SUPREME COURT OF QUEENSLAND

CITATION:	*Wigness & Ors v Kingham, President of the Land Court of Qld & Ors* [2018] QSC 20
PARTIES:	**PEARSON WIGNESS, HARRY SERIAT, ISAAC SAVAGE AND MILTON SAVAGE** (applicants) **v** **FLEUR KINGHAM, PRESIDENT OF THE LAND COURT OF QUEENSLAND** **(**first respondent**)** **MINISTER FOR NATURAL RESOURCES AND MINES** **(**second respondent**)** **TORRES STRAIT ISLAND REGIONAL COUNCIL** **(**third respondent**)** **SERIAKO DORANTE** **(**fourth respondent**)** **PEARSON WIGNESS, HARRY SERIAT, ISAAC SAVAGE AND MILTON SAVAGE** (applicants) **v** **FLEUR KINGHAM, PRESIDENT OF THE LAND COURT OF QUEENSLAND** (first respondent) **MINISTER FOR NATURAL RESOURCES AND MINES** (second respondent) **TORRES STRAIT ISLAND REGIONAL COUNCIL** (third respondent) **PETER CHRISTOPHER SABATINO** (fourth respondent)
FILE NOS:	BS6142 of 2017 BS6145 of 2017
DIVISION:	Trial Division
PROCEEDING:	Applications for review
ORIGINATING COURT:	Land Court of Queensland
DELIVERED ON:	20 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	25 August 2017
JUDGE:	Mullins J

ORDER: **In BS6142 of 2017:**
1. Application dismissed.

In BS6145 of 2017:
1. Application dismissed.

CATCHWORDS: ADMINISTRATIVE LAW – PREROGATIVE ORDERS – where parties who had lease entitlements under the *Aboriginal and Torres Strait Islander Land Holding Act* 2013 (Qld) appealed successfully to the Land Court under s 33 of that Act against the Minister's decision to refuse to amend statements of reasons (obstacles) in respect of the lease entitlements – where the Minister had decided that the claimants' native title claim was a competing interest and therefore a practical obstacle to the grant of the leases – where the claimants intervened in the appeals to the Land Court for the purpose of making submissions about the nature and scope of the appeals and whether their claim was a practical obstacle to the grant of the leases – where the claimants advanced an argument on the validity of the re-vesting of the relevant land under s 11 of the Act which the Land Court did not address – whether the claimants are entitled to prerogative orders in respect of the failure of the Land Court to address their re-vesting argument either on the ground of procedural fairness or on the ground of jurisdictional error – whether there was an error of law on the face of the record

ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES – NATIVE TITLE – PERMISSIBLE FUTURE ACTS – where parties who had lease entitlements under the *Aboriginal and Torres Strait Islander Land Holding Act* 2013 (Qld) appealed to the Land Court under s 33 of that Act against the Minister's decision to refuse to amend statements of reasons (obstacles) in respect of the lease entitlements – where the Land Court found the grant of the leases under that Act to give effect to the lease entitlements would be pre-existing right based acts under s 24IB of the *Native Title Act* 1993 (Cth) – where s 11 of the Act re-vested the land the subject of the lease entitlements into the DOGIT from which it had been divested under s 10 of the *Aborigines and Torres Strait Islanders (Land Holding) Act* 1985 (Qld) on the approval of the applications for the relevant leases – whether the re-vesting of the land into the trust area the subject of the DOGIT was invalid and of no effect pursuant to s 24OA of the *Native Title Act* 1993 (Cth)

Commonwealth of Australia Constitution Act 1900, s 109
Native Title Act 1993 (Cth), s 11, s 24EB, s 24IB, s 24OA, s 233, s 253

Aboriginal and Torres Strait Islander Land Holding Act 2013 (Qld), s 3, s 6, s 9, s 10, s 11, s 16, s 28, s 29, s 30, s 31, s 32, s 33, s 35
Aborigines and Torres Strait Islanders (Land Holding) Act 1985 (Qld), s 9, s 10
Land Court Act 2000 (Qld), s 5

Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58, cited
Dorante v Minister for Natural Resources and Mines & Ors; Sabatino v Minister for Natural Resources and Mines & Ors [2017] QLC 15, related
Lardil Peoples v Queensland (2001) 108 FCR 453; [2001] FCA 414, cited
Queensland Construction Materials Pty Ltd v Redland City Council (2010) 271 ALR 624; [2010] QCA 182, considered
Western Australia v Commonwealth (Native Title Act Case) (1995) 183 CLR 373; [1995] HCA 47, followed

COUNSEL: S Lloyd SC and E Longbottom for the applicants
No appearance for the first respondent
N Kidson and M McKechnie for the second respondent
C McLaughlin for the third respondent
R Merkel QC and R Mansted for the fourth respondents

SOLICITORS: Gilkerson Legal for the applicants
G R Cooper, Crown Solicitor for the second respondent
Torres Strait Island Regional Council for the third respondent
Holding Redlich for the fourth respondents

[1] I will refer to the parties by their designations in the proceedings in this court. The fourth respondents appealed to the Land Court of Queensland under s 33 of the *Aboriginal and Torres Strait Islander Land Holding Act* 2013 (Qld) (2013 LHA) by way of challenge to the decisions made by the second respondent (the Minister) under s 32 of the 2013 LHA to refuse to amend the statutory notices called statements of reasons (obstacles) issued for the respective lease entitlements held by the fourth respondents under the 2013 LHA in respect of land on Hammond Island in the Torres Strait.

