

Aboriginal Land Rights (Northern Territory) Act 1976

Kenbi (Cox Peninsula)

Land Claim

Reasons for decisions on procedural and jurisdictional matters by  
the Aboriginal Land Commissioner, Mr Justice Toohey, and the  
High Court of Australia

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## PREFACE

In June 1978, the Aboriginal Land Commissioner received an application under s.50 (1) (a) of the Aboriginal Land Rights (Northern Territory) Act 1976 concerning a traditional land claim to Dum-In-Mirrie Island, an island off Cox Peninsula in the Northern Territory. This claim was later consolidated with the Kenbi (Cox Peninsula) claim, to islands and land on the Cox Peninsula across the harbour to the south and west of Darwin. The land involved is shown on the map opposite.

To date, there has not been a hearing of the traditional land claim made by Aboriginals claiming to be the traditional Aboriginal owners of the land. However, there have been a number of applications concerning procedural questions and the status of parts of the land claimed. Most of these were dealt with by Mr Justice Toohey during his period as Aboriginal Land Commissioner (1977-82).

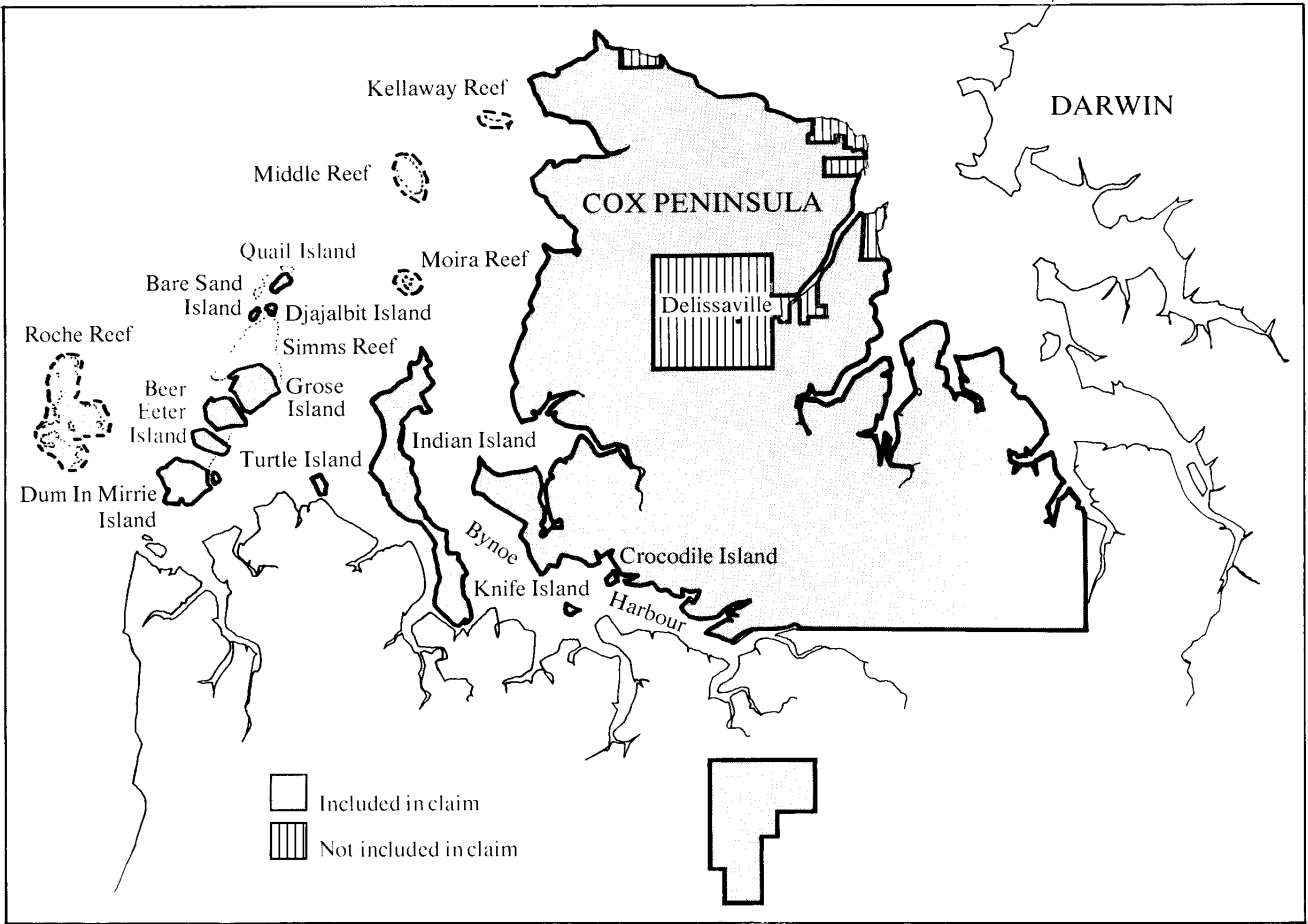
His Honour published six decisions in relation to this claim. They have not been printed previously in a collected form. It is appropriate that this be done to make them more readily available and to complete the printing of decisions given by Mr Justice Toohey as Commissioner.

The High Court had occasion to consider Mr Justice Toohey's decision on that part of the claim area which the Northern Territory Government asserts is land in a town (Darwin) and not available for claim. The reasons for judgement of the High Court, and the decision made by Mr Justice Toohey following the order of the Court are included.

In summary, the decisions cover the following matters:

- |                  |   |
|------------------|---|
| 14 February 1979 | Application for adjournment of the hearing of the claim to Dum-In-Mirrie Island.  |
| 24 July 1979     | Admissibility of an affidavit concerning the expanded boundaries of urban Darwin, and an application for the Commissioner to require the production of certain documents. |
| 2 November 1979  | Process of determining jurisdiction to hear claim to land said to be land in a town.  |
| 20 December 1979 | Status of land said to be land in a town.   |
| 27 June 1980     | Status of islands.  |
| 24 December 1981 | Application to the High Court for an order that a writ of mandamus issue to the Aboriginal Land Commissioner to deal in accordance with law with the Kenbi Land Claim.    |
| 2 April 1982     | Application for discovery of documents relating to town planning regulations.   |

Map of land in Kenbi (Cox Peninsula) Land Claim



Map of Kenbi (Cox Peninsula) Land Claim

## DUM-IN-MIRRIE ISLAND LAND CLAIM

### Application for adjournment

#### Reasons for decision

An application on behalf of Aborigines claiming to have a traditional land claim to Dum-In-Mirrie Island is listed for hearing in Darwin on Monday, 19 February 1979. That hearing date was fixed on 8 December last year, after some months of discussions with the Northern Land Council representing the applicants, and Messrs S. Falconer and C. Clements who had sought the lodging and determination of a claim in accordance with practice directions issued by me in 1977. Late in January this year, Mildren and Partners, solicitors for the Northern Land Council, lodged an application which in form sought an adjournment of the hearing and the consolidation of that claim with a broader claim foreshadowed in respect of the Cox Peninsula. That broader claim had not been lodged nor has it been since. At the time the application to adjourn was lodged, I was absent from the Territory. Before leaving I had fixed for the Northern Land Council and the Central Land Council a meeting on Monday, 5 February 1979 at 4.00 p.m. to discuss the general program for this year. At that meeting, Mr Mildren representing the Northern Land Council, raised with me the matter of the application to adjourn. I was not prepared to deal with it then as the only other person present with a relevant interest was Mrs Withnall, solicitor for Mr M. Baumber, one of those who had lodged notice of intention to be heard. She was there as a result of notice given to her by Mildren and Partners.

Because of an arrangement made last year I was to leave Darwin on the evening of Wednesday, 7 February, not to return until Monday, 12 February. Mr Mildren asked that the application to adjourn be dealt with before 19 February, and as soon as possible to avoid the inconvenience that would result if all concerned in the hearing had to attend on 19 February, and if the matter were then adjourned. Notice of intention to be heard had been lodged on behalf of a number of persons and organisations.

This made sense and I fixed Wednesday, 7 February at 3.00 p.m. for consideration of the application, making clear to Mr Mildren that the first question to arise on that day would be whether I should then hear submissions on the application to adjourn, given the very short notice necessarily involved. I directed Mr Mildren to give notice of the hearing to all those who had lodged notice of intention to be heard, and I issued a statement which was reported in the media in which the hearing on Wednesday was mentioned.

At that hearing, which was public, there was an appearance by counsel on behalf of a number of those who had lodged notice of intention to be heard, including the Northern Territory Attorney-General, Messrs Falconer and Clements and Mr Baumber. Others were present in person. The transcript shows those who appeared either by counsel or in person. I shall not list them in these reasons. It is enough to say that those appearances covered most, although not all, of those who had given notice. Some of what I may loosely call the objectors wished the application to adjourn to be dealt with that afternoon - or at any rate had no objection to it being dealt with. Some wished the application to stand over until 19 February. I decided to deal with the application then and there for these reasons.

The hearing of the land claim will be public and a wide range of persons and organisations have given notice of intention to be heard. Some will appear through counsel, others may appear in person. Clearly enough the convenience of all involved, including the claimants, will be best served by knowing before 19 February whether the hearing is to proceed on that date. It may be that because of the short notice, a few objectors were not given an effective opportunity to be heard. The Northern Territory Fishing Industry Council, be telex, objected:

... on principle to adjournments of any claim on short notice, because of inconvenience and prior arrangements which have been made to facilitate attendance at such claims on advertised dates of such hearings.

I accept the force of this, but the notices of intention to be heard lodged by the Fishing Industry Council and a few others who were not present stressed the effect acceding to the claim was said to have. Any deferral is unlikely to affect adversely the commercial and recreational activities mentioned in those notices. In saying that, I do not overlook the obvious value to the community generally in learning the ultimate fate of this land claim. And for these reasons I decided to hear the application for an adjournment and did so. The attitude of those present was that the claim should be heard as soon as possible, but there was no particular magic in 19 February and no specific detriment that would be suffered if the hearing proceeded at some later date, so long as it was not too distant. The basis of the application to adjourn was twofold. Firstly it was said that despite the length of time that this matter has been under consideration, the anthropological and other field work had not been completed. Secondly it was said that a claim to Dum-In-Mirrie Island, heard in isolation from the broader claim foreshadowed in the respect of the Cox Peninsula, would be artificial in terms of traditional Aboriginal ownership and would lead inevitably to a duplication of evidence at a later stage with a consequent waste of time and money. I do not doubt that this is so. Indeed, the lodging of the claim to Dum-In-Mirrie Island alone was the result of an approach made by Messrs Falconer and Clements, quite properly having regard to their particular interest in the development of that island.

In my view the most compelling consideration is this. Under section 50(1) of the Aboriginal Land Rights Act, when an application is made, the Commissioner's function is to ascertain whether the claimants or any other Aboriginals are the traditional Aboriginal owners of the land. The Act imposes an obligation on the Commissioner faced with an application to determine who are the traditional owners. That obligation is one that can only be carried out within the limits of reasonable practicability. But if on 19 February the Northern Land Council presented no evidence or entirely inadequate evidence of traditional ownership, that would not relieve me of my obligation under the Act. The matter would then have to be adjourned anyway or, without the background, information and resources of the Northern Land Council, I would have to embark on an inquiry of my own. Undoubtedly, that would occupy many months.

The realities of the situation leave me no alternative but to adjourn the application. I do so without making any order that this claim be consolidated with any other. That aspect was not much pursued during the hearing. It is, I think, a matter for the Northern Land Council in the exercise of one of its functions, which is s.23(1) (f)

to assist Aboriginals claiming to have a traditional land claim to an area)of land within the area of the Land Council in pursuing the claim, in particular, by arranging for legal assistance for them at the expense of the Land Council.

I do not propose to adjourn the hearing to a fixed date. Mr Mildren gave an assurance that the wider claim will be ready to proceed in October and it is impossible to say what my commitments will be at that time. It may well be that another land claim will be in progress. Others will have to wait the completion of that hearing.

Given the history of this matter since 1977, it is desirable that the claim, and a claim to as wide an area of land as is thought to have some relevant connection, should be heard as soon as possible. The Act has been in operation since 26 January 1977, and the interests of all will be served best by orderly programming and preparation that will enable claims to be dealt with in some reasonable sequence and without substantial gaps. This hearing will be adjourned to a date to be fixed. About the end of June the matter will be called again in public. I shall inquire whether the assurance about October can be bettered. I shall then seek to fix a hearing date in the light of the answer to that question, my own commitments and any other relevant considerations.

Mr Justice Toohey  
Aboriginal Land Commissioner  
Darwin

14 February 1979

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## KENBI (COX PENINSULA) LAND CLAIM

Admissibility of affidavit and application to produce documents

Reasons for decision

This is an application on behalf of Aboriginals claiming to have a traditional land claim to an area of land in the Cox Peninsula, Bynoe Harbour, Port Paterson area of the Northern Territory.

Preliminary question

The application was made under s. 50(1) para. (a) of the Aboriginal Land Rights (Northern Territory) Act 1976 which permits such a claim to be made to unalienated Crown land. It became evident at the outset that a substantial question would arise as to the status of land claimed in the Cox Peninsula, in particular whether that land met the definition of unalienated Crown land in the Act.

By s. 3(1) of the Act, unalienated Crown land is defined to mean 'Crown land in which no person (other than the Crown) has an estate or interest, but does not include land in a town'. The question likely to arise was whether any of the land claimed in the peninsula was land in a town; if it was, no claim under s. 50(1) para. (a) could be made to it.

A determination of that question will have a direct bearing on the area of land available to be claimed and that in turn will greatly influence the preparation of the claim and the evidence to be presented. As well it may prove decisive as to those who wish to be heard in regard to the claim. For those reasons, I fixed a hearing confined to the question whether any of the land claimed was not unalienated Crown land, being land in a town. The claimants were directed to serve notice of that hearing on the government departments, organisations and persons thought likely to have an interest, and that was done. As well the hearing was advertised extensively through newspapers and generally was given considerable media publicity.

Representation

At the hearing, counsel appeared on behalf of the claimants, the Attorney-General of the Northern Territory, the Commonwealth of Australia and the Australian Telecommunications Commission, the Cox Peninsula Progress Association and also on behalf of Mr and Mrs Baumber of Dum-In-Mirrie Island with a watching on behalf of Westby Pty Limited.

Jurisdiction

Counsel for the claimants submitted, in opening, that the Commissioner has power to determine whether he has jurisdiction in respect of any claim under the Act. He further submitted that he may receive evidence of a factual nature to which he applies the law. That may be a wide inquiry involving oral and written evidence.

Counsel for the Attorney-General did not dispute these propositions except to say that a distinction must be drawn between jurisdictional facts, facts necessary to decide whether jurisdiction exists, and facts that are irrelevant to that inquiry.

The affidavit

After I heard some formal evidence, counsel for the claimants sought to tender in evidence a lengthy affidavit sworn by Peter Dickson Heathwood of Brisbane and accompanied by a number of exhibits. Objection was taken to the admissibility of that affidavit and I heard submissions why it should and should not be admitted. No objection was taken to the form of

the affidavit nor as to my power to receive affidavit evidence; rather, it was argued that I should reject the affidavit as being irrelevant to my inquiry. Because the matter was one of relevance, submissions ranged over a wide area and these reasons will, to some extent, do the same. Nevertheless it should be made clear that the immediate point at issue is the admissibility of the affidavit. The status of the land still remains to be determined.

#### The application

During the hearing I was asked by counsel for the claimants to make an order in exercise of the power conferred on me by s. 54(1) of the Act which reads:

The Commissioner may, by notice in writing, require a person whom he believes to be capable of giving information relating to a matter being inquired into by the Commissioner in carrying out his functions under this Act, being a matter specified in the notice, to attend before him at the time and place specified in the notice and there to answer questions in relation to that matter and to produce to the Commissioner such documents and other records in relation to that matter as are specified in the notice.

I shall deal with this application in more detail later in these reasons. All I need say now is that although there was some debate about the form and content of the notice, the real question became one of relevancy of the material sought to be produced.

Whether the affidavit of Mr Heathwood should be admitted into evidence depends upon its relevancy; whether it is relevant depends initially upon the meaning of 'town' in the Land Rights Act.

#### The meaning of 'town'

The definition of 'town' in s. 3(1) of the Act is referential; it is expressed to have - the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town.

Section 3(1) of the Town Planning Act 1964, a law of the Northern Territory, defines 'town' to mean:

- (a) municipality; or
- (b) a place that is a town within the meaning of section 5 of the Crown Lands Ordinance 1931-1971 but is not part of a municipality.

Legislation in the Territory is now referred to as Acts not Ordinances; I shall use the latter term only when appropriate in quotations.

'Municipality' is defined to mean 'a municipality constituted or established under the Local Government Ordinance 1954-1970'. It is unnecessary to refer to the provisions of the Local Government Act nor is it necessary to refer to the Crown Lands Act except to mention the definition of town in s. 5 of that Act as:

. . . any town constituted and defined in accordance with the provisions of this Ordinance or in accordance with the provisions of any law in force in the Northern Territory prior to the commencement of this Ordinance.

Thus a comprehensive examination of the definition of 'town' in the Land Rights Act requires a consideration of several other statutes. However, because of the factual situation here and the way in which the matter was argued, it is unnecessary to look beyond the provisions of the Town Planning Act, except for historical purposes.

Under the Town Planning Act, the significance of land being in a town is, broadly speaking, that it may be subject to a town planning scheme designed to secure the proper development and use of that land.

#### Regulation-making power

Section 73 of the Act empowers the Administrator in Council to make regulations, not inconsistent with the Act 'prescribing all matters required or permitted to be prescribed, or

necessary or convenient to be prescribed, for carrying out or giving effect to this Ordinance . . .'

Section 5 of the Act provides that the regulations may prescribe that a specified area of land shall be subject to the provisions of the Act 'as if it were a town' and may also prescribe that land 'adjacent to a town' shall be subject to the Act 'as if it were part of that town'. On its face, that section authorises regulations that may subject land to the control inherent in the Act without taking any of the steps necessary to constitute that land a town. Likewise, on its face, it may subject land to those controls by reasons only of it being adjacent to a town. The significance of s. 5 in the present proceedings is that in exercise of the power contained in para. (b) of that section, the Administrator made Regulations 1978, No. 53 dated 22 December 1978, whereby a substantial area in the Cox Peninsula the subject of the present claim, 'being adjacent to' the town of Darwin, was prescribed to be subject to the provisions of the Town Planning Act as if it were part of that town. The land affected by the regulation and its relationship to the town of Darwin and to the area claimed may be seen most readily on Exhibit 7.

#### Validity of regulation No. 53

Regulation No. 53, at least so far as it related to the land in the claim, was attacked by the claimants as beyond power and invalid. In brief, it was said that s. 5 cannot be read literally, divorced from the context of the Act. The regulations authorised by s. 5, so the argument ran, must be shown to carry out or give effect to the Act in terms of s. 73. In turn that means that the land affected must be capable of having a reasonable connection with the town in question and be reasonably capable of being required for the purposes to be found in the Act. The relevant area contained in the regulation is 4350 square kilometres, a very large area indeed, especially when compared with the existing town of Darwin, .142.4 square kilometres. It is so large that the claimants contend that in truth there can have been no proper exercise of the regulation-making power contained in s. 5(b) of the Act.

#### Contents of the affidavit

It is in this respect that the affidavit of Mr Heathwood is said to be relevant. As already mentioned, the affidavit is a long one and is accompanied by a number of exhibits. It is enough for present purposes to say that Mr Heathwood is an architect who practises as a town planner, that he has read a great deal of material relating to the Darwin area, its town planning and its future expansion, that in his opinion there is no need to expand the boundaries of urban Darwin beyond the 1973 acquisition area (32 square miles east of the town) to cater for the foreseeable growth of the town, that if at some future date further expansion is needed the area required will be small indeed compared with the area affected by regulation No. 53, that the Cox Peninsula is one of the least satisfactory locations for any expansion and that, except for land around the present perimeters of Darwin, the area and location of the land the subject of regulation No. 53 go far beyond any reasonable requirements for land to be set aside for town planning purposes as land adjacent to Darwin.

#### The Crown's submission

The Government of the Northern Territory argued that the submissions made by the claimants in this regard misunderstood the language and operation of s. 5 of the Town Planning Act. While that section itself contains no regulation-making power and clearly presupposes the existence of such a power elsewhere in the Act, counsel contended that the necessary power is to be found in s. 73 insofar as that section empowers the Administrator in Council to make regulations, not inconsistent with the Act, prescribing inter alia all matters 'permitted to be prescribed' for carrying out or giving effect to the Act. One of the matters permitted to be prescribed is the making of regulations to give effect to s. 5. In that event, it was said, when regulations are made to give effect to para. (b) of that section, the only issue

is whether the specified area of land answers the description 'land adjacent to a town'. Counsel for the Government argued that the word 'adjacent' is an ordinary English word having no technical meaning and that it is a matter for me to decide whether the land the subject of the regulation is adjacent to the town of Darwin.

I may be assisted, said counsel, by evidence on such matters as the distance of the land from the town of Darwin, access to it from the town and topographical features. By implication counsel conceded that if Mr Heathwood's affidavit were confined to those matters, it would be unobjectionable. But, seeking as it does, to express views about the town planning connection of the area with the town of Darwin, it goes beyond any matter that may properly be the subject of inquiry by me.

The operation of s. 5

In my view, the Crown's contention is correct. If s. 5 did not exist, such a regulation would have to justify itself as being 'necessary or convenient to be prescribed for carrying out or giving effect to this Ordinance'. But s. 5 is in clear terms and, in the language of s. 73, it permits certain matters to be prescribed by regulation. In those circumstances, I do not think it possible to read down s. 5 as if the section were itself no more than a regulation.

For that reason, much of the argument addressed to me on behalf of the claimants did not touch upon the real issue. In saying that, I defer for later consideration questions going to the purpose for which regulation No. 53 was made and its validity if made in bad faith. At this stage my concern is with the claimants' submission that the regulation is invalid unless it can be shown to have a connection with the general policy of the Town Planning Act, a policy said to be one of securing the proper development and use of land existing as a town or likely to be required in the foreseeable future for development as a town. Whatever validity those contentions may have in regard to a regulation relying for its force and effect upon the general language of s. 73, they cannot destroy the operation of s. 5.

In my view, whether regulation No. 53 is an effective exercise of power depends upon the answer to the question - does the regulation prescribe that a specified area of land, being land adjacent to a town, shall be subject to the provisions of the Act as if it were part of that town? In form the regulation does that; whether in truth it does so depends upon the answer to the particular question - is the land prescribed adjacent to a town?

Section 28 of the Act, which speaks of proposals for a town planning scheme for a town, speaks also of proposals for securing the proper development and use of land in or near a town. It is unnecessary to consider whether, if s. 5 did not exist, a regulation such as No. 53 could be supported by the combined operation of ss. 28 and 73. Nor do I think that s. 5 can be read down in any way by s. 28. If there is a distinction between land being adjacent to a town and being near a town, it may be thought that the former has a narrower operation. Yet decisions such as *Mayor of Wellington v. Mayor of Lower Hutt* (1904) AC 773 and *Geneff v. Shire of Perth* (1967) WAR 124 suggest otherwise. I say no more about this aspect as I do not wish to anticipate argument that may arise in regard to the meaning and operation of the words in s. 5 'adjacent to a town'. It may be that some parts of Mr Heathwood's affidavit are relevant to that question. The claimants did not contend for its admissibility on that ground; whether an affidavit in a more restricted form would be material to that inquiry must await further argument.

Validity of regulation No. 53

The claimants made a further attack upon the validity of regulation No. 53, the contention being that having regard to the size of the land specified in the regulation it is apparent or can be demonstrated that some purpose, other than a town planning one, motivated the making of the regulation. If I understood the claimants' submissions correctly, that argument was used for two ends. The first was to support the admission of Mr Heathwood's affidavit. The second was to justify the application for the exercise of power under s. 54 of the Land Rights Act. The claimants say, I gather, that unless there is some basic principle that protects the

making of this regulation from an inquiry as to its true purpose or as to the motives that produced it, an attack upon its validity cannot be determined until there has been production and inspection of a wide range of documents sought by the notice. Those documents relate to the history of the regulation and the considerations that brought it into existence.

An exercise of power under s. 54 of the Land Rights Act does not require first a decision on any questions of privilege that may arise. Those questions properly fall to be determined on the return of any notice that may issue. *Sankey v. Whidam* (1978) 21 ALR 505.

Section 54 of the Land Rights Act calls for the identification of the matter being inquired into by the Commissioner because the power is one to require a person to attend 'to answer questions in relation to that matter and to produce . . . documents and other records in relation to that matter . . .' It further requires, on the part of the Commissioner, a belief that the person called upon to attend is capable of giving information relating to that matter. No one contended that such a belief can be reached only on the basis of oral testimony. There was general agreement that the Commissioner may arrive at such a belief in a variety of ways, by evidence, by material placed before him, by statements from the bar table or because the relevance of a particular matter is self-evident.

Mr Thomas, Q.C., counsel for the Attorney, contended that if, in making regulation No. 53 the Administrator acted as the Crown or under the shield of the Crown, or if he acted in such a legislative capacity as to obtain the protection accorded to legislative acts, the regulation was protected from an inquiry as to the true purpose for which it was made and the motives that led to it being made. In particular, he submitted, it was not open to attack on the ground of bad faith or improper motive.

#### Self-Government

Whatever the historical role of the Administrator, the authority for his acts and the scope of those acts is now to be found in the Northern Territory (Self-Government) Act 1978, most of which came into operation on 1 July 1978. That Act established the Northern Territory of Australia as a body politic under the Crown (s. 5). It vested in the Legislative Assembly power, with the assent of the Administrator or the Governor-General, to make laws for the peace, order and good government of the Territory (s. 6). It required every proposed law to be presented to the Administrator for assent and, broadly speaking, empowered the Administrator to assent, withhold his assent or, in some cases, reserve a proposed law for the Governor-General's pleasure (s. 7). The Act vested in the Governor-General a power, exercisable within six months after the Administrator's assent, to disallow a law or part of a law (s. 9).

The Act provides that there shall be an Administrator, to be appointed by the Governor-General to hold office during his pleasure (s. 32(1)). The Administrator is charged with the duty of administering the government of the Territory (s. 32(2)) with an Executive Council constituted by the Act to advise in relation to matters in-respect of which the Ministers have executive authority (s. 33(1)).

Section 35 provides that the regulations may specify the matters in respect of which the Ministers are to have executive authority. By statutory rules 1978 Nos 102, 168 and 290, a wide range of matters has been specified.

Finally, s. 51 expressly recognises the concept of the Crown in right of the Territory as indeed do the amendments made to the Land Rights Act by No. 70 of 1978.

#### The position of the Administrator

Counsel for the claimants submitted that there are differences between the Administrator on the one hand and the Governor-General and the Governors of the States on the other. Those differences were said to be such that whatever protection the latter enjoy from the scrutiny of the Courts in respect of their actions, whether legislative or executive, no such protection extends to the former. It was said that the position of the Administrator since the passing of

the Self-Government Act is not materially different from that before 1978. It was further said that the Self-Government Act did not create a sovereign state and that the Administrator does not hold sovereign rights or rights from the Crown so that decisions of the Courts, withholding scrutiny from the acts of a Governor-General or Governor have no application to him.

In my view this is not so. It is true that the Self-Government Act did not purport to create a sovereign state as distinct from conferring Self-Government upon the Territory. And it is true that the Administrator is not appointed by the Queen but by the Governor-General. But in all relevant respects it seems to me that his position is the same as that of Governors. For all purposes material to this hearing, the Administrator is the representative of the Crown and, if it be necessary to take a further step, the Crown in right of the Territory. That, I think, emerges sufficiently from the terms of the Self-Government Act and its expressed object of conferring Self-Government upon the Northern Territory. In particular I refer to the establishment of the Northern Territory of Australia as a body politic under the Crown, the legislative power of the Legislative Assembly, the power vested in the Administrator of assenting, withholding assent or reserving proposed laws together with his general function of administering the government of the Territory and to the provision in s. 31 of the Act that the duties, powers, functions and authorities of the Administrator extend to the exercise of the prerogatives of the Crown so far as they relate to those matters.

The concept of the Crown in the right of the Commonwealth and the Crown in right of a State has emerged over a number of years, whatever its precise juristic basis. The relevant judicial decisions are collected in Wynes Legislative executive and judicial powers in Australia, 5th ed., pp. 390-2.

#### Northern Territory decisions

My attention was drawn to two decisions of the Supreme Court of the Northern Territory, in each of which the Administrator was a defendant. These decisions were referred to in support of the submission that the acts of the Administrator are not beyond the scrutiny of the courts. But the Crown did not suggest that the Administrator enjoyed some blanket immunity nor, I think, was there any such suggestion in respect of the Governor-General or the Governors of the States. I shall refer to this aspect again later in these reasons.

The first of the two decisions was Northern Uranium Corporation v. North Australian Uranium Corporation (1954-55) NTSC Judgements 150. It concerned an action for a declaration that the defendant had no right to apply to the Mining Warden to be registered as the owner of mineral claims. The plaintiff sought also an injunction against the Mining Warden to restrain him from sending his report to the Administrator and an injunction restraining the Administrator from acting on that report. Kriewaldt J had no doubt 'that this Court in a proper case had power to enjoin officers of the executive branch of the Government from a performance of a proposed illegal act' (at p. 153). But there was no contention in the present hearing that in making regulation No. 53 the Administrator was performing an illegal act.

In the second action, Wood v. Nott (1962-65) NTSC Judgements 257, the plaintiff sought declarations and orders against the Administrator, the Administrator's Council and the Land Board regarding an area of Crown land. In essence, the claim against the Administrator was that he had determined the plaintiff's application for a pastoral lease contrary to law. Certainly the Court, while rejecting the plaintiff's claim, seems to have assumed that had the plaintiff made good his case judgement could have been entered against the Administrator. But the point did not arise for any real consideration.

In my opinion neither case is of help in resolving the issues that arose during this hearing. In any event, for the reasons given earlier, I consider that the Self-Government Act placed the Administrator in a comparable position to that of the Governor-General and of Governors of the States.

Legislative or executive act?

There was some discussion whether the making of a regulation such as No. 53 was a legislative or an executive act. It is accepted that an authority of subordinate law making may be invested in the executive. *Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan* (1931) 46 CLR 73, especially per Rich J at pp. 86-7, and per Dixon J at pp. 100-1. It does not follow that the exercise of such power is without control. Regulations may be disallowed by parliament and, as *Dignan's Case* itself explains, they may be invalid as beyond power.

Motive and purpose

A line of authorities beginning with *Duncan v. Theodore* (1917) 23 CLR 510 and continuing at least until *N. S. W. Mining Co. Pty Ltd v. Attorney-General for N. S. W.* (1967) 67 SR (NSW) 341 has established that the courts will not inquire into the reason why the Crown or its representative exercised a particular regulation-making power and that bad faith may not be imputed to them. The authorities are mentioned in *Whitmore and Aronson Review of Administrative Action* 214.

In my view, for the reasons set out earlier, the same is true of the actions of the Administrator in making regulation No. 53, whether part of the legislative or executive process.

While motive is irrelevant, the purpose of a regulation may be material even when that regulation has been made by the Governor-in-Council. The distinction between motive and purpose is not always an easy one to draw, yet it must be drawn in the present context. If a given purpose is made an express condition of exercising a power and that purpose is not pursued, the power has not been validly exercised. However, where a general legislative making power is being exercised, it is only if the delegated legislation was not made in good faith that the courts will intervene, and then not in the case of the Crown or its representative. Authority for the earlier of these propositions may be found in *Jones v. Metropolitan Meat Industry Board* (1925) 37 CLR 252 and in *Arthur Yates and Co. Pty Ltd v. The Vegetable Seeds Committee* (1945) 72 CLR 37. Authority for the latter proposition may be found in those decisions and in the cases mentioned earlier in these reasons.

In *Shanahan v. Scott* (1957) 96 CLR 245 the High Court considered a power conferred on the Governor-in-Council in general terms to make regulations, followed by the identification of particular powers. It held a regulation made by the Governor-in-Council to be invalid. But as I read the case it was demonstrated on the face of the regulation, read in conjunction with the Act, that the regulation did not fall within the particular or general regulation-making power so that it was *ultra vires*.

The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the act, to add new and different means of carrying them out or to depart from or to vary the plan which the legislature had adopted to attain its ends. (at p. 250)

I do not think that any of the principles applied to strike down the particular regulation in *Shanahan v. Scott* are available here. The motives of the Administrator cannot be called in question. Regulation 53 purports to have been made pursuant to s. 5 of the Town Planning Act. I find nothing in the regulation itself inconsistent with that section or inconsistent with the Act. I must make it clear that in saying this I am not upholding the validity of the regulation. Whether or not it is valid will depend upon a consideration of whether or not the area can fairly be described as adjacent to the town of Darwin.

Admissibility of affidavit

On that matter there may be portions of the affidavit of Mr Heathwood that are relevant but my attention has not, at this stage, been drawn to any. And since most of the affidavit is

aimed at demonstrating that the area in question is not reasonably foreseeable as part of a town planning scheme, a proposition which in my view does not determine the validity of the regulation, the affidavit should not be admitted. It would be wrong to admit it in its entirety and then embark upon the exercise of selecting such portions as may have some relevance to what, in my view, is the real question for determination. An affidavit in more limited terms will require further consideration.

#### Exercise of power under s. 54

For the same reason I am of the opinion that I should not exercise my powers under s. 54 of the Act to require the production of all those documents described in the claimants' notice. If it proves necessary I am prepared to issue a notice confined to the production of documents throwing light upon the question whether the area prescribed is truly adjacent to the town of Darwin. Because I have heard no argument on the point, I do not wish to express any opinion as to whether 'adjacent', in s. 5 of the Town Planning Act, is a purely geographical concept or whether it has other overtones.

#### Conclusions

In short then:

1. I hold that the affidavit of Mr Heathwood is inadmissible.
2. I decline to exercise my power to order the production of the documents contained in the claimants' notice except those that may fairly be said to be relevant to the question whether the area prescribed is adjacent to the town of Darwin.

It may be that the Crown is prepared to make those documents available without any demand from me. If it is not, I shall hear counsel as to the precise form of the notice that should issue.

Mr Justice Toohey

Aboriginal Land Commissioner

Darwin

24 July 1979

## KENBI (COX PENINSULA) LAND CLAIM

Matter of jurisdiction

Reasons for decision

This is a further step in the hearing of an application on behalf of Aboriginals claiming to have a traditional land claim to an area of land in the Cox Peninsula, Bynoe Harbour, Port Paterson area of the Northern Territory.

That application was made under s. 50(1) para. (a) of the Aboriginal Land Rights (Northern Territory) Act 1976 which enables such a claim to be made to unalienated Crown land. The Attorney General for the Northern Territory and others objected to the claim on the ground that it included land in a town. The Land Rights Act excludes from the definition of unalienated Crown land any land in a town.

The question whether any of the land claimed was land in a town was set down for hearing as a preliminary issue in June 1979, but I was asked to deal first with procedural matters, the admissibility of an affidavit and the issue of a notice under s. 54 of the Act. My reasons for decision on that application were delivered on 24 July 1979; because of the relationship between that hearing and the present one, they appear as an appendix to these reasons.

The earlier hearing involved a consideration of the Town Planning Act 1964 and regulations made thereunder. On 3 August 1979 the Planning Act 1979 came into operation, repealing the Town Planning Act 1964. This reactivated the question of the status of the land but in a rather different form as in some important respects the current legislation differs from that which it repealed.

Section 3(1) of the Land Rights Act provides that:

'town' has the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town.

It will be necessary to look at this definition in some detail but at the outset two general features of it should be noted. The first is that it recognises the legislative competence of the Northern Territory to regulate town planning and development, tailoring its own meaning to that law. Secondly, it contemplates that the relevant law may permit subordinate legislation to draw in land that is neither a town nor near a town.

The definition is referential and ambulatory; its content must be gathered not from the Land Rights Act or other Commonwealth legislation but from the state of the relevant law of the Northern Territory at the appropriate time.

To understand how the issue has arisen in its present form it is necessary to look at the Planning Act 1979. Again it has one aspect to be noted at this stage. Unlike the legislation it repealed, it is not just concerned with town planning. As its long title indicates, it is an Act 'To provide for the planning and control of the use and development of land'.

Section 4(1) of the Act defines 'town' to mean:

- (a) a town within the meaning of the Crown Lands Act;
- (b) a municipality; or
- (c) land specified by the regulations to be an area which is to be treated as a town.

Municipality is a concept under the Local Government Act 1954 so that the meaning of town within paras (a) and (b) of the definition is to be gathered from those statutes. Paragraph (c), in its terms, delegates to regulations the work of specifying an area which is to be treated as a town, hence a town within the meaning of the Act. The notion of treating is rather like that of deeming; something is to be regarded as that which it is not.

Paragraph (c) is not a source of power; that must be found in s. 165(1) of the Act which

enables the Administrator to make regulations 'prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act . . .'

By Regulations 1979 No. 13, notified in the Northern Territory Government Gazette on 3 August 1979, several areas of land were specified to be treated as towns for the purposes of s. 49 of the Act. Included was one of 4350 square kilometres, described as Darwin with a detailed land description. With some small changes, it is identical to the land described in the regulations made under the Town Planning Act considered in the earlier hearing. It takes in a large part of the land the subject of the application, in particular that within the Cox Peninsula.

