s 46 of the Land Grant Act; and

Answer 4: The Tenancies Act does not apply to Aboriginal Land for the purposes of s 46 of the Land Grant Act to the extent that s 8(1)(a) read with sch 1, cl 72 and further read with s 9 of the Tenancies Act would prohibit subletting, and s 54 and s 128 would operate upon that prohibition, on Aboriginal Land.

36. While the answers suggested above are different from the formal answers given by the primary court (CAB 19) they ultimately do not differ in their substantive effect when the "one aspect on which the parties were united" is factored in, which is: That *aside from* those parts of the Tenancies Act "dealing with sub-letting" or "sub-leasing", the Tenancies Act is capable of operating concurrently with the Land Grant

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[14] Tenancies Act, s 8(1)(a) read with sch 1, cl 72 and further read with s 9, and ss 54 & 128.
[15] Land Grant Act, s 41.

Act within the meaning of s 46 of the Land Grant Act (CAB 14, 17 and 45; (2016) 212 FLR 60 at [23], [52] and [53]; (2017) 12 ACTLR 207 at [84]).

Intermediate appellate court's approach

37. The intermediate appellate court determined that it was appropriate to use the test articulated by Dixon CJ in respect of inconsistency under s 109 of the Constitution to answer the question of whether a law applying in the JBT was capable of operating concurrently with the Land Grant Act for the purposes of s 46 (CAB 36-37; (2017) 12 ACTLR 207 at [44]-[45]).

38. That test asks whether the Tenancies Act would "alter, impair or detract from" the operation of the Land Grant Act. If so, then it would be incapable of operating concurrently with the Land Grant Act (CAB 37; (2017) 12 ACTLR 207 at [45]).

39. To answer this question required the intermediate appellant court to construe and determine the scope of the Land Grant Act. In its view, the "determinative" issue became whether, on its proper construction, the power of the first respondent to grant leases under s 38 of the Land Grant Act was intended to be at the first respondent's *discretion*, or whether it was intended to be subject to other laws in operation in the JBT (CAB 42; (2017) 12 ACTLR 207 at [71]).

40. While acknowledging that the power to grant leases under s 38 was not expressly stated to be "on terms that the [first respondent] thinks fit" (CAB 42; (2017) 12 ACTLR 207 at [71]), the intermediate appellate court found that features of the Land Grant Act "collectively [indicated] that the power of the [first respondent] to grant leases should not be treated as one subject to laws specifying mandatory terms for such leases ... [but] should be interpreted as including the power to determine for itself the terms of those leases and not subject to qualification by provisions which would alter the terms of those leases" (CAB 43; (2017) 12 ACTLR 207 at [74]).

41. The intermediate appellate court observed that the primary court, when interpreting s 38 of the Land Grant Act, should have placed greater emphasis "on those statutory indications that the [first respondent's] power to grant a lease includes the power to determine the terms of that lease" (CAB 45; (2017) 12 ACTLR 207 at [84]).

42. Having construed s 38 in that way, the intermediate appellate court then went on to construe the Tenancies Act and apply the test it had previously determined ought to apply in order to assess "concurrent operation". It found that the Tenancies Act would render void any terms of inconsistent leases that the first respondent might grant or would impose terms of the standard residential tenancy agreement on leases granted by the first respondent which did not otherwise contain those terms. On that basis, it concluded that the Tenancies Act would effectively "alter, impair or detract" from the power given to the first respondent under the Land Grant Act (CAB 45; (2017) 12 ACTLR 207 at [82]).