[2] Each fourth respondent claimed entitlement to the grant of a lease over the land on which he had constructed a house, as a result of a right under the now repealed *Aborigines and Torres Strait Islanders (Land Holding) Act* 1985 (Qld) (1985 LHA). The 1985 LHA was repealed by the 2013 LHA. The Minister issued each statement of reasons (obstacles) on the basis that the grant of the lease would be an invalid future act under the *Native Title Act* 1993 (Cth) (NTA) that would have to be authorised by an indigenous land use agreement (ILUA) under s 24EB of the NTA.

[3] The applicants (who are the claimants on behalf of the Kaurareg People in a native title application made to the Federal Court of Australia in 2010) (the Kaurareg #3 NTDA)

sought leave to be joined in the two appeals to the Land Court. The joinder applications were heard at the same time as the appeals to the Land Court. The President of the Land Court refused the applicants' application to be joined, but allowed them to make submissions about the nature and the scope of the appeals to the Land Court and whether the Kaurareg #3 NTDA is a practical obstacle to the grant of the leases to satisfy the lease entitlements: *Dorante v Minister for Natural Resources and Mines & Ors; Sabatino v Minister for Natural Resources and Mines & Ors* [2017] QLC 15 (the reasons) at [45]-[47]. There was no challenge by the applicants to the jurisdiction of the Land Court to hear the appeals pursuant to s 33 of the 2013 LHA by the fourth respondents in respect of the Minister's refusal to amend the statement of reasons (obstacles).

[4] The appeals were determined on the basis of the agreed statements of facts filed in the Land Court on 13 January 2017 (the agreed facts). The President allowed the appeals on the basis that the grant of the lease to each fourth respondent in accordance with the 2013 LHA is a pre-existing right-based act (PERBA) under s 24IB(a) of the NTA or, alternatively, that the requirements of s 24IB(b) of the NTA are established, with the consequence that any native title rights or interests established by the applicants would be extinguished by the grant of the leases, giving the applicants a prospective right to compensation against the State of Queensland: the reasons at [140]-[150]. The President concluded at [150] that:

> "Accordingly, I am satisfied the grant of the leases under the 2013 LHA would be PERBAs. Any native title rights or interests the claimants may establish would be extinguished by the grant of the leases. The claimants' prospective right to compensation on extinguishment is a claim against the State of Queensland, not Mr Dorante and Mr Sabatino. Both extinguishment of native title and the right to compensation, if they are exist, are the consequence of, not a practical obstacle to, the grant of the leases."

[5] The applicants supported the position taken by the Minister in the Land Court, but the Minister has accepted the President's decision and therefore opposes the applicants' applications for review and now supports the position of the fourth respondents who seek to uphold the President's decision. The third respondent also supports the position of the fourth respondents.

[6] The applicants are not appealing the President's decision, but applying for orders in the nature of certiorari and mandamus to quash and set aside the orders made by the President and remit the matters to the Land Court to be determined according to law and for declarations that the orders of the Land Court are void and of no effect.

Grounds of review

[7] The applicant seeks the prerogative relief and the declaration in each proceeding on the basis of the following grounds:

(a) the Court erred in failing to consider whether the existence of native title was a practical obstacle as stated in the statement of reasons (obstacles) because the existence of native title, by reason of the NTA, would prevent

the re-vesting of the Lease Entitlement Land in the Hammond Island DOGIT under s 11 of the 2013 LHA, which is a critical pre-condition to the granting of a lease under the 2013 LHA;

(b) the Court erred in failing to accord the claimant natural justice by deciding not to consider their submission that the existence of native title was a practical obstacle as stated in the statement of reasons (obstacles) because the existence of native title, by reason of the NTA, would prevent the re-vesting of the Lease Entitlement Land in the Hammond Island DOGIT under s 11 of the 2013 LHA, which is a critical pre-condition to the granting of a lease under the 2013 LHA;

(c) the Court erred in failing to conclude that the existence of native title is a practical obstacle as stated in the statement of reasons (obstacles) because the existence of native title, by reason of the NTA, would prevent the re-vesting of the Lease Entitlement Land in the Hammond Island DOGIT under s 11 of the 2013 LHA, which is a critical pre-condition to the granting of a lease under the 2013 LHA.

[8] The nub of the applicants' submissions for relief in these proceedings is that the re-vesting under s 11 of the 2013 LHA was an invalid future act under s 24OA of the NTA to the extent that it affected native title and was therefore inoperative from which it would follow that the Minister's statements of reasons (obstacles) should have been upheld (which is the relief the applicants seek ultimately). The applicants submit that the dismissal of the fourth respondents' appeals to the Land Court would facilitate the course proposed by the applicants that the issue of native title and the grant of leases to the fourth respondents be resolved by an ILUA.

Agreed statements of facts

[9] The following summary is taken from the agreed facts before the Land Court.

[10] On 24 July 1989 the fourth respondent Mr Dorante made an application for a lease over identified land on Hammond Island. The fourth respondent Mr Sabatino together with his father also made an application for a lease over other identified land on Hammond Island on 24 July 1989. Each application was properly made under s 5 of the 1985 LHA for the purpose of s 9(2) of the 2013 LHA, made over a "trust area" for the purposes of s 9(2)(a) and s 10(1) of the 2013 LHA, made on or after 15 June 1985, but on or before 20 December 1991, for the purpose of s 9(2)(b) of the 2013 LHA, and exhibited in the way, and for the period, required under the 1985 LHA for the purposes of s 9(2)(c) of the 2013 LHA.