In some respects this approach of the legislature resembles that taken in the Town Planning Act, as discussed in the earlier decision. That Act had a tighter definition of town, one geared to a municipality or a town within the Crown Lands Act. But it went on in s. 5 to provide that:

regulations may prescribe that a specified area of land ... being land adjacent to a town, shall be subject to the provisions of this Ordinance, as if it were part of that town.

There are two important differences between the approach taken in the two statutes. The Planning Act builds into the definition of town the specifying of an area by regulation and it removes any overt controlling criteria such as adjacency.

In the submission of counsel for the Attorney General, the relevant provisions of the Planning Act must be read quite literally. In that event, it was said, a regulation purporting to give effect to para. (c) results in the area so specified constituting a town for the purposes of the Act. It is another and different question, as counsel recognised, to ask whether the Planning Act is a law of the Northern Territory relating to the planning and developing of towns or otherwise within the definition of town in the Land Rights Act.

As to the Planning Act itself, the precise significance of a town does not emerge very clearly. The legislation is concerned with the planning and control of land generally. It does this in part through 'planning instruments', defined to mean 'a regional plan or a town plan made under section 6 1'.

A 'town plan' means 'a planning instrument that applies, either wholly or substantially, to land which is in a municipality or a town'.

Since town is defined to include a municipality, one wonders at the dual reference. A 'regional plan' means 'a planning instrument that applies, either wholly or substantially, to land which is not in a municipality or town'.

Section 61 empowers the Administrator to make a planning instrument in relation to land, a document which may permit or control the use of land and the carrying out of any development on or in relation to it (s. 34(1)). Town planning schemes in force when the Act came into operation are deemed to be planning instruments made under the Act (s. 171(1)).

The Act imposes controls on the subdivision of land but again it is on land generally. It is unnecessary to carry out a detailed analysis of the Act; the point is that it is of general application. Presumably the differences between town and region will manifest themselves in the application of the criteria the Act lays down for the preparation of draft planning instruments (s. 44), the determination of objections to them (s. 56) and the consideration of applications for subdivision (s. 93) and of development applications (s. 110).

Nevertheless town is a concept within the Planning Act with a meaning which must be ascertained in the search for an answer to the question - is any of the land claimed land in a town?

The answer to that question involves two steps. The first is to ask whether the regulations purporting to characterise the land as a town are effective. The second asks whether town as so defined is part of the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns including any area that, by virtue of regulations in force under that law, is to be treated as a town.

The Crown's submission was that in para. (c) of the definition of town in the Planning

Act the legislature of the Northern Territory had in effect delegated to the Administrator, acting with advice of the executive council, the power to specify any land to be an area to be treated as a town, hence any land to be a town for the purposes of the Planning Act. In answer to the question, does that mean that the regulations may specify the whole or a large part of the Northern Territory to be a town, it being apparent that much of that land has no possible connection with any town existing or likely to exist, counsel's answer was: Yes; it would be a political act by the legislature of the Northern Territory, to be answered politically by the Commonwealth if it was thought to frustrate the operation of the Land Rights Act. That political answer would be a change in the definition of town in the Land Rights Act.

I do not accept this submission. It is true that the definition of town in the Planning Act, coupled with the regulation-making power in s. 165, confers upon the regulation-making authority a wide discretion. But it is another and much greater step to say that the exercise of that power is untrammelled, in particular that it can result in land being treated as a town, hence a town for planning purposes, even though it may have no connection whatsoever with the planning and control of the use and development of that land as a town or in relation to a town.

In the reasons for decision delivered on 24 July 1979 I expressed the view that for relevant purposes the Administrator is the representative of the Crown in right of the Territory, that bad faith may not be imputed to him in the exercise of regulation-making power and that it is not appropriate therefore to inquire into the motives with which a regulation is made. In the present hearing no one sought to dissent from that view or to argue a contrary position and I see no reason to alter the views there expressed. But the question of the purpose for which a regulation is made is another matter.

In the field of subordinate legislation, if a particular purpose is made an express condition of exercising a power and that purpose is not pursued, the power has not been validly exercised. *Jones v. Metropolitan Meat Industry Board* (1925) 37 CLR 252, *Arthur Yates & Co. Pty Ltd v. The Vegetable Seeds Committee* (1945) 72 CLR 37.

in that regard there is no reason for distinguishing in principle between a power to prescribe by regulation matters 'required or permitted' to be prescribed and those 'necessary and convenient' to carry out or give effect to the controlling statute. Nor does it depend upon the nature of the regulation-making body, regulations made by a representative of the Crown being open to challenge on this ground as well as those made by others to whom such a power is delegated. This appears, if only by inference, from the judgements in *Shanahan v. Scott* (1957) 96 CLR 245, *Utah Construction & Engineering Ply Ltd v. Pataky* (1965) 39 ALJR 240 and *Willocks v. Anderson* (1970) 124 CLR 293.

Each of those decisions concerned regulations made by the Governor or Governor-General and in each case regulations made pursuant to a power expressed in general terms (and in the first two, in particular terms as well) were held invalid.

The following dictum in *Shanahan v. Scott* was approved in each of the later cases.

The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself, and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends (per Dixon CJ, Williams, Webb and Fullagar JJ at p. 250)

Thus, whatever the nature of the regulation-making body, it is open to a court to inquire whether a particular purpose has been given effect to or whether a particular regulation can be justified by reference to a 'necessary or convenient' formula or to a specific head of power. Purpose may be expressed or it may be inferred.

The earlier hearing concerned a regulation made pursuant to a section of the Town Planning Act permitting regulations to prescribe a specified area of land 'being land adjacent

to a town' to be subject to the legislation 'as if it were part of that town'. The reasons delivered on that occasion contained this passage:

I find nothing in the regulation itself inconsistent with that section or inconsistent with the Act. I must make it clear that in saying this I am not upholding the validity of the regulation. Whether or not it is valid will depend upon a consideration of whether or not the area can fairly be described as adjacent to the town of Darwin.

As mentioned earlier, the land description in the current regulations corresponds almost exactly with that in the regulations made under the Town Planning Act. But whereas the latter identified the land as adjacent to the town of Darwin, the former is headed 'Darwin' with no apparent significance attached to that fact. It is of interest to note that the other land described in the same schedule is expressed to be 'near' Alice Springs and Katherine respectively.

I return to the definition of town in the Planning Act, in particular para. (c) 'land specified by the regulations to be an area which is to be treated as a town'. Two questions arise. Is there any purpose to which such a regulation must give effect? If so, what is that purpose?

As to the first, it is true that the definition expressly recognises that regulations may be made treating as a town land which does not otherwise satisfy the definition. However it does not follow that what the paragraph contemplates is a general legislative-making power, untrammelled by any consideration of the nature and object of the legislation. Such a notion is possible (see *Roche v. Kronheimer* (1921) 29 CLR 329, also *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* (1931) 46 CLR 73 at pp. 100-1). But it is unusual and is not a conclusion to be reached lightly.

In my opinion that is not how para. (c) should be viewed. It does not stand on its own; it is preceded by two paragraphs each of which contributes something to the meaning of town. Clearly the intention of para. (c) is to bring within the concept of 'town' land which is neither a town under the Crown Lands Act nor a municipality. Equally clearly, it commits to the regulation-making authority a wide discretion in specifying land. But, in my view, that discretion is controlled by the purpose which the notion of 'town' serves under the Planning Act.

I do not think it is right to say that if there is a control it can be only by reference to a planning purpose in general. The Act is concerned with planning generally and, as already observed, it makes little direct reference to towns as distinct from other land. Nevertheless town plans and regional plans are contemplated and a regional plan cannot apply to land in a town.

In my view, if regulations are made pursuant to s. 165 of the Planning Act purporting to give effect to para. (c) of the definition of town, their efficacy depends upon the land specified having some connection with a town planning purpose.

In the event of arriving at some such conclusion, I was not asked to give content to the concept of town planning purpose nor to spell out the evidence which may be admissible to that end. In particular, counsel for the claimants expressly refrained from addressing any argument as to the admissibility of the affidavit of Peter Dickson Heathwood that featured in the earlier proceedings.

These are matters which must await a further hearing. It may help however if I make some comments, although tentatively at this stage. I do not think that para. (c) of the definition of town is merely ancillary to the paragraphs preceding it. It has a force and operation of its own which is not necessarily dependent upon the land specified being near or adjacent to a town as defined in paras (a) and (b).

Nor do I see the situation as one in which I should hear competing evidence from town planners as to the suitability or desirability of developing the land in question as a town, either in its own right or as an extension of the town of Darwin. In particular it is not my function to substitute my views on town planning for those of persons more qualified to express opinions.

Insofar as I am able to formulate a test at this stage it is that the efficacy of the exercise of power reflected in reg. 5 and schedule 3 of Regulations 1979 No. 13 depends upon the existence of a town planning purpose.

In terms of onus of proof, it is for the claimants to demonstrate that the exercise of power is not reasonably capable of fulfilling a town planning purpose. This is not a situation in which a comparison of a regulation with the statute empowering it will demonstrate invalidity, as in *Shanahan v. Scott* supra. In its terms reg. 5, read with schedule 3, is an effective exercise of power and it will require evidence to demonstrate otherwise.

It is necessary now to return to the definition of town in the Land Rights Act. The claimants' submissions came close to suggesting that because the Planning Act related to the planning and control of land generally it was not 'the law' or part of 'the law' relating to the planning and development of towns. In the end their counsel disclaimed any reliance upon that submission which could not succeed.

There was some discussion as to how the definition of town should be read, in particular whether each component should be taken disjunctively. In my view the definition is a composite. Essentially it is concerned with the law of the Northern Territory relating to town planning and development, a concept which is filled out by reference to the use of land in and near towns and in an express recognition that regulations may seek to treat an area of land as a town for the purposes of that general law.

When the Land Rights Act came into operation, s. 5 of the Town Planning Act empowered regulations to prescribe that a specified area of land shall be subject to the provisions of that Act as if it were a town and may be referred to as a town or, being land adjacent to a town, shall be subject to the Act as if it were part of that town.

The concluding words of the definition in the Land Rights Act recognise the existence of some such provision and the wheel has turned full circle with the Planning Act picking up the language of the Land Rights Act.

But it is not enough to say that because on paper there is a law relating to the planning and development of towns - the Planning Act - and because Regulations 1979 No. 13 were made pursuant to that Act, the regulations are part of that law. The reference in the definition in the Land Rights Act to 'the law of the Northern Territory' and to 'regulations in force under that law' presuppose something that has an effective operation. If regulations made with reference to para. (c) of the definition of town in the Planning Act are shown to be invalid, the land so specified does not answer the description of 'town' in the law of the Northern Territory and cannot answer that description in the Land Rights Act.

Again, as to onus of proof, it is for the claimants to show that the land claimed is unalienated Crown land. They cannot succeed if the land is in a town. Part of the land claimed is within the apparent operation of regulations made under the Planning Act. It is for the claimants to displace the ordinary presumptions of validity and regularity which, in my opinion, they may do if they can show that the land specified is not reasonably capable of fulfilling a town planning purpose.

#### Summary of conclusions

1. If regulations are made pursuant to s. 165 of the Planning Act 1979 purporting to give effect to para. (c) of the definition of town, their efficacy depends upon the land specified having some connection with a town planning purpose.
2. The efficacy of the exercise of power reflected in reg. 5 and schedule 3 of Regulations 1979 No. 13 depends upon the existence of a town planning purpose.
3. It is for the claimants to demonstrate that the exercise of power is not reasonably capable of fulfilling a town planning purpose.
4. If regulations made with reference to para. (c) of the definition of town in the Planning Act are shown to be invalid, the land so specified does not answer the description of

'town' in the law of the Northern Territory and cannot answer that description in the Aboriginal Land Rights (Northern Territory) Act 1976.

5. It is for the claimants to show that the land claimed is unalienated Crown land.
6. Part of the land claimed is within the apparent operation of regulations made under the Planning Act, hence on its face is land in a town. The claimants may displace the ordinary presumptions of validity and regularity if they can show that the land specified is not reasonably capable of having some connection with or fulfilling a town planning purpose.

Mr Justice Toohey

Aboriginal Land Commissioner

Darwin

2 November 1979

## KENBI (COX PENINSULA) LAND CLAIM

Status of land claimed

Reasons for decision

On 2 November 1979 I handed down reasons dealing generally with the question of jurisdiction in this traditional land claim. They ended with the following summary:

1. If regulations are made pursuant to s. 165 of the Planning Act 1979 purporting to give effect to para. (c) of the definition of town, their efficacy depends upon the land specified having some connection with a town planning purpose.
2. The efficacy of the exercise of power reflected in reg. 5 and schedule 3 of Regulations 1979 No. 13 depends upon the existence of a town planning purpose.
3. It is for the claimants to demonstrate that the exercise of power is not reasonably capable of fulfilling a town planning purpose.
4. If regulations made with reference to para. (c) of the definition of town in the Planning Act are shown to be invalid, the land so specified does not answer the description of 'town' in the law of the Northern Territory and cannot answer that description in the Aboriginal Land Rights (Northern Territory) Act 1976.
5. It is for the claimants to show that the land claimed is unalienated Crown land.
6. Part of the land claimed is within the apparent operation of regulations made under the Planning Act, hence on its face is land in a town. The claimants may displace the ordinary presumptions of validity and regularity if they can show that the land specified is not reasonably capable of having some connection with or fulfilling a town planning purpose.

Against the background of those conclusions and the criteria spelt out in them, I later heard evidence and argument. The evidence consisted of the oral and written testimony of two town planners, Peter Dixon Heathwood and David Ross McInnes, supplemented by written material, in particular reports and studies relating to the expansion of Darwin. There was no objection to the tendering of the written material but it was made clear to counsel that I would regard as relevant only those portions to which attention was drawn by them or by the witnesses they called.

At their request, counsel for the claimants and for the Attorney General of the Northern Territory submitted final addresses in written form. Counsel assisting made oral submissions.

The issues

In view of some of the evidence submitted, it is important to make clear what the issues are and what they are not.

Most of the land claimed lies within the Cox Peninsula but some extends to off-shore islands. The claim is expressed to be to unalienated Crown land and in the ordinary sense of the term that appears to be the case. In saying that I do not prejudge any other questions that may arise; it is just that on its face the claim is one to land in which only the Crown has an estate or interest.

But 'unalienated Crown land' to which claims may be made under the Aboriginal Land Rights (Northern Territory) Act 1976 has its own special definition which excludes 'land in a town'. 'Town' is given a particular meaning in the Act.

These matters are referred to at some length in the earlier reasons and I do not propose to repeat what is said there. Nor do I intend to canvass again the history of this matter except to remind that on 3 August 1979 the Planning Act 1979 came into operation and that by

Regulations 1979 No. 13, notified in the Northern Territory Government Gazette on 3 August 1979, an area of 4350 square kilometres was specified to be treated as a town for the purposes of s. 4 of that Act.

The land so specified included that part of the claim lying within Cox Peninsula. That was the context in which the reasons of 2 November 1979 were delivered and the recent hearing took place. To determine whether or not the land claimed is unalienated Crown land it is necessary to decide whether any of it is land in a town. And to do that a decision is necessary as to the validity of Regulations 1979 No. 13, at least to the extent that it specifies the area of 4350 square kilometres.

The land within the peninsula is within the apparent operation of that regulation. The test formulated in the earlier reasons and upon which the recent hearing proceeded was that the claimants may displace the ordinary presumptions of validity and regularity so far as that regulation is concerned 'if they can show that the land specified is not reasonably capable of having some connection with or fulfilling a town planning purpose'.

Although the evidence and argument tended to fasten upon Cox Peninsula and its relationship to the expansion of Darwin, the issue must relate to the entire area specified. It is legitimate to look at particular portions to build up a case for or against validity but in the end the regulation, at least in respect of the Darwin area, stands or falls in its entirety.

Again the issue is not one of comparing possible areas of expansion of Darwin so as to forecast either the directions in which the town is likely to expand or the areas which are most suitable for that expansion. That must be a matter for the Government of the Northern Territory, based upon the advice it receives from its officers and others whom it may consult, in the light of such considerations as it thinks relevant.

Nor is the issue resolved simply by a comparison of the testimony of the witnesses called and of the material tendered. Both Mr Heathwood and Mr McInnes have pertinent qualifications and experience. Each had given consideration to the relevant studies and reports. Necessarily each was taken into an area of opinion and value judgement. Some reference to their evidence is necessary but only within the framework of the appropriate criteria.

In saying that the matter is not one merely of comparison I am not suggesting that it is enough for the claimants or the Attorney General just to produce a witness with town planning experience to express an opinion. It may be possible to show that such a witness possessed so little expertise, had given the matter so little thought or had so failed to direct his mind to the real issues involved that his evidence should be totally disregarded. That is not the case here.

#### Planning instrument

In this task of defining and refining issues there is another matter to which reference should be made. There was tendered in evidence (Exhibit 15) plan UD 1420 together with a schedule of land use, relating essentially to the land specified in the regulation. Together the documents constitute a draft planning instrument for the purposes of the Planning Act. In fact they came into existence for the purposes of the Town Planning Act 1964 and have their present status by reason of the transitional provisions in Part IX of the Planning Act, in particular s. 175 para. (e). This instrument is indicative of what is proposed, at any rate for the time being, for the land under consideration. But in the end it is the Administrator who may make a planning instrument, when the draft has been accepted by the Minister (s. 61). The essential question still remains - is the relevant land specified in the regulation land in a town?

Under the Planning Act a planning instrument may be a regional plan or a town plan. It may permit or control the use of land and the carrying out of any development on or in relation to land (s. 34).

Counsel for the claimants directed to Mr Heathwood in examination in chief and to Mr McInnes in cross examination questions aimed to show that whatever development is

planned for Cox Peninsula may be effected by a regional plan rather than a town plan. That line of inquiry runs the risk of missing the real point in issue and of begging the very question to be answered. The reason simply is that s. 4(l) of the Planning Act defines 'town plan' to mean a 'planning instrument that applies, either wholly or substantially, to land which is in a municipality or a town' and 'regional plan' to mean 'a planning instrument that applies, either wholly or substantially, to land which is not in a municipality or town'.

Thus if an area of land is wholly in a town, any planning instrument that relates to it must be a town plan. Likewise if land is wholly outside a town or municipality, the instrument must be a regional plan.

So it does not help to ask whether the land use controls sought by exhibit 15 or by some hypothetical planning instrument may be achieved by a regional plan rather than a town plan.

First it is necessary to know whether the land sought to be controlled is wholly or substantially in a municipality or town or wholly or substantially outside.

And that brings us back to the true issue. Have the claimants shown that the land specified is not reasonably capable of having some connection with or fulfilling a town planning purpose?

The evidence

It is not easy, in a summary way, to do justice to the oral and written evidence but I shall refer to the main aspects of it, especially as it bears upon the central issue.

Mr Heathwood's evidence

For land to be reasonably capable of fulfilling a town planning purpose it must be possible now to foresee such a purpose. At most town planning purposes can be foreseen for 20 to 30 years; even then it is rarely necessary to set aside land that far ahead except perhaps in the case of a water supply catchment.

By the year 2004, 25 years away, an upper limit population for Darwin is 190 000. On current population figures that means that land will be required to accommodate an additional 140 000 people.

Some 163 000 people can be accommodated in existing Darwin and in Darwin East.

Darwin East, together with the rural living areas north of the Stuart Highway, Howard Springs and Humpty Doo has a population capacity of between 125 000 and 157 000. With the capacity of existing Darwin those areas combined can accommodate 200 000 to 232 000 people.

Any expansion of Darwin town beyond Darwin and Darwin East should be at Gunn Point.

Within Cox Peninsula lie the town of Belyuen (Delissaville), which is part of an Aboriginal reserve, Mandorah, Maluk Beach, Wagait Beach and Mica Beach (areas used for holiday making and recreation trips), Telecom installations, some freehold land along the northern beaches and east of the reserve and mining and mineral leases.

Cox Peninsula is unsuitable for the expansion of the town of Darwin because it is too remote from Darwin for its airport, has no existing resource that would lead to the establishment of a village, is not needed for industrial purposes, is too far from Darwin to serve as a dormitory suburb, has little visual or climatic attraction for use for hobby farming and rural living, is too remote from existing public utility services, schools, shops and public transport for those purposes and is not required for any future water supply or electricity generation.

Bynoe Harbour is capable of being made into a seaport but in relation to Darwin is too remote for that purpose.

The only town planning purposes on the peninsula are those already established, in particular the use of land along the beaches for holiday making and recreation. There is no reasonable likelihood that the vast area of the Cox Peninsula will be required to satisfy any town planning purpose related to Darwin.

Mr McInnes' evidence

On 21 March 1979 the Northern Territory Government adopted recommendations emanating from 'Darwin East in the Regional Context', a report by government officers published that month.

Those recommendations included a strategy of longer term regional development around Port Darwin to Cox Peninsula and towards Bynoe Peninsula, the development of Darwin East as the next town to be built, with Darwin East Stage I to contain about 25 000 people, and the commissioning of studies to examine transport links between Darwin East and Darwin and an all-weather shortened road to Cox Peninsula-Bynoe Harbour to be conducted in concert with water supply studies already under way.

This adoption signified an important and vital step in projecting a long term planning development program for what will eventually be metropolitan Darwin.

Town planning should ensure that long term goals and objectives, once identified, are evaluated and constantly updated. At times this will require the identification and protection of large areas of land which even with a 20 to 25 year time span may appear excessive.

Planning generally is a process rather than a profession and is involved with a far wider array of activities than simple land use zoning exercises. It involves a responsibility to consider very long term possibilities of human settlement while being sensitive to concepts of equity, opportunity, choice, goal and objective formulation.

Town planning may be defined as:

the management and conservation of natural and human resources in space and time, involving processes aimed at reducing uncertainty, providing environments for the opportunity of equitable socio-economic community and individual development, while aspiring to improve the quality of human settlements.

Regional planning is more concerned with 'policy and economic' planning than with physical arrangements.

Regional planning matters cannot be separated from town planning concerns and the future town planning aspirations and requirements of metropolitan Darwin are directly associated with possible growth prospects in the Cox Peninsula, Port Darwin, Gunn Point sub-region.

Loss of Cox Peninsula would dramatically change the expectations of possible growth and urban settlement relationships in what could be part of a greater metropolitan complex. It would eliminate a large area which has been consistently identified by the Northern Territory Department of Lands and Housing and the Department of the Northern Territory for future expansion, as far back as 1968.

Taken to the year 2000, the most acceptable population projections envisage possible populations for Greater Darwin of 105 000 and 140 000. Taken to the period 2000-2030, a minimum population will be in excess of 200 000 and possibly will reach 420 000. It is evident that well before the 1980-2030 time frame additional land, excluding Greater Darwin and Darwin East, will be required to accommodate Darwin's growth.

In terms of expansion, it is not possible at this time to determine one area over another. It is important to retain options permitting growth in several directions.

Cox Peninsula is a strategic town planning land area with a vital and therefore immediate concern in Darwin's future planning and development. This opinion is based on such considerations as the present population growth of Darwin, its strategic defence responsibilities, the opportunity for development as a duty free port, the possibility of a large sea port, the likelihood that growth will be initially Darwin centred but with major road and sea linkages to Cox Peninsula, the possible development of Bynoe Harbour and the need to provide a form of living catering for recreation facilities, sports centres and parks with access to areas possessing natural features.

Excluding Delissaville Reserve and Telecom's land, Cox Peninsula has a number of squatter and illegal developments as well as tourist attractions with beach and bungalow developments at Mandorah, Maluk, Wagait and Mica Beaches. It is urban in the sense that it

provides a land bank facility rather than rural oriented in function and potential. Town planning controls in the area are essential.

Retention of Cox Peninsula for future town urban use is not only a responsible town planning policy but when viewed in the light of metropolitan Darwin's future long term growth is an essential and vital land option.

The evidence discussed

A glance at Exhibit 7 will show that the land specified to be treated as a town includes not only existing Darwin, Darwin East, Gunn Point and Cox Peninsula, but also a sizeable area east to the Adelaide River about which there was no particular evidence.

I Whether the land specified is reasonably capable of having some connection with or fulfilling a town planning purpose is a question to be answered with reference to the area generally. To fasten on to particular sections is useful only for the light it throws upon the whole.

Criticism was made of Mr Heathwood's evidence on the ground that his mind was not directed to the relevant question but instead concentrated upon the land claimed within the peninsula. There is some force in this although it is possible to argue from his evidence that the lack of a town planning purpose for such a large piece of land is enough to bring down the entire specification.

The material upon which the witnesses relied including the Pak-Poy reports and the Darwin East in the Regional Context report are all important documents. Their importance lies in the information they provide and in the views they express about the likely expansion of Darwin. But the issue is not resolved merely by weighing one report against another or by singling out one option as opposed to another. The last of the Pak-Poy reports, the Darwin Regional Strategy Study, upon which Mr Heathwood placed much reliance, recognised that--

'A great deal of further research is required before a final commitment can be made to urban development in the region outside the Great Darwin Area. . .' (Exhibit 17, p. 12 1). That study was published in August 1974. While it opted for Gunn Point as 'the most attractive area for new large scale urban use' (p. 121), in absolute terms it recognised Cox Peninsula as suitable for large scale urban development. See generally Exhibit 17, pp. 106-22.

The conclusion of the team responsible for the Darwin East in the Regional Context report, published in March 1979, was:

The desirable regional pattern of development together with the land suitability analysis suggests that population growth beyond the capacity of Greater Darwin should be accommodated in Cox Peninsula with some development occurring south of Darwin East (Exhibit 14, p. 12)

The reasons for that conclusion are set out in the report which includes this paragraph:

The desirability of developing Cox Peninsula is supported by the availability of suitable land, an attractive environment with potential for residential and tourist activities, the close proximity of the area both to existing Darwin development and to Bynoe Harbour with its potential for future fishing, major port and recreation activities. Development on Cox Peninsula has in fact begun and can be expected to increase rapidly, given encouragement (Exhibit 14, p. 13)

Thus among those who have carried out extensive studies into the future development of Darwin there is one body of expert opinion favouring expansion in Gunn Point and another and more recent favouring Cox Peninsula. Even within the former may be found a recognition of the suitability of Cox Peninsula for urban expansion.

In that situation it must be hard to demonstrate that the land specified in Regulations 1979 No. 13 as relating to Darwin is not reasonably capable of having some connection with or fulfilling a town planning purpose because it includes Cox Peninsula.

In my view it has not been demonstrated. The Darwin Regional Strategy Study was not shown to be more persuasive than the Darwin East in the Regional Context report. In neither case did the authors give evidence and I was dependent upon my own assessment of those reports in the light of the other evidence.

And the case has not been made out by reference to a more general consideration of the land specified. There was no attack upon the inclusion of any other particular area. The emphasis Mr McInnes placed upon long term planning and the need to retain real and proper options so as to keep open the opportunity to develop major planning alternatives was supported by experience and reason. Indeed I do not think that Mr Heathwood would disagree with it although he might apply it differently.

Within that broader framework it was not shown that the land specified is not reasonably capable of having some connection with or fulfilling a town planning purpose.

I use 'reasonably' here as in the reasons of 2 November 1979, to exclude the fanciful and insubstantial.

The land claim as a competing use threat

From time to time during the hearing there was a suggestion that the existence of the traditional land claim was itself a competing use threat which might justify the inclusion of that land in the area specified.

The argument derived from the fact that a grant of land under the Land Rights Act confers an estate in fee simple although a rather unusual one and that various sections of the Act impose controls on entry on to Aboriginal land and dealings with it.

Section 74 of the Land Rights Act reads:

This Act does not affect the application to Aboriginal land of a law of the Northern Territory to the extent that that law is capable of operating concurrently with this Act.

Just how far Aboriginal land may be controlled by town planning and similar legislation is a question that, so far as I am aware, has not arisen for determination. And it does not arise here.

But it seems to me circular reasoning to start with the proposition that the Land Rights Act excludes land in a town from a traditional land claim, note that town is defined by reference to the law of the Northern Territory relating to towns and then argue that the existence of a claim is a reason for specifying land as an area to be treated as a town so that it may be controlled as such. Certainly the Land Rights Act takes the notion of town as it finds it or more accurately as the law of the Northern Territory finds it.

If land is not a town within the Crown Lands Act or is not a municipality, it can become so only by being treated as a town in exercise of the regulation-making power under the Planning Act. The justification for such a regulation is a town planning purpose as discussed in these reasons. The existence of a land claim is something which may bring into question a regulation so made; it is not a consideration against which the validity of the regulation may be measured.

If all the land claimed was unalienated Crown land, no doubt many issues would be raised as to the impact of a grant upon its present and future use. Section 50(3) of the Land Rights Act requires comment upon a range of matters including the advantage and detriment that might result if a claim were acceded to. But that stage has not yet been reached. The question at the moment is the status of the land.

Severability

Some mention was made during the hearing of severability in regard to the land specified. It was common ground that within Regulations 1979 No. 13 it was proper to took at the Darwin land divorced from the rest.

No one suggested that, in terms of the land identified in Exhibit 7, the regulation might stand or fall in part. It would be quite wrong for me to embark on a town planning exercise of my own for which there is no warrant in statute or regulation. The relevance of a particular area is the light it may throw upon the specification generally.

## 'Town' in the Land Rights Act

In the written reply delivered by the claimants' counsel as part of the final addresses a submission was made that even if Regulations 1979 No. 13 is a valid exercise of power it does not follow that the land specified is in a 'town' as defined in the Land Rights Act. This echoed an argument used in the earlier hearing and dealt with in the reasons of 2 November 1979 at pp. 13-14. As was said there:

... the definition is a composite. Essentially it is concerned with the law of the Northern Territory relating to town planning and development, a concept which is filled out by reference to the use of land in and near towns and in an express recognition that regulations may seek to treat an area of land as a town for the purposes of that general law.

If a regulation in force under the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns and purporting to treat an area as a town is a valid exercise of power, the land so treated is within the definition of 'town' in the Land Rights Act.

The Planning Act is such a law and the regulation has not been shown to be an invalid exercise of power. The land specified is therefore in a town and is not unalienated land. This does not mean that the Government of the Northern Territory has an unbridled power by regulation to treat land as a town. The criterion of town planning purpose discussed in the earlier reasons and in these reasons stands as some control.

### Summary of conclusions

1. It has not been shown that the Darwin land specified in Regulations 1979 No. 13 and appearing in Exhibit 7 is not reasonably capable of having some connection with or fulfilling a town planning purpose.
2. The regulation specified that land to be an area to be treated as a town for the purposes of the Planning Act 1979.
3. The land is land in a town within the Aboriginal Land Rights (Northern Territory) Act 1976 hence not unalienated Crown land within that Act.
4. The land is not available to be claimed as unalienated Crown land under s. 50(1) (a) of that Act.

Mr Justice Toohey  
Aboriginal Land Commissioner  
Darwin  
20 December 1979



## KENBI (COX PENINSULA) LAND CLAIM

Status of islands

Reasons for decision

This is a further chapter in this continuing story which began as a land claim to Dum-In-Mirrie Island off Cox Peninsula. Later it incorporated other islands and most of the peninsula itself, but in reasons for decision delivered on 20 December 1979 I held that the peninsula was not available to be claimed as unalienated Crown land under s. 50(1) (a) of the Aboriginal Land Rights (Northern Territory) Act 1976.

That decision has recently been the subject of proceedings in the High Court. At the time of writing, an application by the Northern Land Council for mandamus and for certiorari has been referred by a justice of the High Court to the Full Court. A reading of the transcript of proceedings before his Honour Mr Justice Gibbs suggests some confusion in the mind of counsel regarding the earlier history of this matter. That history is contained in decisions to which it is not now necessary to refer except to say that at an early stage I accepted in principle the advantage of hearing at the one time the evidence of the claimants relating to the islands and to the peninsula. That seems to have become transposed into a suggestion that this present hearing, confined to the status of the islands should not proceed until the outcome of the matter before the High Court was known. But considerations of time and expense, indeed all relevant considerations, point to the desirability of determining the status of the islands now. If that decision is challenged, it may prove possible for all jurisdictional questions in this claim to be heard at the same time by the High Court. A decision on the peninsula only will not define the scope of land available to be claimed as unalienated Crown land.

The wisdom of this seems to have been accepted by all concerned in arguing the matter before me. There was general agreement that I should proceed to determine all questions relating to the status of the islands.

Because of the size and nature of some of the islands within the claim area, there is an initial difficulty in identifying precisely what is being claimed. However I am hopeful that the principles underlying the decision I have reached will be of general application, sufficient to answer any further questions likely to arise.

I propose in what follows to rely upon Exhibit 4, a map of Darwin and environs, as a guide to the existence of islands the subject of claim.

The island from which the claim originally took its name is Dum-In-Mirrie. To its north lie Grose, Bare Sand and Quail Islands and as part of the group two small islands, not named on the map. Between that chain and the peninsula lies Indian Island and further into Bynoe Harbour are Turtle, Knife and Crocodile Islands. Also within the claim area are reefs, some named (Sims, Roche, Moira, Kellaway and Middle Reefs) and others apparently unnamed. There was no challenge to the status of most of the land. The Commonwealth objected to the claim insofar as it extended to Bare Sand Island and Quail Island. Counsel assisting raised a question in regard to Indian Island. No one argued that Dum-In-Mirrie Island was not unalienated Crown land but counsel assisting drew attention to the existence of two occupation licences on that island.

Bare Sand Island and Quail Island

I propose to deal first with Bare Sand Island and Quail Island.

In essence the Commonwealth contended that neither could be the subject of a claim under the Land Rights Act as neither was Crown land.

Under the Land Rights Act traditional land claims may be made to unalienated Crown

land. Section 3(1) defines 'Crown land' to mean land in the Northern Territory not alienated by a grant of an estate in fee simple, but not to include 'land set apart for, or dedicated to, a public purpose under the Lands Acquisition Act 1955 or under any other Act'.

The Commonwealth did not contend that either island had been dedicated to a public purpose. Nor did it rely upon the Lands Acquisition Act. Its argument was that in each case the land had been set apart for a public purpose, in the case of Quail Island under the Northern Territory (Self-Government) Act 1978 and in the case of both islands, under the Air Force Act 1923 or the Defence Act 1903.

By reason of s. 69(2) of the Northern Territory (Self-Government) Act 1978 all interests of the Commonwealth in land in the Territory were vested in the Territory 'on the commencing date', an expression defined in s. 56 to mean 1 July 1978. Section 70 contemplates a transitional period of one year during which the Minister may recommend to the Governor-General that any interest in land vested or to be vested in the Territory by s., 69(2) be acquired from the Territory by the Commonwealth under this section.

In that event the Governor-General may, on the recommendation of the Minister, authorise the acquisition of that interest 'for a public purpose approved by the Governor-General'. The Minister may then cause to be published in the Gazette notice of the authorisation 'and, in the notice, declare that the interest is acquired . . . for the public purpose approved by the Governor-General'.

Upon publication of such a notice or immediately after the commencement of s. 69, whichever is the later, the interest to which the notice relates is by force of the section vested in the Commonwealth and 'freed and discharged from any restriction, dedication or reservation made by or under any enactment . . .'

Action under s. 70 was taken in respect of Quail Island but not Bare Sand Island. First however it is necessary to consider the implications of an order published in the Commonwealth Gazette of 14 February 1957 relating to an area of land and water bounded by the circumference of a circle of a radius of 6000 yards, having as its centre the centre point of Quail Island. The area, illustrated in the order, included Quail Island, Little Quail Island, Bare Sand Island, a small unnamed island just south of Quail Island and two reefs.

That order was in the following terms:

Whereas by the Air Force Regulation 439 it is prescribed inter alia -

- (a) that the Governor-General may by order declare any area to be an air fighting, gunnery, bombing, or similar practice area;
- (b) that a ship, boat, aircraft or person shall not come or remain within any area so declared while any air fighting, gunnery, bombing or similar practice, as the case may be, is in progress or remain in any position to obstruct such practice:

Now therefore I, Sir William Joseph Slim, the Governor-General aforesaid, acting with the advice of the Federal Executive Council, do hereby declare the area described in the Schedule hereto to be a bombing area for the purpose of the said regulation.

Two questions arose in regard to this order. One concerned its validity by questioning whether it was authorised by Air Force Regulation 439 and in turn whether that regulation was within power. The other asked whether a declaration in terms of the order was in truth the setting apart of land for a public purpose.

There was no serious contention that the order itself was not authorised by Air Force Regulation 439. That regulation empowers the Governor-General by order to 'declare any area to be an air fighting, gunnery, bombing or similar practice area'. When any area has been so declared, there is a prohibition against ships, boats, aircraft or persons coming or remaining within the area.

However there was a challenge by the claimants to the validity of reg. 439 itself.

Interestingly the Air Force Regulations do not purport to have been made pursuant to any particular statute although it was common ground that their source of authority must be found in the Air Force Act 1923 or in the Defence Act 1903.

The Commonwealth submitted that reg. 439 was a valid exercise of the Governor-

General's regulation-making power conferred by s. 9 of the Air Force Act. That section empowers the Governor-General to make regulations:

prescribing all matters which are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for securing the discipline and good government of the Air Force and the members thereof . . . or for carrying out or giving effect to this Act.

The Air Force Act comprises only nine sections, its purpose being to recognise the Air Force of the Commonwealth and to control service in that force. In my view nothing in the regulation-making power in s. 9 authorises reg. 439 which is directly concerned with service-type operations.

However that is not the end of the matter. The Defence Act 1903 is: 'An Act to provide for the Naval and Military Defence and Protection of the Commonwealth and of the several States'. It is an Act cast in the widest terms, as one might expect, encompassing the raising of the defence force, its service and in Part VI a range of special powers in relation to defence.