10 43. This characterisation of the test in s 46 and construction of s 38 of the Land Grant Act led the intermediate appellate court to allow the first respondent's appeal (CAB 44-46; (2017) 12 ACTLR 207 at [81]-[85]) and give the following formal answers:

> [Answer 3:] The [Tenancies Act] is not capable of operating concurrently (within the meaning of s 46 of the [Land Grant Act]) with the [Land Grant Act] insofar as:
>
> a. s 8 requires a lease granted by the [first respondent] to contain the standard residential tenancy terms within the meaning of the [Tenancies Act];
>
> b. s 9 renders void terms of a lease granted by the [first respondent] that
20 are inconsistent with the standard residential tenancy terms under that Act.
>
> [Answer 4:] The [Tenancies Act] does not apply to Aboriginal Land for the purposes of s 46 of the [Land Grant Act] to the extent to which ss 8 or 9 of the [Tenancies Act] would apply to a lease granted by the [first respondent] (CAB 46 to 47 & 50; (2017) 12 ACTLR 207 at [86] to [88]).

Proper approach

44. The second respondent respectfully contends that while the intermediate appellate court was correct to first construe the scope of the leasing power under the Land Grant Act and then go on to assess how the terms of the Tenancies Act would affect
30 it, it erred:

(1) *first,* in substituting the test for s 109 inconsistency in place of the words actually contained in s 46 of the Land Grant Act when assessing the effect of the Tenancies Act on the Land Grant Act; and

(2) *secondly*, in construing the terms of the Land Grant Act in the way that it did.

45. The second respondent contends that the task of assessing the extent to which the Tenancies Act is capable of operating concurrently with the Land Grant Act for the purposes of s 46 ought not be dictated or controlled by reference to either the jurisprudence of s 28 of the ACT Self-Government Act or s 109 of the Constitution.

46. First, this is because they provide tests for the resolution of a conflict between any of the laws of separate and independent bodies politic (the ACT and the Commonwealth in the case of s 28, and a State and the Commonwealth in the case of s 109). In contrast, s 46 of the Land Grant Act operates only to resolve a conflict between it and the other laws in force in the JBT.

47. Secondly, the *outcome* of the test provided for by s 46 of the Land Grant Act stands in contrast to the outcome of the tests provided for by s 28 of the ACT Self-Government Act and s 109 of the Constitution, in that an ACT law that is inconsistent with a Commonwealth law "has no effect" and a State law that is inconsistent with a Commonwealth law "is invalid to the extent of the inconsistency".

48. Accordingly, the correct approach when applying s 46 is to simply ask: Is the Tenancies Act "capable of operating concurrently with" the Land Grant Act?

49. While it has been observed that concurrency is a narrower concept than inconsistency,[16] this Court has held that where an *original* Commonwealth law provides a comprehensive and exhaustive statement of the law in relation to a particular matter, then there can be no room left for concurrent operation.[17] But if that field is not comprehensive and exhaustive, and so there is room left for concurrent operation, the provisions said to conflict can be laid side by side to

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[16] *Northern Territory v GPAO* (1999) 196 CLR 553 at [60] per Gleeson CJ and Gummow J. The primary court made a similar observation: CAB 16; (2016) 212 FLR 60 at [46]. The intermediate appellate court appears to have conflated the two: CAB 36-37; (2017) 12 ACTLR 207 at [44] to [48].

[17] *Commonwealth v ACT* (2013) 250 CLR 441 [52] per the Court (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

determine whether there is a real conflict or whether upon their proper construction the provisions are non-conflicting and capable of concurrent operation.

50. The starting point, then, is to construe the Land Grant Act and, if it allows for concurrency, then construe the Tenancies Act.

51. In undertaking this construction exercise, the common law principles reflected in the Acts Interpretation Act require consideration of the natural and ordinary meaning of the language, and the scope and object of the legislation as a whole, including its context, purpose and policy.[18]

Construction of the Land Grant Act

52. In 1986, the Land Grant Act was enacted to enable the grant of an interest in Commonwealth land in the JBT to the Wreck Bay Aboriginal Community (**Community**).