[11] At the time of these applications for lease, the Hammond Island Council was the "trustee" as that term is defined in s 10(2) of the 2013 LHA of land and waters situated on Hammond Island that were described as the "DOGIT" and was the "trustee council" (as that term is defined in the 2013 LHA) for the applications.

[12] On 25 August 1989 the Hammond Island Council approved the granting of the Dorante lease and the Sabatino lease.

[13] In 2008 the Hammond Island Council amalgamated with other councils to become the Torres Strait Island Regional Council (which is the third respondent in these applications for review). Upon amalgamation, the third respondent assumed the trusteeship of the DOGIT.

[14] The land the subject of the Dorante application and the Sabatino application respectively is within the DOGIT. (The applicants submit that this is a conclusion of law and not of fact which they are able to controvert, despite it being characterised by the parties to the appeal to the Land Court as one of the agreed facts.) Mr Sabatino's father passed away in 1993 and a death certificate was provided to the State of Queensland.

[15] The Dorante lease was never granted under the 1985 LHA and the fourth respondent Mr Dorante is the sole holder of a lease entitlement for the purposes of s 9 of the 2013 LHA. The Sabatino lease was never granted under the 1985 LHA and the fourth respondent Mr Sabatino is the sole holder of a lease entitlement for the purposes of s 9 of the 2013 LHA.

[16] On 20 August 2015 the Department of Natural Resources and Mines (the Department) published a lease entitlement notice identifying the fourth respondent Mr Dorante as the holder of Lease Entitlement 18/89 (the Dorante Lease Entitlement). On the same date the Department also published notice identifying Mr Sabatino and his father as the holder of Lease Entitlement 1/89 (the Sabatino Lease Entitlement). Both the Dorante Lease Entitlement notice and the Sabatino Lease Entitlement notice were published in accordance with s 16 of the 2013 LHA.

[17] The third respondent is the relevant reference entity for the purposes of s 30(1)(b) of the 2013 LHA in respect of the Dorante land and the Sabatino land.

[18] On 7 September 2015 the Minister referred the Dorante Lease Entitlement notice and the Sabatino Lease Entitlement notice to the third respondent as the reference entity in accordance with s 30(1)(b) of the 2013 LHA.

[19] On 16 March 2016 the third respondent gave the Minister advice and recommendations in response to the Dorante Lease Entitlement notice. The third respondent advised there were no practical obstacles to the grant of the lease under s 35 of the 2013 LHA to Mr Dorante. On 10 June 2016 the third respondent gave the Minister advice and recommendations in response to the Sabatino Lease Entitlement notice. The third respondent advised there were no practical obstacles to the grant of the lease under s 35 of the 2013 LHA to Mr Sabatino.

[20] On 23 June 2016 the Minister gave a statement of reasons (obstacles) regarding the Dorante Lease Entitlement to the fourth respondent Mr Dorante and the third respondent. On the same date the Minister gave a statement of reasons (obstacles) regarding the Sabatino Lease Entitlement to the fourth respondent Mr Sabatino and the

third respondent. In respect of each lease entitlement, the Minister had regard to the Kaurareg #3 NTDA over areas which include Hammond Island, including the lease entitlement land, and advice from the Department that native title is a competing interest that needs to be dealt with to satisfy the lease entitlement and would therefore be considered a practical obstacle under s 29 of the 2013 LHA, and the grant of the lease under the 2013 LHA will be a future Act under the NTA.

[21] Each of the fourth respondents applied to the Minister to amend the statements of reasons (obstacles) to state there are no practical obstacles to the granting of a lease to satisfy the lease entitlement, but the Minister refused to amend each statement of reasons (obstacles). The Minister (by its delegate) was satisfied that, in respect of each application for lease entitlement, native title was a competing interest and a practical obstacle to the grant of the lease entitlement and that native title was required to be addressed before the lease could be granted.

The reasons

[22] The President at [28] of the reasons identified the dispute between the parties as "whether the Kaurareg People #3 claim is a *competing interest* that *needs to be dealt with* and, therefore a practical obstacle to the leases being granted". (Practical obstacles are explained in s 29 of the 2013 LHA and it is specified that "that competing interests in the lease entitlement land need to be dealt with" could be expected to be identified as obstacles to satisfy a lease entitlement.) The President decided at [28] of the reasons that the dispute between the parties would be resolved by determining whether the grant of the leases would be PERBAs under the NTA.

[23] At the hearing in the Land Court the Minister agreed with the approach of the fourth respondents to the appeals that if the grant of the leases are PERBAs, this would extinguish native title over the leased area and would not present a practical obstacle (noted at [55] of the reasons). On the basis of this concession, the President noted at [57] that it was not necessary to address certain arguments in the parties' written submissions and that it was also not necessary to address the argument that was raised only by the applicants about the validity of the 2013 LHA or re-vesting land in the trustee under the 2013 LHA.

[24] The fourth respondents had submitted in the Land Court that the grant of leases to them under the 2013 LHA would be in exercise of a legally enforceable right accrued under the 1985 LHA. The President found at [81] of the reasons that each fourth respondent's accrued right under the 1985 LHA was a right to be granted a lease in the nature of a perpetual lease which conferred exclusive possession, rather than the narrower characterisation favoured by the Minister of a right to be granted a perpetual lease under the 1985 LHA, on the basis "the right relates to the tenure, not the means by which it was granted".