Section 124 empowers the Governor-General to make regulations prescribing all matters required or permitted to be prescribed by the Act or which are necessary or convenient to be prescribed for securing discipline or for carrying out or giving effect to the Act. Specific heads of regulation-making power in 1957 included:

(p) The regulation of artillery and rifle practice . . .

(q) The preservation of the public safety in or at any naval, military or air-force operation or practice.'

Paragraph (p) was amended by Act No. 96 of 1975 so that it now reads:

'(p) The regulation of naval, military or air-force operation or practice'.

It may be difficult to give 'artillery and rifle practice' a meaning, broad and contemporary enough, to encompass bombing from aircraft. But the general regulation-making power contained in s. 124 is wide enough to support a regulation in terms of Air Force Regulation 439.

Section 3(1) of the Air Force Act incorporates various sections of the Defence Act so that they: '. . . apply to and in relation to the Air Force and the members of that Force'. That incorporation includes Part XI of the Defence Act which itself contains s. 124, the regulation-making power.

It do not think it is necessary to determine precisely where the source of authority for Air Force regulation 439 lies. In my opinion it lies in the Defence Act primarily or in the Air Force Act by force of s. 3(1). In one or the other, sufficient authority may be found; hence the regulation and the order made pursuant to it were within power and effective.

The next question is whether the order, in 'declaring the area to be a bombing area for the purpose of the regulation, had the effect of setting the land apart for a public purpose. The consequence of such a declaration, in terms of regulation 439, is to prohibit entry within the area while bombing is taking place. A monetary penalty is attached.

The term 'set apart', although to be found in a number of statutes, does not appear to be a term of art. It seemed to Isaacs J in *Williams v. Attorney-General for New South Wales* (1913) 16 CLR 404 at p. 440:

... to denote merely a segregation in fact, a laying aside from the general mass. It does not necessarily involve the creation of a right in another; though in many cases it is the preliminary step to the creation of such a right.

'Public purpose' is not the same as public use and there are occasions when land is set aside for what is clearly a public purpose, with prohibitions attached to its use by the public. Land set apart for the purpose of water catchment or for power transmission would seem to fall into this category.

For that reason the prohibition of the public from entry on to land during bombing practice is not inconsistent with the notion of it having been set apart for a public purpose. At the same time it might be said that the object of the order was to do no more than create a

situation in which the public might lawfully be barred from entry on to land. That is perhaps to read the order too narrowly. I have not found the point easy but in the end I am of the opinion that the order did set the land apart for a public purpose, in identifying it as land to be used for specific defence purposes and so declaring it.

If that be right, there is little doubt that the land was set apart for a public purpose under an Act. Although designated by an order made pursuant to regulation, it was set apart 'under' the Defence Act or the Air Force Act in the sense that it was set apart 'pursuant to' one of those statutes. *R. v. Clyne; Ex parte Harrap* (1941) VLR 200.

It now becomes necessary to consider the effect of the Northern Territory (Self-Government) Act 1978 and in the case of Quail Island the implications of a notice of acquisition given under that Act.

As mentioned earlier s. 69(2) of the Self-Government Act operated to vest all interests of the Commonwealth in land in the Territory (with some exceptions that are not relevant) in the Territory on 1 July 1978. Section 70 came into operation on the Act receiving the Royal Assent, that is on 22 June 1978, enabling the Commonwealth to acquire land from the Territory for a public purpose. Acquisition had to take place within 12 months of the vesting effected by s. 69(2). Because s. 70 came into operation a short time before s. 69, s. 70(1) speaks of land 'vested or to be vested in the Territory'. We are concerned here only with a situation in which land had been vested in the Territory and was sought to be acquired by the Commonwealth for a public purpose.

When by reason of s. 69(2) the interests of the Commonwealth in Quail Island and Bare Sand Island vested in the Territory, it seems to me that any setting apart of that land for a public purpose ceased to exist. Section 56 of the Self-Government Act defines 'interest' in broad terms to include 'any right, title, estate, power, privilege, claim, demand . . .' The notion of land being vested in the Territory but at the same time remaining set apart for a public purpose earlier determined by the Commonwealth within its legislative competence is inconsistent with the operation of s. 69(2). This is particularly so when regard is had to s. 70 which enables the Commonwealth, within a period of 12 months, to acquire land for a public purpose. Although there is nothing in s. 70 that speaks of existing public purposes, those purposes must have been in contemplation. If existing public purposes were to continue one would expect to find a provision maintaining them, notwithstanding the vesting of land in the Territory.

In my opinion, all land the subject of the order made under the Air Force Regulations vested in the Territory and became unalienated Crown land.

Quail Island however was the subject of a notice of acquisition dated 28 June 1979, virtually at the end of the 12 month period during which the Commonwealth was empowered to acquire land for a public purpose. The terms of s. 70 have already been mentioned. The reference in s. 70(4) to land being vested in the Commonwealth and 'freed and discharged from any restriction, dedication or reservation made by or under any enactment . . .' is a reference to laws made by the Legislative Assembly following the Self-Government Act and to ordinances made under the Northern Territory (Administration) Act 1910 and continued in force by the Self-Government Act. The intention is to remove any fetters from the land if acquired by the Commonwealth.

If the Commonwealth acquired land in exercise of its powers under s. 70, there is nothing to suggest that any setting apart for a public purpose would survive merely by force of that acquisition.

However the real question here is whether the notice of acquisition published in regard to Quail Island had itself the effect of setting it apart for a public purpose, namely defence. For reasons already given I am satisfied that if land is set apart for defence, it is set apart for a public purpose.

My decision on the Uluru (Ayers Rock) National Park and Lake Amadeus Luritja Land Claim was concerned with the status of the Uluru National Park. In the course of reasons I said:

Assuming that the notice . . . was a valid exercise of the power in s. 70 of the Self-Government Act, it went no further than to bring about an acquisition of land so that title passed from the Territory to the Commonwealth. In my view it did not set apart for or dedicate to a public purpose the land concerned. Section 70 confers a power of acquisition, although for a public purpose; the effect of a notice is simply to vest land in the Commonwealth. Before the land may be said to have been set aside or dedicated, some further step is necessary such as the proclamations mentioned in s. 54 of the Lands Acquisition Act 1955 and in s. 7(2) of the National Parks Act. No such step was taken; at least there was no evidence of any.

I am not persuaded that this view was wrong. In the present case the effect of the notice of acquisition was certainly to vest Quail Island in the Commonwealth. The authority for that vesting was the notice of acquisition which itself depended upon an authorisation by the Governor-General, on the recommendation of the Minister.

It is quite true that acquisition for a public purpose is essential before S. 70 may operate. Nevertheless I am of the opinion that the effect of the section is to do no more than vest land in the Commonwealth and that some further step is essential before the land can be said to be set apart for a public purpose under an Act. A proclamation under S. 54 of the Lands Acquisition Act 1955 represents such a step. That view accords with the way in which the Lands Acquisition Act itself operates. Section 10 sets out the machinery by which land may be compulsorily acquired by the Commonwealth for a public purpose. Upon publication of the notice required by the section, the land vests in the Commonwealth but is not expressed to be set apart for the public purpose in question.

The approval of the Governor-General, required by S. 70(2), is a necessary step but it is not of itself: 'a segregation . . . a laying aside from the general mass'. Something more is needed to accomplish that.

In summary then, I am of the opinion that Quail Island, Bare Sand Island and the other islands within the order of 1957 are Crown land, unalienated Crown land and available to be claimed. The implications of a grant of land under the Land Rights Act for Quail Island (where bombing is still carried out) becomes a matter for comment under S. 50(3) of the Land Rights Act.

#### Indian Island

Two questions arose in regard to Indian Island. The first was that Indian Island Forest Reserve, an area of 2600 hectares, was entered in the Register of the National Estate pursuant to S. 23(4) of the Australian Heritage Commission Act 1975. That notice, dated 21 March 1978, appeared in Commonwealth of Australia Gazette No. G11, 21 March 1978.

If Indian Island was before 21 March 1978 unalienated Crown land, its entry in the Register of the National Estate did not affect that status. It is unnecessary to dwell on the provisions of the Act. It places certain restraints upon the Commonwealth, its ministers and agencies where a place on the register may be adversely affected by their actions. More than this it does not do, nor did the Australian Heritage Commission suggest otherwise.

Section 10 of The Woods and Forest Act 1882 of South Australia (part of the law of the Northern Territory) empowered the Governor of South Australia to reserve Crown land as a forest reserve. By notice published in the South Australian Government Gazette of 26 December 1889, the Governor reserved Indian Island as a forest reserve.

That reservation had the effect of setting the land apart for a public purpose. But, in terms of the Land Rights Act, land must be set apart for a public purpose under an Act before it ceases to be Crown land. The Land Rights Act consistently draws a distinction between Acts on the one hand and laws of the Northern Territory on the other. See for instance Ss. 12B(2), 18B(1) and 73, also Acts Interpretation Act 1901 (Commonwealth) S. 38.

When the Land Rights Act speaks of an Act, it means an Act of the Commonwealth in contradistinction to a law of the Territory or any other law. Indian Island was not set apart for a public purpose under an Act of the Commonwealth and it is unalienated Crown land.

#### Dum-In-Mirrie Island

On Dum-In-Mirrie Island there are two occupation licences, No. 937 in favour of Mr Baumber and No. 992 in favour of Mrs Rivers.

Neither Mr Baumber nor Mrs Rivers (who incidentally is one of the claimants) argued that the occupation licences constituted interests in land hence were not unalienated Crown land under the Land Rights Act. In the Borroloola Report paras 140, 141 I gave my reasons for concluding that an occupation licence is unalienated Crown land and available to be claimed. I set out those paragraphs and adopt what is said there.

140. Section 108 (of the Crown Lands Ordinance) provides that the Administrator may grant a licence to any person to occupy Crown lands 'for such purposes as the Administrator thinks fit'. Such a licence shall not exceed five years. The position of the holder of an occupation licence is equally precarious because reg. 83 permits forfeiture for non-compliance with a condition of the licence and cancellation on three months notice.

141. In time the categories of estates in land have become well recognised and neither of the licences mentioned falls into any of the accepted categories. The Ordinance itself draws a clear distinction between leases and licences. The expression 'interest in land' is not capable of precise definition. "Interest" is not a technical word in the sense in which "fee simple" or "estate tail" may be said to be technical words, but includes all those various limitations of real estate allowed by law, vested, contingent or executory' (Hoysted v. Federal Commissioner of Taxation (1920) 27 CLR 400 at p. 409. However broadly those words are read they do require a right to the land, at its widest perhaps a right to the proceeds of the sale of land. Whatever rights are conferred by a grazing licence and an occupation licence are given to a particular individual to make use of land for some specified purpose. They do not confer any right to the land itself and their personal nature is emphasised by the power to revoke or cancel. There is support for this view in Vaughan v. Shire of Benalla (1891) 17 VLR 129. It follows then that neither licence constitutes an estate or interest in land and each therefore is unalienated Crown land.

#### General

In summary then, Bare Sand, Quail, Indian and Dum-In-Mirrie Islands are each unalienated Crown land and may be claimed under the Land Rights Act.

No one suggested that the remaining islands and reefs were other than unalienated Crown land. Some questions may arise concerning reefs but they have not yet done so.

Mr Justice Toohey  
Aboriginal Land Commissioner  
Darwin  
27 June 1980





GIBBS C.J. This is an application for a writ of certiorari to quash a decision made on 20th December 1979 by Toohey J., sitting as an Aboriginal Land Commissioner under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) as amended ("the Land Rights Act") to hear a matter known as the Kenbi Land Claim, and for a writ of mandamus directing Toohey J. to exercise his jurisdiction under the Land Rights Act and hear the claim. An application for prohibition was also made, but not strongly pressed. Kenbi is the Aboriginal name for the Cox Peninsula in the Northern Territory. An application was, on 20th March 1979, made to the Commissioner by the prosecutor, the Northern Land Council, on behalf of Aboriginals claiming to have a traditional land claim to a substantial area of the Cox Peninsula and to islands and reefs lying off the coast of the peninsula. The application was made under s.50(1)(a) of the Land Rights Act which provides as follows:

"(1) The functions of the Commissioner are -

- (a) on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which an estates and interests not held by the Crown are held by, or on behalf of, Aboriginals -
  - (i) to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land; and
  - (ii) to report his findings to the Minister and to the Administrator of the Northern Territory, and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land in accordance with sections 11 and 12",

By s.3(1), "unalienated Crown land" is defined so as not to include land in a town, and "town" is defined as follows:

'town' has the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town".

On 20th December 1979 the Commissioner held that a large part of the land the subject of the claim was land in a town within the meaning of the Land Rights Act, and was not available to be claimed as unalienated Crown land under s.50(1)(a). The land which the Commissioner held to be land in a town was specified in schedule 3 to the Planning Regulations made by the Administrator of the Northern Territory under the Planning Act 1979 (N.T.). By s.4(1) of that Act, "town" means, inter alia, "(c) land specified by the regulations to be an area which is to be treated as a town". Regulation 5 of the Planning Regulations provides as follows:

"For the purposes of section 4 of the Act, the several areas of land specified in Schedule 3 are specified to be areas which are to be treated as towns."

In schedule 3, under the heading "Part I - Darwin", there is described a large tract of land extending out from Darwin in most directions; the tract contains an area of 4350 square kilometres, and includes most of the land in the Cox Peninsula the subject of the claim, as well as much other land. The most important question in the case is whether, and if so on what grounds, the validity of this regulation is open to challenge.

Before turning to this and to the other questions raised in the case, it is necessary to refer to the facts. Darwin is a town whose population is about 50,000. It occupies an area of about 142 square kilometres. The Cox Peninsula is separated from Darwin by an arm of the sea. Although the nearest point of the peninsula is only about six kilometres from Darwin by sea, access by road is much longer and more difficult. Much of the peninsula is vacant land. Its area is about 800 square kilometres. The Northern Land Council is established as a body corporate under s.21 of the Land Rights Act in respect of an area which includes the subject land. Its functions include that of assisting Aborigines claiming to have a traditional land claim to an area of land to pursue the claim (s.23(1)(f) of the Land Rights Act). However, a body known as the Northern Land Council, which was in existence before the Act was passed, on 23rd September 1976 wrote to the Interim Aboriginal Land Commissioner enclosing a map which showed the areas of land on the Cox Peninsula and nearby islands claimed by Aborigines. Later, on 26th September 1977 and 14th March 1978 the Northern Land Council wrote to the Lands Branch of the Department of the Northern Territory indicating that claims were made to vacant land on the Cox Peninsula, and asking that this land be not alienated until the matter was determined by the Commissioner. The first application under s.500(a) in respect of any of the subject land was lodged with the Commissioner on 29th June 1978 in respect of Dum-In-Mirrie Island, one of the islands the subject of the present claim. When, on 20th March 1979, the present application was made, the two applications were consolidated. In the meantime, on 22nd December 1978, Town Planning Regulations were made by the Administrator under the Town Planning Act 1964 (N.T.) as amended. The regulations were gazetted on 29th December 1978. By s.5(b) of that Act it was provided that the regulations may prescribe that a specified area of land - "(b) being land adjacent to a town, shall be subject to the provisions of this Act, but not including the provisions of sub-section (4) or (5) of section eight or sub-section (2) of section eleven of this Act, as if it were part of that town." The Town Planning Regulations provided (inter alia) that the area of land specified in schedule 1, being adjacent to the town of Darwin, was prescribed

under s.5(b) of that Act to be subject to the provisions of the Act (s.8(4) and (5) and s. 11(2) excepted) as if it were a part of that town. The area specified comprised the 4350 square kilometres subsequently described in schedule 3 to the Planning Regulations.

The making of the Town Planning Regulations raised the question whether the land the subject of the application was "unalienated Crown land", and the Commissioner fixed a date for the hearing of argument on that question. Counsel for the Northern Land Council then tendered an affidavit by Mr Heathwood, a town planner, in which Mr Heathwood expressed the opinion that land on the Cox Peninsula was not reasonably required to be set aside for town planning purposes as land adjacent to Darwin. During the hearing the Commissioner was asked by the applicants to make an order, under s.54 of the Land Rights Act, requiring the production of certain documents. The Commissioner gave judgement on 24th July 1979. He held that the motives of the Administrator in making the regulation could not be called in question, and that the affidavit was inadmissible. He declined to order the production of any documents except those relevant to the question whether the area prescribed is adjacent to Darwin.

The Planning Act, which was assented to on 14th May 1979, came into operation on 3rd August 1979. It repealed the Town Planning Act. The Planning Regulations were made on 31st July 1979; they also came into effect on 3rd August 1979. In the light of this change in the law, the Commissioner heard further argument, and on 2nd November 1979 he published his judgement in respect of that argument. He adhered to the view, which he had expressed on 24th July 1979, that the Administrator is the representative of the Crown, that bad faith may not be imputed to him, and that it is therefore not appropriate to inquire into the motives with which he makes a regulation. However he said that if a particular purpose is made an express condition of exercising a power, and the purpose is not pursued, the power is not validly exercised. He concluded that the efficacy of the Planning Regulations "depends upon the land specified having some connection with a town planning purpose", and that the onus of proving that the exercise of power was not reasonably capable of fulfilling a town planning purpose lay on the claimants. He then heard evidence, and held, on 20th December 1979, that it had not been shown that the land specified in the Planning Regulations is not reasonably capable of having some connection with or fulfilling a town planning purpose. He accordingly held that the land is land in a town and not unalienated Crown land.

For the purpose of the first submission made on behalf of the prosecutor counsel accepted that the land has become a town within the meaning of the Land Rights Act, and is therefore no longer unalienated Crown land. The submission was that the Commissioner may and should exercise the function conferred on him by s.50(1)(a) if the land in question is unalienated Crown

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land at the time when a claim to it is made, and that the fact that the land has subsequently ceased to be unalienated Crown land is irrelevant to the question whether the Commissioner should proceed to discharge his function. This submission faces the initial difficulty that the Town Planning Regulations, made on 22nd December 1978, i.e., before the application was made to the Commissioner on 20th March 1979, had prescribed that an area which includes most of the land in question should be subject to the provisions of the Town Planning Act as if it were part of a town. The prosecutor sought to meet this difficulty in two ways. First, it was said that the land had been claimed by the letter written to the Interim Aboriginal Land Commissioner on 23rd September 1976, or perhaps even earlier, or alternatively by the letters written to the Lands Branch of the Department of the Northern Territory on 26th September 1977 and the 14th March 1978. However, it is clear that an application to which s.50(1)(a) refers is an application made to the Commissioner under the Land Rights Act, and that a claim to the land made before that Act was passed, or made to some authority other than the Commissioner, does not answer that description. It cannot possibly be relevant that the land was unalienated Crown land at an earlier date; if it is not unalienated Crown land, or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals, at the time the application is made the Commissioner has no function to exercise. Secondly, it was said on behalf of the prosecutor that even if the land had become a town by virtue of the provisions of the Town Planning Act and the Town Planning Regulations, that Act and those Regulations were repealed on 3rd August 1979 - after the application had been made to the Commissioner - and that the fact that the land thereupon became a town as a result of the enactment of the Planning Act 1979 and the making of the Planning Regulations only means that the land underwent a subsequent change of status, and that should be disregarded. However, the Planning Act and the Planning Regulations came into force at the very instant that the Town Planning Act and the Town Planning Regulations ceased to operate, so that, assuming the validity and applicability of both sets of regulations to the land in question, there was never any moment after 29th December 1978 at which that land was not a town. It follows that even if the major premise in the prosecutor's argument is correct, the submission that the land was unalienated Crown land at the date when the application was made to the Commissioner cannot succeed if the regulations are valid.

Since I take this view, I find it unnecessary finally to decide whether the major premise in the prosecutor's argument is correct. The question is not free from difficulty. The function described in s.50(1)(a) is cast on the Commissioner 66 on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals".

These words suggest that if the land answers the requisite description at the date of the application the Commissioner may proceed to inquire and report notwithstanding that subsequently the land ceases to answer that description. That view derives possible support from s.50(3)(d) which requires the Commissioner, in making his report, to comment on the following matter:

"where the claim relates to alienated Crown land - the cost of acquiring the interests of persons (other than the Crown) in the land concerned."

Although this provision may refer to alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals, it may equally refer to land which has been alienated to persons other than Aboriginals. It is true that there is nothing to prevent the alienation of land, or any other alteration in the status of land, after an application in respect of that land has been made to the Commissioner. However, the inquiry and report of the Commissioner will not necessarily be a futility even if land which at the date of the application was unalienated Crown land has since become land that is part of a town. Section 11 (1) provides as follows:

"Where -

- (a) the Commissioner recommends to the Minister in a report made to him under paragraph 50(1)(a) that an area of Crown land should be granted to a Land Trust for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of that area of land, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission; and
- (b) the Minister is satisfied that the land, or any part of the land, should be so granted,

the Minister shall -

- (c) establish a Land Trust under section 4 to hold that land, or that part of that land, for the benefit of such Aboriginals;
- (d) where that land, or that part of that land, is, or includes, alienated Crown land, ensure that the estates and interests in that alienated Crown land of persons (other than the Crown) are acquired by the Crown by surrender or otherwise; and
- (e) after any acquisition referred to in paragraph (d) has been effected, recommend to the Governor-General that a grant of an estate in fee simple in that land, or that part of that land, be made to that Land Trust."

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Although, by s.3(1), "alienated Crown land", like, "unalienated Crown land", does not include land in a town, the definition of "Crown land" in that subsection does not contain any such exclusion. It would therefore appear that the Minister has power, if the necessary conditions precedent are satisfied, to recommend the grant of an estate in fee simple in Crown land that is land in a town, provided that it was unalienated Crown land at the time when the application was made to the Commissioner. Paragraph (d) of s. 11 (1) refers to alienated Crown land; the estates and interests in such land might be held by Aborigines, or by persons who are not Aborigines. Although, as I have said, there is nothing to stop dealings with the land after an application has been made, it may nevertheless have been intended by the Parliament that once the Commissioner had embarked upon his function his inquiry should not be frustrated by a subsequent alienation of the land, or by the making of regulations by which the land was to be treated as a town. However, as I have said, I need not express a concluded opinion on this question since there was no change in the status of the land after the date of the application.

Then it was submitted on behalf of the prosecutor that the Planning Act is not "the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns" within the meaning of those words in the definition of "town" in the Land Rights Act. The Planning Act set up a Northern Territory Planning Authority with power, inter alia, after following a prescribed procedure, to submit to the Minister a draft planning instrument permitting or controlling the use of land and the carrying out of any development on or in relation to land (ss.34-59). If the Minister accepts the draft, the Administrator may make a planning instrument in relation to the land (s.61). It is an offence to use or develop land otherwise than in accordance with any planning instrument (s.63). The Act contains other provisions relating to approval of subdivisions and development control. The provisions of the Act are not restricted to towns, and the Act makes no special provision in relation to the planning or development of towns, or to the use of land in or near towns. It relates to the planning and developing of all land, and the use of all land, and this obviously includes land in towns. It seems to me therefore that the Planning Act does relate to the planning and developing of towns and the use of land in or near towns although it relates to the use of other land as well. No other law in the Northern Territory now in force that relates to the planning and developing of towns and the use of land in or near towns was brought to our attention. It follows that the Planning Act is "the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns" within the meaning of those words in the definition of "town", and that if reg.5 of the Planning Regulations is valid the area of land specified in schedule 3 to the regulations is an area that by virtue of those regulations is to be treated as a town. In other words, if reg.5 is valid, the land in question is land in a town within the meaning of the Land Rights Act.

The next submission on behalf of the prosecutor was that reg.5 of the Planning Regulations is invalid. If that is so, the land in question will no longer be land in a town, and will therefore be unalienated Crown land within the meaning of s.50(1)(a). Even if it be right to say that the Commissioner is bound to discharge his function in respect of land which was unalienated Crown land at the time the application was made to him, although the land ceases to answer that description at some later date, it does not follow that the Commissioner may not hold an inquiry and make a report when land which, at the time when the application was first made, was not unalienated Crown land, becomes unalienated Crown land at a later date. Section 50(1)(a) requires no particular kind of application. In the present case, if the land in question had become unalienated Crown land on 3rd August 1979 because reg.5 of the Planning Regulations was invalid, there would after that date have been a subsisting application of the kind referred to in s.50(1)(a). In other words if the change in status of the land after the application is made has the result that the land comes within the description of s.50(1)(a) and the application remains on foot, the Commissioner should proceed under s.50(1)(a).

The submission that the regulation is invalid was put in two ways. It was first said that reg.5 was purposeless -that to specify that an area should be treated as a town entailed no consequence under the Planning Act. At the time when the regulations were made, the only reference to "town" in that Act was to be found in the definitions in s.4(1) and in the transitional provisions in Part IX where the word appears in the expressions "town planning scheme" and "town plan", which refer to town planning schemes and town plans under the repealed Act. Paragraph (c) of the definition of "town", which I have already set out, shows that the Act contemplated that the regulations might specify an area to be treated as a town. By s.165(1) of the Planning Act, the Administrator is given power to make regulations, not inconsistent with the Act, "prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act"; then follows a reference to some particular matters which have no bearing on the present case. Regulation 5 plainly enough prescribes a matter permitted by the Act to be prescribed, but it was submitted that the words "for carrying out or giving effect to this Act" govern the words "required or permitted by this Act to be prescribed" as well as the words "or necessary or convenient to be prescribed", and that reg.5 does not prescribe any matter which is permitted to be prescribed for carrying out or giving effect to the Act. The words from s.165(1) which are quoted above appear in the same or in a similar form in many statutes. Sometimes they appear with a comma after "prescribed" where it appears for the second time, and that makes the construction of the provision a little more difficult. Where, as here, no comma appears in that position, there is no reason for regarding the phrase "for carrying out or giving effect to this Act" as qualifying "required or permitted by this Act to be prescribed". If the Act requires or permits a matter to be prescribed,

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it would seem superfluous to consider whether that matter is prescribed for carrying out or giving effect to the Act. But, assuming that the prosecutor's argument as to the construction of s. 165 (I) is correct, it does not follow that reg.5 does not prescribe any matter permitted to be prescribed for carrying out or giving effect to the Act. By the regulation, par.(c) of the definition of "town" is made actually, rather than potentially, effective to include particular land within the definition. In s.4(l) of the Planning Act, "planning instrument" is defined to mean a regional plan or a town plan made under s.6 1, and "town plan" means "a planning instrument that applies, either wholly or substantially, to land which is in a municipality or a town". Although neither s.6 1, nor any of the other sections that deal with the making of a planning instrument, draws any distinction between a regional plan or a town plan, it is obvious enough that there may be very significant differences between planning instruments in respect of a region and those in respect of a town. It may have been regarded by the legislature as convenient for administrative purposes to know whether a regional plan or a town plan was in contemplation when a draft planning instrument was produced, and for this reason to know what was a town, even though the Act did not expressly state the consequence of declaring that an area should be treated as a town. By an amendment made to the Act which took effect on 14th March 1980, there was inserted a section which does use the word "town", and which attaches consequences to the fact that land is 41 within a town" - s.60A, which deals with plans for small towns. If the regulation had been made after that date its validity on this ground could not have been questioned. However, even before that amendment was made reg.5 was in my opinion within the powers conferred on the Administrator by s.165(j), being a regulation which prescribed a matter permitted to be prescribed and (if it matters) prescribed for giving effect to par. (c) of the definition of "town".

The final submission made on behalf of the prosecutor raises important issues. It was submitted that the Commissioner was wrong in holding that the Administrator was the representative of the Crown in the Northern Territory, and that it was not permissible to inquire into the reason why the Administrator made the regulations or to impute bad faith to him. It was submitted that the Commissioner should have inquired into the question whether reg.5 of the Planning Regulations was made for the purpose of defeating the claim by the Aborigines to the land described in schedule 3, or of converting that land into land that was not within the description contained in s.50(l)(a) so that the Commissioner could not entertain the application made with respect to it. It was not suggested that this Court should decide that question - obviously it could not do so on the present state of the evidence - but that the matter should be remitted to the Commissioner for further inquiry. It was not essential to the prosecutor's argument to establish that the Administrator could not be regarded as the representative of the Crown, for it was submitted that the challenge to the validity of the regulation could be made even if the Administrator represented the Crown. Nevertheless it is convenient to proceed to consider that question.

The Administrator who made the regulations, Mr J.A. England, had been appointed under s.3A of the Northern Territory (Administration) Act 1910 (Cth) as amended. At the time when he made the regulations the Northern Territory (Self-Government) Act 1978 (Cth) ("the Self-Government Act") had come into force, and by s.58 of that Act the Administrator continued to hold office as if he had been appointed under that Act. The Self-Government Act was enacted for the purpose of conferring Self-Government on the Northern Territory which, by s.5, is established as "a body politic under the Crown". Provision is made for the office of Administrator by s.32 of the Self-Government Act, which provides as follows:

"(1) There shall be an Administrator of the Territory, who shall be appointed by the Governor-General by Commission under the Seal of Australia and shall hold office during the pleasure of the Governor-General.

(2) The Administrator is charged with the duty of administering the government of the Territory.

(3) Subject to this Act, the Administrator shall exercise and perform all powers and functions that belong to his office, or that are conferred on him by or under a law in force in the Territory, in accordance with the tenor of his Commission and (in the case of powers and functions other than powers and functions relating to matters specified under section 35 and powers and functions under sections 34 and 36) in accordance with such instructions as are given to him by the Minister."

The terms of the Commission in fact issued to Mr England are unenlightening. The Commission is signed and sealed by the Governor-General, who states that "I ... hereby appoint John Armstrong England to be the Administrator of the Northern Territory of Australia on and from 1 June 1976." Section 31 of the Self-Government Act provides as follows:

"The duties, powers, functions and authorities of the Administrator, the Executive Council and the Ministers of the Territory imposed or conferred by or under this Part extend to the execution and maintenance of this Act and the laws of the Territory and to the exercise of the prerogatives of the Crown so far as they relate to those duties, powers, functions and authorities."

Section 35 of the Act provides that the regulations may specify the matters in respect of which the Ministers of the Territory are to have executive authority, and regulations have in fact specified a large number of matters in respect of which the Ministers of the Territory have executive authority. The number and designation of ministerial offices is determined by the Administrator (s.34) and the Administrator may appoint a member of the Legislative Assembly to a Ministerial office and may at any time terminate the appointment (s.36).

No doubt in exercising these powers the Administrator must act in accordance with the principles of responsible government. By s.6 it is provided as follows:

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"Subject to this Act, the Legislative Assembly has power, with the assent of the Administrator or the Governor-General, as provided by this Act, to make laws for the peace, order and good government of the Territory."

If a proposed law is presented to the Administrator for assent he may assent to it, withhold assent, or reserve it for the Governor-General's pleasure (s.7). The Governor-General has power to disallow laws to which the Administrator has assented (s.9). Section 51(1) provides as follows:

"Where an Act (whether or not by express provision) binds each of the States or the Crown in right of each of the States, that Act, by force of this sub-section, binds the Territory or the Crown in right of the Territory, unless that Act specifically provides otherwise."

The reference to "the Crown in right of the Territory" in this section does not indicate who is the representative of the Crown in the Territory.

The Northern Territory, although granted Self-Government, remains a Territory of the Commonwealth. The Governor-General is the Queen's representative within the Commonwealth: see ss.2,61 of the Constitution. By the constitutions of the States, which are continued by s. 106 of the Constitution, the Governor is the Queen's representative within the State, and the office of Governor of a State is recognised by a number of sections of the Constitution: see ss.7,12,15,21,84 and 110. The Constitution does not recognise that any person other than the Governor-General is the Queen's representative within a Territory which has not yet become a State. I need not consider whether the power conferred by s.1 22 would enable the Parliament to provide by legislation for the appointment of an officer who would be the Queen's representative in a Territory. If the Parliament has that power, one would expect that an intention to exercise it would be expressed in clear words. The Self-Government Act nowhere declares the Administrator to be the Queen's representative. The absence of any Letters Patent, Instructions under the Sign Manual or Commission from Her Majesty marks a departure from the manner in which other representatives of the Queen have been appointed in Australia. The decision of the Judicial Committee in *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* [ 1892] A.C. 437 suggests that the absence of the usual instruments of appointment is not necessarily conclusive. Lord Watson, who delivered the judgement of the Board, considered the position of the Lieutenant-Governor of a province of Canada who was not appointed by the Queen but by the Governor-General under the authority of s.58 of the British North America Act 1867, and said, at p.443, that "a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government." The case is however distinguishable,

because it concerned the position of one of the provinces which were united into the Dominion of Canada, and the power under which the Lieutenant-Governor was appointed was contained in the Imperial Statute that formed the Constitution under which the provinces were united. It does not follow from that decision that the absence of any appointment by the Queen, and of any express statement that the Administrator is to be the Queen's representative, is lacking in significance in the present case. It is clear that the Administrator can not be the Queen's representative for all the purposes of the government of the Territory, because his functions are limited by ss.34-36 of the Self-Government Act. Moreover, in exercising powers and functions outside those limits he must act in accordance with such instructions as are given to him by the Minister. It may be that the matters in respect of which he is bound to act on ministerial instructions are comparatively few, but it does not seem consistent with the position of a representative of the Queen that he should be liable to receive instructions of that kind at all. The provisions regarding the reservation of proposed laws for the Governor-General's pleasure and the power of the Governor-General to disallow enactments do not assist in the determination of the present question; they are neutral. However, having regard to the matters to which I have referred, I consider that the fact that the Administrator is charged with the duty of administering the government of the Territory and that his duties, powers, functions and authorities extend to the exercise of the prerogatives of the Crown so far as they relate to those powers, functions and authorities, does not mean that the Administrator is the representative of the Crown. His office is an important one, but in my opinion he does not represent the Crown within the Northern Territory, although, when exercising the prerogatives of the Crown, he is no doubt entitled to such privileges and immunities as those prerogatives attract.

However, since it appears that a majority of the Court may be of opinion that the Administrator does represent the Crown, I should approach the question on that basis. We are not concerned to consider generally to what extent the acts of the Crown are subject to judicial review, and in view of the constitutional importance of the matter it is desirable to define precisely what does fall for decision and what is outside the scope of our inquiry. The case does not concern the exercise of a prerogative power. It does not involve the question whether the writs of certiorari and mandamus are available against the Crown - a question which, on the present state of the authorities, would be answered in the negative: *R. v. The Governor of the State of South Australia* (1907) 4 C.L.R. 1497, at p.1512; *Horwitz v. Connor* (1908) 6 C.L.R. 38, at p.40; *Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222, at p.241. The case is one in which the Administrator (whom I shall assume represents the Crown) has exercised a power conferred on him by statute. It is of course a power that the Administrator exercises on the advice of his Executive Council. The power is not one whose existence is expressed to depend on a subjective belief or opinion (such as is the case where a Governor-General or Governor is given power to act "if it appears to him . . ." or "if he is

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satisfied nor, on the other hand, is it granted to be exercised for a particular specified purpose. Under a statutory provision such as the present, the nature and extent of the power "must be inferred from a construction of the Act read as a whole": *Padfield v. Minister of Agriculture, Fisheries and Foods* [ 1968 ] A.C. 997, at p. 1033. The principle, which is clearly settled, at least in the case of authorities subordinate to the Crown, is that a statutory power may be exercised only for the purposes for which it is conferred. As Latham C.J. said in *Brownells Ltd. v. Ironmongers' Wages Board* (1950) 81 C.L. R. 108, at p. 120:

"No inquiry may be made into the motives of the Legislature in enacting a law, but where a statute confers powers upon an officer or a statutory body and either by express provision or by reason of the general character of the statute it appears that the powers were intended to be exercised only for a particular purpose, then the exercise of the powers not for such purpose but for some ulterior object will be invalid. This question was fully examined in *Arthur Yates & Co. Pty Ltd. v. Vegetable Seeds Committee* [(1945) 72 C.L.R. 37, at pp.67-69,72,75,76,82,83] and it was there held that subordinate bodies exercising powers conferred by statutes were bound to exercise their powers bona fide for the purposes for which the power was conferred and not otherwise."

In the present case, it is not open to doubt that the powers conferred by s. 165 of the Planning Act, read in conjunction with the definition of "town" in s.4(1), are to be exercised only for planning purposes, using that expression widely to include such matters as subdivision and development. It is incontestable that the power is not intended by the Act to be conferred for the purpose of defeating the traditional land claims of Aborigines. If it was used for that purpose the exercise of the power was invalid, unless the Administrator enjoys some privilege that enables him to transcend and disregard the limitations which the statute on its proper construction imposes. It would be surprising in principle if this were so. It seems fundamental to the rule of law that the Crown has no more power than any subordinate official to enlarge by its own act the scope of a power that has been conferred on it by the Parliament.

One thing that is clearly settled by numerous cases is that a power expressed in terms such as those of s. 165 of the Planning Act does not enable the Governor-General in Council or Governor in Council to make regulations "which go outside the field of operation which the Act marks out for itself": *Morton v. Union Steamship Co. of New Zealand Ltd.* (1951) 83 C.L.R. 402, at p.410. The principle was stated as follows in *Shanahan v. Scott* (1957) 96 C.L.R. 245, at p.250:

". . . such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect

what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

This passage was adopted with approval by the Judicial Committee in *Utah Construction & Engineering Pty. Ltd. v. Pataky* [1966] A.C. 629, at p.640 and by this Court in *Willocks v. Anderson* (1971) 124 C.L.R. 293, at pp.298-9 - both cases which, like *Shanahan v. Scott*, concerned an exercise of regulation-making power by the Crown in Council. These authorities establish that if it can be seen from the words of the regulations themselves that the regulations go beyond the purposes of the statute under which they were made, the regulations will be invalid, although made by the Crown in Council. In this respect the Crown stands in no different position from any official to whom a statutory power is entrusted.