53. At the time of the Bill's introduction to Parliament, the purpose of the Land Grant Act was said to be to "provide for the grant of inalienable freehold title to a portion of the [JBT] to the [Community]"[19] and to "give effect to [the Commonwealth Government's] policy of providing secure tenure to land in respect of Australia's indigenous population".[20]

54. The text of the Land Grant Act (and the amendments to that Act) is consistent with the originally articulated purpose of the draft law. The provisions reflect Commonwealth Parliament's intention that the Aboriginal people in the JBT have secure tenure to land and that this was to be achieved by the creation of the first respondent who would receive the grant of land and hold title to it in the JBT.[21] However, the text reveals that the purpose is more complex than mere tenure, in

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[18] See, albeit in the context of s 109 inconsistency, *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 per the Court (French CJ, Gummow, Heydon, Crennan, Kiefel and Bell JJ) at [45] quoting from *WA v Commonwealth* (1985) 183 CLR 373 at 465 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ and also citing *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ, quoted with approval in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69] per McHugh, Gummow, Kirby and Hayne JJ.

[19] Explanatory Memorandum to the Bill for the Land Grant Act, page 2.

[20] *House of Representatives* Official Hansard, Bill for the Land Grant Act, 29 May 1986 Second Reading Speech, page 4193.

[21] Land Grant Act, ss 4, 6(a) and 8.

particular through the various functions that are conferred on the first respondent including:

(1) to use its powers as owner of Aboriginal Land for the benefit of members of the Community;[22]

(2) to take action for the benefit of the Community in relation to (among other things) housing needs, in consultation with the relevant Commonwealth Minister;[23]

(3) to protect and conserve natural and cultural sites on Aboriginal Land;[24]

(4) to engage in land use planning in relation to Aboriginal Land;[25]

(5) to manage and maintain Aboriginal Land;[26]

(6) to conduct business enterprises for the economic or social benefit of the Community.[27]

55. The way that the Land Grant Act enables these functions to be achieved is not simply by granting the first respondent title to the Aboriginal Land but by regulating the first respondent's dealings with it. Part V contains the key provisions in this regard including those which:

(1) permit the first respondent to grant a lease of Aboriginal Land to a registered member for domestic purposes;[28]

(2) oblige the first respondent to grant a class of persons called ***existing occupiers*** a 99 year lease for residential purposes;[29]

(3) prohibit the first respondent from including a term in a lease granted to an existing occupier that requires payment by the tenant in respect of a building or improvements erected solely at the expense of the tenant;[30]

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22 Land Grant Act s 6(b).
23 Land Grant Act, s 6(ca).
24 Land Grant Act s 6(cc).
25 Land Grant Act s 6(cd).
26 Land Grant Act s 6(ce).
27 Land Grant Act s 6(cf).
28 Land Grant Act, s 38(2)(a).
29 Land Grant Act, s 40(a).
30 Land Grant Act, s 40(b).

(4) permit the first respondent to include a term in a lease granted to an existing occupier, approved by the relevant Commonwealth Minister, that a tenant pay to the first respondent in respect of a building or improvements erected by the Commonwealth, but only up to the value of the fixed improvements on the land at the time it became Aboriginal Land;[31] and

(5) permit a tenant to sub-lease the lease of their Aboriginal Land in certain circumstances.[32]

56. In the second respondent's contention, properly construed Part V of the Land Grant Act – especially the leasing power in s 38 – does not manifest an intention to be an exhaustive or comprehensive statement of the law governing the relationship between the first respondent as the landlord and its tenants, such as the appellant, on Aboriginal Land (compare the intermediate appellate court at CAB 42 to 45; (2017) 12 ACTLR 207 at [71] to [84]). Rather, it *qualifies the power* of the first respondent as the owner of the Aboriginal Land so as to achieve the functions and purposes set out in s 6, as follows.

57. The opening words of s 38 provide that the first respondent must not deal with any interest in Aboriginal Land, *except as provided for by Part V* of the Land Grant Act. Section 38 therefore imposes limits. It does not purport to lay down a complete legislative framework within which the relationship between landlord and tenant is to be governed. The limits it imposes relate to:

(1) *who* can be granted a lease (generally need to be registered members);

(2) for what *purpose* a lease may be granted (generally needs to be domestic, business or for the benefit of the Community); and

(3) for how *long* a lease may granted (it can be lengthy).