[25] In respect of the Minister's submission that any rights of the fourth respondents under the 1985 LHA had been repealed by the 2013 LHA, the President held at [87] of the reasons:

> "The plain meaning of the language used in s 6 does not evidence a contrary intention to displace the statutory presumption that Mr Dorante's and Mr Sabatino's right to the grant of leases survived the repeal of the 1985 LHA."

[26] The President analysed s 6 and other provisions of the 2013 LHA in [88] to [92] of the reasons. In particular, the President noted at [88] that s 6 of the 2013 LHA starts by recognising a person may have a right to the grant of a lease under the 1985 LHA and rather than generating a new right, it provides how the right will be satisfied. The President concluded at [93]:

> "No new rights to grant are created by the 2013 LHA. The function of the Act is to continue granted leases, grant leases approved and provide for the administration of both types of leases."

[27] In dealing with the Minister's argument based on differences in the tenure and grant processes under the 1985 LHA and the 2013 LHA respectively, the President referred in passing at [97] of the reasons to the re-vesting of the land in the trustee under s 11 of the 2013 LHA which had been divested from the trustee and became Crown land under s 10 of the 1985 LHA. This was relevant to the President's disposal of the Minister's argument based on the identity of the grantor which was dealt with at [96] to [98] of the reasons:

> "[96] The first difference asserted by the Minister is the identity of the grantor. However, the Minister has confused the grantor with the lessor. During the application period under the 1985 LHA, the trustee of a trust area did not have the power to lease land in a trust area. To facilitate grant, the land was divested from the trustee and became Crown Land. The Crown granted the lease and the 1985 LHA conferred certain administrative powers on the trustee.
>
> [97] The trustee now does have power to enter into a lease and the 2013 LHA vests the land in the trustee. It also specifies the trustee is the lessor.
>
> [98] However, it is still the State (through the Minister) that grants the leases under the 2013 LHA. The consistency of the State being grantor under both Acts sits comfortably with the grant under the 2013 LHA fulfilling the State's obligation to grant, which was acknowledged in the Explanatory Memorandum." (*footnotes omitted*)

[28] The President noted at [109] of the reasons that: "There is a direct and unavoidable nexus between the right accrued under the 1985 LHA and the grant of the lease under the 2013 LHA". It was noted at [114] of the reasons as particularly relevant that a person does not apply for a grant under the 2013 LHA, but:

> "The grant process commences by the Minister identifying and publishing information about *lease entitlements*, including the identity of the holder of that entitlement."

The purpose of the 2013 LHA

[29] The President recorded at [16] of the reasons:

> "The Explanatory Notes for the *Aboriginal and Torres Strait Islanders (Land Holding) Bill 2012* recorded difficulties in operating and granting leases under the 1985 LHA. It also noted difficulties in application, assessment and approval processes under that Act. As at 30 July 2012, the Government identified 474 unresolved applications under the 1985 LHA, 222 of which were valid. The two applications the subject of these appeals are amongst that number." (*footnote omitted*)

[30] As the President observed at [17] of the reasons, a main object of the 2013 LHA set out in s 3(a) of the 2013 LHA is to provide a framework for identifying and satisfying entitlements to grants of leases that are outstanding under the 1985 LHA, including by dealing with practical obstacles to satisfy the entitlements.

[31] As the trustee of a trust area under the 1985 LHA did not have the power to lease land to an applicant for lease under the 1985 LHA, it was necessary for the land to be divested from the relevant council and become Crown land to facilitate the grant (at [96] of the reasons).

[32] Section 10 of the 1985 LHA had provided:

> "**10 Divesting and vesting of title to land**
>
> (1) Where the title to land in respect of which any person or persons is or are entitled to a lease pursuant to section 9(2) is vested in an indigenous council the title shall, upon the approval referred to in section 9(2), divest from the council and the land shall thereupon become and be unallocated State land.
>
> (2) Where land in respect of which any person or persons is or are entitled to a lease pursuant to section 9(2) is land reserved and set apart for a public purpose and under the control of a trustee, the land shall, upon the approval referred to in section 9(2), pass from the control of the council, cease to be land reserved and set apart and shall thereupon become and be unallocated State land.
>
> (3) The purpose for which land shall become and be Crown land under subsection (1) or (2) is the issue of a lease in perpetuity or other appropriate lease, in accordance with this Act, to the qualified person or persons approved by the appropriate trustee council and no other authority shall be exercised on behalf of the Crown in respect of the land unless that lease has been issued.
>
> (4) Upon land within an indigenous council area becoming Crown land under subsection (1) or (2) it ceases to be part of the trust area within which it is situated but for the purposes of—
>
> (a) the discharge of the functions of local government within the trust area and the exercise of powers incidental thereto; and
>
> (b) the making and levying of rates on and the charging of service charges in respect of the land; and

(c) the application of the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* in respect of the land; the land shall be deemed to be part of the trust area and the indigenous council in which the trust area is vested or in whose control the trust area is shall be deemed to be charged with the functions of local government in respect of the land.

the land shall be deemed to be part of the trust area and the indigenous council in which the trust area is vested or in whose control the trust area is shall be deemed to be charged with the functions of local government in respect of the land."