There are, however, a number of decisions of this Court which appear to provide authority for the view that an act done by the Crown, apparently regular on its face, cannot be impugned because it was done for a purpose unauthorised by the statute which was relied upon to provide the necessary power. In the first of these cases, *Duncan v. Theodore* (1917) 23 C.L.R. 510, the jury had made a finding that the proclamation in question, which had been issued by the Governor in Council, was not issued in good faith in the sense that there was no real intention to act under the relevant statute, but an intention to achieve an ulterior purpose. *Isaacs and Powers JJ.* said, at p.544, that "it is not open to impute mala fides with respect to the issue of a royal Proclamation, which is the act of the King by himself or his representative." *Barton J.* seems to have inclined to the same opinion: see at pp.525-6. Since *Isaacs and Powers JJ.* held that there was no sufficient evidence to support the jury's finding their remarks were obiter. No reasons were given and no authority was cited in support of them. On appeal to the Privy Council the judgement of *Isaacs and Powers JJ.* was approved ((1919) 26 C.L.R. 276, at p.283) but on this point their Lordships said no more than that "it cannot be assumed that the Queensland Ministry would have acted in any fashion inconsistent with such duty as they had been entrusted with by the representative of the Sovereign" (see at p.282). In *James v. Cowan* (1930) 43 C.L.R. 386 *Isaacs J.* said (at p.411):

"You cannot challenge the Minister's bona fides on the ground of dishonesty at all - that, in my opinion, can never be imputed to the King's Executive."

Again, the Privy Council, on appeal, did not endorse these remarks, but rather suggested that the existence of bad faith on the part of a Minister might be proved: see (1932) 47 C.L.R. 386, at p.395.

Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan (1931) 46 C.L.R. 73 is the strongest authority in favour of the view that the motives of the Governor-General in Council in making a regulation are immaterial to its validity. The regulations there in question had been made under a statute whose validity was upheld as a law with respect to interstate and overseas trade and commerce and they were challenged on the ground (amongst others) that they were being used for industrial purposes. The Court held the regulations to be valid. Gavan Duffy C.J. and Starke J., at p.84-5, simply said that the only remedy for an abuse or misuse of the power of making the regulations was by political action, and that the only question for the courts is whether the regulations are within the power conferred by the statute. Rich J. said, at p.86:

"It is now contended, however, that the actual motives of the Executive should be inquired into for the purpose of invalidating the Regulations.

The power given to the Governor-General in Council is not, in my opinion, of an order which makes the validity of its exercise depend upon the grounds taken into consideration by the donee of the power".

Dixon J. said, at p. 104:

"But it is now suggested that in fact the actual exercise of the discretion by the Executive was clearly not directed to the subject of trade and commerce. This contention too is answered, I think, by the legislative character of the function entrusted to the Governor-General in Council. His discretionary power over the subject is as unqualified as that of a legislature, and the actual grounds upon which it is exercised are, therefore, immaterial."

Evatt J., at p. 129, left open the question whether it is possible to impute want of good faith to the representative of the Crown for the purpose of nullifying executive acts performed in the name of the representative of the Crown.

The argument to which the members of the Court directed themselves appears to have been that those who made the regulation had no purpose connected with trade and commerce (see per Dixon J. at p. 103), rather than that it was made for a purpose which the Act did not authorise. The judgements are not distinctly directed to the point now under consideration, but the case nevertheless assists the argument of the respondent.

In the next case, Arthur Yates & Co. Pty Ltd. v. The Vegetable Seeds Committee, it was held that orders made by a subordinate authority (not by the Crown) were open to attack on the ground that they were made for a purpose other than that conferred by the statute under which they purported to be made. In the course of the valuable discussion in which the members of the Court engaged somewhat divergent opinions were expressed on the present question. Latham C.J., at pp.64-5, referred to the fact that there is authority that the bona fides of the Crown cannot be impugned, but suggested,

without finally deciding, that evidence of dishonesty might be proved in the case of an individual Minister for the purpose even of invalidating a legislative act which he is authorised to perform. However, he said that the rule against inquiry into motives applied only to laws (including "some" regulations) and not 'co orders and directions given under statutory powers (see at pp.65-67). Rich J. said, at p.73, that the bona fides of delegated legislation made by the Crown's representative will not be examined, but thought that a court might examine the bona fides of a purported exercise of power by an individual Minister even if the power was of a legislative character. Starke J. said, at p.74, that the motives, reasons and bona fides of a sovereign legislative body cannot be examined in a court of law, and that "it may be that orders in council made pursuant to statutory authority fall within this category". Dixon J. held, at pp.80-1, that the question whether the purpose of orders renders them invalid does not depend on whether the orders are of a legislative character. He said, at pp.81-2, that the acts of a sovereign legislature could not be challenged on this ground and added, "Then, too, legislative and executive acts formally done in the name of the Crown stand in a special position: see *Duncan v. Theodore*". He appears to have drawn a distinction between statutes and acts formally done in the name of the Crown, on the one hand, and the acts or determinations of subordinate authorities on the other. However, in the course of discussion of the principle that a power to make by-laws ought not to be used for a collateral purpose, he cited, at p.84, *Bailey v. Conole* (1931) 34 W.A.L.R. 18 without any adverse comment. That was a case in which a regulation made by the Governor in Council, and "in form within the letter of the statute" (see at p.24) was held invalid because it was made for an object foreign to the scope of the Act.

In *Australian Communist Party v. The Commonwealth* (1951) 83 C.L.R. 1, Dixon J., in the course of discussing the validity of one of the sections of the statute there in question, whose operation was made conditional upon the opinion of the Governor-General in Council, again expressed, at pp. 178-9, his acceptance of the correctness of the statement that the good faith of any of the acts of a representative of the Crown cannot be questioned in any court of law. He gave as a reason the fact that the counsels of the Crown are secret. Fullagar J., at pp.257-8, expressed similar views. It has been suggested that Williams J. expressed the same opinion at p.221, but in my opinion his remarks were directed only to the effect of the particular statute before Mm. The other members of the Court did not deal with the question.

Finally, in *W.H. Blakeley & Co. Pty. Ltd. v. The Commonwealth of Australia* (1953) 87 C.L.R. 501 it was held that the effect of the Lands Acquisition Act 1906 (Cth) as amended was to make a notification by the Governor-General, under s.15(2) of that Act, of the purpose of an acquisition, conclusive of the existence of that purpose. The decision appears to me to rest on the proper construction of the Act, rather than on any general principle which precludes the Court from examining the purposes of the Crown.

Gibbs CJ.

It can be seen that there are expressions of opinion which are entitled to great weight in support of the view that acts of the Crown in Council, apparently regular in form, cannot be examined on the ground that they were done with the intention of achieving an unauthorised purpose - i.e. done in bad faith, in the sense in which that expression has sometimes been used in the authorities. Those statements have naturally been followed in some decisions of the Supreme Courts in Australia. However, it is significant that this view does not appear to have been so firmly accepted elsewhere. Although in *De Smith, Judicial Review of Administrative Action*, 4th ed. (1980), at pp.287,336 it is stated that bad faith cannot be attributed to the Crown, the only authorities cited for that proposition are *Duncan v. Theodore* and *Australian Communist Party v. The Commonwealth*. The English authorities leave the position unsettled. In *Attorney-General for Canada v. Hallet & Carey Ltd.* [1952] A.C. 427 the Judicial Committee rejected an argument that the courts might canvass the considerations that led the Governor-General to deem it necessary to act under a statute which authorised him to do such things as he might, by reason of the continued existence of an emergency, deem necessary or advisable for any of various specified purposes. However, Lord Radcliffe said, at p.444:

"There is no warrant at all for presenting this as a case in which powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorised or actually forbidden. If bad faith of that kind can be established, a court of law may intervene".

In *Ningkan v. Government of Malaysia* [ 1970] A.C. 379 a proclamation which recited that the Supreme Head of the Federation of Malaysia was satisfied that a state of emergency existed, was challenged on the ground that it was made not to deal with grave emergency but for another purpose. It was held that the appellant had not discharged the onus of proof which lay upon him, but Lord MacDermott, who delivered the judgement of the Judicial Committee said, at p.391-2, that it was "unsettled and debatable" whether a proclamation made by the Supreme Head of the Federation of Malaysia under statutory powers could be challenged on some or any grounds. In *New Zealand (Reade v. Smith* [ 1959] N.Z.L.R. 996) and *Canada (Re Doctors Hospital and Minister of Health* (1976) 12 O.R. (2d) 164 and *Re Heppner and Minister of the Environment for Alberta* (1977) 80 D.L.R. (3d) 112) there are decisions that support the view that some investigation at least may be made into the purposes with which the Crown in Council acted.

In this state of the authorities it appears to me that this Court is free to decide for itself the question that now arises. As I have shown, if the Crown in Council makes a regulation which appears on its face to be made for a purpose that was not authorised by the statute under which it purports to be made, the regulation will be invalid. It would be anomalous if a regulation which bore the semblance of propriety would remain valid even though it should be shown in

fact to have been made for an unauthorised purpose; that would mean that a clandestine abuse of power would succeed when an open excess would fail. As Mr Hogg points out in an article "Judicial Review of Action by The Crown Representative" (1969) 43 A.L.J. 215, three reasons appear to have been suggested for giving an immunity from review to acts of the Crown. The first is that the Ministers on whose advice the representative of the Crown relies are responsible to Parliament, whose scrutiny is available to check excesses of power. If that reason were valid it ought logically to follow that the act of an individual Minister also could not be invalidated even if it were shown that he had acted for an extraneous purpose. Not all of the members of this Court who have upheld the immunity of the Crown have gone so far as to extend it to the acts of individual Ministers. To do so would be contrary to the approach taken in such cases as *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [ 19771 A.C. 10 14. Moreover, under modern conditions of responsible government Parliament could not always be relied on to check excesses of power by the Crown or its Ministers. The second reason suggested is that the courts should not substitute their views for those of the executive on matters of policy. That is of course true, but it does not mean that the courts cannot ensure that a statutory power is exercised only for the purpose for which it is granted. A third reason suggested is that the counsels of the Crown are secret. However the secrecy of the counsels of the Crown is by no means complete (see *Sankey v. Whitlam* (1978) 142 C.L.R. 1) and if evidence is available to show that the Crown acted for an ulterior purpose, it is difficult to see why it should not be acted upon. In my opinion no convincing reason can be suggested for limiting the ordinary power of the courts to inquire whether there has been a proper exercise of a statutory power by giving to the Crown a special immunity from review. If a statutory power is granted to the Crown for one purpose, it is clear that it is not lawfully exercised if it is used for another. The courts have the power and duty to ensure that statutory powers are exercised only in accordance with law. They can in my opinion inquire whether the Crown has exercised a power granted to it by statute for a purpose which the statute does not authorise. The onus of proving that the Crown did act for an unauthorised purpose lies on those who make that assertion: see *Ningkan v. Government of Malaysia*, at p.390, and *McEldowney v. Forde* [ 19711 A.C. 632, at p.660.

In the present case, the appellant was in my opinion entitled to challenge the Planning Regulations, and if necessary also the Town Planning Regulations, on the ground that they were made for a purpose which was not a planning, or a town planning, purpose. The challenge might be made either on the ground that the regulations were invalid on their face, or on the ground that evidence would show that they were in fact designed to defeat the traditional land claims of Aborigines. It was necessary for the Commissioner to decide on the validity of the Planning Regulations to enable himself to determine whether the application was made in respect of land to which s.50(1)(a) of the Land Rights

Act applied. If the regulations were invalid, there was no justification for him to fail to continue to exercise his function under s.50(1)(a). For the reasons given the Commissioner has not exercised his functions in accordance with law and the case is a proper one for mandamus.

Reference was made to 0.55 r.30 of the High Court Rules which provides that an application for a writ of mandamus to a judicial tribunal to hear and determine a matter shall be made within two months of the date of refusal to hear or within such further time as is, under special circumstances, allowed by the Court or a Justice. No application for an order nisi was made in the present case until May 1980. I doubt whether the Commissioner was a judicial tribunal within the meaning of this rule, but if he was there are special circumstances warranting an extension of time. The delay in making the application is explained by the difficulty in getting instructions from the applicants, since to communicate with them it was necessary to enlist the assistance of a linguist and an anthropologist, and by the time that it took to obtain legal opinions in respect of a matter which was undoubtedly a difficult one. Although as at present advised I consider that the Court would have jurisdiction to grant certiorari, for the reasons I gave in *Reg. v. Cook; Ex parte Twigg* (1980) 31 A.L.R. 353, at p.361, I do not think that certiorari would be necessary in the present case, assuming it to be appropriate. Mandamus is sufficient.

I would make an order for mandamus.

STEPHEN J. The Northern Land Council is a body corporate created pursuant to Part III of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). One of its functions is to assist Aboriginals living in northern parts of the Northern Territory to pursue traditional land claims. The Council has for some time been assisting a group of Aboriginals with its claim to land on Cox Peninsula and adjacent islands. Cox Peninsula, some 800 square kilometres, projects out into the Timor Sea a few kilometres to the west of Darwin, separated from it by the waters of Port Darwin.

The making of traditional land claims

The first formal step in making a traditional land claim is to apply to the Aboriginal Land Commissioner under s.50(1)(a) of the Act. This the Council has done in respect of Cox Peninsula and adjacent islands. Once such an application is made the Commissioner must ascertain whether the applicants or any other Aboriginals are the traditional Aboriginal owners of land and must report his findings to the Minister. Where he finds that there are traditional Aboriginal owners of the land he is to make recommendations to the Minister for the granting of the land to a Land Trust in accordance with s. 11 of the Act.

The Commissioner may only exercise these functions in relation to certain classes of land, the presently relevant class being "unalienated Crown land". Unless the Cox Peninsula is "unalienated Crown land" he cannot embark upon the task of ascertaining its traditional Aboriginal owners, let alone make any recommendations about it. "Unalienated Crown land" is defined by s.3(1) of the Act to mean "Crown land in which no person (other than the Crown) has an estate or interest, but does not include land in a town".

#### The claim to Cox Peninsula

It is this exclusion of "land in a town" which has given rise to these proceedings. The Commissioner has held that Cox Peninsula is land in a town and therefore not available to be claimed as unalienated Crown land under s.50(1)(a) of the Act. The Council now seeks certiorari to quash the Commissioner's decision and mandamus to compel him to carry out his functions under s.50(1)(a).

Although Darwin lies only some six kilometres away, across the waters of Port Darwin, the Cox Peninsula is itself far from urban. Its 800 square kilometres are mainly low-lying forest and scrub land, fringed with mangroves and surrounded at low tide by great mud flats which connect its western shores with what, at high tide, are off-shore islands. Its road system is primitive, sometimes impassable even to four-wheel drive vehicles. Apart from some mining leases, a few small private freehold and leasehold areas, an Aboriginal reserve, a forest reserve and some extensive areas owned by the Commonwealth and used as sites for overseas radio transmitters or, in the case of one of the off-shore islands, as an aircraft bombing range, the remainder, well in excess of three quarters of the total area, is largely undeveloped Crown land. The Peninsula is used extensively by the residents of Darwin for outdoor recreational purposes - camping, fishing, swimming and the like. Its permanent population, apart from residents of the Aboriginal Reserve, is very small, at most one or two hundred persons.

#### "Land in a town"

This undeveloped and sparsely populated peninsula is said to have become "land in a town" because of the interaction of the Planning Act 1979, an Act of the Northern Territory legislature, regulations made under it and certain provisions of the Commonwealth Parliament's Aboriginal Land Rights (Northern Territory) Act 1976. This is said to have happened in this way. Regulation 5 of the Planning Regulations provides:

"5. For the purposes of section 4 of the Act, the several areas of land specified in Schedule 3 are specified to be areas which are to be treated as towns".

Stephen J.

One area of land in Schedule 3 comprises 4,350 square kilometres centred upon the town of Darwin, itself only some 143 square kilometres in extent. It includes the Cox Peninsula. Regulation 5 derives its effect from par.(c) of the definition of "town" in s.4(l) of the Planning Act. That definition is as follows:

" 'town' means -

- (a) a town within the meaning of the Crown Lands Act;
- (b) a municipality; or
- (c) land specified by the regulations to be an area which is to be treated as a town-,".

Taken together, the regulation and this definition purport to extend the meaning of "town" in the Planning Act to the whole 4,350 square kilometres centred upon Darwin, including the Cox Peninsula.

This extended meaning of "town" is then taken up by the Aboriginal Land Rights (Northern Territory) Act 1976. In s.3(l) of that Act "town" is defined as follows:

" 'town' has the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town;".

The result of the interaction of these provisions is said to be that Cox Peninsula, being "land in a town", is not "unalienated Crown land" to which s.50(l)(a) can apply.

I have referred only to the current planning legislation of the Northern Territory, the Planning Act 1979, and to the regulations made under it. Its predecessor, the Town Planning Ordinance 1964-1978, (whose name was changed from "Ordinance" to "Act" shortly before it was supplanted by the current legislation) contained a provision somewhat similar to the provisions of the Planning Act described above. By a regulation made under that ordinance an area substantially the same as the present 4,350 square kilometres was, in 1978, made subject to the Ordinance "as if it were a part of" the town of Darwin. It included the whole of the Cox Peninsula. It will be necessary to revert to this earlier legislation, but for the moment I confine myself to the current Planning Act and regulations.

The Land Council's first submission

The Northern Land Council relied upon two principal submissions in urging before the Commissioner and in this Court that the Cox Peninsula was nevertheless "unalienated Crown land" for the purposes of s.50(1)(a) of the Aboriginal Land Rights (Northern Territory) Act 1976. The first was founded upon the premise that if an application is made to the Commissioner under s.50(1)(a) at a time when the land claimed is unalienated Crown land, no subsequent change in the status of that land can prejudice the application. Moreover, any change in status of the land occurring after application is made and which, had it occurred before that application was made would have removed any obstacle in the application's path, will have that same beneficial effect upon an existing application. For present purposes, and without determining the correctness of this premise, I am content to accept it.

The Council contends that, when understood in the context of the changing pattern of the Territory's planning legislation, the facts concerning traditional land claims to Cox Peninsula give rise to a situation to which the above premise can be applied. The result is said to be that the Cox Peninsula must be treated by the Commissioner as "unalienated Crown land". Various alternative circumstances are put forward as constituting the making of a relevant application in respect of Cox Peninsula under s.50(1)(a). The earliest in point of time involves land claims made before the Aboriginal Land Rights (Northern Territory) Act 1976 came into operation. It was put, somewhat tentatively, that these might in some way have been converted into applications under s.50(1)(a) when the Act came into operation. However, it was conceded in argument that there are substantial difficulties involved in this contention, quite apart from the vague nature of aspects of these early claims. Together these factors make it unnecessary to do more than note my rejection of these early claims as land claims under the Act.

Then it is said that a letter of 26 September 1977, written after the Act had come into operation and before the making of the first disqualifying regulation under the Town Planning Ordinance, can be regarded as an application under s.50(1)(a) in respect of the Cox Peninsula. It was addressed to the Lands Branch of the Department of the Northern Territory and merely informed the Branch that, since a claim was to be made to the Commissioner in respect of "vacant Crown land on Cox Peninsula" it was assumed that the policy of not alienating claimed lands until the claim had been dealt with by the Commissioner would apply to that land. Its contents preclude it from being relied upon as an application under s.50(1)(a).

Stephen J.

A later letter, dated 14th March 1978, from the Council to the Lands Branch, is also relied upon. It refers to the Council's understanding that all vacant Crown land on Cox Peninsula had earlier been claimed before "the interim Land Commissioner". It speaks of the "considerable confusion" which had earlier existed concerning appropriate procedures and of advice received by the Council from the Minister for Aboriginal Affairs that his Department had been notified by the interim Land Commissioner of a claim to all vacant Crown land on Cox Peninsula. It concludes by referring to "the general uncertainty that still prevails" regarding land claims and asks that Cox Peninsula be afforded the status of being under claim and therefore not subject to further alienation until determined upon by the Lands Commissioner.

The reply, dated 11 th April 1978, from the Lands Branch states that the Lands Commissioner is unaware of any land claim to the Cox Peninsula and that "it is not possible to extend any, previous undertakings to the administration and alienation of land on Cox Peninsula, not contained within" an area marked on the enclosed plan. For reasons which remain unexplained the area so marked in fact comprises by far the greater part of Cox Peninsula. Material in evidence suggests that much confusion must then have surrounded the making of land rights claims; there must also have been much other correspondence relating to claims to Cox Peninsula which is not before the Court. In the result much remains unexplained: the status of the interim Land Commissioner, who receives no statutory recognition in the Aboriginal Land Rights (Northern Territory) Act 1976, is unclear; there must have been land claims of some sort to some parts of Cox Peninsula made well before March 1978 and made to what were then thought to be the appropriate authorities. Perhaps all that emerges at all clearly is that even when the Land Branch's letter of 11 th April 1978 was written the Commissioner was still not in receipt of any application made under s.50(1)(a) in respect of Cox Peninsula. This is confirmed by what happened at the hearing of another application under s.50(1)(a), confined to one of the off-shore islands of Cox Peninsula. In January 1979 an adjournment was sought by the Council so that, in the words of the Commissioner in his reasons for judgement delivered on 14th February 1979, it could be consolidated 14 with a broader claim foreshadowed in respect of the Cox Peninsula". His Honour added that "that broader claim had not then been lodged nor has it been since".

Only on 20th March 1979 was that broader claim made by formal application pursuant to s.50(1)(a) of the Act. It alone can in my view be regarded as the application initiating the Commissioner's enquiry relating to Cox Peninsula: to it alone may the Council's initial premise be applied. It was made when the Town Planning Ordinance and the regulation made under it were still in force; not until 3rd August 1979 did the current Planning Act and its accompanying reg.5 come into operation and thereby repeal the Town Planning Ordinance. Upon that repeal the Council's argument must rest.

Applying the Council's initial premise, the repeal of the Ordinance and, consequently, of the regulation made under it is said to have caused the Cox Peninsula to revert to the status of "unalienated Crown land", that repeal causing the land to cease to be deemed to be part of the town of Darwin. The simultaneous coming into operation of the new Planning Act and its accompanying reg.5 is, according to the premise, a change in status of the land adverse to the application and therefore to be ignored: upon the repeal of the Town Planning Ordinance the application was regularised: it thereafter applied to land which was to be treated as "unalienated Crown land", to which s.50(1)(a) could properly apply. In the words of the submission, the repeal repaired the flaw in the application, and if there was need for re-application after its repair that was satisfied by the Council's subsequent pressing of its application. This might have been well enough had there been any period between repeal of the Ordinance and the commencement of the Planning Act and reg.5 during which the land could be regarded as reverting to its original status as "unalienated Crown land". But there was no such period. The Cox Peninsula never reverted to its original status; what brought about the repeal of the Ordinance was the simultaneous coming into operation of the Planning Act and also of reg.5. Cox Peninsula remained throughout as an area to be treated as a town and hence excluded from the status of "unalienated Crown land". It follows that even if the Council's initial premise be correct, it will not serve the purpose for which it is proposed. The first of the Council's submissions must be rejected.

The attack on the validity of reg.5

The Council's second submission was that reg.5 of the Planning Regulations was not validly made and was therefore ineffective to make Cox Peninsula "land in a town". It took two forms: the first relied upon the express terms of the regulation and of the Act, the second, while accepting that the regulation was good on its face, sought to establish invalidity by proof that it was in fact made for no purpose of the Act but for a quite alien purpose, the removal of Cox Peninsula from the operation of the Aboriginal Land Rights (Northern Territory) Act 1976. To found the second line of attack, the Council sought an order pursuant to s.54 of the Aboriginal Land Rights (Northern Territory) Act 1976 for the production and inspection of a wide range of documents in the possession of the Administration relating to the considerations which brought into existence the predecessor of reg.5, at that time the relevant regulation. The Commissioner refused to make any such order because he regarded this particular line of attack as not being open in principle. If in fact such an attack is permissible in principle, its ultimate success will depend upon the Council establishing by evidence the existence of such an alien purpose. However it is exclusively with the preliminary question of principle that this Court is concerned.

Stephen J.

The regulation-making power is conferred by s.165(l) in the following terms:

", 165(l) The Administrator may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act and, in particular -

- (a) providing for the payment of fees and expenses to witnesses required under this Act to attend and give evidence before the Authority or another person;
- (b) prescribing the manner in which fees or payments prescribed shall be paid;
- (c) specifying subdivisions to be excluded subdivisions;
- (d) amending the provisions of section 94 or 110;
- (e) providing for the inspection of a register of consents kept under this Act; and
- (f) prescribing penalties, not exceeding a fine of \$ 1.00, for offences against the regulations".

I have earlier set out the other relevant provisions, the definition of "town" in s.4(l) of the Planning Act and reg.5 of the Planning Regulations. The conjoint effect of reg.5 and of this definition is, as I have already said, to make a "town" of an area of land specified in Schedule 3 of the Planning Act and centred upon but more than thirty times larger than the present area of Darwin and which includes all of Cox Peninsula.

The first line of attack on reg.5

The first line of attack upon the validity of reg.5 takes an unusual form, prompted by unusual features of the Planning Act itself. Delegated legislation is commonly attacked as ultra vires because it deals with a subject beyond the scope of the regulation-making power, because, as Isaacs J. said in *Carbines v. Powell* (1925) 36 C.L.R. 88, it supplements rather than complements the granted power. Not so in the present case: the Council relies rather upon the complete inutility of the regulation to take it outside the scope of the granted power. That this inutility stems not so much from the character of the regulation as from the statutory definition of "town" itself is said to be no obstacle to this view.

The attack begins by showing the definition of "town" to have no purpose since the Act contains no provision which operates in terms of towns: the word "town" nowhere appears in the legislation once the definition section is passed until the last of its nine Parts, Part IX headed "Transitional", is reached. In that Part "town" frequently appears, but always as a descriptive substantive, preceding either "planning scheme" or "plan", each referring to planning instruments in force or proposed under the previous town planning legislation. Although the Act legislates exclusively in terms of planning instruments which may be either regional plans or town plans, nothing seems to turn upon this distinction.

The Council seizes upon the definition's apparent lack of purpose: if it be purposeless to define "town", reg.5, which does no more than extend the meaning of that useless definition, must be equally lacking in utility. While the statutory definition, being part of the Act, cannot be attacked for inutility, that same inutility, communicated by it to the regulation, will make the latter ultra vires the regulation-making power conferred by s.165(1). That power is confined to the prescription of matters "required" or "permitted" by the Act to be prescribed or "necessary" or "convenient" to be prescribed "for carrying out or giving effect to this Act". This last phrase is said to qualify the whole grant of power, not merely its second limb, and because the regulation, being inutile, neither carries out nor gives effect to the Act it is beyond power.

The opening words of the grant of regulation-making power in s. 165 are in a form long familiar in Commonwealth legislation. They seem in the past to have been understood as involving two distinct limbs, the concluding phrase, "for carrying out or giving effect to this Act", being treated as forming part of the second limb only, as explanatory of what is "necessary" or "convenient" in the second limb and as inapplicable to "required" or "permitted" appearing in the first limb - *Carbines v. Powell* per Isaacs J. at p.92, *Broadcasting Co. of Australia Pty Ltd v. The Commonwealth* (1935) 52 C.L.R. 52 per Rich J. at p.63 and see *Reade v. Smith* (1959) N.Z.L.R. 996 per Turner J. at p.999. However, let it be accepted, as the Council contends, that each exercise of the regulation-making power must be "for carrying out or giving effect" to the Act: I am nevertheless unable to accept the view that to prescribe that which adds to the meaning of a word not fully defined in the Act, doing so in the manner contemplated by the terms of that statutory definition, can ever be said not to carry out or give effect to the Act because inutile. The inutility of the statutory definition itself, both before and after its meaning has been added to in this way, is irrelevant for this purpose: the definition itself stands inviolate against attack as purposeless, and for the regulation to add to its meaning in the manner which the statute contemplates is, I think, sufficient to bring it within power. An amendment made to the Act in 1980, by which a new s.60A was

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inserted, serves to illustrate how reg.5 has itself never lacked utility. Section 60A contemplates planning instruments which relate to land within a town and although its insertion in the Act cannot, as it were, retrospectively confer utility ab initio upon the statutory definition of "town", it does demonstrate how reg.5 from its inception served the purpose of giving "town" an expanded meaning. That for some years the operation of the Act did not make use of that expanded meaning is not to the point.

The second line of attack on reg.5

There remains the Council's second line of attack on validity of the regulation. This is the attack which the Commissioner stopped in its tracks when he rejected the Council's application for discovery of Administration documents. While accepting that on its face the regulation is within power, the Council seeks to show that, because it was made for a purpose extraneous to the purpose for which the regulation-making power was conferred, the regulation was made in excess of power and is accordingly ultra vires.

The Commissioner acted as he did because he held that the Administrator was the Crown's representative in the Territory and that, as such, the purpose which actuated his exercise of power under s.165 was immune from any examination by the courts. The Council contends that the Administrator is only a servant of the Crown, not its representative, and in that capacity possesses no immunity. It also makes the broader submission that, even if he be its representative, the suggested immunity does not exist. If this broader submission be correct, as I think it is, the other becomes irrelevant. I accordingly turn to that broader submission.

Minister's decisions open to attack for purpose

It is now well established that both the exercise and non-exercise by Ministers of the Crown of discretionary powers vested in them are subject to judicial review, which extends to the examination of the reasons which led to the Minister's exercise or non-exercise of his power - *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) A.C. 997 especially per Lord Reid at pp.1032-1034, Lord Morris at p.1041, Lord Hodson at pp.1045-6 and 1049, Lord Pearce at pp. 1053-4 and Lord Upjohn at pp. 1060-1062. As Lord Pearce pointed out at p.1053, a Minister cannot in his discretion "set aside for his period as Minister the obvious intention of Parliament"; he must rather "use his discretion to promote Parliament's intention" - at p.1054. In *Congreve v. Home Office* (1976) 1 Q.B. 629, Lord Denning M.R. observed at p.649 that a Minister's discretionary power must be uninfluenced "by any ulterior motives"; and see per Roskill L.J. at pp.65 7-9. See also *Laker Airways v. Department of Trade* (1977) 1 Q.B. 643 at p.707 per Lord Denning M.R. and the recent case

of Secretary of State for Education and Science v. Tarnside Metropolitan Borough Council (1977) A.C. 1014, where Lord Wilberforce observed at p. 1047 that the courts will ensure that a discretionary power given to a minister has not been exercised "outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact" - and see per Viscount Dilhorne at p.1062, Lord Diplock at pp.1064-5, Lord Salmon at p.1071 and Lord Russell at p.1074. In this Court modern instances are provided by Television Corporation Ltd v. The Commonwealth (1963) 109 C.L.R. 59 and by Murphyores Inc. Pty Ltd v. The Commonwealth (1976) 136 C.L.R. 1, per Barwick C.J. at p.6, per McTiernan J. at p.8, Gibbs J., at p.9, and Murphy J. at p.26. In Murphyores it was the exercise of discretion by the Minister of State for Minerals and Energy that was in question and Mason J. said, at p.23,

"There remains for consideration the plaintiffs' argument based on the scope and purpose of the Customs Act and the Customs (Prohibited Export) Regulations. It was said, correctly, that the subject matter and the scope and purpose of a statutory enactment may enable a court to pronounce the reasons given for the exercise of a statutory discretion to be extraneous to any objects the legislature had in mind . . .".

In that case I said of the Minister's statutory powers, at p. 12,

"So much for the constitutionality of a decision whether or not to relax a prohibition upon export. A quite distinct question also arises: has the maker of the decision duly exercised his decision-making power or, on the contrary, is his decision vitiated by the nature of the considerations, extraneous to the power conferred, to which he has had regard in arriving at that decision? This question must depend for its answer primarily upon the legislation which confers the power. Where the extent of the power is delineated, perhaps by specific enumeration of matters to be considered, perhaps as a result of implications which may be drawn from the subject matter dealt with, the courts will relieve against excesses of power affecting the rights of a subject. It will be seldom, if ever, that the extent of the power cannot be seen to exclude from consideration by a decision-maker all corrupt or entirely personal and whimsical considerations, considerations which are unconnected with proper governmental administration; his decision will not be a bona fide one since these considerations will, on their face, not be such as the legislation permits him to have regard to. In other instances the task for the court will be to discern what restraints, if any, the legislation places upon considerations to which he may have had regard".

What of decisions of the Crown's representative?

It is accordingly clear that had reg.5 been made by a Minister of the Northern Territory Government it would have been open to the Council to seek to show that the regulation was beyond power because made for a purpose other

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than that for which the power was granted. Having in fact been made by the Administrator-in-Council the same question arises which confronted the Ontario Divisional Court in *Re Doctors' Hospital and Minister of Health* (1976) 68 D.L.R. (3d) 220 at p.230: does it make any difference in law that the relevant power was one exercised not by a Minister of the Crown but by the representative of the Crown upon the advice of his Ministers? To that question I would give the answer "No", as did the Ontario Divisional Court, which held that, whether it be Minister or Lieutenant-Governor in whom discretionary power is vested by statute, its exercise will be "subject to Court review". Where a Parliament confers powers they will seldom if ever be conferred in gross, devoid of purposes or criteria, express or implied, by reference to which they are intended to be exercised. Unless a Parliament, acting constitutionally, can be seen from the terms of its grant of power to have excluded judicial review, the Courts will, at the instance of a litigant, examine the exercise of powers so granted, determining whether their exercise is within the scope of Parliament's grant of power. This will be so whether the grant of power be to the representative of the Crown, to a Minister of the Crown or to some other body or person.

The Commissioner, in rejecting the Council's application for discovery of Administration records, took a view of the examinability of the exercise of power by the Administrator-in-Council quite different from that which I have expressed. He did so in reliance upon "a line of authorities beginning with *Duncan v. Theodore* (1917) 23 C.L.R. 510", which he regarded as establishing that "the Courts will not enquire into the reason why the Crown or its representative exercised a particular regulation-making power and bad faith may not be imputed to them".

The Australian cases

It is the joint judgement of Isaacs and Powers JJ. in *Duncan v. Theodore* which has provided the basis for much of what has subsequently been said in Australia concerning the examinability of the exercise of power by representatives of the Crown. This is despite the fact that what their Honours said was both brief and obiter. It was obiter because their Honours held that there was no evidence fit to go to a jury to support a finding that the proclamation of the Governor-in-Council there in question was issued *mala fide*. Its brevity may be demonstrated by setting out the relevant passage in full: It reads:

"But in our opinion it is not open to impute *niala fides* with respect to the issue of a royal Proclamation, which is the act of the King by himself or his representative".

There are three comments to be made concerning this passage. The first is that when *Duncan v. Theodore* was successfully appealed to their Lordships - (1919) 26 C.L.R. 276, the dissenting joint judgement of Isaacs and Powers JJ. being upheld, this question of immunity of the Crown's representative was not dealt with. Indeed the judgement, delivered by Lord Haldane, appears to attach no significance to the fact that the proclamations in question were made by the representative of the Crown, throughout it is to "the Queensland Ministry" or to "Ministers" that reference is made - see especially at p.282.

The second is that by their use of the term "mala fides" their Honours would seem to have intended to confine the immunity to cases where actual dishonesty is sought to be imputed. This emerges from the judgement of Isaacs J. - a few years later in *Jones v. Metropolitan Meat Industry Board* (1925) 37 C.L.R. 252, where his Honour said at pp.263-4,

"The good faith, which is the antithesis of fraud in this connection, is that which is required in the common law sense in relation to the legal exercise of statutory powers, and is not dependent on any doctrine of equity. It is wholly distinct from the notion of mistakenly pursuing a by-purpose. Such a pursuit may in this connection be honest or dishonest. The body pursuing it may genuinely avow it, thinking it permissible. There the action adopted may be ultra vires, but not mala fide. On the other hand, there may be a pretended pursuit of a legitimate purpose that is mala fide".

Again in *Werribee Council v. Kerr* (1928) 42 C.L.R. 1 at pp.8-9 his Honour emphasised the distinction between "honest error and dishonest design", only the latter involving want of bona fides. At least to Isaacs J. "mala fides" seems in *Duncan v. Theodore* to have signified actual dishonesty and not the mistaken pursuit of a by-purpose.

Thirdly, Isaacs J. appears elsewhere to have contemplated that this immunity extended equally and without distinction to Ministers of the Crown and to its representatives. Thus in *James v. Cowan* (1930) 43 C.L.R. 386, a case of Ministerial discretionary action, his Honour, having once again distinguished between immunity from examination for good faith and the absence of such immunity where "what is really excess of power" is in question, said at pAl 1:

"You cannot challenge the Minister's bona fides on the ground of dishonesty at all - that, in my opinion, can never be imputed to the King's Executive".

This wide view of immunity, extending to Ministers, no longer finds support in the modern authorities earlier referred to.