58. It can be readily appreciated how imposing these sorts of limits will assist the achievement of the first respondent's functions as set out in s 6 and therefore the overarching purpose of security of tenure for the first respondent's members.

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[31] Land Grant Act, s 40(c).
[32] Land Grant Act, s 41.

59. Other surrounding provisions in Part V similarly support this purpose. Where the first respondent grants a lease of Aboriginal Land, there are limited rights under s 41 of the Land Grant Act to sub-lease that land. The rights are limited in that the sub-lease cannot be granted to persons other than registered members, the Commonwealth or an Authority except with the consent of the Minister and the purposes for which the land must be used need to be the same as the purpose of the original lease unless the Minister consents otherwise.

60. Further, where a registered member has the benefit of a lease or sub-lease of Aboriginal Land for residential purposes, that benefit may be transmitted (by will or under a law relating to intestacy) to a relative of the member under s 42 of the Land Grant Act.

61. Again, this ensures that the use of the land is maintained for the benefit of the Community, that tenure is secure for the registered members and the purposes to which the land is put are appropriate ones as determined by the first respondent in pursuit of its functions and purposes.

62. In this way, the second respondent contends that the preferable construction is that the Land Grant Act is intended to operate within the setting of (or alongside) the Tenancies Act and that both Acts are to be read to operate together so far as possible. It is not a case of one law permitting what the other forbids.[33]

63. This is entirely consistent with the function conferred on the first respondent of managing and maintaining the land. Notions of management and maintenance of land do not themselves regulate the relationship between a lessor and tenant. The first respondent's function of managing and maintaining the land is wholly consistent with its obligations under the general law as owner of land to repair premises as a lessor of residential premises under the Tenancies Act.

64. Indeed, the Land Grant Act provides minimal guidance on the terms and conditions of leases granted over Aboriginal Land. Some specific requirements are set out for

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[33] *Telstra v Worthing* (1999) 197 CLR 61 at [27] per the Court (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ); *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J (with whom Rich J separately agreed at 480); *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47 at 57-58 per Wilson, Deane and Dawson JJ (with whom Gibbs CJ and Brennan J separately agreed at 49).

those tenants who were existing occupiers, that is, registered members of the first respondent in 1986. Leases granted to existing occupiers are subject only to the qualifications in ss 40 (b) and (c), which both restrict the first respondent's ability to charge rent under the lease. But beyond that the Land Grant Act does not specify any regime governing rights and responsibilities of lessors and tenants.

65. Accordingly, the second respondent submits that the Land Grant Act properly construed does not provide an exhaustive and comprehensive statement of the law governing the relationship between landlord and tenant on Aboriginal Land in the JBT and there is therefore scope for the Tenancies Act to operate. The second respondent respectfully submits that the approach of the intermediate appellate court in concluding that s 38 was an "exhaustive and comprehensive statement" of the power to lease by construing the provision as though it included the terms "on such conditions as the [first respondent] sees fit" was impermissible and not supported by either the text or purpose of the Land Grant Act.

Construction of the Tenancies Act

66. Having determined the scope of the Land Grant Act and in particular the power to lease in s 38, it is necessary to construe the Tenancies Act and lay the provisions side by side to determine if there is a conflict or, alternatively, if they can operate concurrently.

67. The second respondent's submissions are premised on the ACAT's satisfaction that the first respondent and the appellant have a tenancy agreement for the purposes of the Tenancies Act.[34]

68. The Tenancies Act forms a code regulating the rights, duties and obligations that apply to the lessor and tenant in a residential lease.

69. Once an agreement between a landlord and tenant is characterised as a residential tenancy agreement, then the agreement is taken to contain the Standard Residential Tenancy Terms set out in Schedule 1 of the Tenancies Act.[35] A residential tenancy

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[34] See Tenancies Act, s 6A; and *Williams v Wreck Bay Aboriginal Community Council* [2015] ACAT 79 at [58] per Symons PM. The first respondent did not appeal from the ACAT's decision and accepted in the primary court that a residential tenancy agreement exists: CAB 13; (2016) 212 FLR 60 at [14].