[33] Section 10 of the 1985 LHA operated according to its terms upon the approval of the application for a lease pursuant to s 9(2) of the 1985 LHA. As recognised by the President at [96] of the reasons the land subject of approval referred to in s 9(2) of the 1985 LHA was divested from the trustee council and became Crown Land to facilitate the grant of the lease approved by the trustee council. The effect of s 10 of the 1985 LHA in respect of the land subject to the Dorante Lease Entitlement and the Sabatino Lease Entitlement was that the relevant land was unallocated State land at the date of commencement of the 2013 LHA on 20 February 2014 which recognised the outstanding lease entitlements under the 1985 LHA in respect of the relevant land.

[34] Section 11 of the 2013 LHA which deals with re-vesting of the land which had been divested under s 10 of the 1985 LHA provides:

"**11 Return of land previously divested under 1985 Land Holding Act**

(1) On the commencement of this section, land within a trust area that, under the 1985 Land Holding Act, section 10(1) or (2) divested from, or passed from the control of, an entity, becomes vested in the entity that is currently the trustee of the trust area, or the part of the trust area, in which the land is located in the same way it would have been vested if it had not been divested.

Example—

If the external boundaries of the trust area are the external boundaries of a deed of grant in trust under the Land Act, the land vested under this section becomes part of the deed of grant in trust land.

(2) The vesting of land under subsection (1) does not affect—

(a) the continuation of any 1985 Act granted lease granted over the land; or

(b) the ownership of a structural improvement located on that land.

Note—

See also section 12 and part 7.

(3) The chief executive, or, if appropriate, the registrar, must make any necessary change in the appropriate register to record the operation of subsection (1)."

How the issue of re-vesting was addressed by the applicants in the Land Court hearing

[35] As the applicants were not parties to the appeals in the Land Court, they were not parties to the agreement that resulted in the agreed facts. The applicants expressly recorded in their written submissions in the Land Court that they did not agree to any of the agreed facts, except for those necessary to establish the jurisdiction of the Land Court to hear and determine the appeals to the Land Court and treated the agreed facts as allegations in a hearing that was in the nature of a demurrer, so they contended that, even if the agreed facts were made out, the appeals to the Land Court should be dismissed.

[36] The applicants' contention that there was invalid re-vesting of lease areas under s 11 of the 2013 LHA was set out in paragraphs 58 to 59 of their written submissions made to the Land Court:

> "58. The applicants contend that the re-vesting of the appellants' lease entitlement areas in the DOGIT held by the Second Respondent, by operation of LHA s.11, is a future act the validity of which is determined by the future act provisions of NTA part 2 division 3. The re-vesting was effective on 20 February 2014, when the Kaurareg People #3 claim was registered on the Register of Native Title Claims under the NTA.
>
> 59. No provision of NTA part 2 division 3 supports the validity of the s.11 re-vesting and, the applicants contend that vesting is invalid to the extent it affects native title under NTA s.24OA. If the vesting of the lease entitlement areas is invalid to the extent it affects native title, then any lease appendant to the rights conferred by the vesting (such as the prospective leases to satisfy the appellants' lease entitlements) would similarly be invalid." (*footnote omitted*)

[37] The applicants' submission that, if it were found that the re-vesting of the fourth respondents' lease entitlement areas in the DOGIT held by the third respondent was invalid to the extent that it affected native title, a lease of that fee simple would be correspondingly invalid, was relied on by the applicants as an additional factor in support of the submission the prospective leases were not PERBAs (at paragraph 48(d) of the applicants' written submissions in the Land Court).

[38] Mr Yarrrow of counsel who appeared for the applicants in the Land Court submitted that from the time of the approval in 1989 of the application for a lease made by each fourth respondent under the 1985 LHA, the land became vacant Crown land under the *Land Act* 1962 (Qld) and, upon the commencement of the *Land Act* 1994 (Qld) became unallocated State land under that Act and that was the status of the land when the operative provisions of the 2013 LHA commenced.

[39] Mr Yarrow's oral submissions (at Transcript 1-67) were then:

> "My point is to say, your Honour, that the vesting in section 11 is itself a future act, a future act that calls to be assessed under the future act

provisions of the Native Title Act. Your Honour will not find any provision that gives a broad authority to simply vest land in an Indigenous representative body like a - a Council. No - no provision confers that kind of general authority. My submission is that that is indicative of an impermissible future act, an act to which 24OA will apply. So your Honour will recall I'm - I'm making an alternative submission to my Lardil submission. Even if your Honour is against me on Lardil there is another reason why there is a practical obstacle; the ineffective vesting under section 11 has flow-on consequences for the leases sought by the appellants.

Your Honour will recall that one of the unique features of the 2013 Act is that under section 50 the lessor is the - what the old terminology was - a Trustee Council. The - the grantee whether it's deed of grant in trust or indigenous freehold the grantee is the lessor. The Minister has no title. My submission proceeds on the basis that the ineffective re-vesting under section 11 has - has impacts upon the validity of the lease granted to satisfy the lease entitlement. That lease is not granted by reason of the Minister's title; the Minister has no title. The Minister creates a statutory contract between the trustee and the grantee of the lease. Section 50 tells us that.