Before leaving *Duncan v. Theodore* and the judgement of Isaacs J. in *James v. Cowan* I should mention the view taken by Latham C.J. in *Arthur Yates & Co. Pty Ltd v. The Vegetable Seeds Committee* (1945) 72 C.L.R. 37 of their

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Lordships' judgements in these two cases. The Chief Justice, after citing what Isaacs J. had said in *James v. Cowan*, said this at p.65:

"But it may be noted that the Privy Council in *James v. Cowan* (1932) 47 C.L.R. 386 at p.395 said that, in view of the finding of the trial judge, 'their Lordships do not think it would be right to adopt any view of the facts which would appear to suggest bad faith on the part of the Minister or his advisers'. Apparently their Lordships did not regard the existence of bad faith on the part of Ministers as a fact which could not be proved or which would be irrelevant if it were proved. So also in *Theodore v. Duncan* (1919) 26 C.L.R. 276, at p.282, their Lordships of the Privy Council said, while referring to the fact that Ministers are responsible for the exercise of their functions to the Crown and to Parliament only, that 'it cannot be assumed that the Queensland Ministry would have acted in any fashion inconsistent with such duty as they had been entrusted with by the representative of the Sovereign'. This statement does not go so far as to say that it could not have been proved that Ministers have acted otherwise than in good faith. See also *The Crown v. McNeil* (1922) 31 C.L.R. 76, where a case depending upon allegations of fraud against the Crown was dealt with without any suggestion that the Crown was incapable of fraud. It may, therefore, be that evidence of dishonesty in the case of an individual Minister may be admissible for the purpose even of invalidating a legislative act which he is authorised to perform; but it is not necessary to decide this question in the present case".

In *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* (1931) 46 C.L.R. 73, regulations made by the Governor-General on the advice of the Federal Executive Council were attacked as an abuse of power and hence ultra vires. In rejecting this argument Gavan Duffy C.J. and Starke J. concluded that the only remedy for such abuse was by political action - p.83: not, however, because of any particular immunity of the representative of the Crown: it was of "the Executive" and "the Executive Government" that they spoke as being amenable only through political action. For Rich J., at p.87, it was the legislative character of the grant of power which prevented "the reasons and motives of the donee" of the power from affecting validity. His Honour eschewed what would have provided a short and conclusive answer to the plaintiff's attack based upon the Governor-General's reasons for making the regulations, his immunity as Crown representative. Dixon J., at p.100, seems to have regarded the ample terms of the grant of power as the cause of unexaminability of "the ends to be achieved and the policy to be pursued as well as the means to be adopted". At p.104 he emphasised "the legislative character of the function entrusted to the Governor-General-in-Council" saying that "His discretionary power over the subject is as unqualified as that of a legislature, and the actual grounds upon which it is exercised are, therefore, immaterial". For Evatt J. it was an open question whether the exercise of power could be reviewed by the courts for want of good faith. He said at

p. 129 that had actual bad faith been alleged it "would give rise to a very grave constitutional question as to whether it is possible to impute want of good faith to the King's representative or the King's advisers, for the purpose of nullifying executive acts performed in the name of the King or his representative". His Honour seems to have regarded the advisers of the Crown as in no different position from the Crown's representative; it was the executive acts which each performed which for him formed the true subject matter of the constitutional question.

What was said by Dixon J. in two later cases, the Vegetable Seeds case and the Australian Communist Party v. The Commonwealth (1951) 83 C.L.R. 1, has been much cited. In the Vegetable Seeds case Dixon J., after distinguishing American doctrine, which makes the legislative character of the measure the criterion of immunity from judicial examination of good faith, said, at p.81:

"But in English law the position is not quite the same. Our distinctions are concerned rather with the status, composition and purposes of the body, with the difference between bad faith and ultra vires objects and with the precise provisions of the legislation under which the power arises and with the grounds for judicial review they afford".

Acts of Parliament, whether private or public, were, he said, immune. So too were legislative and executive acts formally done in the name of the Crown; they stood in a special position. For this his Honour cited what had been said by Isaacs and Power JJ. in *Duncan v. Theodore* and, curiously enough, the passage from their Lordships' judgement referred to by Latham C.J., of the significance of which the latter took a very different view.

I have already referred to the contrasting views expressed by Latham C.J. in the Vegetable Seeds case. His Honour, in the passage at pp.64-65 which I have already cited, does not appear to draw any distinction between the Crown's representative and Ministers of the Crown. He does distinguish between legislative and administrative acts but concludes, at p.67, that even if the orders of the Vegetable Seeds Committee be legislative in character ". . . it does not necessarily follow that the orders themselves are actual laws to which the rule mentioned should be applied", that protection which political sanctions offer against abuse of power by those who must face an electorate being absent in the case of the Committee. Rich J., at p.73, upheld the Court's power to examine what he termed the bona fides of legislation made by the King or his representative, limiting it however to a consideration of "whether its terms are such that the act is a real or only an ostensible exercise" of the power purported to be exercised. In relation to the acts of the Minister, a servant of the Crown, his Honour, like Latham C.J., had difficulty in accepting what had been said by Isaacs J. in *James v. Cowan*: he doubted that a court was precluded from examining a charge of dishonesty in the exercise of statutory power conferred

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upon a Minister or statutory body. Starke J., at p.74, observed that attacks upon the validity of the acts of legislative bodies such as the Commonwealth Parliament must necessarily be confined to the question of ultra vires and did not extend to "the motives, the reasons and bona fides". As to the point here in issue he said only that "It may be that orders in council made pursuant to statutory authority fall within this category".

In the Australian Communist Party case Dixon J. said, at pp. 178-9:

"In the case of the Governor-General in Council it is not possible to go behind such an executive act done in due form of law and impugn its validity upon the ground that the decision upon which it is founded has been reached improperly, whether because extraneous considerations were taken into account or because there was some misconception of the meaning or application, as a court would view it, of the statutory description of the matters of which the Governor-General in Council should be satisfied or because of some other supposed miscarriage. The prerogative writs do not lie to the Governor-General. The good faith of any of his acts as representative of the Crown cannot be questioned in a court of law (*Duncan v. Theodore* (1917) 23 C.L.R. 510 at p.544). An order, proclamation or declaration of the Governor-General in Council is the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown".

However, the views of other members of the Court were by no means consistent with those of Dixon J. Latham C.J. in his dissenting judgement appears to accept that the Governor-General's opinion is not per se immune from examination - at p. 158. That this view was not confined to that dissenting judgement seems to follow from the reasoning adopted in a number of the other judgements. While they concluded that in the instant case such examination was excluded they, unlike Dixon J., based that conclusion exclusively upon the particular terms of the legislation, which they regarded as conferring an absolute discretion upon the Governor-General. Their failure to attribute unexaminability to the special status of the Governor-General is in high contrast to the approach of Dixon J.; it gains added significance from the fact that were such status enough to bar judicial examination it would have provided a succinct and conclusive basis for the conclusion to which in that case each of them came: I refer to the judgements of McTiernan J. at pp.210-211, of Williams J. at pp.221 - 222 and of Kitto J. at pp.279-289. Only Fullagar J. appears to share the view of Dixon J. and only he joins in relying upon *Duncan v. Theodore* for the proposition as to unexaminability.

Australian courts and commentators have, like the Commissioner in the present case, tended to regard these decisions in this Court as establishing that the Crown's representative is immune from examination for purpose: the cases are cited and discussed by Professor Hogg in his comprehensive article in

.43 A.L.J. 215 and more recently in Whitmore & Aronson's Review of Administration Action (1978) pp.198-214 and in Sykes, Lanham and Tracey's Administrative Law (1979) at pp.64-65. This view has been adopted despite the now undoubted examinability for purpose of Ministerial decisions and the readiness with which acts of the Crown's representative have always been examinable for ultra vires.

For my part, I regard the cases in this Court, of which I have discussed only those most directly in point, as leaving the matter very much at large in point of authority.

#### British and Commonwealth authorities

Decisions of their Lordships and of other Commonwealth Courts over the past thirty years strongly favour the absence of such immunity. I have already referred to English authority establishing that decisions of Ministers of the Crown are examinable for purpose. Such examinability does not stop short at Ministers of the Crown, it also extends to representatives of the Crown exercising statutory powers upon the advice of their Ministers. In *Attorney-General for Canada v. Hallet & Carey Ltd* (1952) A.C. 427 Lord Radcliffe, delivering the judgement of their Lordships, was concerned with war-time powers conferred in Canada upon the Governor-General-in-Council to make such orders and regulations as he deemed necessary or advisable for certain specified purposes.

The challenged order, vesting wheat in a Board, recited the war-time emergency as making necessary such vesting. Lord Radcliffe, while making it clear that the instant case was not one. "in which powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorised or actually forbidden", said of such a case, at p.444, that "If bad faith of that kind can be established, a court of law may intervene: see, for instance, *Lower Mainland Dairy Products Board v. Turner's Dairy Ltd* (1941) S.C.R. 573".

In *Chandler v. Director of Public Prosecutions* (1964) A.C. 763 Lord Devlin spoke of the extent to which Courts may enquire into the proper exercise of discretionary powers conferred by statute. Without in any way distinguishing between them he dealt with such powers conferred upon the Crown itself, upon one of its Ministers or upon a public body. He said, at p.810:

"The courts will not review the proper exercise of discretionary power but they will intervene to correct excess or abuse. This is a familiar doctrine in connection with statutory powers. In relation to the prerogative, it was expressed by Warrington U. in *In re A Petition of Right* [1915] 3 K.B. 649, 666, in the proviso which he made to W's general statement of principle".

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That proviso had been expressed by Warrington L.J. in these terms: provided that they (the competent authorities) act reasonably and in good faith". Lord Devlin went on to say that where the Crown or a Minister has a discretionary power to requisition goods or land as necessary for a particular purpose the Court would not canvass the question of necessity which the Minister had decided for himself:

"It is said that in such cases the Minister's statement is conclusive. Certainly: but conclusive of what? Conclusive, in the absence of any allegation of bad faith or abuse, that he does think what he says he thinks. The court refrains from any inquiry into the question whether the goods are, in fact, necessary, not because it is bound to accept the statement of the Crown that they are, and to find accordingly, but because that is not the question which it has to decide".

In *Ningkan v. Government of Malaysia* (1970) A.C. 379 there had been the proclamation of a state of emergency by the Supreme Head of the Federation of Malaysia on the advice of the Federal Cabinet. Its validity was challenged upon the ground that the "proclamation was in fraudem legis in that it was made not to deal with grave emergency . . . but for the purpose of removing" the appellant from office - at p.389. Issue was joined on this allegation and it was also said that the allegation was not justiciable, the proclamation being conclusive and not assailable on any ground. Their Lordships did not determine the question of justiciability, which they described as "a constitutional question of far-reaching importance which, on the present state of the authorities, remains unsettled and debatable" and better to be determined in proceedings in which a decision upon it was necessary - at p.392. Instead they disposed of the appeal by examining the allegation of mala fides. They concluded that the plaintiff had failed to discharge the onus of showing that the "Government was acting erroneously or in any way mala fide" in taking the view that there was an emergency calling for immediate action. The appellant had "failed to satisfy the Board that the steps taken by the Government ... were in fraudem legis or otherwise unauthorised by the relevant legislation" - at p.391.

The recent cases of *McEldowney v. Forde* (1971) A.C. 632 and of *Tameside* did not involve a representative of the Crown. They were United Kingdom cases in which power had been conferred upon Ministers, but, as the earlier decisions show, no distinction seems to have been drawn on this ground. In *McEldowney* the observations of Lord Diplock at pp.659-661, in the course of which he cites *Attorney-General for Canada v. Hallett & Carey Ltd* (which did concern the representative of the Crown) and in *Tameside* those of Lord Wilberforce at p.1047 are particularly in point. In the latter passage Lord Wilberforce said:

"(2)The section is framed in a 'subjective' form - if the Secretary of State 'is satisfied'. This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgement. But I do not think that they go further than that. If a judgement requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgement has been made upon a proper self-direction as to those facts, whether the judgement has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgement, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment v. ASLEF (No. 2)* [1972] 2 Q.B. 455, per Lord Denning M.R., at p.493.

(3) The section has to be considered within the structure of the Act. In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at".

This passage is noteworthy since it is directed to the case of a grant of power which took a "subjective" form, which might be thought to render it less appropriate to judicial review than a grant in the form of s.165(l) of the Planning Act.

Two New Zealand cases are of particular interest. In *Reade v. Smith* (1959) N.Z.L.R. 996 a regulation made by the Governor-General under a power very similar to that conferred in the present case by s.165(l) was in question. Turner J. rejected a submission that a power to make regulations "generally for all purposes which he (the Governor-General) thinks necessary in order to secure the due administration of the Act", conferred a complete and unexaminable discretion - at p.999. His Honour referred to *Liversidge v. Anderson* (1942) A.C. 206, as instancing those cases concerned with war-time regulations which "must, in my opinion, be carefully examined before being used too hastily as a touchstone for the validity of regulations made under more normal conditions" - at p. 1000. His Honour concluded that "the Court may, in my view, always inquire, in any case, whether the Governor-General (or the Minister as the case may be) could reasonably have formed any opinion, on law or on fact, which is set up as a foundation of the regulations" - at p.1001.

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His Honour's entire judgement repays careful study but for present purposes it is enough to cite two further passages, both at p. 1002. In the first his Honour said:

"It cannot be, and, in my view, never has been, the law that where such words as those before me are found in an enabling statute, the opinion of the Governor-General is to be taken as conclusively governing the matter. As Lord Radcliffe said in delivering their Lordships' judgement in *Nakkuda Ali v. Jayaratne* [1951] A.C. 66: 'After all, words such as these are commonly found when a Legislature or law-making authority confers powers on a minister or official. However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. But if the question whether the condition has been satisfied is to be conclusively decided by the man who wields the power, the value of the intended restraint is in effect nothing'."

Later his Honour said:

"I emphatically reject the contention that the question whether the condition has been satisfied can be 'conclusively decided by the man who wields the power'. In a time in which the individual citizen is every day confronted with some new legislation by regulation, it is imperatively necessary for the Courts to retain and to exercise the salutary jurisdiction which enables them to protect the liberty of the subject ... I apply it and hold that the words

'for any purposes which the [Governor-General] thinks necessary to secure the due administration of the Act.'

lay upon me the duty of inquiring whether the purposes of the regulation could reasonably as a matter of law have been considered by the Governor-General to be necessary in order to secure the due administration of the Act; and if the regulation cannot pass this test, it will become my duty to declare that it is ultra vires and void."

In *Labour Department v. Merrit Beazley Homes Ltd* (1976) 1 N.Z.L.R. 505 Mahon J. applied *Reade v. Smith* and the Privy Council's decision in *Attorney-General for Canada v. Hallett & Carey Ltd* to a case of regulations made by the Governor-General-in-Council under a power similar to that conferred by s.165(1), concluding that the regulation could not in fact be regarded as "necessary or expedient for giving full effect to the provision of the Act" - at p.507 and had accordingly been made in consequence of "a misconstruction of the legal effect of the statute" by the Governor-General-in-Council. The "effectuated opinion of the Executive" which the regulation represented was accordingly to be treated as if it did not exist - at p.508.

In Canada there is a wealth of authority for the proposition that the actions of the representative of the Crown, taken pursuant to discretionary powers conferred by statute, may be examined by the Courts and will be declared void if vitiated by the existence of a purpose alien to the grant of power. In the Supreme Court *Price Bros & Co. v. The Board of Commerce of Canada* (1920) 54 D.L.R. 286 and *Roncarelli v. Duplessis* (1959) 16 D.L.R. (2d) 689 provide instances. In the former an Order in Council made by the Governor-in-Council shortly after the war but under still subsisting war-time emergency powers was held invalid because the circumstances were such that it could only have been made in bad faith or under an erroneous impression that the power might be exercised despite an absence of belief that its exercise was necessary for the security of Canada. Anglin J. said, at p.297,

"Confronted with the alternatives of an imputation of bad faith or of finding that there has been an attempted exercise of power through overlooking, or under a mistaken view as to the effect of, a condition requisite for its exercise imposed by the Act conferring it, I have no hesitation in choosing the latter".

It had been unsuccessfully submitted that such Orders in Council were un-examinable but as Duff J. observed, at p.291

"I think such orders are reviewable, in this sense that when in a proper proceeding the validity of them is called into question, it is the duty of a Court of Justice to consider and decide whether the conditions of jurisdiction are fulfilled and if they are not being fulfilled, to pronounce the sentence of the law upon the illegal order".

*Roncarelli* was not itself concerned with the case of a representative of the Crown but has since been applied to such a case - *Re Heppner and Minister of the Environment for Alberta* (1977) 80 D.L.R. (3d) 112, no distinction being drawn in the Canadian cases between servants and representatives of the Crown. In *Roncarelli* Rand J. said, at p.705,

". . . no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption".

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The recent decision of the Appellate Division of the Alberta Supreme Court in *Re Heppner* provides a particularly apt analogy to the present case. It concerned an Order in Council of the Governor under environmental legislation which was held invalid because although on its face within power it was proved to have been made for a purpose alien to the legislation; see especially at pp. 117-120. See also *Re Doctors' Hospital and Minister of Health* earlier referred to, a further instance of a decision of a Lieutenant-Governor-in-Council, on its face within power, being held to have been vitiated because the discretionary power was exercised otherwise than "in pursuance of the objects and policy of the Act" - at p.232.

#### Conclusion on examinability

The trend of decisions in British and Commonwealth courts has encouraged me to conclude that, in the unsettled state of Australian authority, the validity of reg.5 was open to be attacked in the manner attempted by the Council. Such a view appears to me to be in accord with principle. It involves no intrusion by the courts into the sphere either of the legislature or of the executive. It ensures that, just as legislatures of constitutionally limited competence must remain within their limits of power, so too must the executive, the exercise by it of power granted to it by the legislature being confined to the purposes for which it was granted. In drawing no distinction of principle between the acts of the representative of the Crown and those of Ministers of the Crown it recognises that in the exercise of statutory powers the former acts upon the advice of the latter: as Latham C.J. said in the *Australian Communist Party* case, at p. 158, the opinion of the Queen's representative "is really the opinion of the Government of the day". That this is so in the Northern Territory appears from s.33 of the Northern Territory (Self-Government) Act 1978. I have already referred to the possibility of a legislature by appropriate words excluding judicial review of the nature here in question. The terms of the present grant of power conferred by s. 165(1) are devoid of any suggestion of such exclusion. It follows that if it be shown that a regulation made under that power was made for a purpose wholly alien to the Planning Act it will be ultra vires the power and will be so treated by the courts.

#### Consequences of this conclusion

This Court should not, I think, attempt in the abstract to define and describe the precise limits of the regulation-making power conferred by s. 165(1). It will be for the Council to adduce before the Commissioner such evidence as it can in support of its allegations of improper purpose, the Commissioner then determining in the light of that evidence whether or not reg.5 was in fact made within the scope of the grant of power conferred by s. 165(1).

Because of the view taken by the Commissioner concerning the unexam-inability of the Administrator's exercise of regulation-making power his Honour declined to make an order under s.54 of the Aboriginal Land Rights (Northern Territory) Act 1976 for production of Administration documents. It follows from my conclusion as to examinability that his Honour was mistaken in the ground upon which he refused to make such an order. His refusal vitally affected the subsequent course of proceedings and will have affected its out-come if there be in fact Administration documents which, had they been tendered in evidence before the Commissioner, would have made good the Council's case as to improper purpose. In these circumstances mandamus should go, requiring the Commissioner to hear and determine according to law and it would also seem appropriate to grant certiorari, doing so upon the basis and for the reasons discussed by Gibbs J. in *Ex parte Twigg* (1980) 54 A.L.J.R. 515, at pp.519-520.

There remain only two matters which call for brief mention. Aspects of the Commissioner's approach to the onus of proof and to evidentiary matters were criticised in the course of the Council's submission. I do not propose to enter upon any consideration of that criticism. His Honour's approach was much affected by the exclusion from evidence of Administration documents. If discovery of such documents is granted and some are allowed in evidence and are to the effect hoped for by the Council this will so alter the complexion of the proceedings as to render largely irrelevant the aspects complained of by the Council. If, on the contrary, discovery of the documents does not lead to these consequences the complaints of the Council are not, in my view, such as to entitle it to the relief sought in this Court.

There was a further and independent submission made on behalf of the Council with which I should deal. It was that the Planning Act is not within the description of a "law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns" appearing in the definition of "town" in s.3(1) of the Aboriginal Land Rights (Northern Territory) Act 1976. In my view there is no substance in this submission. The Planning Act is, of course, part of the law of the Northern Territory. Its provisions may be applied to land anywhere in the Territory, whether in towns or in the bush. In that sense it is a law relating to the planning of towns and to the use of land in or near towns, although it relates equally to the planning of rural land. If that be not enough to bring the Planning Act within the description of such a law of the Northern Territory, and I think it is, a further step may be taken which resolves any doubt. The transitional provisions of Part IX of the Act, and in particular ss.171-173, deem existing and proposed town planning schemes under the earlier Town Planning Act to be planning instruments or draft planning instruments under the Planning Act. To that extent the Act is quite specifically a law of the Territory relating to the planning and developing of towns and the use of land in or near towns.

I would make the orders for mandamus and certiorari. No prohibition is called for.

MASON J. I am in agreement with the reasons for judgement prepared by Stephen J. However, having regard to the importance of the question, I shall state for myself the reasons why, on the assumption that the Administrator in Council is the Crown, reg. 5 is open to challenge on the ground that it was made for a purpose other than that for which the power was granted.

In my view the rule that the acts of the Crown or its representative cannot be impugned has no application to the exercise of a statutory discretion by the Crown in Council or by a Crown representative. The general rule, to the extent to which it now has any application at all, is confined to the exercise of prerogative powers.

The proposition that the acts of the Crown or its representative cannot be impugned, though limited in ambit, has, as might be expected, ancient authority to support it. It reflected the position of the Sovereign as the head and representative of the English state in the seventeenth century. It was only natural that it should be accepted and applied by the King's courts which evolved the doctrine that the King can do no wrong from the earlier rule that the Sovereign could not be sued in his own courts. Needless to say, the authorities related to the exercise of prerogative powers, the conferring of power on the Crown and its representatives by statute being of comparatively recent origin.

For the most part the rule was expressed in absolute or very wide terms.

Blackstone, in his Commentaries on the Laws of England (1809) Book 1p. 251 states

"In the exertion therefore of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution."

Chitty on Prerogatives of the Crown (1820) p. 6 says

"in the exercise of his lawful prerogatives an unbounded discretion is, generally speaking, left to the King;".

Even so, as de Smith points out in his Judicial Review of Administrative Action, 4th ed., p. 286, the courts in earlier times took it upon themselves to decide whether a particular prerogative power existed, what was its extent, whether it had been exercised in appropriate form and how far, if at all, it had been superseded by statute (see *The Case of Monopolies* (1602) 11 Co. Rep. 84b; 77 E.R. 1260; *Prohibitions del Roy* (1607) 12 Co. Rep. 63; 77 E.R. 1342; *Proclamations* (1611) 12 Co. Rep. 74; 77 E.R. 1352).

There was no doubt that an exercise of prerogative power was considered to be immune from attack for mala fides. Likewise, although the grounds on which exercise of a discretionary power might be set aside had not been fully elaborated and refined at that time, there is no doubt that an attack on the exercise of a prerogative power for improper purpose and inadequacy of grounds was regarded as inconsistent with accepted doctrine. So much at least emerges from the authorities which Gibbs J. and I discussed in *Barton v. The Queen* (1980) 32 A.L.R. 449. According to these authorities the prerogative discretions of the Attorney-General to enter a nolle prosequi, to grant or refuse a fiat in relator actions and to file an ex officio information are not subject to curial review (see. *Reg. v. Prosser* (1848) 11 Beav. 306; 50 E.R. 834; *Reg. v. Allen* (1862) 1 B. & S. 850; 121 E.R. 929; *London County Council v. Attorney-General* [1902] A.C. 165 at pp. 168-169, 170; *Reg. v. Labouchere* (1884) 12 Q.B.D. 320; *Reg. v. Comptroller-General of Patents, Designs and Trade Marks* [1899] 1 Q.B.D. 909 at p. 914; *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 at p. 488). The comments of Dixon J. in *Arthur Yates & Co. Pty. Ltd. v. The Vegetable Seeds Committee* (1945) 72 C.L.R. 37 at p. 82 and *Australian Communist Party v. The Commonwealth* (1951) 83 C.L.R. 1 at pp. 178-179 reflect this view.

Generally speaking the discussion in these and other cases proceeds on the footing that the exercise of prerogative power by the Attorney-General is unexaminable as such, without assigning any particular ground therefor. An exception is the statement of Dixon J. in the Communist Party case "The counsels of the Crown are secret" (at p. 179). Dixon J. was then dealing with a power conferred by statute of a Governor-General acting on the advice of the Executive Council; he was not dealing with the prerogative. He was however concerned to identify what he considered to be the reason underlying the general rule so as to justify the conclusion that the exercise of statutory power was not examinable. As we shall see, the view that the counsels of the Crown are secret is no longer an acceptable basis for excluding acts or decisions of the Crown from judicial review, but for the moment this question may be put to one side. Other bases which have been suggested for the rule, but not generally accepted, are the need to protect the administrative process from unnecessary judicial intervention and the sufficiency of the doctrine of ministerial responsibility - see the Communist Party case at pp. 221-222, per Williams J.

There is, as the commentators have noted, a contrast between the readiness of the courts to review a statutory discretion and their reluctance to review the prerogative. The difference in approach is none the less soundly based. The statutory discretion is in so many instances readily susceptible to judicial review for a variety of reasons. Its exercise very often affects the right of the citizen; there may be a duty to exercise the discretion one way or another; the discretion may be precisely limited in scope; it may be conferred for a specific

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or an ascertainable purpose; and it will be exercisable by reference to criteria or considerations express or implied. The prerogative powers lack some or an of these characteristics. Moreover, they are in some instances by reason of their very nature not susceptible of judicial review. See the list of prerogative powers in "The Courts and the Executive: Four House of Lords Decisions" by Philip Aflott (1977) C.L.J. 255 at pp. 267-268. See also the observations in *China Navigation Co. Ltd. v. Attorney-General* [1932] 2 K.B. 197 at pp. 214-215, 228, 242-243 and *Chandler v. Director of Public Prosecutions* [1964] A.C. 763 at pp. 790-792, 796, 800-801, 809-810, 814. They suggest that the refusal of the courts to review the exercise of the royal prerogatives relating to war and the armed services is based on the view that they are not, by reason of their character and their subject matter, susceptible of judicial review. It was for very much the same reason that this Court in *Barton v. The Queen* refused to review the decision of the Attorney-General for New South Wales to file an ex officio information under s. 5 of the Australian Courts Act 1828.

The foundations of the old rule have been undermined. Procedural reforms have overcome the Sovereign's immunity from suit which in turn was the source of the principle that the King can do no wrong. Appropriate as it is that this principle should apply to personal acts of the Sovereign, it is at least questionable whether it should now apply to acts affecting the rights of the citizen which, though undertaken in the name of the Sovereign or his representative, are in reality decisions of the executive government. In the exercise of the prerogative as in other matters the Sovereign and her representatives act in accordance with the advice of her Ministers. This has been one of the important elements in our constitutional development. The continued application of the Crown immunity rule to the exercise of prerogative power is a legal fiction.

An examination of the cases in which the courts have refused to examine the exercise of prerogative powers reveals that most, if not all, of the decisions, can be justified on the ground that the prerogative power in question was not, owing to its nature and subject matter, open to challenge for the reason put forward. The willingness, recently enunciated, of the courts to overrule a Minister's certificate in support of a claim of Crown privilege is an indication that the old rule has been eroded and that the ground stated above should now be recognised as the true basis of the cases on prerogative powers. Crown privilege was formerly regarded as an instance of the prerogative. It is now well settled that the Minister's claim is subject to judicial review and that the courts may look behind the certificate (*Sankey v. Whitlam* (1978) 142 C.L.R. 1). The force of the rule that the acts of the Crown or its representative cannot be impugned has been compromised by the modern authorities endorsing judicial review of the exercise of statutory discretions by the Crown, especially by Ministers of the Crown. Despite the tenor of some of the remarks in *Gouriet*,

there is much to be said for the view expressed by Lord Denning M.R. in *Laker Airways Ltd. v. Department of Trade* [ 1977] 2 W.L.R. 234 at p. 250 that the exercise of a discretionary prerogative power "can be examined by the courts just as any other discretionary power which is vested in the executive". The question would then remain whether the exercise of a particular prerogative power is susceptible of review and on what grounds. See "The Prerogative and Preventive Justice" by D.G.T. Williams [ 1977] C.L.J. 201 at p. 204. In these circumstances should the old rule be extended so as to apply to the exercise of statutory discretions? There are powerful reasons for saying "No". As we have seen, the foundations on which the legal fiction was built have crumbled. It has ceased to serve a useful purpose and it is out of harmony with the current approach of the courts to the review of statutory discretions.

The purposes said to be served by the rule are:

- (1) prevention of unnecessary judicial intervention in the administrative process; and
- (2) maintaining the secrecy of deliberations of the Crown.

Because the rule in terms makes no attempt to distinguish between judicial review which is legitimate and that which is illegitimate, there is an initial problem in ascertaining precisely what judicial intervention in relation to statutory powers it is supposed to exclude. Isaacs and Powers JJ. in *Duncan v. Theodore* (1917) 23 C.L.R. 510 at p. 544 and Isaacs J. in *James v. Cowan* (1930) 43 C.L.R. 386 at p. 411 said that the act of the Governor or a Minister is immune from attack for mala fides, but evidently not on other grounds. Another approach was that of Jacobs J.A. (dissenting) in *N.S.W. Mining Co. Pty. Ltd. v. Attorney-General for N.S.W.* (1967) 67 S.R. (N.S.W.) 341 at p. 357. His Honour stated that where the subject matter of consideration is placed in general terms within the discretion of the Governor in Council,

"The reasonableness or bona fides of the act ... cannot be challenged, nor does it make any difference if it can be shown that some element in the purpose of the decision is based on a misapprehension of the law. If it were otherwise the path of the Crown, the executive government, would be so strait that no government could walk it. In the case of most executive decisions the reasons for the decisions are peculiarly a matter for the executive and the law governing decisions of public corporations of limited powers or decisions of quasi-judicial tribunals cannot be applied to executive decisions."

However, his Honour thought that a decision of the Governor in Council was open to challenge on the ground that it was contrary to law.

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It is, I think, unjust and unacceptable to deny review for mala fides and for misapprehension of the law, more particularly, if it be conceded, as it must be, that the courts are entitled to review for purpose the exercise of a purposive power by the Governor-General in Council. Unfortunately bad faith may take the form of a false recital of a legitimate purpose to disguise the pursuit of an object outside the scope of the power (Arthur Yates at p. 83). There seems to be no good reason for drawing, as Jacobs J.A. suggested, a distinction between the Governor in Council and subordinate officials. Nor, with respect, is there much substance in the notion that the process of the government would grind to a halt if decisions were open to review on those grounds. This does not appear to have been the result of the Canadian experience to which I shall refer later.

The purpose of preventing unnecessary judicial intervention is better achieved, and achieved with greater fairness to the citizen, by denying review in those cases in which the particular exercise of power is not susceptible of the review sought. Likewise, the old rule does not conform to the modern notions of freedom of information and secrecy. See *Attorney-General v. Jonathan Cape Ltd.* [1976] 1 Q.13. 752 and *The Commonwealth v. John Fairfax & Sons Ltd.* (1980) 32 A.L.R. 485. *Sankey v. Whiflam* shows that proceedings of the Executive Council and documents relating thereto are not privileged from production unless their non-disclosure is necessary for the protection of the public interest and that public interest outweighs the public interest in the proper administration of justice.

To these remarks I should add the comment that the doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.

I acknowledge that the modern development of the law as it affects the exercise of statutory powers conferred on the Crown and its representatives provides some instances on which the courts have applied the traditional rule that the acts of the Crown and its representatives are not examinable. Quite apart from the *Communist Party* case and the *N. S. W. Mining Co.* case there are *McGowan v. Bundaberg Harbour Board* [ 1960] Qd.R. 5; *Reg. v. Martin* (1967) 67 S.R. (N.S.W.) 404; *Ex parte R. on the relation of Warringah Shire Council and Jones*; *Re Barnett* [ 1967] 2 N.S.W.R. 746. In all these cases the Courts applied to powers exercisable by the Governor or the Governor in Council the comments made by Dixon J. in the *Communist Party* case, generally without further exposition of reasons justifying the existence of the rule and its application to statutory discretions.

In *Barnett* it was held that the *audi alteram partem* rule had no application to the Governor in Council. The decision appears to be inconsistent with *De Verteuil v. Knaggs* [1918] A.C. 557; *Wilson v. Esquimalt and Nanaimo Railway Co.* [1922] 1 A.C. 202; *Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222 at p. 241; *Treasury Gate Pty. Ltd. v. Rice* [1972] V.R. 148 at p. 162. *De Verteuil v. Knaggs* was distinguished in *Barnett* on the unsatisfactory ground that the Governor in that case was acting as an administrative officer in a colony, whereas "the Governor of an Australian State is a Vice-Regent exercising the powers of the Sovereign with the advice of the Executive-Council" (p. 749). K.C. Wheare in *Constitutional Structure of the Commonwealth* notes that

"in a dependent territory, the Governor is not only the representative of the Queen, but the representative of Her Majesty's Government also."

(see p. 24). There is of course a change of status in the position of the Governor when the colony becomes independent in that he is no longer subject to the instructions of the United Kingdom Government and acts on the advice of his local Ministers. However, he continues to act as the representative of the Sovereign. Although the natural justice cases may stand in a special position, it is not easy to accept that a decision of the Governor in Council open to challenge for denial of natural justice is immune to challenge for *mala fides* and for purpose where those grounds are appropriate.

Stephen J. has pointed out that there are many recent decisions and statements made by courts of high authority in Australia, the United Kingdom, Canada and New Zealand, which proceed on the footing that the old rule has no application to the exercise of statutory powers. For the most part they are cases in which the courts have examined the exercise of a statutory discretion by a Minister of the Crown (see, for example, *Television Corporation Ltd. v. The Commonwealth* (1963) 109 C.L.R. 59; *Murphyores Incorporated Pty. Ltd v. The Commonwealth* (1976) 136 C.L.R. 1; *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014. Others are cases which examine the exercise of a statutory power or discretion by the Governor-General in Council or the Governor in Council (see for example *Banks* at p. 241; *Attorney-General for Canada v. Hallet & Carey Ltd.* [1952] A.C. 427; *Reade v. Smith* [1959] N.Z.L.R. 996; *Price Bros. and Co. v. The Board of Commerce of Canada* (1920) 54 D.L.R. 286; *Re Heppner and Minister of the Environment for Alberta* (1977) 80 D.L.R. (3d) 112).

It may now be taken as accepted that the courts will review the exercise of a statutory discretion vested in a Minister of the Crown. It has been assumed, if not recognised, that the Crown representative rule has no application to the

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exercise by a Minister of such a discretion. But as we have already seen, there is a controversy as to the application of the rule to statutory powers vested in the Governor-General or Governor in Council.

The authorities supporting the application of the rule are mainly Australian, the later authorities drawing their inspiration from the observations of Dixon J. in the Communist Party case. These observations proceed on the footing that the rule applied to the exercise of the prerogative, that no discretion is to be drawn between prerogative and statutory discretions and that the rule was based on the need to preserve the secrecy of the deliberations of the Crown. For the reasons already given this approach is unacceptable. The cases which deny the application of the rule to the exercise of a statutory discretion by the Governor-General or Governor in Council are mainly Canadian. It seems that in Canada regulation-making and adjudicative powers are conferred on the Governor and the Lieutenant-Governor in Council more frequently than similar powers are conferred on their counterparts in Australia, the United Kingdom and New Zealand. See Henry L. Molot, "Administrative Discretion and Current Judicial Activism" (1979) 11 Ottawa L.R. 337, at p. 338. Here the practice is to confer adjudicative powers on a Minister; to confer them on the Governor-General or the Governor is an exception to the general rule. No doubt the Canadian practice provides an additional ground for confining the old rule so as to ensure that administrative action is generally subject to judicial review. Nevertheless, this difference in approach is not a sufficient ground for disregarding the Canadian decisions.

What is more, the Canadian decisions support the view expressed by Barwick C.J. in *Banks* at pp. 241-242. There the Chief Justice, referring to the Executive Council, said (at p. 241):

"That Council was by the statute given both the power and the duty to consider the matter for itself. In so saying, I fully realise the inconvenience in which a proper consideration of such matters must involve the Governor in Council. But Parliament has taken the course of creating that situation. It cannot be avoided ... by mere endorsement of a Minister's recommendation. Of course, certiorari will not go to the Governor in Council but that does not deny that the proceedings of the Governor in Council in performance of a statutory function may be void and in an appropriate case be so declared."

This view, though at variance with that of Dixon J. in the Communist Party case, is not opposed to the approach taken by other members of the Court in that case who, as Stephen J. has noted, base their conclusions on the interpretation of the relevant statutory provision, the majority thinking that the provision excluded judicial review, Latham C.J. being of a contrary opinion.

There is no rational basis for drawing a distinction in the application of the rule that the acts of the Crown representative cannot be impugned - by conceding its application to the exercise of legislative powers and denying its application to the exercise of adjudicative powers. Such a startling difference in approach is not justified by the difference in character of the two functions, especially when we recall that the modern view, now received doctrine, is that the classification of powers is not a sound criterion for the operation of precise rules of law.

The general principles which guide judicial review of legislative and adjudicative powers do not suggest such a difference in approach. There is much common ground between the process by which a court arrives at the conclusion that a legislative act is ultra vires and that by which a court decides that the exercise of a statutory power is void or voidable. A legislative power which is purposive is, like any other statutory discretion, open to attack for purpose. A more complex question is the extent to which, if at all, the distinction expressed by Latham C.J. in *Arthur Yates* (at p. 68) still holds good. There his Honour said:

"But the purpose of legislation is to be ascertained by considering the true nature and operation of the law and the facts with which it deals, and ... not by examining the motives of the legislative authority. No such limitation applies in the case of administrative acts."