[35] Tenancies Act, s 8(1)(a).

agreement captures a broad range of oral and written agreements and applies to tenancy agreements with the ACT Commissioner for Social Housing.

70. The landlord and the tenant may depart from the Standard Residential Tenancy Terms, provided the non-standard term has been endorsed by the ACAT under s 10 of the Tenancies Act.[36]

71. The ACAT has jurisdiction to determine disputes under residential tenancy agreements.[37]

72. In this way, the Standard Residential Tenancy Terms impose a minimum default standard regulating the rights, duties and obligations of landlord and tenant in a residential lease.

Laying the provisions side by side

73. The provisions of the Tenancies Act and the Land Grant Act that deal with subletting and sub-leasing, respectively, when laid side by side, reveal a real conflict, because the Tenancies Act provisions prohibiting subletting or operating on that prohibition[38] are not capable of concurrent operation with the Land Grant Act provisions that permit sub-leasing.[39]

74. However, other than the standard term that prohibits subletting, the second respondent contends that the Tenancies Act provisions that provide for Standard Residential Tenancy Terms[40] and, unless approved by the ACAT, void terms in residential tenancy agreements that are inconsistent with those standard terms,[41] are capable of concurrent operation with Land Grant Act provisions discussed above that permit the first respondent to grant residential leases within certain limits.

75. It is difficult to see how imposition of Standard Residential Tenancy Terms (apart from the prohibition on subletting) into the first respondent's residential leases to its

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[36] Tenancies Act, s 8(1)(c)(ii).
[37] Tenancies Act, s 76.
[38] Tenancies Act, s 8(1)(a) read with sch 1, cl 72 and further read with s 9, and ss 54 & 128.
[39] Land Grant Act, s 41.
[40] Tenancies Act, s 8(1)(a).
[41] Tenancies Act, s 9.

Community would negate the essential scheme of the Land Grant Act for ensuring security of tenure for the Community.

76. If, contrary to these submissions, this Court were to conclude that the Standard Residential Tenancy Terms in their entirety cannot operate concurrently with the Land Grant Act, logically that would entail the conclusion that the Tenancies Act more broadly cannot apply to Aboriginal Land in the JBT.

77. Such a finding would have the consequence that the appellant will be wholly deprived of the normal protections afforded to tenants by the Tenancies Act in those other parts of the JBT that are not Aboriginal Land, including tenants whose landlord is the Commonwealth. The appellant would have only the minimal protections of the common law which relevantly do not include any basic duty to repair. In the second respondent's submission, such a result ought not be reached in the absence of clear and unambiguous language.

78. The second respondent contends that a construction of s 46 of the Land Grant Act that has the effect of putting a tenant of the first respondent in an inferior position to other JBT residents should not be preferred.

Conclusion

79. The first respondent contends that, properly construed, s 46 of the Land Grant Act means that the Tenancies Act applies to Aboriginal Land in the JBT, except to the extent that in so applying it would prohibit subleasing under s 41 of the Land Grant Act.

80. To put this in the form of Answers to Questions 3 and 4 of the amended special case (CAB 6) the second respondent contends that Questions 3 and 4 should be answered as follows:

Answer 3: Yes, the Tenancies Act, in part, is a law that is not capable of operating concurrently with the Land Grant Act within the meaning of s 46 of the Land Grant Act;

Answer 4: The Tenancies Act does not apply to Aboriginal Land for the purposes of s 46 of the Land Grant Act to the extent that s 8(1)(a) read with sch 1, cl 72 and

further read with s 9 of the Tenancies Act would prohibit subletting, and ss 54 and 128 operate upon that prohibition, on Aboriginal Land.

Part VI: Argument on notice of contention or notice of cross appeal

81. Not applicable.

Part VII: Estimate of time

82. The second respondent estimates half an hour will be required for presentation of his oral argument.

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