In fact, your Honour will also observe that other provisions of the 2013 Act alter the operation of '85 - the 1985 Act granted leases. Those leases too are taken to be granted by the trustee of the deed of grant in trust. And therefore, my submission proceeds that the invalidity of the re-vesting can confer no greater title on the lessee. The lessee receives an invalid - a lease that is invalid to the extent that it affects native title and therefore when you - when your Honour proceeds to examine the provisions of 24ID your Honour should not be satisfied that the - the lease affects native title.

PRESIDENT: Because it's not otherwise valid.

MR YARROW: Because it's not otherwise valid. Quite so. There is a- an organic flaw in the re-vesting and that echoes through into the title received by the grantee of the lease. It's elementary, your Honour, that a person can confer no greater title than that they have. If the landlord's fee simple is invalid to the extent of a vexed native title so too the tenant, in my respectful submission."

[40] The applicants' submissions on the re-vesting point in the Land Court can therefore be characterised as asserting the re-vesting under s 11 of the 2013 Act was an invalid future act under s 24OA of the NTA to the extent it affected native title that was incapable of supporting a grant of lease to give effect to a lease entitlement under the 1985 LHA.

Should the President have addressed the applicants' re-vesting argument?

[41] As the President expressly acknowledged at paragraph [57] of the reasons that the argument raised by the applicants on re-vesting land in the trustee under the 2013 LHA was not being addressed, the applicants now argue, as a matter of procedural fairness (the second ground of review) and also as a matter of jurisdiction (the first ground of review), that their re-vesting argument should have been addressed by the President in dealing with the appeals to the Land Court. On the hearing in this Court, a subsidiary issue was raised about the extent to which interveners have a right to have their argument addressed, when no party to the proceeding pursued the same argument.

[42] There was some debate during the hearing of the applications in this Court on the content of the applicants' re-vesting argument. It was suggested (at Transcript 1-34) that the applicants were, in fact, arguing that the re-vesting did not occur under s 11 of the 2013 LHA and the land remains unallocated State land and is not part of the DOGIT. Perhaps the literal language of the grounds of review for the applications suggests that the applicants were arguing that re-vesting did not occur at all, but the substance of the applicants' written and oral submissions accords more with the applicants' re-vesting argument was that raised in the Land Court that asserted re-vesting under s 11 of the 2013 Act was an invalid future act under s 24OA of the NTA to the extent it affected native title.

[43] It is the consequences of that asserted invalidity that may have resulted in the applicants' assertion in paragraph 66 of their written submissions that "the purported re-vesting of the Lease Entitlement Land under s 11 of the 2013 LHA was an invalid future act such that the leases could not be granted over that land, because it remained unallocated State land". That it is the consequences of the asserted invalidity which was the applicants' focus is reflected in paragraph 77 of the applicants' written submissions where it is stated "the existence of native title, by reason of s 24OA of the NTA, would prevent the re-vesting of the Lease Entitlement Land in the Hammond Island DOGIT under s 11 of the 2013 LHA, which is a critical pre-condition to the granting of a lease under the 2013 LHA". The applicants seem to be asserting the effect of s 11 being an invalid future act under s 24OA of the NTA to the extent it affects native title is that the land does not re-vest at all, because it is subject to native title. As explained by Mr Lloyd of senior counsel who appeared with Ms Longbottom of counsel on behalf of the applicants (at Transcript 1-24), the applicants dispute the effectiveness of s 11 as a matter of law to re-vest the land "covered by native title" that was cut out of the DOGIT "back into the DOGIT".

[44] The applicants' re-vesting argument proceeds on the unwarranted assumption that the re-vesting under s 11 of the 2013 Act was of unallocated State land unaffected by the Dorante Lease Entitlement and the Sabatino Lease Entitlement and that the re-vesting should be considered as an isolated act in disregard of its purpose under the scheme that resulted in the enactment of s 11.

[45] There certainly was a difference in emphasis between the applicants' re-vesting argument advanced in the Land Court and that advanced in this Court. Whether or not the applicants' re-vesting argument advanced in this Court was that raised in the Land Court does not make any difference to the outcome of these applications.

[46] The Dorante Lease Entitlement and the Sabatino Lease Entitlement were processed under the 2013 LHA and had got to the stage of the application of Part 4 of the 2013 Act which, according to s 28, establishes a process for examining each lease entitlement to identify practical obstacles that need to be resolved before a lease can be granted to satisfy the lease entitlement. As the Minister under s 31 of the LHA identified practical obstacles to the granting of a lease to satisfy each of the subject lease entitlements, the statement of reasons (obstacles) was issued by the Minister about satisfying each lease entitlement. That gave the fourth respondents rights under s 32 of the 2013 LHA which on the Minister's refusal to amend the statements of reasons (obstacles) allowed the jurisdiction under s 33 of the 2013 LHA to be invoked by the fourth respondents:

> "**33 Refusal to amend statement of reasons (obstacles)**
>
> (1) If the Minister refuses to amend the statement of reasons (obstacles) in the way mentioned in section 32—
>
> (a) the notice to the relevant person advising of the decision must include the Minister's reasons for the decision to refuse; and
>
> (b) the relevant person may appeal to the Land Court against the decision; and
>
> (c) the relevant person must, in starting the appeal, give the Land Court a copy of the Minister's reasons; and
>
> (d) the Minister must advise the reference entity for the lease entitlement the subject of the application of the starting of the appeal and give the reference entity a copy of the reasons mentioned in paragraph (a).
>
> (2) The appeal must be started within 28 days after the relevant person is given advice of the decision.
>
> (3) In deciding the appeal, the court may order the Minister to change the statement of reasons (obstacles) in the way the court considers appropriate.
>
> (4) If the court orders the Minister to change the statement of reasons (obstacles), the Minister must give a copy of the changed statement of reasons (obstacles) to—
>
> (a) the relevant person; and
>
> (b) the reference entity for the lease entitlement.
>
> (5) The parties to the appeal are—
>
> (a) the relevant person; and
>
> (b) the Minister; and
>
> (c) the reference entity for the lease entitlement."