See also pp. 64-65, per Latham C.J. and pp. 82-83, per Dixon J.

It is incontestable that the Courts will not examine the motives which inspire members of Parliament to enact laws. No doubt the Courts will continue to adopt a similar approach to the exercise by a subordinate law making body of legislative powers which are not purposive and are not conditioned on the opinion of the body as to the existence of a state of facts. But when the legislative power is purposive or conditioned on such an opinion the objection to an examination of the motives of the members of the legislative body lies not so much in the character of the function as in the relationship or lack of relationship between the motives of the individual members on the one hand and the extraneous purpose or the want of a bona fide opinion on the other hand. The problem is partly a practical problem of proof. In one case there is the difficulty of translating individual motives into objective purpose. In the other case there is the difficulty of deducing from individual motives the conclusion that a collective opinion was not a bona fide held opinion. It would be unwise in the absence of some knowledge of the facts to explore these questions further.

I would make the orders for mandamus and certiorari.

MURPHY J. The Northern Land Council made a formal application to the Aboriginal Land Commissioner on 20 March 1979 on behalf of a group of Aborigines making a traditional land claim under s.50(l) of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) (the Land Rights Act) to an area of land which included part of the Cox Peninsula. Cox Peninsula projects into the Timor Sea approximately six kilometres to the west of Darwin across the waters of Port Darwin.

Section 50 of the Land Rights Act provides for the Aboriginal Land Commissioner to deal in a specified way with applications "by or on behalf of Aborigines claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aborigines".

Section 3(l) defines certain expressions (unless the contrary intention appears). "Unalienated Crown land" means "Crown land in which no person (other than the Crown) has an estate or interest, but does not include land in a town". " 'Town' has the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town".

Section 4(l) of the Northern Territory Planning Act 1979 defines "town" as follows:

'town' means -

- (a) a town within the meaning of the Crown Lands Act;
- (b) a municipality; or
- (c) land specified by the regulations to be an area which is to be treated as a town;"

Regulation 5 of the Planning Regulations, made under the Planning Act 1979, provides:

"For the purposes of section 4 of the Act, the several areas of land specified in Schedule 3 are specified to be areas which are to be treated as towns".

One area of land specified in Schedule 3 is an area of 4,350 square kilometres, which includes the Cox Peninsula; it is centred upon the town of Darwin which is about 140 square kilometres in area. The Cox Peninsula is far from urban.

It is undeveloped and sparsely populated and until December 1978, the area the subject of the Council's claim was within the meaning of "unalienated Crown land" in the Land Rights Act.

In considering the Council's claim the Commissioner held that because of the combined operation of the Land Rights Act, the Northern Territory Planning Act and Regulation 5 of the Planning Regulations made under the latter Act, the Cox Peninsula is land in a town and therefore cannot be claimed as unalienated Crown land within s.50(1)(a) of the Land Rights Act. This was on the basis that it was "treated as a town" in the Planning Regulations. The Council, on a number of grounds, seeks certiorari to quash that decision, and prohibition and mandamus to compel the Commissioner to carry out his functions under s.50(1)(a).

The specification in the Planning Regulations of land to be treated as a town under the Planning Act, to be effective in relation to the Land Rights Act, must be in accordance with s.3(1) of the latter Act. My conclusion is that in so far as the Planning Act authorises the treatment as a town of the area in question it goes beyond the description in the Land Rights Act of a law of the Northern Territory which relates to the planning and development of towns and the use of the land in or near towns. Taking into account the general legislative intent of the federal Parliament, the exception for "land in a town" in the Land Rights Act could not have been intended to extend to such a gross area as has been specified for Darwin (and similarly for Alice Springs, Tennant Creek and Katherine) under the Planning Regulations. The land "treated as a town" must bear some reasonable relationship to the concept of a town. The suggestion that any area can be specified by the Northern Territory Government under the Planning Regulations and this would be effective to exempt it from the Land Rights Act cannot be correct. Otherwise half or even all of the Northern Territory could have been specified and the purpose of the federal Act entirely frustrated. Such an approach would make nonsense of the national will as expressed in the Act. Yet this would be the result demanded by the absolutely literal approach.

Therefore the area to be treated as a town must be limited and the limits are passed when the area is beyond what could reasonably be described as that of a town. Human settlements ascend in order from village to town, to city, to metropolis, to megalopolis (see Constantinos A. Doxiadis, *Ekistics: an Introduction to the Science of Human Settlements*, London, 1968, pp.91-101). The federal Parliament contemplated a town, perhaps even a large or very large town. In modern times the word town is used fairly loosely. However, the areas prescribed for Darwin (and Alice Springs, Tennant Creek and Katherine) in Schedule 3 of the Planning Regulations go far beyond what could have been in the contemplation of the federal Parliament when using the word "town". The area for Darwin is appropriate not to a town but to a megalopolis. It is extravagantly beyond what could reasonably be described as a town.

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The question is not so much one of validity of the regulation, as of its effectiveness for the purposes of the Land Rights Act. So regarded, the area prescribed in the regulation falls outside the scope of what Parliament intended by "land in a town" in the Land Rights Act. Even if this part of the Planning Regulations is effective for other purposes under Northern Territory law, it is not effective to create an exemption under the Land Rights Act of the disputed areas as "land in a town".

Legislative bona fides

Important changes have occurred in relation to the legislative executive and judicial powers in the Northern Territory, but the Northern Territory is not a State; it remains a territory of the Commonwealth. The legislative power in respect of the Northern Territory is vested in the federal Parliament (Constitution ss.1 and 122). The legislative power vested in the legislature of the Northern Territory is delegated power. Thus the Planning Regulations are a delegated (or sub-delegated) exercise of power vested in the federal Parliament. Inquiry by the judicial branch into the misuse of legislative powers (at least except where authorised by Parliament) is inconsistent with the separation of legislative and judicial powers. The judicial branch is not empowered to inquire into the good faith of the Senate, or the House of Representatives, or the Governor-General in participating (or declining to participate) in the enactment of legislation. It is equally not empowered to inquire into the good faith of exercise or non-exercise of legislative power by any delegate of the Parliament (*The Victorian Stevedoring and General Contracting Company Proprietary Limited v. Dignan* (1931) 46 C.L.R. 73). The Parliament can control the exercise of delegated legislative power in various ways (the Acts Interpretation Act 1901 (Cth) provides generally for disallowance by either House). Parliament can ensure its control in other ways, for example by imposing a condition of approval by both Houses. It could require approval by the Houses, or by all three constituents or provide for a disallowance by one or more (or only by all) of the constituent bodies of the Parliament. But whether or not Parliament provides a regular procedure for its control of delegated legislation, it retains control.

Judicial review of delegated legislation which focuses on whether there is power to make the delegated legislation is consistent with the separation of powers; this is enforcing the limits established by Parliament. If the delegate has power to make the regulation, then it is not open to the judicial branch, except with Parliamentary authority, to entertain a challenge to the validity of the regulation on the ground that the legislative power was misused (for example, because of bad faith or ulterior purpose or insufficient regard for those affected). Good faith (or proper purpose or due regard for those affected) is irrelevant to the validity of the regulation. This is true of all exercises of legislative power

by delegation, unless the legislature makes good faith (or propriety of purpose or due regard for those affected) a condition of validity. The statement that "powers must be exercised bona fide, and having regard to the purposes for which they were created, and to the rights of persons affected by them" (see *Isles v. Daily Mail Newspaper Ltd* (1912) 14 C.L.R. Mr Justice Isaacs 193, 202) does not apply so as to enable the judicature to inquire into or invalidate the exercise of the legislative power of the Commonwealth. If delegated legislative power could be subjected to this gauntlet race, not only would legislation by delegation be impracticable, but the judicial power could be invoked, and no doubt would be invoked, to question a multitude of laws so as to extend greatly the possibilities of conflict between the judicial and legislative branches. Laws would be subject to invalidation on proof (or perhaps confession) of what would usually not be in the public arena. The relative certainty about the validity of delegated laws would be replaced by uncertainty. A question mark would be put against every regulation and other delegated legislation. Under the separation of powers the judicial branch may inquire into and determine whether a challenged law is within the scope of the legislative or delegated legislative power, but not whether the power has been misused. As Chief Justice Marshall explained in *Marbury v. Madison* 5 U.S. 137 (1803) the federal judicial power authorises invalidation of laws which exceed the limits of legislative power; this is necessary to vindicate the Constitutional allocation of and restrictions on federal and State powers. There is no such justification for judicial invalidation of laws within the scope of legislative power which have been made by misuse of that power. Misuse of legislative power may be dealt with by Parliament or by the electorate; or if Parliament authorises it to do so, by the Judicature (for example by criminal laws dealing with corruption or abuse of office).

#### The Crown

In this case, the traditional mythology about the Crown, Crown immunities and prerogatives has again been aired. Significantly, the Australian Constitution nowhere refers to prerogative. Any general immunity of the Crown deriving from doctrines such as "The King can do no wrong" and "The King cannot be sued in his own courts" is entirely inappropriate for a modern democratic society. These ideas were advanced by royal sycophants in England, especially in Stuart times, often based on the absurd "divine right of kings". They were embraced by judges during the period when the judges were dependent upon royal pleasure for their continuance in office. Since then, governments, even republican ones as in the United States (at State and federal level), have sought to rely upon these doctrines for general immunity from accountability.

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In most common law jurisdictions, especially in the United States of America, the immunity doctrines are being eroded. In Australia the federal courts are not even nominally royal delegates or agents (as in theory the courts are in England). Under the Constitution the executive power of the Commonwealth is vested in the Queen (s.61) and the legislative power is vested in the federal Parliament consisting of the Queen, the Senate and the House of Representatives (s.1). But the judicial power of the Commonwealth is vested in "a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction" (s.71). The aping of English customs has led to erroneous use of forms which suggest that the judicial power of the Commonwealth vested in the High Court and other federal Courts is vested in the Queen exercisable by the judges on her behalf. For example the Judiciary Act 1903 s.9 and now the High Court of Australia Act 1979 s. 11 and Schedule, provides that a person appointed as a Justice take an oath or make an affirmation to serve the Queen in the Office of Chief Justice or Justice. By contrast the Justices of the Family Court of Australia take an oath or affirmation to "serve in the office" (Family Law Act 1975 s.26). Another example is that all writs, commissions and process issued from the High Court shall be in the name of the Queen (Judiciary Act 1903 s.33). However, the Queen in her nominal role is a frequent litigant in the federal courts, in civil and criminal matters. In my opinion, the orders of this and other courts vested with judicial power of the Commonwealth may issue against the Governor-General or if necessary against the Queen as well as in their favour.

The regulation was made by the Administrator of the Northern Territory. It is immaterial whether the Administrator is "the Crown". If the regulation is within the scope of the regulation-making power it may not be invalidated on the ground that it was made in bad faith or for an ulterior purpose. This is not because of any supposed immunity of the Crown or its representatives from judicial inquiry and orders; it is because the judicial power (at least in the absence of legislative authority) does not extend to invalidation of any exercise of legislative power (including delegated exercise) on the ground of its misuse. Different considerations arise where the legislature has made good faith or propriety of purpose a condition of the exercise of delegated power, with the intention that in their absence the exercise will be invalid.

The Commissioner was in error in finding that Cox Peninsula is land in a town and therefore cannot be claimed as unalienated Crown land under s.500(a) of the Land Rights Act. This Court has ample power to grant complete relief (see Judiciary Act 1903 ss.31,32,33). I agree that mandamus should issue to require the Commissioner to hear and determine the claim according to law.

AICKIN J. This application by the Northern Land Council ("the Council") is for writs of certiorari, prohibition and mandamus against the Honourable Mr Justice Toohey, the Aboriginal Land Commissioner ("the Commissioner") appointed under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) ("the Act"). The Council, which is a body corporate under Part III of the Act, made a traditional land claim by application to the Commissioner in respect of Cox Peninsula and adjacent lands. The function of the Commissioner in relation to such an application is to ascertain whether the applicants or other Aboriginals were "traditional Aboriginal owners" of the land and to report his findings to the Minister. Those functions however can be performed in respect only of certain categories of land.

The legislation, both Commonwealth and Northern Territory, which is presently relevant is set out and explained in the reasons for judgement of my brother Stephen, as are the formal steps which have been taken under the legislation. That judgement also states the nature of the issues which have arisen. I do not need to repeat any of those matters.

The first submission made on behalf of the Council was that the land in question had reverted to the status of "unalienated Crown land" because of the course of the repeal of the Town Planning Ordinance 1964, as amended, and the coming into operation of the Planning Act 1979 (N.T.). I agree with Stephen J.'s reasons for rejecting this argument and there is nothing which I wish to add on that aspect of the case.

The second submission was that reg.5 of the Planning Regulations made under the Planning Act was invalid. This was supported on two grounds, the first of which was that the regulation was completely useless and therefore outside the regulation-making power. In his reasons for judgement my brother Stephen rejects this submission for reasons with which I am in full agreement and to which there is nothing I can usefully add. The second ground of attack on reg.5 was that, although it was ostensibly within power, it was made for a purpose extraneous to that for which the power was conferred and therefore outside the regulation-making power. The Council applied to the Commissioner for an order for the production by the Administration of certain documents, the nature of which does not appear from the material placed before this Court. The Commissioner refused that application on the ground that the Administrator was the representative of the Crown and the purpose for which he exercised the regulation-making power under s.165 of the Planning Act was not examinable by the courts. Two separate questions are involved in this argument, first whether the reasons, motives or purposes for which the Crown or its representative exercises a statutory power are examinable by a court, and, if not, whether the Administrator is in the relevant sense a "representative of the Crown".

The terminology used in relation to the first of those questions is unfortunately neither uniform nor precise and it is sometimes impossible to be certain of the meaning intended to be conveyed by such expressions as, e.g., good faith and bad faith. There are three distinct bases upon which an exercise of administrative power or authority and delegated legislative power or authority may be attacked; they are first the existence of a corrupt purpose, second the existence of an improper purpose and third ultra vires in the narrow sense of the act done being beyond the power of the body concerned, irrespective of the motive or intention of the person or body exercising the power. It is true that in one sense the term ultra vires is capable of embracing all three conceptions. It is however generally unhelpful, if not misleading, to use the term in that wide sense and I shall confine its use to the narrowest sense. In the examination of passages which I shall quote from cases I have found it necessary in some instances to indicate the sense in which I understand such words to have been used. I use the adjective "corrupt" to mean an act done for personal gain, including a gain for the person doing the act or his family or friends. Where some act is authorised to be done for a purpose, the doing of that act "falsely avowing a legitimate purpose to cover the actual pursuit of an object outside the scope of the power" is better classified as "improper" rather than "corrupt" in the absence of an endeavour to obtain personal gain, though the ultimate result of invalidity would follow on either view.

I use the term "improper purpose" to mean one for which the relevant power or authority was not conferred. It makes no difference whether or not that purpose was known to, or believed or suspected to be necessary by, the person exercising the power. Generally speaking executive or administrative powers are conferred for a purpose ascertainable, with greater or lesser difficulty, from the terms of the instrument conferring the power. In the case of legislative powers it is not always possible to discern a purpose, as distinct from subject matter or content. A belief that the act done is being done for an authorised purpose will be irrelevant if the purpose for which the power is in fact exercised is not such a purpose, whether the belief is as to a matter of fact or law.

Delegated legislative power may be conferred in respect of a subject matter rather than a purpose, though the two ideas overlap, as some cases concerning municipal by-laws demonstrate. However for present purposes there is no distinction between legislative and administrative acts; each may be attacked in the courts. See generally *Jones v. Metropolitan Meat Industry Board* (1925) 37 C.L.R. 252, per Isaacs J. (with whom the majority agreed) at pp.262-264; *Arthur Yates & Co. Pty Ltd v. The Vegetable Seeds Committee* (1945) 72 C.L.R. 37, per Rich J. at pp.72-73, per Starke J. at pp.74-76, per Dixon J. at pp.79-84. Dixon J. (at pp.82-83) in the latter case draws attention to the problems of evidence and proof in the case of a "deliberative assembly" and cites the well-known passage from the judgement of Cussen J. in *In re the Mayor, Etc., of the City of Hawthorn; Ex parte The Co-operative Brick Company*

Limited [ 1909 ] V.L.R. 27, at pp.51-52. See also *United Buildings Corporation Limited v. City of Vancouver Corporation* [ 1915 ] A.C. 345 where evidence was given by some councillors of the municipal corporation as to their reasons for voting in favour of the relevant resolution and it was held that no bad faith or improper conduct was shown.

The argument accepted by the Commissioner was that it was not possible for a court or a tribunal to investigate the "bona fides" of the representative of the Crown in order to establish whether the power was exercised for a purpose outside the proper legislative scope of the power.

The extent of the power of the courts to set aside or to hold invalid acts done by Ministers, statutory authorities and public officers generally has been the subject of extensive discussion by text writers and in journals and in recent years in a substantial number of decided cases. It has only recently been established that acts done by Ministers of the Crown pursuant to statutory powers can be examined for the purpose of ascertaining whether they have been done for improper purposes. The first case in which this view has been taken by this Court appears to have been *Murphyores Incorporated Pty Ltd v. The Commonwealth* (1976) 136 C.L.R. 1. The actual decision was that the Minister's power had been properly exercised but the reasoning of some members of the Court assumes, without stating expressly, that the Court may investigate the exercise of statutory powers by Ministers for that purpose: per Barwick C.J. at p.6; Stephen J. at p.12 appears to have assumed that an exercise of power by a Minister may be challenged in court; Mason J. at pp.23-24 also appears to have assumed this. The other members of the Court do not advert to the problem.

It was suggested that *Television Corporation Ltd v. The Commonwealth* (1963) 109 C.L.R. 59 provided an earlier example but I am unable to agree with that view, save in respect of an obiter dictum by Kitto J. at pp.69-70. The ratio of the majority of the Court (Kitto J. and Taylor, Windeyer and Owen JJ.) was that the act done by the Minister was outside the power given to him by the Act. It was a case of ultra vires in the narrow sense. Jurisdiction in that area has never been questioned in this Court.

In England the power to investigate the purposes of Ministers in the exercise of statutory powers was clearly established by *Padfield v. Minister of Agriculture, Fisheries and Food* [ 1968 ] A.C. 997 to which I shall refer below. This represents an abandonment of the view expressed by Lord Greene M.R. in *B. Johnson & Co. (Builders), Ltd v. Minister of Health* (1947) 177 L.T. 455, at p.459. It is however not now open to doubt that a court may investigate whether statutory powers conferred on Ministers, public authorities, municipal councils and statutory authorities have been validly exercised for the purpose

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for which they have been conferred by the Parliament or by regulations. The question is whether that proposition is correct in the case of powers so conferred on the Crown or the Crown's representative. In considering that question it will be necessary to bear in mind such powers as are now exercised by the Crown in Council or the Governor in Council and in no sense do orders made represent or involve a personal decision by the Queen or a Governor or Governor-General.

It will be convenient to begin by an examination of the Australian cases, before turning to other cases on which reliance has been placed. The first occasion on which the position of the Crown, or the Crown's representative, appears to have arisen in this context was in *Duncan v. Theodore* (1917) 23 C.L.R. 510 which concerned a proclamation made by the Governor in Council of the State of Queensland which purported compulsorily to acquire certain property. It was held by the majority of the Court that a subsequent Act did not validate an acquisition purported to have been made by an earlier proclamation. Isaacs and Powers JJ. dissented and they said (at p.544):

"4. Bona Fides. - There is still one contention of the appellants to be mentioned. They obtained a finding of the jury that the Proclamation of 1st June was issued mala fide, in the sense that there was no real intention to act under the Sugar Act but an intention to use that Act as a screen to shut off an attack for alleged illegal action under the Meat Act. We were not referred to any evidence fit to be submitted to a jury to support that finding. But in our opinion it is not open to impute mala fides with respect to the issue of a royal Proclamation, which is the act of the King by himself or his representative.-

There was an appeal to the Privy Council (*Theodore v. Duncan* (1919) 26 C.L.R. 276) where their Lordships said (at p.282):

"The Crown is one and indivisible throughout the Empire, and it acts in self-governing States on the initiative and advice of its own Ministers in these States. The question is one not of property or of prerogative in the sense of the word in which it signifies the power of the Crown apart from statutory authority, but is one of ministerial administration, and this is confided to the discretion in the present instance of the same set of Ministers under both Acts. With the exercise of that discretion no Court of law can interfere so long as no provision enacted by the Legislature is infringed. The Ministers are responsible for the exercise of their functions to the Crown and to Parliament only, and cannot be controlled by any outside authority, so long as they do nothing that is illegal. Their Lordships are of opinion, not only that the Proclamation in question was within the statutory powers of the Government, but that it rested within the discretion of Ministers whether and to what extent it should be applied to any particular matter falling within its scope."

Their Lordships made no express reference to the passage from the joint judgement of Isaacs and Powers JJ. which I have quoted and, with respect, do not make entirely clear the sense in which they use the word "illegal". It seems unlikely that their Lordships meant "criminal" and probable that they meant "contrary to law" in the sense of purporting to do some act beyond their powers as Ministers.

The next material decision in this Court was not concerned with the Crown but with a municipal authority (and I refer to it only as a useful indication of the views of the Court in relation to statutory authorities). In *Werribee Council v. Kerr* (1928) 42 C.L.R. 1 Knox C.J., Higgins, Powers and Starke JJ. held that a purported compulsory acquisition of land "for the purpose of providing a public road" by a Council was invalid upon the ground that the real purpose of the Council in acquiring or purporting to acquire the land was not to provide a road but to enable a company to continue or to maintain a pipeline on private land which it had placed there without authority. Knox C.J. relied upon the decision of the Privy Council in *Municipal Council of Sydney v. Campbell* 19251 A.C. 338, where their Lordships said at p.343:

"A body ... authorised to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the Courts will interfere."

Higgins J. said at p.30:

"If this was the real purpose of the Council, the plaintiff must succeed in her objection ... For the Council's power to take the strip of land is not general: it is limited to the particular purpose stated in the Act; and if the Council's real purpose is not a road, if its purpose is to get the Company out of a difficulty (to which the Council had contributed), the plaintiff is entitled to prevent the interference with her rights of property."

See also Powers J. at p.36 and per Starke J. at p.37. Isaacs J. dissented. The principle which the Court applied was by no means new and the judgements indicate the previous authorities for the basic proposition - see, for example, the authorities referred to by Higgins J. at p.30. That proposition is not challenged in the present case so far as it is applied to statutory authorities.

The case in which the position of the Crown next arose was *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* (1931) 46 C.L.R. 73. That case concerned regulations made under the Transport Workers Act 1928-1929 (Cth) which conferred upon the Governor-General in Council power to make regulations, which were to have the force of law, with respect to transport workers, and in particular for regulating the engagement, service, and discharge of transport workers, and the licensing of persons as transport

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workers. It was held that the Act was a valid law of the Commonwealth and that the regulations were valid notwithstanding that they restricted the loading and unloading of interstate and overseas vessels to members of a specified industrial union and to returned sailors and soldiers. Similar regulations had been made on a number of previous occasions and had each time been disallowed by the Senate pursuant to s.48 of the Acts Interpretation Act 1901 (Cth). Each time further regulations followed shortly after the disallowance, not in precisely the same form because that would have been contrary to s.48 of the Acts Interpretation Act in its then form, but sufficiently similar as to produce substantially the same practical result. The question of the validity of such regulations on the basis of want of good faith or the presence of illegitimate purposes was considered by all members of the Court. In the joint judgement of Gavan Duffy C.J. and Starke J. they said (at pp.84-85):

"The attack upon the Regulations - the subject of the second and third grounds of the orders nisi to review - was decided in principle against the appellants in the Huddart Parker Case (1931) 44 C.L.R. 492 and Dignans Case (1931) 45 C.L.R. 188. AR that is new in these grounds is the suggestion that the Regulations were an abuse of power, and so ultra vires. If Parliament, however, placed in the hands of the Executive the power of making the Regulations the subject of attack in these proceedings, and that power has been abused or misused, the only remedy is by political action, and not by appeal to the Courts of law (see *Attorney-General for Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898) A.C. 700, at p.713). The only question for the Courts of law in these circumstances is whether the Regulations are within the power conferred upon the Executive Government by the Transport Workers Act 1928-1929. And the Huddart Parker Case and Dignan's Case have resolved this question in favour of the Regulations. This disposes of the second and third grounds of the orders nisi."

Rich J. said (at pp.86-87):

"I have read the judgement of my brother Dixon, and agree with the view of that authority [i.e. *Roche v. Kronheimer* (1921) 29 C.L.R. 3291 which he has expressed. It follows in my opinion not only that the delegation of power is open to no objection, but the power given by the delegation is so akin to that of legislation that the reasons and motives of the donee, whether appearing ex facie the Regulations or aliunde, cannot affect their validity."

Dixon J. said (at pp. 103-104):

"The fact that the Executive has made another similar regulation as often as the Senate has disallowed that which preceded it, was relied upon as confirming the inference that it was not the regulation of trade and commerce but of industrial relations that was aimed at. No confirmation

of the motives animating the makers of the regulation was or is necessary. The only question was whether, notwithstanding the nature of these motives, the regulation did operate upon a matter forming an actual part of inter-State and overseas commerce. I think an enactment which does operate directly upon an activity or transaction forming a part of such commerce does not cease to be a law in respect to trade and commerce with other countries and among the States because it may equally be referred to some other legislative category. The difficulty must always be great in deciding whether such an enactment is a law with respect to such commerce when it appears from its very terms that the motives which guided the lawgivers were connected with matters belonging to the other category. But I do not think the words 'with respect to' in sec.51 are directed so much to the purpose of the law as to its relevance and operation. Perhaps in this case the real question turns upon the application of the criterion they describe. I remain of the opinion that the regulation 'directly controls the selection of agents for the doing of work forming part of such commerce,' and that, for this reason, it is a law with respect to such commerce (1931) 44 C.L.R., at p.516. But it is now suggested that in fact the actual exercise of the discretion by the Executive was clearly not directed to the subject of trade and commerce. This contention too is answered, I think, by the legislative character of the function entrusted to the Governor-General in Council. His discretionary power over the subject is as unqualified as that of a legislature, and the actual grounds upon which it is exercised are, therefore, immaterial."

Evatt J. expressed similar views at pp. 125-126 and at pp. 128-129.

Later cases show that the distinction between the legislative and the administrative character of instruments issued and acts done has been abandoned as generally unhelpful. In *Dignan's Case* it was used as part of the reasoning which led to the conclusion that the regulation could not be challenged. The case was however one which turned very much on the particular character of the regulations and the nature of the legislative power with respect to trade and commerce with other countries and among the States. It was held that, if a regulation were one with respect to such trade and commerce, it was on that basis necessarily valid, whether or not it also served other purposes.

In *The Australian Communist Party v. The Commonwealth* (1951) 83 C.L.R. 1 Dixon J., after describing the relevant portions of the Communist Party Dissolution Act 1950 (Cth), said (at pp. 178-179):

"Two things appear to me to be clear about this. The first is that it leaves to the opinion of the Governor-General in Council every element involved in the application of the proposition. Thus it would be for the Governor-General in Council to judge of the reach and application of the ideas expressed by the phrases 'security and defence of the Commonwealth', 'execution of the Constitution', 'maintenance of the Constitution',

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'execution of the laws of the Commonwealth', 'maintenance of the laws of the Commonwealth' and 'prejudicial to'. In the second place the expression by the Governor-General in Council of the result in a properly framed declaration is conclusive. In the case of the Governor-General in Council it is not possible to go behind such an executive act done in due form of law and impugn its validity upon the ground that the decision upon which it is founded has been reached improperly, whether because extraneous considerations were taken into account or because there was some misconception of the meaning or application, as a court would view it, of the statutory description of the matters of which the Governor-General in Council should be satisfied or because of some other supposed miscarriage. The prerogative writs do not lie to the Governor-General. The good faith of any of his acts as representative of the Crown cannot be questioned in a court of law (*Duncan v. Theodore* (1917) 23 C.L.R. 510, at p.544: cf. (1919) A.C. 696, at p.706). An order, proclamation or declaration of the Governor-General in Council is the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown. The counsels of the Crown are secret and an inquiry into the grounds upon which the advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown by the Governor-General in Council. It matters not whether the attempt to invalidate an order, proclamation or other executive act is made collaterally or directly. One purpose of vesting the discretionary power in the Governor-General is to ensure that its exercise is not open to attack on such grounds and the inference that such a purpose animates sub-s.(2) is confirmed by sub-ss.(4), (5) and (6) giving as they do a special and guarded means of obtaining relief from the conclusion of the Governor-General in Council that the communistic connections of the body would bring it within the application of s.5 and from that conclusion only."

His Honour then went on to deal with an argument that on its proper construction the sub-section referred to was not intended to make the opinion of the executive decisive and that certain of the facts referred to must be shown to exist independently of the opinion formed by the executive. That argument was advanced in aid of the validity of the section in question. His Honour then said (at p.180):

"The second argument was that, although no prerogative writ could go to the Governor-General in Council, yet in a suit for an injunction or in collateral proceedings the validity of a declaration under s.5(2) could be impugned by invoking the same principles as govern discretionary powers confided to subordinate administrative officers or bodies. Those principles have been explained and applied in this Court in a succession of cases beginning perhaps with the judgement of O'Connor J. in *Randall v. Northcote Corporation* (1910) 11 C.L.R. 100, at pp. 109-111, the latest being *Water Conservation and Irrigation Commission (N.S.W.) v. Browning* (1947) 74 C.L.R. 492, except for *Avon Downs Pty. Ltd v. Federal Commissioner of Taxation* (1949) 78 C.L.R. 353, at p.360, where sitting as a primary judge I dealt with the matter.

These two contentions were pressed, but all I shall say about them is that the first depends upon a construction or constructions of the provision of which it is clearly incapable and the second upon applying to the Governor-General in Council rules of law which have never been applied to him and are inapplicable as well as being inconsistent with the plain meaning of the sub-section."

It appears to me that those observations form part of the basis of his Honour's decision and provided a reason for his rejection of the argument for the Commonwealth.

Williams J. said (at p.221):

"It would be altogether unreasonable to attribute to Parliament an intention that the satisfaction of the Governor-General should be open to review to this limited extent if it were intended that it was to be open to review in other respects. The words are apt and apt only to leave the whole decision to the Governor-General without any qualification. See the illustrations of the effect of similar expressions given by Lord Atkin in *Liversidge v. Anderson* [ 19421 A.C., at pp.232, 233. The effect of such a discretion in the case of a Minister of the Crown is described by Lord Greene M.R. in *B. Johnson & Co. (Builders) Ltd. v. Minister of Health* (1947) 177 L.T. 455, at p.459 as follows: 'every Minister of the Crown is under a duty, constitutionally, to the King, to perform his functions honestly and fairly, and to the best of his ability; but his failure to do so, speaking quite generally, is not a matter with which the courts are concerned at all. As a Minister, if he acts unfairly, his action may be challenged and criticised in Parliament'. This description would, I should think, apply a fortiori to a discretion given to the Governor-General, that is, to the Governor-General acting with the advice of the Federal Executive Council."

These observations of Williams J. are based in part on the construction of the particular statute but also in part on the view of Lord Greene MR, as applied to acts done by the Governor-General in Council; thus he treats the examination of the reasons and motives of the Governor-General in Council as not reviewable. The observations of Lord Greene M.R. in relation to Ministers *ca*(?misprinting?) be regarded as accurate in the light of both English and Australian authorities.

Fullagar J. said (at pp.257-258):

"If the opinion is to be that of the Governor-General, it cannot, in my opinion, be examined at all, for it is not open to impute mala fides with respect to an act of the King by himself or his representative (*Duncan v. Theodore* (1917) 23 C.L.R., at p.544 (per Isaacs and Powers JJ))."

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Thus three members of the majority of six expressed the view that the motives of the Governor-General in Council were not examinable.

Kitto J. concluded that by reason of the particular provisions of the Act the reasons and motives of the Governor-General were unexaminable. He said (at pp.279-280):

"Section 5 provides for what is in effect a right of appeal from the Governor-General's satisfaction that the body is one which answers any of the descriptions in s.5(1), but it does not provide for any form of challenge to his satisfaction as to the prejudicial character of the continued existence of the body. In the absence of any such provision, a declaration of this satisfaction is, in my opinion, immune from challenge or examination in any court upon any ground. It was strongly urged on behalf of the defendants that if it were shown that the Governor-General, upon the materials before him in relation to a body which he declares an unlawful association under the section, could not have the necessary satisfaction without misconceiving the legal significance of the expression 'activities prejudicial to the security and defence of the Commonwealth' &c., it would be competent for the Court to hold his declaration to be unauthorised and of no effect. I find it impossible to accede to this argument. The section on its face will bear no other meaning than that the Governor-General is to form an unchallengeable judgement as to whether the continued existence of the body will have the necessary tendency. In sharp contrast to the provision for judicial review of W's opinion as to whether a body is one to which the section applies, is the very limited provision that the Executive Council shall not advise the Governor-General to make a declaration unless the material upon which the advice is founded has first been considered by a statutory committee. It is not required that the advice tendered to the Governor-General shall be consistent with the opinion formed by the committee. In the face of this contrast, the inference is irresistible that it is left to the Executive Council to give such advice as it thinks proper, being assisted but not controlled by the views of the committee. To hold that nevertheless a court may review the legal conceptions which underlie the advice would be to ignore the plain meaning of the legislation. Moreover, it is in the nature of things practically, if not totally, impossible for a court to know in a given case either what those legal conceptions were or to what facts they were applied; and I find it impossible to attribute to the legislation any other intention than that the Governor-General may exercise his power with complete immunity from judicial interference. Finally, it must be remembered that the satisfaction with which alone the section is concerned is the satisfaction of the Governor-General acting with the advice of the Executive Council. So acting he has not to consider for himself either questions of fact or questions of law, but will be satisfied as he may be advised."

In *W.H. Blakeley & Co. Pty Ltd v. The Commonwealth of Australia* (1953) 87 C.L.R. 501 the Full Court comprising Dixon C.J. and all Justices of the Court had to consider whether on the proper interpretation of the Lands Acquisition Act 1906-1936 the notification by the Governor-General under that Act of the purpose of an acquisition of land was conclusive of the actual existence of that purpose and whether it was incidental to the power granted by s.51(xxxi) of the Constitution so to provide. In a joint judgement the Court said (at p.521):

"It is easy to understand that nothing the Executive Government is authorised to do can conclude the question whether the particular purpose for which it desires the land is in point of law one within the Federal province. But the purpose for which it requires the land is a thing depending entirely on the intention of the Executive Government itself. It is subjective and is naturally to be ascertained from the formal act of the Executive. Doubtless s.51(xxxi) enables the legislature to authorise subordinate Federal bodies as well as the Governor-General in Council to acquire property. But acquisition by the Commonwealth itself is at the centre of the legislative power and that means the Executive Government. The good faith of the Governor-General cannot be questioned and that is an additional consideration in aid of an interpretation which makes the word 'for' refer to or at best include the purpose declared. Why should a law not be one with respect to the compound conception when it provides for an acquisition characterised by the inclusion, in the formal act on which the law places the validity of the Commonwealth's title, of a statement by the Governor-General conclusively declaring the purpose for which he has acted?"

The reference to good faith of the Governor not being capable of challenge is there treated as an "additional consideration" in arriving at the proper construction of the Act, but is not expressed as an alternative reason for reaching the same conclusion. Notwithstanding that it is part of a considered judgement by all seven members of this Court it does not appear to be part of the *ratio decidendi*.

The question of the bona fides of a committee set up under the National Security (Vegetable Seeds) Regulations was considered in *Arthur Yates & Co. Pty Ltd v. The Vegetable Seeds Committee* (1945) 72 C.L.R. 37 where it was held that orders of the Committee were open to attack on the ground that they were not made bona fide for the purposes for which the power was conferred but for an extraneous purpose of the Committee. Latham C.J. dealt with the matter at pp. 64-66. He referred to a number of authorities which establish that the motives of a legislative body when acting within its powers do not affect the validity of the legislation, e.g., *Radio Corporation Pty Ltd v. The Commonwealth* (1938) 59 C.L.R. 170, at p. 185, *Trustees Executors & Agency Co. Ltd v. Federal Commissioner of Taxation* (1933) 49 C.L.R. 220, at p.240 and *Stenhouse v. Coleman* (1944) 69 C.L. R. 45 7, at p.47 1. He also referred to *Joseph v. Colonial Treasurer (N.S.W.)* (1918) 25 C.L.R. 32 where Isaacs, Powers and Rich JJ. said (at p.43):

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"The legality of the Crown's action may be tested by reference to power as existing and intended to be exercised, but its honesty cannot be impugned in the King's Courts."

Latham C.J. said (at p.65):

"The rule against inquiries into motives was applied to regulations made by the Governor-General (on the advice of a Minister) in *Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan* (1931) 46 C.L.R. 73."

Dixon J. after examining the position in the United States said (at pp.81-83):

"But in English law the position is not quite the same. Our distinctions are concerned rather with the status, composition and purposes of the body, with the difference between bad faith and ultra vires objects and with the precise provisions of the legislation under which the power arises and with the grounds for judicial review they afford. Indeed the last matter may be expressed not inappropriately in language used recently in America by Frankfurter J. in relation to a kindred topic: 'Whether judicial review is available at all, and, if so, who may invoke it, under what circumstances, in what manner and to what end are questions that depend for their answer upon the particular enactment under which judicial review is claimed,' that is, of course, always subject to the constitution. 'Apart from the text and texture of a particular law in relation to which judicial review is sought, "judicial review" is a mischievous abstraction. There is no such thing as a common law of judicial review in the federal courts' (*Stark v. Wickard* (1944) 321 U.S. 288, at p.312). Under our law in the case of a supreme legislature there could, of course, be no question. Even with a private Act of Parliament, the grounds upon which it proceeded were never considered examinable. So a suggestion that the promoters had obtained it by fraud could not be entertained (*Stead v. Carey* (1845) 1 C.B. 496, at pp.515, 522; *Waterford, Wexford, Wicklow and Dublin Railway Co. v. Logan* (1850) 14 Q.B. 672, at pp. 675, 680). And if a false or erroneous recital is contained in a statute it must be ascribed to misinformation, Forasmuch as the legislature always have [sic] justice and truth before their eyes' (*Earl of Leicester v. Heydon* (1570) 1 Plowden 384, at p.398). 'If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it; but, so long as it exists as law, the courts are bound to obey it' (*Lee v. Bude and Torrington Junction Railway Co.* (1871) L.R. 6 C.P. 576, at p.582, per Willes J.). Then, too, legislative and executive acts formally done in the name of the Crown stand in a special position: see *Duncan v. Theodore* (1917) 23 C.L.R. 510, at p.544; (1 919) 26 C.L.R. 276, at p.282. But with respect to the acts or determinations of subordinate authorities other questions arise. To begin with their powers are limited and the form of the limitation upon a power of subordinate legislation may itself involve purpose. If there is an exercise of such powers for a different purpose, it is outside the Act

which confers them (*Narma v. Bombay Municipal Commissioner* (1918) 45 Ind. App., at p. 129). 'There are forms of legislative authority, such as in *Ganricarde's Case* (1914) 79 J.P. 481 and in *Municipal Council of Sydney v. Campbell* (1925) A.C. 338 where a given "purpose" is made an express condition of exercising the power. If that "purpose" is not pursued, the power is not exercisable, and therefore the facts are examinable in order to ascertain what purpose was in view,' per Isaacs J. in *Jones v. Metropolitan Meat Industry Board* (1925) 37 C.L.R., at p.262: Cp. *Werribee Council v. Kerr* (1928) 42 C.L.R. 1 (which, however, like *Ganricarde's Case* and *Campbell's Case* did not involve a by-law). But where purpose is not made expressly, or by necessary intendment, a condition of the exercise of the power, then it is necessary to consider the composition of the body, and, if it is a deliberative assembly, to distinguish between the motives actuating individual members and the purpose disclosed by the character and operation of the measure in relation to the actual facts and circumstances. In *In re the Mayor &c. of the City of Hawthorn; Ex parte Co-operative Brick Co. Ltd* (1909) V.L.R., at pp.51, 52, speaking of a by-law of an elective municipal council, Cussen J. said: 'So far as the question of bad faith is concerned, if it is meant by this that individual councillors were actuated by improper motives in giving their votes, I find no evidence of the fact, and even if there was, I find great difficulty in seeing how such a contention could be given effect to. Each councillor may be actuated by many reasons, each having some different reasons from the others, and it seems to me almost, if not quite, impossible to penetrate into their minds. It must at least be necessary to show that the improper motive was the sole or dominant one, and that but for it a majority would have voted against adopting the by-law. The ratepayers and councillors honestly voting for the by-law would be placed in a false position if the by-law could, perhaps after a long time, be upset on such a ground. These considerations make one think that the furthest the Court can go is to look at the object and effect of the by-law, to be gathered from its language, and possibly by applying it in a general way to the existing state of legislation, and to the conditions of things existing in the locality.' On this point the judgements in the Supreme Court were approved in this Court (1909) 9 C.L.R., at pp.309, 314, 315."

That case however does not directly touch the question of the position of the Crown or the Crown's representative, though Latham C.J. and Dixon J. clearly recognised the existence of a rule that the Court cannot examine the reasons or motives of the Crown.

The same view as expressed in the High Court as to the position of the Governor in Council has been taken by State Supreme Courts in a number of cases, e.g. *N.S.W. Mining Co. Pty Ltd v. Attorney-General for New South Wales* (1967) 67 S.R. (N.S.W.) 341 and *McGowan v. Bundaberg Harbour Board* (1960) Qd.R. S. There are also two other Australian cases to which reference was made in argument. The first is the South Australian case *In re a By-law made by the District Council of Prospect; Ex parte Hill* (1926) S.A.S.R. 326

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which concerned a by-law which prevented buses from stopping to put down passengers within 30 feet of a tramcar stopping place. It was argued that in fact the by-law had been made for the purpose of preventing buses competing with trams. The Full Court of the Supreme Court of South Australia held that the by-law was within the authorised purpose and this being so it was no ground for holding it bad that it may have served some other purpose as well. The Court said (at p.333):

"The motives of the by-law making body, unless shewn to be mala fide, that is, dishonest or morally wrong, cannot be inquired into".

This view however is not consistent with subsequent Australian cases, e.g., *Werribee Council v. Kerr* and *Municipal Council of Sydney v. Campbell*. The second was *Bailey v. Conole* (1931) 34 W.A.L. R. 18 in which regulations made by the Governor in Council prohibited buses from picking up or setting down passengers on a route used by government trams. The regulations purported to have been made under a power to regulate the use of buses. It was conceded by counsel for the Crown that trams stopped on that route and Draper J. observed at p.22 that "it has not been disputed that the reason of the prohibition is to restrict competition with the Government Tramways, and on the facts of this case I have no doubt the regulation was made for this purpose", presumably meaning thereby not disputed by counsel. The regulations were held to be invalid. There was no discussion of any of the earlier Australian cases to which I have referred.

In the United Kingdom there have been a number of recent cases in which it has been held that the purposes of a Minister in the exercise of powers conferred upon him by statute or by regulation may be investigated for the purpose of ascertaining whether there has been "a misuse" of a power, i.e., use of a power for an improper purpose. It is sufficient to refer to three decisions of the House of Lords, *Padfield's Case*, *McEldowney v. Forde* [1971] A.C. 632 and *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014. *McEldowney v. Forde* was a case in which the Minister was empowered by the relevant Act to make regulations. The majority held that the particular regulation was valid on the ground that it was for the Minister to determine whether a particular organisation should be deemed to be unlawful and that "in the absence of bad faith" a court could not question what he had done, though it is not altogether clear what is meant by "bad faith" in this context. Lord Hodson said (at p.645):

"The vexed question remains whether the impugned regulation is capable of being related to the prescribed purpose, that is to say, the preservation of the peace and the maintenance of order. The authorities show that where, as here, there is no question of bad faith the courts will be slow to interfere with the exercise of wide powers to make regulations."

See also Lord Guest at p.649 and at p.650 where he said:

"The present case ... is not a case of an executive order made by a Minister under a regulation, but the challenge of a regulation made by a Minister under an Act of Parliament conferring power on him to make regulations for certain specified purposes".

Lord Pearce and Lord Diplock dissented on the ground that the regulation made by the Minister was outside the regulation-making power conferred upon him by the Act and they did not consider the question of improper purposes.

It should be borne in mind in relation to these cases that generally speaking, though not invariably, the recent practice in the United Kingdom is for regulation-making powers to be conferred upon the relevant Minister, rather than upon the Queen in Council, and the courts have indicated clearly enough that they would be prepared to investigate the question whether such a power has been exercised by a Minister for an improper purpose. In *Padfield's Case* legislation provided for the appointment of committees of investigation which had the duty when so directed by the Minister of considering and reporting to him on complaints made as to the operation of schemes under the Agricultural Marketing Act, 1958. The Minister was requested to appoint a committee of investigation into certain complaints but he refused to do so and an application for an order of mandamus was made to the Court. The House of Lords held that the order should be made. Lord Reid said (at pp.1032-1033):

"But I do not agree that a decision cannot be questioned if no reasons are given. If it is the Minister's duty not to act so as to frustrate the policy and objects of the Act, and if it were to appear from all the circumstances of the case that that has been the effect of the Minister's refusal, then it appears to me that the court must be entitled to act."

The speeches of their Lordships make it clear that they regarded the exercise of the Minister's discretion as examinable by the Court, whether or not he gave reasons for his decision, and that it was for the Court to determine whether the discretion had been properly exercised within the scope of the legislation and that the Court could examine the reasons which led to the particular decision for the purpose of determining whether they were relevant or erroneous in law or based upon extraneous considerations, including whether there had been a failure to take into consideration relevant matters. The decision in the *Tarnside Case* is to the same effect - see per Viscount Dilhorne at p.1062, per Lord Wilberforce at p.1047 and per Lord Diplock at p.1064. Lord Russell said (at p. 1074):

"It is, my Lords, no doubt a most serious matter for the judiciary to overturn a conclusion of a minister with overall responsibility in a field of such importance to the national welfare as education, when it is not suggested either that the conclusion was motivated by partly political considerations or that it involved bad faith. On the other hand it is not my understanding that the mere expression by the Secretary of State of his satisfaction that particular proposals are unreasonable deprives the court of the ability to decide that there were no sufficient grounds for that satisfaction and that consequently the Secretary of State must in some respect have misdirected himself in applying his mind to the problem."

There appears to have been no House of Lords decision in which a regulation made, or other act done, by the Queen in Council has been challenged upon the ground that irrelevant considerations were taken into account, whether knowingly or otherwise, though the Court of Appeal in *Rex v. Comptroller General of Patents; Ex parte Bayer Products Ltd* [ 1941 ] 2 K.B. 306 held that the Court could not investigate the reasons of, or the advice which moved, His Majesty to make a particular regulation. The recent English authorities, which have undoubtedly extended the area of ministerial action which may be challenged in the courts, throw no light on that problem, for they dealt with regulations made by Ministers.

There are three decisions of the Privy Council to which I should refer before examining the Canadian authorities on which reliance has been placed. In *Wijevesekera v. Festing* [ 1919 ] A.C. 646 their Lordships held that it was not possible for an owner of land to contest the decision of the Governor of Ceylon that his land was "likely to be needed for any public purpose" under the Acquisition of Land Ordinance (Ceylon), 1876 and therefore capable of being compulsorily acquired. Lord Finlay said at p.649:

"The whole case is decided, in the opinion of their Lordships, in the last three lines of s.6 of the Ordinance: 'And upon the receipt of such report it shall be lawful for the Governor, with the advice of the Executive Council, to direct the Government agent to take order for the acquisition of the land.' When you have an enactment of that kind it shows that it was intended that the decision of the Governor in Executive Council on the point should be binding."

That conclusion may perhaps have been reached as a matter of construction but the same words would not now be construed as giving an unexaminable discretion to a Minister or statutory authority.

Much reliance has been placed upon the reasons of the Privy Council in *Attorney-General for Canada v. Hallet & Carey Ltd* [ 1952 ] A.C. 427 ("*Hallet & Carey Ltd*"). The legislation there in question was the National Emergency Transitional Powers Act, 1945 (Canada) which authorised the Governor in Council to:

[D] o and authorise such acts and things, and make from time to time such orders and regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of -

- (c) maintaining, controlling and regulating supplies and services, prices, transportation, use and occupation of property, rentals, employment, salaries and wages to ensure economic stability and an orderly transition to conditions of peace".

In the ostensible exercise of those powers an Order in Council was made on 3 April 1947 which provided that "all oats and barley in commercial positions in Canada," with certain exceptions, "are hereby vested in the Canadian Wheat Board." The validity of that order was challenged by the respondents. It was held by the Privy Council that, save in a case of "bad faith", it was not competent for the courts to canvass the considerations which led the Governor-General in Council to deem it necessary to effect the vesting, or to ascribe to the Order in Council a purpose other than that which it professed to serve; the measures authorised were such as the Governor-General in Council, not the courts, deemed necessary or advisable. The reasons of their Lordships were delivered by Lord Radcliffe who said (at pp.444-445):

"The orders that are valid under the Act are such orders as the Governor in Council may by reason of the continued existence of the emergency deem necessary or advisable for any of the specified purposes. The preamble of this order states that it is necessary by reason of the continued existence of the emergency to effect the vesting in the Wheat Board of such holdings as are now in question 'for the purpose of maintaining, controlling and regulating supplies and prices, to ensure economic stability and an orderly transition to conditions of peace.' How, then, can a court of law decide that the vesting was for another and extraneous purpose or hold that what the Governor in Council has declared to be necessary is not in fact necessary for the purposes he has stated? There is no warrant at all for presenting this as a case in which powers entrusted for one purpose are deliberately used with the design of achieving another, itself unauthorised or actually forbidden. If bad faith of that kind can be established, a court of law may intervene: see, for instance, *Lower Mainland Dairy Products Board v. Tumer's Dairy Ld* [1941] S.C.R.573. To speak of the 'real purpose' of this order as being that of confiscating profits is to confuse means with ends, for the true question is whether it can be said that the Governor in Council could not have deemed it necessary to take this step as a means incidental to the realisation of the purposes stated in this order. Clearly he could. Government authority which had hitherto depressed, was now to raise prices, and those responsible might well feel that they must accompany this action with a requisition of some of the profits that they thus created. Nor is this a case in which the order shows on the face of it a

misconstruction of the enabling Act or a failure to comply with the conditions which that Act has prescribed for the exercise of its powers. On the contrary, the order shows on its face compliance with those conditions, and the problem considered by Clauson L.J. in *Rex v. Comptroller-General of Patents* [ 1941] 2 K.B. 306, 316 and by Duff C.J. in *Reference as to the Validity of Certain Chemical Regulations* [1943] S.C.R. 1, 13 is not therefore a present problem. This is an order which not only recites that the Governor in Council regards the making of it as necessary for authorised purposes, but which in terms invokes the powers conferred on him by the Act of 1945. An order so expressed leaves no ground for a judicial inquiry whether the Governor can have intended to exercise those powers, a kind of inquiry which a court has sometimes found itself called on to make in a case where the instrument impugned is itself ambiguous: see, for instance, *In re Price Bros. & Co. and the Board of Commerce of Canada* 60 S.C.R. 265. In the circumstances prevailing here their Lordships are satisfied that the true answer to any invitation to the court to investigate the Order in Council on its merits or to ascribe to it a purpose other than that which it professes to serve is given in the words of Duff C.J. in the *Reference re Chemical Regulations*: 'I cannot agree that it is competent to any court to canvass the considerations which have, or may have, led him to deem such regulations necessary or advisable for the transcendent objects set forth. . . . The words are too plain for dispute: the measures authorised are such as the Governor General in Council (not the courts) deems necessary or advisable.' "

The statement relied upon in argument (at p.444) was: "If bad faith of that kind can be established, a court of law may intervene: see, for instance, *Lower Mainland Dairy Products Board v. Turner's Dairy Ltd.* [ 1941] S.C.R. 573." An examination of the case cited shows that it dealt, not with the Governor-General in Council or a Lieutenant-Governor in Council, but with the activities of a board established by an Order in Council of the Lieutenant-Governor of British Columbia pursuant to a statutory power. That order created a scheme to regulate dairy business in British Columbia and set up the appellant Board to administer it. The Board took various steps including procuring the incorporation of a company called *The Milk Clearing House Limited* and made various other orders for the purpose of carrying out the scheme which prohibited milk producers from selling milk otherwise than to that Clearing House. The order authorised the Clearing House to apportion the proceeds of the resale of the milk irrespective of the quality of and at what price each producer's milk had been sold. It was held that the orders made by the Board were beyond the powers granted by the Order in Council. The Court concluded that there was sufficient evidence to demonstrate that the purpose and the effect of the orders made by the Board were outside its powers under the Act and moreover that the provincial legislature had no power to authorise any such orders because under the *British North America Act, 1867 (Imp.)* it had no power to impose indirect taxation. It was held that extrinsic evidence was admissible to demonstrate the intention of the Board and the effect of its orders - see per Duff

C.J. at pp.575-576 and Taschereau J. at p.579 and pp.582-584. No question arose as to the "bad faith" of the Lieutenant-Governor in Council; the only question was whether the Board established under the order made by the Lieutenant-Governor in Council had exceeded its authority and exercised its powers for an illegitimate purpose.

In my opinion the reasons given by Lord Radcliffe indicate that he was not contemplating an investigation into the motives and purposes or intentions of the Governor-General in Council. This appears from his quotation from the judgement of Duff C.J. in Reference re Chemical Regulations. His Lordship said that the order there in question was an order of the Governor-General in Council which recited that the Governor-General in Council regarded the making of such order as necessary for authorised purposes. It was an order "which in terms invokes the powers expressly conferred on him by the Act of 1945. An order so expressed leaves no ground for a judicial inquiry whether the Governor can have intended to exercise those powers". The approval by his Lordship of the passage which he quotes from Duff C.J. seems to me to be decisive as to what Hallet & Carey Ltd actually decided. It is in my opinion no authority for the proposition that the motives or intentions of the Governor-General in Council are examinable in court. The use by Lord Radcliffe of the expression "bad faith" in that context plainly includes only the "deliberate use" of a power given for one purpose in order to achieve another purpose, unauthorised or actually forbidden, a much narrower conception than "improper purposes" in the sense to which I have referred.

The third decision of the Privy Council is *Ningkan v. Government of Malaysia* [ 19701 A.C. 379 in which an appeal from the Federal Court of Malaysia raised the question whether a proclamation by the Supreme Head of the Federation of Malaysia of a state of emergency throughout the territories of the State of Sarawak was validly made. It was contended that the proclamation was fraudulent and of no effect because no state of "grave emergency" existed so as to justify the proclamation. Lord MacDermott in delivering the judgement of their Lordships said (at pp.391-392):

"The issue of justiciability raised by the Government of Malaysia led to a difference of opinion in the Federal Court, the Lord President of Malaysia and the Chief Justice of Malaya holding that the validity of the proclamation was not justiciable and Ong J. holding that it was. Whether a proclamation under statutory powers by the Supreme Head of the Federation can be challenged before the courts on some or any grounds is a constitutional question of far-reaching importance which, on the present state of the authorities, remains unsettled and debatable. Having regard to the conclusion already reached, however, their Lordships do not need to decide that question in this appeal. They do not, therefore, propose to do so, being of opinion that the question is one which would be better determined in proceedings which made that course necessary."

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A number of the authorities to which I have already referred were cited to their Lordships, including *The Australian Communist Party v. The Commonwealth*, *Victorian Stevedoring and General Contracting Co. Pty Ltd v. Dignan* and *Arthur Yates & Co Pty Ltd v. The Vegetable Seeds Committee*.

The decision of the Privy Council in *Municipal Council of Sydney v. Campbell*, especially at p.343, establishes that evidence is admissible to show the invalidity of by-laws. The fact that the relevant by-law or order is outside power may appear on its face or on an examination of its actual operation. In cases where it does not necessarily so appear, evidence may be led to indicate that, when the surrounding circumstances are fully understood including any express statements as to the objects to be achieved, the by-law is outside the power granted by the enabling Act.

It is, however, a very different proposition to say that the subjective and unstated purposes of those who from time to time may constitute the Governor-General or Governor in Council are capable of examination in order to demonstrate that one or a majority or perhaps all have acted upon some purpose other than that for which the power was granted.

In the absence of reasons given by the Minister or other authority, judicial review will involve an examination of all the surrounding circumstances in order to determine whether there was any basis within the ambit of the power upon which the particular decision could have been reached. See per Lord Wilberforce at p.1047 and per Lord Diplock at p.1064 in the *Tameside Case*, and see the passage in the speech of Lord Russell in that case which I have quoted above, where his Lordship speaks of "partly political considerations" and "bad faith" as being distinct conceptions, but it is not altogether clear what is there comprehended by the term "bad faith".

I turn now to certain Canadian cases which were also relied upon in support of the proposition that the Court may investigate the motives and reasons actuating a decision of a Governor in Council. I do so in relation to a situation in which the act done or order or regulation made is on its face within the relevant power conferred upon the Governor in Council by some legislation. The first in time was *Lower Mainland Dairy Products Board v. Turner's Dairy Ltd* to which I have already referred. That case was not concerned with the intentions, subjective or expressed, of the Lieutenant-Governor in Council but the intentions and activities of the Board. It provides no guidance on the present question.

The next Canadian case is *Re Doctors Hospital and Minister of Health* (1976) 68 D.L.R. (3d) 220. In this case it was held by the Ontario Divisional Court that it could review a decision of the Lieutenant-Governor in Council to ensure that a discretion conferred by statute had been exercised only in pur-

suance of the objects and policy of the statute. It was held that an order closing a hospital for financial or budgetary considerations was outside the power conferred by the relevant Act because those were extraneous matters beyond the objects of the Act. No reference is made in the reasons of the Court to possible differences in the position of Ministers or subordinate administrative bodies and the Lieutenant-Governor in Council. Cory J. said (at pp. 175-176):

[T]he Court would not and could not, per se, review a decision made pursuant to royal prerogative. However, in the absence of clear words to the contrary in the Act in question, the Court can review the decision of the Lieutenant-Governor in Council to ensure that the discretion to revoke had only been exercised in pursuance of the objects and policy of the Act. Since the Lieutenant-Governor in Council in its decision took into account financial considerations, it considered extraneous matters that were beyond the objects and policy of the Public Hospitals Act."

No basis for the distinction between statutory and prerogative powers is stated. The next of these cases is *Re Heppner and Minister of the Environment for Alberta* (1977) 80 D.L.R. (3d) 112. That case concerned an order under a planning Act creating a "restricted development area" and giving power to control by regulation everything of detriment to the environment in the area. The regulation in question appeared on its face to have been made for such purposes but in the course of the proceedings it appeared that the responsible Minister had in a letter stated the purpose to be not protection of the environment but the establishment of a transportation and utility corridor. The Court concluded that because of the admission by the Minister as to the reason for making the Order in Council the regulations purported to be made under the Act were invalid. No inquiry was made as to the motives or purposes of the members of the Executive Council when the regulations were made and it does not appear whether the Minister was then present. The authority of the Minister to make such an admission was not investigated. The judgement of the Court quoted a passage from the speech of Lord Pearson in *McEldowney v. Forde* but did not advert to the possibility of any difference between the position of a Minister and that of the Lieutenant-Governor in Council. No reference was made to the Australian authorities.

An earlier case, *Price Bros. & Co. v. The Board of Commerce of Canada* (1920) 54 D.L.R. 286, makes a reference to the possibility of impugning the good faith of the Governor-General in Council. Duff J. indicated that in his opinion the Orders in Council were reviewable in the sense that it is the duty of the Court to consider and decide whether the conditions of jurisdiction are fulfilled, by which it is clear he meant the statutory conditions for the exercise of the regulation-making power. Anglin J. said (at p.297):

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"In view of the foregoing facts, however, in my opinion it cannot be suggested, without imputing bad faith to the Governor-in-Council, that in making the Order in Council of January 29, 1920, he professed to do something which he 'deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of real or apprehended war, invasion or insurrection."

Confronted with the alternatives of an imputation of bad faith or of finding that there has been an attempted exercise of power through overlooking, or under a mistaken view as to the effect of, a condition requisite for its exercise imposed by the Act conferring it, I have no hesitation in choosing the latter."

The meaning of "bad faith" in this context is by no means clear. It may be intended to refer to an exercise of power without any belief in its existence or with a belief that it did not extend to the particular thing done, but without a corrupt purpose. If so it would be an "improper purpose". The question of "bad faith" was not adverted to by the other members of the Court. It does not appear to me that that case establishes that an investigation of bad faith in such circumstances may be made.

In the Canadian cases there are a number of references to and some reliance upon the decision of the Supreme Court of Canada in *Roncarelli v. Duplessis* (1959) 16 D.L.R. (2d) 689, to which should be added a reference to the decision of the trial judge reported in (1952) 1 D.L.R. 680. With due respect to those who have taken the view that this case indicates that the good faith of the Governor in Council or indeed of a Minister can be examined in a case where he does an act apparently within power but for some improper purpose, it does not seem to me that the case has any relevance to that issue at all. The facts as found were that the defendant (respondent in the appeal) was the Premier and Attorney-General of the Province of Quebec and that, although having no powers, functions or authority under the Alcoholic Liquor Act 1941 of Quebec or otherwise in any relevant respect, had directed the Quebec Liquor Commission (in fact constituted by a single officer) to cancel the restaurant licence held by the plaintiff. In the trial court there is a clear finding by the trial judge that the plaintiff was not seeking to challenge the defendant on the basis of any act done in his official capacity but for acts done quite outside any power that he had as Premier or Attorney-General or in any official capacity at all: see per Mackinnon J. at p.693 and also at p.699 where the learned judge said:

"As to his acting in an official capacity the Court considers that defendant has failed to show any provision in the law giving him the authority to interfere with the administration of the Quebec Liquor Commission and to order it to cancel a licence."

The defendant had endeavoured to rely upon Article 88 of the Quebec Code of Civil Procedure which provided that no public officer or person fulfilling any public function or duty could be sued unless notice of action had first been given. The trial judge held that the acts done by the defendant Premier were not founded in the exercise of his public functions or duties and that provision had no application. The conclusion is summarised in the headnote of the decision of the Supreme Court of Canada which is as follows:

"Where by statute an independent licensing Commission is established, and given discretionary power to issue and cancel renewable licences conferring valuable economic benefits upon the holders, the exercise of discretion to cancel a licence must be related to the administration and enforcement of the Act; and it is an actionable wrong for a superior political official, eg., the Premier and Attorney-General of the Province, to procure the cancellation of a licence by the Commission (holding office at pleasure) on grounds extraneous to the objects and purposes of the licensing Act. An allegation of good faith in the exercise of official functions is not a defence to such interference when there is no statutory authority entitling that official to direct the cancellation."

Rand J. said at pp. 705-706:

"In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion', that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another Province, or because of the colour of his hair? The ordinary language of the Legislature cannot be so distorted.

To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be 'forever'. This purports to divest Ms citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and a fortiori to the Government or the respondent.

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The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the Province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body."

Abbott J. said at pp.730-731:

"In the instant case, the respondent was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission although as Attorney-General of the Province the Commission and its officers could of course consult him for legal opinions and legal advice. The Commission is not a Department of Government in the accepted sense of that term. Under the Alcoholic Liquor Act the Commission is an independent body with corporate status and with the powers and responsibilities conferred upon it by the Legislature. The Attorney-General is given no power under the said Act to intervene in the administration of the affairs of the Commission nor does the Attorney-General's Department Act, R.S.Q. 1941, c. 46, confer any such authority upon him. I have no doubt that in taking the action which he did, the respondent was convinced that he was acting in what he conceived to be the best interests of the people of his Province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority. I have no doubt also that respondent knew and was bound to know as Attorney-General that neither as Premier of the Province nor as Attorney-General was he authorised in law to interfere with the administration of the Quebec Liquor Commission or to give an order or an authorisation to any officer of that body to exercise a discretionary authority entrusted to such officer by the statute.

It follows, therefore, that in purporting to authorise and instruct the Manager of the Quebec Liquor Commission to cancel appellant's licence, the respondent was acting without any legal authority whatsoever. Moreover, as I have said, I think respondent was bound to know that he was acting without such authority.

The respondent is therefore liable under art.1053 of the Civil Code for the damages sustained by the appellant, by reason of the acts done by respondent in excess of his legal authority."

See also per Martland J. at pp.737-738 and 740-744.

With due respect I am unable to see how any assistance can be derived from that decision in relation to the question of whether or not the motives and purposes of the Governor in Council can be investigated by a court. The questions considered and decided in that case are entirely irrelevant to the issue with which this Court is concerned.

I turn now to the New Zealand cases, the first of which is *Reade v. Smith* 1959 1 N.Z.L.R. 996. This case concerned a regulation made by the Governor-General in Council under the Education Act 1914 (N.Z.). That power was one to make regulations "generally for all purposes which he [the Governor-General] thinks necessary in order to secure the due administration of the Act". It was held by the Court that the words did not give the Governor-General in Council a complete and unexaminable discretion. Turner J. said (at pp.1000-1001):

"In my view, any question of law which the Governor-General is required to decide as a basis for his opinion must always be examinable by the Court, and if it can be shown that the regulation has been based upon a wrong opinion by him as to a question of law, it must fall, since its foundation has been removed.

Moreover, the Court may, in my view, always inquire, in any case, whether the Governor-General (or the Minister as the case may be) could reasonably have formed any opinion, on law or on fact, which is set up as a foundation of the regulations. Admittedly, where the question is one of fact, and the sources of governmental information are not disclosed, the question must always be difficult, if not impossible, to resolve against the Crown: but in the case of a question of law no such difficulty presents itself. Then the Court will inquire simply whether the conclusion as to the law which the Governor-General must have formed as a foundation for the regulation is one which is tenable. If it is not, then he could not reasonably have been of the opinion which was necessary to justify the regulation."

The reasons do not distinguish between the Governor-General and the Minister and proceed without reference to any possible distinction between them. I take the expression "one which is tenable", used in relation to the Governor-General's conclusion of law, to mean "one which is correct". It cannot have been intended to refer to a view of the law which was open but which the Court rejects as wrong. The decision does not refer to any of the Australian cases.

The other New Zealand decision referred to was *Labour Department v. Merritt Beazley Homes Ltd* [1976] 1 N.Z.L.R. 505 in which Mahon J. said (at p.506):

"It will be observed that the second branch of subs (1) empowers the Governor-General in Council to make regulations 'as may in his opinion be necessary or expedient for giving full effect to the provisions of this Act'. At first sight the validity of a regulation made pursuant to the opinion or belief of the person or body empowered by the statute to make regulations may seem to involve a subjective appraisal, the only inquiry being whether the opinion or belief was held or maintained in good faith. However, it was made clear by Lord Radcliffe in *Attorney-General for Canada v. Hallett & Carey Ltd* [ 19521 A C 427 that an objective assessment will be necessary where the question arises whether the maker of the subordinate legislation have [sic] used the delegated power under a mistaken belief as to the authority conferred by the legislation. It is possible that the maker of the regulation may have misconstrued the words of the statute in describing the effect to be achieved. If this is so, then he has failed to form the necessary valid opinion or belief."

Mahon J. then quotes the passage from the judgement of Turner J. in *Reade v. Smith* which I have set out above. Mahon J. appears to me to have rejected the notion that the bona fides of the Governor-General could be investigated and to have confined himself to the question of whether, on the proper construction of the Act conferring the regulation-making power, the regulation was within power. This case also seems to me to have no relevance to the present problem. This examination of the authorities shows that there are some authorities in Australia and elsewhere where the courts have acted upon the view that the bona fides (in the sense of absence of corrupt motives and of consideration of irrelevant matters) of the Crown, and of a representative of the Crown, cannot be challenged as a means of attacking the validity of regulations or of orders made by the Crown acting on the advice of the Privy Council or an Executive Council. It is to be borne in mind that in all the jurisdictions in which this problem has arisen or has been adverted to the system of government has been one in which the relevant powers of the Crown and of a Crown representative are exercised in accordance with the advice of the executive arm of government. Such powers are exercised by the Crown in Council or the Governor or Governor-General in Council, as the case may be, upon and in accordance with the advice of the Ministers from time to time comprising the Privy Council or the Executive Council. Acts so done or decisions so made do not depend upon the personal decision of the Queen or the Governor-General or equivalent representative of the Crown but upon the advice of the Ministers, advice which cannot be disregarded by Her Majesty or her representative, in the making of an Order in Council. Her Majesty or her representative acts or decides in the sense that she acts or decides as she is advised by the Privy Council or an Executive Council; see, e.g., per Kitto J. in *The Communist Party Case* in the last two sentences of the passage which I have quoted above.

There is no Australian authority in which a challenge to the validity of an act of an Executive Council, State or Commonwealth, has been denied or upheld after an investigation of the reasons or motives actuating the Governor-General or the members of the Federal Executive Council. The only Australian case in which regulations have been held invalid on the basis of irrelevant matters having been taken into account in the making of regulations is *Bailey v. Conole* in which however the problem was not discussed nor reference made to the authorities. The improper purpose in that case was inferred from the circumstances and was not disputed. I should add that I do not think *Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222 can be regarded as a decision that the proceedings of the Governor or the Governor in Council may be investigated. The majority of the Court proceeded on the view that what was to be investigated was the decision of the Transport Regulation Board and that, if that decision had been arrived at improperly, it was void and subsequent approval by the Governor in Council could not save it. The authorities to which I have referred above demonstrate that it is only in this Court itself that any views have been expressed on the question of whether the Court, or a court, may examine the actions of the Governor in Council or Governor-General in Council for the purpose of ascertaining whether the exercise of powers conferred upon them by the Constitution or by statute had been affected by improper purposes or by what I have called "corrupt purposes" in the doing of any act or the making of any decision which is ostensibly within the power of the Governor in Council. The earlier dicta and decisions of this Court have drawn a clear distinction between the Governor in Council on the one hand and statutory authorities, and more recently Ministers, on the other hand. In relation to Ministers and statutory authorities it is now clear that the Court will investigate the purposes actuating them in the exercise of a statutory power. The position with respect to prerogative powers is not the same as that with respect to statutory powers, it being clear that at least in the case of some prerogative powers, reasons, motives and intentions of the Crown's representative are not reviewable in any court. The prerogative of mercy is a clear enough example (cp. *Horwitz v. Connor* (1908) 6 C.L.R. 38) and it is not relevant to the present case to endeavour to examine each of the remaining ascertained prerogative powers. This case itself is concerned only with powers derived from a statute of the Northern Territory and it is sufficient to leave all questions relating to the prerogative until they arise in some case which requires a decision. The view adopted by this Court in the series of cases to which I have referred has been adopted without dissent in all cases in which it has been adverted to, with the possible exception of *Duncan v. Theodore* in this Court, the dissenting judgement having been upheld in the Privy Council. It has however not always been part of the ratio decidendi of the majority and perhaps, on one view, it has not been so in any case. It is at least clear that it was unanimously

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approved in Blakeley's Case. It is somewhat curious in the light of the substantial number of cases in which the doctrine has been referred to without adverse comment and, in some judgements at least, applied, that the only reason assigned for the rule is that the "counsels of the Crown are secret". That proposition is however no longer as absolute as perhaps it was at the time Dixon J. stated it. The decision of this Court in *Sankey v. Whiflam* (1978) 142 C.L.R. 1 demonstrated that the Crown privilege in respect of discovery of documents in litigation is by no means as extensive or absolute as it was at one time. The Minister's certificate in respect to Crown privilege is no longer regarded as outside the range of investigation by the courts, not only as to whether the privilege is properly claimed, but also as to whether the privilege exists in a particular instance. *Sankey v. Whitlam* has decisively settled the nature of a Minister's claim for privilege by deciding not only that the Court may go behind the certificate but that it may require the production of documents for the Court's own inspection and then determine for itself whether the documents or the parts thereof sought to be relied upon should be the subject of privilege or should be produced in open court. No doubt documents of the Crown and of the Crown in Council are prima facie the subject of privilege when claimed but the decision as to what documents of the Crown shall be produced to the Court is no longer that of the Crown or a Minister of the Crown but of the Court itself. As a reason for the existence of the rule that the motives and purposes of the Crown may not be investigated it no longer has the force which it had in the past. Indeed, nowadays it would seem odd that, if documents of the Crown were within the control of the Court and capable of being produced in evidence in open court upon the Court giving an appropriate ruling, they could not be relied upon to show that a particular act in the exercise of statutory power had been done, perhaps mistakenly, for some purpose outside the purpose for which the power had been given.

It is of course not the law that any and all Crown documents must be produced in open court in the same way in which other documents in the possession of other parties to litigation must be produced. It is always for the Court to decide whether in the particular circumstances Crown privilege does exist in respect of a document at the time when it is sought to have it produced in court. It would not generally be a ground for deciding that privilege still did attach to a particular document that it was one which revealed that the Governor in Council had purported to exercise a power upon some ground or with some intention for which the power was not conferred.

It will be observed that in 1919 the Privy Council in *Wijeyesekera v. Festing* treated an enactment empowering the Governor with the advice of the Executive Council to direct acquisition of land as meaning that the decision of the Governor in Council should be "binding". There is nothing special about the language of the statute and it appears to indicate a view that when a discretion is given to a Governor-General or a Governor in Council then his decision is beyond challenge. The Privy Council in *Theodore v. Duncan* said at p.282:

"With the exercise of that discretion no Court of law can interfere so long as no provision enacted by the Legislature is infringed. The Ministers are responsible for the exercise of their functions to the Crown and to Parliament only, and cannot be controlled by any outside authority, so long as they do nothing that is illegal."

Looked at in terms of the present-day position relating to the review of the governmental activity, that statement may perhaps be regarded as somewhat equivocal but it seems to me to be clear enough that at that time the word "illegal" would not have embraced the taking of an erroneous view as to the purposes for which a power was given, though it might well have covered a case of the deliberate use of a power for a purpose known to be beyond the purposes for which the power was given. Both the observations to which I have referred were made by the Privy Council in 1919 and they appear to me to reflect the atmosphere of the times just as the observations of Isaacs and Powers JJ. in the High Court in *Duncan v. Theodore* reflect that same attitude. The sixty years that have gone by have seen many changes in the law and in particular a great change in the attitude of the courts towards examination of the validity of executive action.