[47] The jurisdiction of the Land Court is statutory and under s 5 of the *Land Court Act* 2000 (Qld) must be given to it under that Act or another Act. As the Land Court was dealing with appeals by the fourth respondents under s 33 of the 2013 LHA which could arise

only after it was recognised under the 2013 LHA that the fourth respondents had lease entitlements to which the 2013 LHA applied, the President considered the appeals in the context that there were existing lease entitlements in favour of the fourth respondents to which effect could be given under the 2013 LHA, but subject to the provisions of the 2013 LHA: see [118] of the reasons. There was no challenge in the Land Court to the Minister's power or authority under the 2013 LHA to issue the statements of reasons (obstacles). The President had no jurisdiction under s 33 of the 2013 LHA to consider an argument that challenged the underlying entitlements of the fourth respondents to be granted leases in accordance with the 2013 LHA.

[48] The applicants attempted to characterise their re-vesting argument as merely supporting the Minister's statements of reasons (obstacles) by showing why their native title claims gave rise to a practical obstacle. That submission glosses over the fact that the re-vesting argument was directed at the validity of the granting of the leases to the fourth respondents, rather than identifying any practical obstacles in the sense in which that expression is explained in s 29 of the 2013 LHA at the stage of the process at which that occurs in giving effect to the entitlements to the grants of leases under the 2013 LHA.

[49] There was therefore no error in the President's decision not to embark on the applicants' re-vesting argument as formulated by them in the Land Court (or even as re-formulated in this Court), whether considered under the first or second grounds of review. Procedural fairness does not require a court to consider an argument that cannot be determined within the court's jurisdiction and it is not jurisdictional error to fail to address an argument for which the court had no jurisdiction on the statutory appeal before it.

[50] In view of the way the re-vesting argument was developed in this Court, I will also analyse it as a legislative act, but undertaken as part of the process of giving effect to the pre-existing lease entitlements under the 1985 LHA. The applicants submitted that where a lease was not granted under the 1985 LHA, any native title rights continued to have full force and effect. Accepting that was the arguable position, all that s 11 of the 2013 LHA did was to move the lease entitlement land from being unallocated State land (subject to the Dorante Lease Entitlement and the Sabatino Lease Entitlement) to the DOGIT (but still subject to these lease entitlements) without in any way purporting by the terms of s 11 or any other provision of the 2013 LHA to affect any existing native title in the land.

[51] Just as the divesting of the land from the DOGIT under s 10 of the 1985 LHA was for the purpose of facilitating the grant of the leases, the re-vesting under s 11 of the 2013 Act was a step in the process of facilitating the grant of leases pursuant to lease entitlements held by the fourth respondents (and others) as a result of approved applications under the 1985 LHA.

[52] There is no challenge on these applications to the conclusion of the President that the grant of the lease under the 2013 LHA to each of the fourth respondents to give effect respectively to the Dorante Lease Entitlement and the Sabatino Lease Entitlement would be a PERBA within the meaning of s 24IB of the NTA.

[53] On the assumption that the re-vesting of the lease entitlement land in the DOGIT was a future act within the meaning of s 233 of the NTA, the re-vesting would still be valid as a matter of State law, but would not, of itself, affect any existing native title, as a result of s 24OA of the NTA. Characterising the re-vesting in that way would not preclude the grant of the lease under the 2013 LHA as a PERBA within the meaning of s 24IB of the NTA.

[54] The applicants raised the relationship between s 24OA the NTA and the 2013 LHA in the context of s 109 of the *Commonwealth Constitution*. For the purpose of these proceedings, the applicants gave notices under s 78B of the *Judiciary Act* 1903 (Cth) on the basis a constitutional issue arose as to whether or not, by reason of s 109 of the *Constitution* and the NTA, the re-vesting of the lease entitlement land under s 11 of the 2013 LHA in the DOGIT is invalid.

[55] Guidance on the understanding of the meaning of "validity" and "invalidity" in the NTA is found in the judgment of the plurality in *Western Australia v Commonwealth (Native Title Act Case*) (1995) 183 CLR 373, 468-470. In discussing whether s 11(1) of the NTA which provides "Native title is not able to be extinguished contrary to this Act" is within Commonwealth power, the plurality at 468-469 concluded that:

> "Therefore s 11(1) is valid and it is within the powers of the Parliament of the Commonwealth to prescribe the areas within which other laws may operate to affect the regime of protection prima facie prescribed by s 11(1)."

[56] The plurality then discussed at 469 whether the use of the term "valid" raises the question whether the NTA "is attempting to prescribe conditions relating to the power to make or the making of a State law, even though the validity of a State law cannot be affected by law of the Commonwealth". The definition of "valid" in s 253 of the NTA was (and is) "includes having full force and effect". The plurality then concluded at 469 in respect of the term "valid":

> "Therefore the use of the term, its derivatives or its opposite in the impugned provisions, so far as those respective terms relate to a State law, must be taken to mean having, or not having, (as the case may be) full force and effect upon the regime of protection of native title otherwise prescribed by the Act. In other words, those terms are not used in reference to the power to make or to the making of a State or Territory law but in reference to the effect which a State law, when validly made, might have in creating an exception to the blanket protection of native title by s.11(1). In using the terms 'valid' and 'invalid', the Act marks out the areas relating to native title left to regulation by State and Territory laws or the areas relating to native title regulated exclusively by the Commonwealth regime."

[57] The applicants' submission (at Transcript 1-26) that the effect that s 109 of the *Constitution* must be that re-vesting operates only where native title does not exist at all purports to interpret "invalid" in s 24OA of the NTA in a way that is unsupported by the *Native Title Case Act* at 469. The applicants' reliance on authorities such as *Wenn v Attorney-General (Victoria)* (1948) 77 CLR 84, 121-122 was also unhelpful, in that the application of s 109 of the *Constitution* to inconsistency between Commonwealth and State laws on the same topic can be contrasted with the approach taken by the

Commonwealth in enacting the NTA to invalidate State legislation enacted after 1 July 1994 to the extent it affects native title (unless a provision of the NTA provides otherwise). By s 24OA prescribing that, unless a provision of the NTA provides otherwise, a future act is invalid to the extent that it affects native title, the extent to which legislation that is a future act is invalidated has been expressly dealt with. Section 109 of the *Constitution* justifies s 24OA being given the effect that it prescribes on a relevant State law without the need for s 109 to be given any separate operation on that State law. To the extent that the applicants' submissions rely on s 109 of the *Constitution* to render s 11 of the 2013 LHA inoperative and ineffective to re-vest the lease entitlement land in the DOGIT, the submissions cannot be accepted.

[58] This outcome of the application of s 24OA that a valid exercise of State legislative power does not affect any existing native title was recognised by Chesterman JA and Applegarth J in *Queensland Construction Materials Pty Ltd v Redland City Council* (2010) 271 ALR 624 at [87].

[59] Even on this alternative analysis of treating the re-vesting of the lease entitlement land under s 11 of the 2013 LHA as a future act, it was not necessary for the President to deal with the re-vesting argument, as it would make no difference to the conclusion that the grants of the leases to the fourth respondents in accordance with the 2013 LHA were PERBAs that would validly extinguish any native title. The applicants cannot succeed on the alternative analysis on either the first or second grounds of review.

[60] In light of the limited jurisdiction conferred on the Land Court under s 33 of the 2013 LHA which precluded consideration of the applicants' re-vesting argument, it is irrelevant to deal with the subsidiary issue about the extent to which interveners have a right to have their argument addressed.

Was there an error of law on the face of the record?

[61] Another way in which the applicants endeavour to rely on the re-vesting argument is for the purpose of the third ground of review that the appeals to the Land Court were on the basis the existence of native title on the Dorante Lease Entitlement land and the Sabatino Lease Entitlement land was not contested from which it would follow the existence of native title, by reason of s 24OA of the NTA, would prevent the re-vesting of the lease entitlement land in the DOGIT under s 11 of the 2013 LHA.

[62] The applicants recognise that to succeed on the third ground of review, they must show error of law on the face of the record. In light of the view of the High Court expressed in *Craig v South Australia* (1995) 184 CLR 163, 180-181 that supports the narrow view of what constitutes the record of an inferior court, the record is confined to the notices of appeal filed by the fourth respondents and the orders made by the President when allowing the appeals.

[63] The second, third and fourth respondents dispute the applicants' contention that the existence of native title on the land the subject of the lease entitlements was uncontested in the Land Court, as it was not an agreed fact and evidence of the fact of the applicants' native title claim was all that was relevantly before the Land Court. Putting that aside,

and proceeding on the assumption that the re-vesting under s 11 of the 2013 LHA was a future act within the meaning of s 233 of the NTA and assuming the existence of native title in the relevant land, the re-vesting of the lease entitlement land in the DOGIT would take effect as a valid exercise of State legislative power, but would not affect any native title in the relevant land pursuant to s 24OA of the NTA: see *Queensland Construction Materials* at [87].

[64] The re-vesting under s 11 of the 2013 Act was a step in the process of facilitating the grant of leases pursuant to lease entitlements held by the fourth respondents (and others) as a result of approved applications under the 1985 LHA. There is nothing in any State legislation that warrants the conclusion that moving the land the subject of the lease entitlements from unallocated State land to the DOGIT would affect any existing native title. It is the grant of the leases that would potentially affect any extant native title.

[65] In view of my rejection of the applicants' submissions that s 24OA of the NTA (or s 109 of the *Constitution*) deprives s 11 of the 2013 LHA of any effect in respect of the lease entitlement land, the applicants cannot succeed at all on the third ground of review. It has therefore been unnecessary to consider the submission based on *Lardil Peoples v Queensland* (2001) 108 FCR 453 at [61], [70] and [114] that, unless it is established that the act in question will affect native title, it cannot be a future act, and for that purpose the existence of a claim for native title is not sufficient to show that native title exists.

Orders

[66] As the applicants have been unsuccessful in establishing their grounds for review, it follows that in each proceeding the application must be dismissed. Subject to hearing submissions on costs, I am inclined to the view that costs should follow the event. I will give the parties an opportunity to consider these reasons, however, before hearing submissions on costs.