The first decision in the English courts in which the House of Lords decided that acts of a Minister in the exercise of statutory powers could be reviewed by a court in order to determine whether they had been exercised for the purposes for which they had been intended was in *Padfield's Case* in 1968. In Australia the earliest case in which the view was taken that acts of a Minister might be examined in order to ascertain whether what he had done was for purposes or with motives or intentions falling within those for which the power had been granted by the relevant legislation or regulations appears to have been *Murphyores Incorporated Pty Ltd v. The Commonwealth* in 1976. It may be noted that in this case the existence of the jurisdiction to investigate the exercise by a Minister of powers granted to him, otherwise than by reference to the existence of constitutional power to make the regulations or orders in question, was assumed rather than discussed and decided in express terms. No argument is reported as having been submitted on this point but it is undeniable that all members of the Court proceeded upon the view that the exercise of a discretion by a Minister could be examined by the Court for the purpose of determining whether it had or had not been exercised for the purpose for which it had been conferred, even though the question is not adverted to in the reasons for judgement.

It must therefore be assumed that the position is that both in Australia and in England the Court may examine the exercise by Ministers of their statutory powers in order to determine whether or not they have been exercised for purposes for which power or discretion has been conferred by the statute. The

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fact that a purpose may not always be readily ascertained from an examination of the statute does not affect the generality of the proposition for it is enough that there may in some cases be a discernible purpose capable of examination and comparison with the motives and intentions pursued or purposes sought to be attained by the Minister.

In the present constitutional framework of the Commonwealth and the States and now of the Northern Territory, the Governor-General, Governors or the Administrator are not in personal control of the executive government.

The executive power is vested in the Governor-General in Council, the Governor in Council or the Administrator in Council, as the case may be. The executive powers are therefore exercised by the Governor-General by and with the advice of such Ministers of the Crown as happen to be present at a particular meeting of the Executive Council. At that meeting members of the Executive Council advise the Governor-General in relation to the action which should be taken on whatever matters are brought before the meeting by one or more of the Ministers present. As Kitto J. observed in the passage which I have quoted above, the Governor-General "will be satisfied as he may be advised" so that, although the formal act is done by the Governor-General by and with the advice and consent of the Executive Council, the deciding mind or minds is that of the Minister or Ministers.

If an act done by a Minister pursuant to power vested in him by statute may be examined by the Court in order to determine whether he has acted for purposes or with intentions which are irrelevant to the proper exercise of power, or contrary to the purposes of the grant of the power, it would seem anomalous and irrational to say that it is impossible to examine a decision made by more than one Minister to advise the Governor-General to do an act which in constitutional reality he is obliged to do once advised so to do. It does not detract from this principle that it may in practice be very difficult for a person seeking to challenge a decision by the Governor in Council to prove the existence of an improper purpose for the reason that the larger the membership of the deciding body the more difficult the proof of an intention or a purpose common to all or common to a majority would be. That however is irrelevant to the principle.

Accordingly I am of opinion that the development and acceptance of the principle that the acts of individual Ministers may be examined by the courts in order to compare the purposes or the motives by reference to which a Minister exercised a power with the purpose for which the power was conferred has produced the consequence that the views expressed in *Duncan v. Theodore* by Isaacs and Powers JJ. and the Privy Council and by all members of this Court in *Blakeley's Case* are no longer reconcilable with later decisions. In so far as those views are based upon the secrecy attaching to Crown documents that

reason has also been substantially weakened by the decision of this Court in *Sankey v. Whitlam*. Notwithstanding that this conclusion finds no support in any decided case which has adverted to the problem, it seems to me to be one which logic and principle now compel the Court to reach notwithstanding that it is tantamount to overruling the views expressed by all members of the Court in the joint judgement in *Blakeley's Case*. There is now no question that the Court has power to overrule its earlier decisions, though the power is one to be exercised sparingly. In *Queensland v. The Commonwealth* (1977) 139 C.L.R. 5851 set out the basis upon which I regarded it as proper for the Court to overrule a previous decision. It may be that what is to be overruled is the reasoning and not the decision in many of the cases discussed. However that may be, I regard the principle stated in those cases as having been "overtaken" by later decisions in the sense in which I used that expression in *Queensland v. The Commonwealth* at p.624.

That conclusion makes it strictly unnecessary to consider the status of the Administrator of the Northern Territory but in the circumstances it seems desirable to do so. I agree with the observations of my brother Wilson on this point and with his conclusion that the Administrator is the representative of the Crown. In my opinion the provisions relied upon for the contention that he was not the representative of the Crown closely follow the provisions of the Australian Constitution itself which reserve to the Governor-General powers for enabling him to withhold consent or delay consent to bills passed by both Houses and reserve to Her Majesty certain powers. These provisions have never been regarded as producing the result that the Governor-General is not the representative of the Crown nor as producing the result that the legislature had a significant diminution of its powers or authorities by reason of those provisions. A useful analogy is provided by the position of the Lieutenant-Governors of the provinces of Canada.

Section 58 of the British North America Act 1867 (Imp.) provides that:

"For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada."

The powers and functions of the Lieutenant-Governors of the provinces do not significantly differ from those of the Governors of the States of Australia. In *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* [ 18921 A.C.437 Lord Watson, delivering the judgement of their Lordships, said (at p.443):

"The act of the Governor-General and his Council in making the appointment [i.e. of a Lieutenant-Governor] is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government."

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The Supreme Court of Canada adopted that view in *Reference re Power of Disallowance and Power of Reservation* [1938] 2 D.L.R. 8, at pp.11-12. There is nothing in the Northern Territory (Self-Government) Act 1978 (Cth) which suggests that a different answer should be given to that question from that given in relation to the Lieutenant-Governors of the provinces of Canada.

The question which remains is what, if any, relief may be granted in the present case. There appears to be no reason for doubting that the Commissioner is an "officer of the Commonwealth" within the meaning of s.75(v) of the Constitution and that the Court would therefore have jurisdiction in an appropriate case to grant an order for mandamus or for prohibition directed to him. Whether it is within the power of the Court to grant certiorari either at all or in a case such as this is a more difficult question and is one to which no definite answer has been supplied by any decision of the Court.

At the beginning of the hearing counsel for the Council stated the application for prohibition would not be pursued and sought an extension of time in which to apply for mandamus. There is no material limitation on the time fixed by the Rules of this Court applicable to an application for certiorari.

It is no doubt true that the line between failure or refusal to exercise jurisdiction and a wrongful exercise of jurisdiction is a fine one. It is an important distinction for present purposes because in the former case mandamus is available, whereas in the latter it is not. There are however instances of what the courts have called constructive failure of, or refusal to exercise, jurisdiction. In the present case the application was dismissed after the Commissioner had refused to make an order for the production of documents which might if produced have provided a basis for establishing the invalidity of the relevant regulation. The decision to dismiss the application was correct on the material before the Commissioner, but the result might have been different if account were taken of the material production of which he refused to order. His jurisdiction was twofold, first to ascertain whether the land in question was "unalienated Crown land", and second, if it were unalienated Crown land, to ascertain whether the applicants or other Aborigines were "traditional Aboriginal owners" of the land.

It is not material whether the power under s.54 of the Act to order production of documents was discretionary, because he did not purport to exercise a discretion. He refused to make the order for production because he thought he had no power to do so. The documents would have been relevant to the validity of the regulation and thus to the jurisdictional question of whether the land was unalienated Crown land. In thinking that he had no power to order production of the relevant documents he was, as we now know, mistaken. The question is whether in the circumstances this amounts to constructive refusal of jurisdiction.

The general principles with respect to constructive refusal of jurisdiction are stated by Jordan C.J. in *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 S.R. (N.S.W.) 416, at P.420:

"Yet it appears from the learned magistrate's report that he regarded the problem set for him by the section as that of determining whether any part of the land the subject of an appeal would derive benefit from the fighting, it following, if it would, that the whole of it must necessarily be included in the scheme, whether the rest of it would derive any benefit or not. In so doing, I think, with all respect, that he misunderstood the question which the section invested Mm with jurisdiction to decide, which was whether any, and if so what part, of the land the subject of an appeal would derive benefit and should therefore be included in the lighting district, and whether any, and if so what part of it, would not derive benefit, and should therefore be excluded.

It was contended, however, that even if this be so, at the worst all that the magistrate had done was to make a mistake of law in construing the section, and the fact that a tribunal has made such a mistake in exercising its jurisdiction does not amount in law to a constructive failure to exercise it. I quite agree that the mere fact that a tribunal has made a mistake of law, even as to the proper construction of a statute, does not necessarily constitute a constructive failure to exercise jurisdiction: *R. v. Minister of Health* [1939] 1 K.B. 232 at 245-6. But there are mistakes and mistakes; and if a mistake of law as to the proper construction of a statute investing a tribunal with jurisdiction leads it to misunderstand the nature of the jurisdiction which it is to exercise, and to apply 'a wrong and inadmissible test': *Estate and Trust Agencies (1927) Ltd v. Singapore Improvement Trust* [1937] A.C. 898 at 917; or to 'misconceive its duty,' or 'not to apply itself to the question which the law prescribes': *The King v. War Pensions Entitlement Appeal Tribunal* (1933) 50 C.L.R. 228 at 242-3; 16 *Austn Digest* 808; or 'to misunderstand the nature of the opinion which it is to form': *The King v. Connell* (1944) 69 C.L.R. 407 at 432, in giving a decision in exercise of its jurisdiction or authority, a decision so given will be regarded as given in a purported and not a real exercise of jurisdiction, leaving the jurisdiction in law constructively unexercised, and the tribunal liable to the issue of a prerogative writ of mandamus to hear and determine the matter according to law: *R. v. Board of Education* [1910] 2 K.B. 165. This is, I think, the predicament of the learned magistrate in the present case."

That case was applied by Barwick C.J. in *Wade v. Burns* (1966) 115 C.L.R. 537, at p.555. In that case Menzies J. said at p.562:

"It remains to consider whether the errors I have found justify mandamus to the mining warden to hear and determine the application according to law. In my opinion, they do. For an administrative authority to refuse an application under the mistaken belief that there is a statutory

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prohibition against granting it would call for mandamus to hear and determine according to law unless the statute made it clear that it was within the function of the administrative authority to determine finally the extent of his authority and to determine finally whether or not an application was within his authority. I do not read s.46(3) as conferring any such authority upon the mining warden. That provision forbids the granting of an application for an authority in the circumstances there stated, and if it appears that a mining warden has mistakenly decided that an application must be refused because in the circumstances he is prohibited from granting it, mandamus lies to compel him to hear and determine the application according to law."

Owen J. said at pp.568-569:

"The fact is that it was not for that reason that the application was refused. It was refused because the warden wrongly considered himself bound to apply ss.46(3) and 50(2)(a) and applied them. In doing so he constructively failed to hear and determine the matter according to law and mandamus should, in my opinion, go."

See also *Hammond v. Hutt Valley and Bays Metropolitan Milk Board* 19581 N.Z.L.R. 720.

What the Commissioner did amounted to a constructive refusal to exercise his jurisdiction to complete the consideration of the jurisdictional question of whether the land was unalienated Crown land. The completion of that matter would have involved his consideration of whether or not to order the production of Crown documents; he dismissed that application upon the erroneous ground that he had no power to order the production of the relevant documents. He thus failed to consider the question whether as a matter of discretion he should order their production. He then dismissed the application upon the ground that the land in question was not unalienated Crown land.

On that view of the situation the appropriate remedy is an order for mandamus directing him to consider whether he should order production of the Crown documents and to complete according to law the determination of the question whether the land was unalienated Crown land as defined and thereafter to proceed according to law. Accordingly I do not need to consider the unresolved question whether this Court may in its original jurisdiction make an order for certiorari or to consider whether there is before this Court anything which could be described as the "record" of the proceedings before the Commissioner.

WILSON J. On 20 March 1979 an application on behalf of Aboriginals making a traditional land claim was made by the Northern Land Council pursuant to the provisions of the Aboriginal Land Rights (Northern Territory) Act 1976 ("the Land Rights Act") in respect of an area of land which included part of the Cox Peninsula. On 20 December 1979 the Aboriginal Lands Commissioner (Toohey J.) declined to proceed with the hearing of the claim on the ground that the Cox Peninsula was not "unalienated Crown land" within the meaning of the Act. It was consequent upon that decision that the applicant applied to this Court for prerogative writs of prohibition, certiorari and mandamus. The application came initially before Gibbs J., who directed that it be made to a Full Court.

Before proceeding to a consideration of the issues involved in the case, it is convenient to outline the statutory context, and then to sketch the chronology of events. Section 50 (as amended) of the Land Rights Act, so far as material, provides as follows:

"50. (1) The functions of the Commissioner are -

- (a) on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land, being unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals -
  - (i) to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land; and
  - (ii) to report his findings to the Minister and to the Administrator, and, where he finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land in accordance with sections 11 and 12; . . .".

A key concept in this provision is "unalienated Crown land", which is defined in s.3 of the Act to mean (unless the contrary intention appears) -

"Crown land in which no person (other than the Crown) has an estate or interest, but does not include land in a town". (My emphasis.)

With respect to "town", the same section provides that -

'town' has the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town". (My emphasis.)

The relevant effect of these provisions for the purposes of this case is that the Commissioner has no jurisdiction to consider and report on a claim that is made in respect of an area of land that, by virtue of regulations in force under the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, is to be treated as a town.

It is common ground that until December 1978, a substantial portion of the Cox Peninsula satisfied the description of "unalienated Crown land" within the meaning of the Act. However, by regulation No. 53, purporting to have been made on 22 December 1978 under the Town Planning Act 1964-1978 (N.T.), and published in the Government Gazette on 29 December 1978, the Administrator prescribed, inter alia, an area of land amounting to 4350 square kilometres more or less in extent said to be adjacent to the town of Darwin and as specified in a Schedule to the Regulation, to be subject to the provisions of the Town Planning Act (excepting certain specified sections) as if it were a part of that town. The Court was informed that the town of Darwin presently occupies an area of approximately 124 square kilometres, so that it will be seen that the effect of the regulation, if valid, was to extend the reach of the Town Planning Act in the region of Darwin to a remarkable extent. Similar prescriptions were made in the regulation with respect to areas said to be adjacent to Alice Springs, Tennant Creek and Katherine. The regulation referred specifically to s.5(b) of its parent Act, which read as follows:

"5. The regulations may prescribe that a specified area of land -

(a) . . .

(b) being land adjacent to a town, shall be subject to the provisions of this Act, but not including the provisions of sub-section (4) or (5) of section eight or sub-section (2) of section eleven of this Act, as if it were part of that town."

Section 73 provided that -

"The Administrator in Council may make regulations, not inconsistent with this Act, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to this Act".

On 26 and 27 June 1979, the Commissioner heard argument that was directed primarily to the question whether the claim was maintainable in respect to that part of the area claimed which was specified in regulation No. 53. The claimants argued that the Administrator had made the regulation for an ulterior purpose, namely, to defeat the claim, and that it was therefore invalid. The Attorney-General of the Northern Territory was heard in support of the validity of the regulation. On 24 July 1979, the Commissioner published

his decision on the matters that had been canvassed in the June hearing. He held that the Administrator was a representative of the Crown, and that consequently the bonafides of his action could not be called in question. He held further that the only way in which the validity of the regulation could be challenged was by reference to the question whether the area could fairly be described as adjacent to the town of Darwin.

The matter did not rest there. On 3 August 1979, the Planning Act 1979 (N.T.) came into force, repealing the Town Planning Act, and replacing regulation No. 53 with a new set of regulations (No. 13), which included a reg.5, reading as follows:

"5. For the purposes of section 4 of the Act, the several areas of land specified in Schedule 3 are specified to be areas which are to be treated as towns".

Section 4 provides, inter alia, that in the Act, unless the contrary intention appears, the word "town" means -

- "(a) a town within the meaning of the Crown Lands Act;
- (b) a municipality; or
- (c) land specified by the regulations to be an area which is to be treated as a town".

The correspondence between the phrase "treated as a town" in these provisions and the definition of "town" in the Land Rights Act is an indication that the draftsman had the latter Act in mind when preparing the Planning Act. The new regulations No. 13 specified in Schedule 3 under a heading "Part I - Darwin", an area of land similar to that which was described in the earlier regulation No. 53 as adjacent to the town of Darwin. The power to make the regulations is contained in s.165 of the Planning Act, a provision to which I will refer later.

The change in the law led to a further hearing before the Commissioner on 29 and 30 October 1979, when the validity of the new regulation was challenged by the claimants. As before, the Attorney-General appeared to support the regulation. The Commissioner again parried the attack, while rejecting some of the submissions advanced from both sides. His Honour noted that the Land Rights Act, by its definition of "town", yielded responsibility for the content of that term to the law of the Northern Territory as it may be from time to time in relation to the planning and developing of towns and the use of land in or near towns, and also that it contemplated that the relevant Territory law may permit subordinate legislation to draw in land that is neither a town nor near a town. I pause to reflect whether the latter conclusion may not proceed from a construction of the definition that is erroneous. It seems to me that

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since the source of a regulation whereby an area is to be treated as a town must be a law "relating to the planning and developing of towns and the use of land in or near towns" it follows that the land which is to be treated as a town must be land which, not being a town, is near a town. However, if it becomes necessary to apply such a construction to the facts of the case, it may be that this Court is in as good a position to answer the question as the Commissioner. When he turned to examine the validity of the regulation which designated the area of land including Cox Peninsula as an area "to be treated as a town", the Commissioner rejected the Crown's contention that the Administrator's power to specify by regulation an area to be treated as a town was wholly uncontrolled by any legal considerations. He held that, to be valid, the regulation must serve the purposes of the Planning Act, and in particular the purpose which the notion of "town" serves under that Act. He therefore held that the criterion of validity was the existence of a town planning purpose with which the specified land had some connection. He observed that part of the land the subject of the claim is within the apparent operation of regulations made under the Planning Act, and ruled that the onus lay on the claimants to show that the specified land is not reasonably capable of fulfilling a town planning purpose, and thereby to displace what he described as the ordinary presumptions of validity and regularity.

The claimants attempted to discharge this onus at a further hearing held on 26 and 27 November 1979, when the Commissioner heard evidence tendered by them and by the Attorney-General. In the result he was not persuaded that the subject land in the regulation was not reasonably capable of having some connection with or fulfilling a town planning purpose. The regulation was therefore valid, with the consequence that the land was not available to be claimed as unalienated Crown land under s.50 of the Land Rights Act.

I come now to consider the submissions advanced by Mr. Sher for the applicant. They may be grouped conveniently under three heads: firstly, the significance if any of the change in the law after the lodgment of the claim; secondly, the validity of the regulation; and finally, decisions of the Commissioner with respect to onus of proof and the formulation of the test of validity of the regulation with respect to purpose.

#### Effect of Change in law

For the purpose of this argument, the applicant assumes the validity of both regulation No. 5 3 under the Town Planning Act, and the later regulations under the Planning Act. It then argues -

- (a) that the proper construction and application of the Land Rights Act requires that the date of the making of a claim is the critical time so far as concerns the status of the land as unalienated Crown land, and the jurisdiction of the Commissioner;
- (b) that no formality is necessary to the making of a claim, and the fact that some indication of a claim to the Cox Peninsula was given by the Northern Land Council to the Northern Territory Government before there was any change in the status of the land precluded subsequent alienation or at least ensured that the subsequent alienation could not disturb or prevent the processing of the claim; and
- (c) in any event, the repeal of regulation No. 53 after the lodgment of a formal claim was sufficient to validate that claim.

The affidavit of Philip John Teitzel, filed in support of the application, provides a detailed history of the events leading up to the hearing before the Commissioner. It exhibits correspondence in September 1977 and March 1978 from the Northern Land Council to the Lands Branch of the Department of the Northern Territory in Darwin in respect of a claim to the Cox Peninsula made or to be made to the Aboriginal Lands Commissioner. However, that correspondence falls far short of establishing that a claim was ever made to the Commissioner in respect of the Peninsula prior to 20 March 1979. In his affidavit, Mr. Teitzel describes the steps taken in January 1979 to adjourn the hearing of a claim to Dum-in-Mirrie Island then scheduled for February 1979 so that the claim could be consolidated with the claim 'then foreshadowed' in respect of the Cox Peninsula, and he then says "At that time the broader claim had not been lodged". The affidavit then proceeds to the statement that on 20 March 1979 a claim was lodged by him on behalf of the Northern Land Council in respect of the substantial area of land in the Cox Peninsula. There can be no doubt that for the purpose of considering the operation of s.50 of the Land Rights Act, this is the date of the application to which the section refers. At that time, of course, regulation No. 53 (assuming validity) was already operative, the Cox Peninsula was no longer "unalienated Crown land", and the Commissioner was without jurisdiction to entertain the claim.

At this point in the argument, the applicant relies on the repeal on 3 August 1979 of the Town Planning Act and regulation No. 53. But of this stand, two things must be noted. The first is that a fresh claim was not made; the second, more importantly, is that the new regulation came into operation on the same day as the repeal of the old one became effective, so that there was no point of time at which it could be said that the Cox Peninsula had reverted to the status of "unalienated Crown land".

In any event, this submission would only avail the applicant if it were correct in its premise, namely, that so long as an application has been made pursuant to s.50 of the Land Rights Act in respect of unalienated Crown land, then a subsequent change in the status of the land is immaterial. It is true that s.50 outlines the function of the Commissioner "on an application being made" in respect of a traditional land claim to an area of land which satisfies a given description. It is clearly the policy of the Act that a land claim can be entertained only in respect of land which is "unalienated Crown land or alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals". But, unfortunately, from the point of view of the claimants, the Act does not prevent the land being alienated subsequently to an application being made, nor does it provide any procedures whereby a claim may be granted notwithstanding such an alienation. The applicant pointed to the provision in s.1 l(1)(d) whereby the Minister, in the event that he is satisfied that the land or any part of it should be granted to the Aboriginals, is required in the case of alienated Crown land to ensure that the estates and interests in that land of persons other than the Crown are acquired by the Crown by surrender or otherwise. But in my opinion this provision is simply a recognition of the fact that an application may be made under s.50 in respect of land which is alienated Crown land in which all estates and interests not held by the Crown are held by, or on behalf of, Aboriginals - hence the emphasis on "surrender". I am forced, reluctantly, to the conclusion that the Commissioner's function under s.50(1)(a) extends only to land which satisfies the description contained therein. A change in the status of the land subsequently to the making of an application whereby the land ceases to fit the description necessarily has the effect of depriving the Commissioner of any further function in respect of it.

If it should be thought that this result reflects a serious gap in the legislation, it must be remembered that at the time of the passing of the Land Rights Act the authority of the Commonwealth extended not only to the administration of the Act but also to the alienation of Crown land in the Northern Territory, with the result that a conflict of policy may not have been anticipated. However, that situation was changed when self-government was conferred on the Northern Territory in 1978.

The validity of the regulation: (a) Want of Utility

The applicant advances two independent submissions by way of attack on the validity of the regulation under the Planning Act that purported to come into effect on 3 August 1979. The first is that it fails for want of a useful purpose; the second is that it fails because of bad faith or improper purpose, an issue which he submits the Commissioner wrongly held was not maintainable in relation to the actions of the Administrator in his capacity as a representative of the Crown. If this latter allegation succeeds, then the matter may have to be remitted to the Commissioner for the issue to be determined on evidence.

In support of the first of these submissions, the applicant relies on the nature and thrust of the Planning Act. It says that it is an Act of general application. Its long title declares that it is an Act to provide for "the Planning and Control of the Use and Development of Land". It draws no distinction between town and country, between urban and non-urban land. The word "town" appears only in s.4, the definition section, and in Part IX which contains transitional provisions. It follows therefore, so it is said, that there is no purpose of the Act to be served by identifying an area as a town or as an area which is to be treated as a town. I will consider the argument before describing an amendment to the Act which received assent on 14 March 1980, and which may be relevant.

In *Shanahan v. Scott* (1957) 96 C.L.R. 245, a majority of the Court (Dixon C.J., Williams, Webb, and Fullagar JJ.) discussed the scope of a general power to make regulations providing for all or any purposes necessary or expedient for the administration of an Act or for carrying out the objects of an Act. In a joint judgement, their Honours, after referring to *Carbines v. Powell* (1925) 36 C.L.R. 88, *Gibson v. Mitchell* (1928) 41 C.L.R. 275, *Broadcasting Company of Australia Pty. Ltd. v. The Commonwealth* (1935) 52 C.L.R. 52, *Grech v. Bird* (1936) 56 C.L.R. 228, and *Morton v. The Union Steamship Company of New Zealand Ltd.* (1951) 83 C.L.R. 402, at pp.409 and 410 said:

"The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends." (p.250)

This passage was approved by the Judicial Committee of the Privy Council in *Utah Construction & Engineering Pty. Ltd. v. Pataky* (1966) A.C. 629, at p.640, and affirmed by this Court in *Willocks v. Anderson* (1971) 124 C.L.R. 293.

It will be noted that the attack here is not that the regulation is bad because it extends the operation of the Planning Act; it is rather that it achieves nothing at all. As I have already observed, the power to make regulations is found in s. 165; it extends to "regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act . . . ". The applicant argues that the words "for carrying out or giving effect to this Act" govern both the prescriptions described in this section, with the consequence that it is not enough that a regulation should be in respect of a matter which is required or permitted by the Act to be prescribed; it must also be seen

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to carry out or give effect to the Act. The grammatical construction of the section is opposed to the argument because, in contrast to its predecessor (s.73) in the Town Planning Act, there is no comma to separate the concluding phrase from the words immediately preceding it.

But even if the point be conceded, the submission that this regulation is invalid because it fails to serve a useful purpose and is therefore unnecessary cannot in my opinion be sustained. It is true, as the Commissioner observes, that the precise significance of a town does not emerge very clearly in the Planning Act. However, the Act is clearly concerned with the planning and control of the use and development of land generally, whether it be land within a town or otherwise. An important technique of control is the "planning instrument", which is defined to mean either a regional plan or a town plan. A regional plan applies wholly or substantially to land which is not in a town, and a town plan applies to land which is. Presumably the distinction which the Act draws between town and region will find expression in the pursuit of the procedures for which the Act provides, for example, the preparation of a draft planning instrument (s.44), the hearing of objections (s.56), the consideration of an application for subdivision (s.93), and of a development application (s.110). Part IX of the Act (ss.166 ff.) deals with transitional provisions, and includes many references to town planning schemes, but this term takes its meaning from the repealed Act. I do not think that this Part materially contributes to an understanding of the part that "town" plays in the Planning Act. Finally, in this regard, reference may be made to s.60A of the Act. This is a section which was inserted on 14 March 1980 by amending Act No. 24 of 1980. It contemplates that the Minister may prepare and accept a draft planning instrument in relation to any land within a town in the circumstances which are there set out. Clearly, it is a section which is affected in its operation by the definition of "town" in s.4, including the regulation which is in question here.

It is also alleged for the applicant that the earlier regulation (No. 53 of 1978) was invalid, and therefore inoperative at the time when its formal claim was lodged in March 1979. The submission assumes a form which differs from that which I have discussed in relation to the later regulation. The earlier regulation was made under the Town Planning Act, in pursuance of a provision (s.5(b)) in that statute which expressly authorised the prescription of a specified area of land, being land adjacent to a town, to be subject to certain provisions of the Act "as if it were part of that town". In this case the argument is that the regulation is invalid for failing to serve the purposes of the Act because it was premature. To be valid such a prescription should be made only when a proposal for a town has been prepared. No authority was advanced in support of such a contention, and I find it quite untenable.

The validity of the regulation:

(b)Improper purpose: Status of the Administrator

However, notwithstanding the fate of these submissions, the applicant argues that the validity of both the regulations is open to attack on an entirely different ground, a ground which the Commissioner refused to entertain, and the success of which would require the matter to be remitted to him for further hearing. This is the argument that both regulations were made for an ulterior purpose, namely, to thwart the traditional land claim to the Cox Peninsula. The Commissioner ruled that the Administrator was the representative of the Crown, and that the doctrine of Crown immunity applied so as to preclude a Court from questioning the motive behind his actions. The applicant contests both the status of the Administrator and the existence of the doctrine in any event.

Mr. Sher argues that the position of the Administrator under the Northern Territory (Self-Government) Act 1978 is no different in essential respects from his position under the Northern Territory (Administration) Act 1910-1976. He points out that under the earlier Act the Administrator was charged with the duty of administering the government of the Territory on behalf of the Commonwealth, was bound to comply with such instructions as were given to him by the Commonwealth Minister, and obliged to take an oath of service as well as the oath of allegiance to Her Majesty. In the light of these features of the office, so it is said, the Administrator was clearly a servant of the Crown in right of the Commonwealth with the consequence that his legislative and executive acts were open to challenge for want of good faith. As it was then, so it is now. In my opinion, this submission fails to have regard to the true significance of the Self-Government Act. It effected an important change in the political character of the Northern Territory with a corresponding change in the status of the office of Administrator. The preamble to the Act declares its purpose to be to confer self-government on the Territory, and for that purpose to provide, inter alia, for the establishment of separate political, representative and administrative institutions in the Territory. Section 5 declares that -

"The Northern Territory of Australia is hereby established as a body politic under the Crown by the name of the Northern Territory of Australia".

This section is of fundamental and far-reaching importance. It brings into being a new self-governing polity under the Crown. Of necessity, it required the appointment of a representative of the Crown in right of that polity, to administer the government thereof and perform the traditional vice-regal functions. Section 6 invests the Legislative Assembly with power to make laws for the peace, order and good government of the Territory, a power which in my opinion, subject to the limits provided by the Act, is a plenary power of the

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same quality as, for example, that enjoyed by the legislatures of the States. The constitution of the Territory as a self-governing community is no less efficacious because it emanates from a statute of the Parliament of the Commonwealth than was the constitution of the Australian colonies as self-governing communities in the nineteenth century by virtue of an Imperial statute: cf. *Hodge v. The Queen* (1883) 9 App. Cas. 117; *Powell v. Apollo Candle Company* (1885) 10 App. Cas. 282. In my opinion, the Self-Government Act is a valid exercise of the power conferred on the Parliament by s. 122 of the Constitution. The fact that the Administrator is appointed by the Governor-General and holds office at his pleasure does not deny his character as representative of the Crown in right of the Territory: *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick* (1892) A.C. 437; *The King v. Carroll* (1948) 2 D.L.R. 705. The status of the new polity is borne out by the provisions of the Self-Government Act, which, contrary to the submission of the applicant, differs significantly from the earlier Administration Act. The Administrator no longer administers the government of the Territory "on behalf of the Commonwealth"; that government is henceforth administered in its own right by the Administrator (s.32). There is no longer any general subjection of the Administrator to the instructions of the Commonwealth Minister; henceforth such instructions are of force only in relation to the exercise of the powers and functions of the Administrator that fall outside ss.34 and 36 which cover decisions touching the size of the ministry and the participation of members of the Legislative Council in that ministry, and in relation to matters which fall outside those in respect of which the Ministers of the Territory are to have executive authority (ss.32 and 35). The range of matters which have been specified pursuant to s.35 is extensive. The effect of the section is such as to limit the possible impact of ministerial instructions to a small compass. Mr. Sher stressed the fact that the Administrator is still required to take an oath of service to the Crown, but in my opinion this does not determine his relationship to the Crown. Furthermore, while there are provisions which emphasise a continuing role for the Governor-General in relation to the assent to bills, and to their disallowance (ss.8 and 9), and which maintain a special relationship between the Territory and certain specified laws of the Commonwealth (see, e.g. ss.53 and 54), and while it remains true that the Parliament retains the power to repeal or amend the enactment, none of these things destroy the analogy in the present situation with the relationship that existed between the United Kingdom Government and Parliament and the Australian colonies in the nineteenth century. The creation of a new polity under the Crown, with its own Crown representative, remains a fact.

Validity of the regulation:

(c)Improper purpose: Examinability

This brings me to the second limb of the argument, namely, that Toohey J. erred in holding that he could not entertain an attack on the validity of the regulation which proceeded beyond its form to the purpose to which it was

directed. The submission focuses attention on the problem which lies very close to the heart of this case. It raises a question of great importance to the relationship of the courts to the executive government. There is good ground for saying that the Commissioner faithfully applied the relevant law so far as it has been expressed previously in Australia. But, as Stephen J. has demonstrated in his reasons for judgement in this case, and which I have had the advantage of reading, the established view rests on somewhat slender foundations, and appears to differ markedly from the course that has been taken in Canada, New Zealand and the United Kingdom. In particular, the statements of Dixon J. and Fullagar J. in *Australian Communist Party v. The Commonwealth* (1951) 83 C.L.R. 1, at pp.179 and 257 respectively, must be seen in the context of the facts of that case, where the relevant subject-matter under consideration was the examinability of the view taken by the Governor-General in relation to matters of national security. Such matters are necessarily of a kind which are not often susceptible of judicial review, and the particular responsibility of the Crown and its advisers will generally attract ready recognition: cf. *Chandler v. Director of Public Prosecutions* (1964) A.C. 763, per Lord Radcliffe at p.797. Even in this field, much may depend on the precise form of the issue and the way in which it is raised: *ibid*, per Lord Devlin at p.809 ff.

In view of the uncertain state of the authorities revealed in the discussion by Stephen J., I think it desirable that I should examine the matter afresh. In any event, there is every justification for such an examination. The steadily expanding role of the State in recent decades provides increasing occasion for the individual citizen to feel aggrieved as the result of administrative action with a consequent need to ensure that the principles of administrative law relating to judicial review of such action remain sufficiently flexible to meet the requirements of justice without imposing unreasonable restraints on the freedom of government action. As recently as 1967, Jacobs J.A. justified the restraints as then understood on judicial review of discretionary decisions of the Governor in Council by saying that "if it were otherwise the path of the Crown, the executive government, would be so strait that no government could walk it": *New South Wales Co. Pty. Ltd. v. Attorney-General for New South Wales* (1967) 67 S.R. (N.S.W.) 341, at p.357. But the winds of change were already beginning to blow, and to blow strongly. In *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) A.C. 997, at p. 1030, Lord Reid asserted the justification for a wide-ranging doctrine of judicial review:

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

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cf. also *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1977) A.C. 1014, at p.1025; *Laker Airways Ltd. v. Department of Trade* (1977) Q.B. 643, at pp.707-8.

But it is not only in materials of recent origin that guidance is to be found.

The distinction has frequently been drawn in this area of discourse between powers which have their origin in the prerogatives of the Crown, and those which are conferred by statute, the latter being said to be more susceptible of judicial review than the former. It may well be true that the limits of a statutory power can be more readily discerned from the Act conferring the power.

The distinction is well illustrated in the historical survey which Mason J. has undertaken in his reasons for judgement in this case, and to which I am indebted.

Even so, Blackstone would seem to have contemplated the same principle as applicable to the exercise of prerogative powers when he wrote in his *Commentaries*, 15th Ed. Vol. 1, at p.251:

"For the prerogative consisting ... in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner"

Lord Denning referred to this passage in his judgement in *Laker Airways* (at p.706), and proceeded to the conclusion that -

... when discretionary powers are entrusted to the executive by the prerogative - in pursuance of the treaty-making power - the courts can examine the exercise of them so as to see that they are not used improperly or mistakenly."

By "mistakenly", His Lordship meant "under the influence of a misdirection in fact or in law".

Again, a distinction has sometimes been drawn between powers which have a legislative character and powers which are more aptly described as administrative or executive powers, the former being thought to be less open to judicial review. But it would seem that only limited assistance is to be gained from such an attempt at characterisation. In *Arthur Yates & Co. Pty. Ltd. v. The Vegetable Seeds Committee* (1945) 72 C.L.R. 37, Dixon J. was discussing the question whether the legislative character of orders made by the Committee was relevant to the question whether the purpose animating the Committee was a ground of invalidity. He continued (at p.80):

"Indeed I do not think that in English law such a question will be found ever to be solved by ascertaining whether, upon a correct juristic analysis, the power should or should not be described as legislative. It will depend rather upon the nature of the authority in whom the power is reposed and upon the measure and extent of the power, its subject matter and its limitations and the conditions in or upon which it is exercisable".

It seems to me that the fact that a particular power is reposed in the representative of the Crown acting on the advice of his Ministers will seldom warrant the operation of different principles of judicial review to those which would apply if the power were reposed in a Minister of the Crown acting alone. I am unable to draw any distinction in principle between the two cases. Of course, it is not for the courts to assume any responsibility for oversight of the policy expressed through the decisions of the executive government. There is no reason whatever to doubt the statement of Warrington L.J. in *Short v. Poole Corporation* (1926) Ch. 66, at pp.91-92:

"With the question whether a particular policy is wise or foolish the Court is not concerned; it can only interfere if to pursue it is beyond the powers of the Authority."

In other words, the courts will not review the proper exercise of discretionary power. Furthermore, in the case of a statutory power the construction of the relevant statute will be of primary importance in determining the nature and extent of any such power and the consequent scope for any judicial review. In the case of prerogative powers, the subject matter of the power will be of primary importance in determining whether the manner of exercise of the power is justiciable. In this regard, I have already referred to observations of their Lordships in *Chandler*. Likewise, I would not question the correctness of the statement of Lawton L.J. in *Gouriet v. Union of Postal Workers* (1977) Q.B. 729, at p.768, and confirmed by the House of Lords (1978) A.C. 435, to the effect that the courts have no jurisdiction over the discretion of the Attorney-General as to when, and when not, he should grant his fiat in a relator action, or as to a decision to prosecute or not to prosecute. These powers are necessarily encompassed wholly within his traditional law-enforcement function as the Law Officer of the Crown: cf., also, *Barton v. The Queen* (1980) 32 A.L.R. 449. Against this background, I return to the complaint of the applicant in this case. The Administrator made a regulation which was in due form and to all appearances a proper exercise of the power conferred by s. 165 of the Planning Act. In the exercise of the power, he was obliged to act with the advice of the Executive Council consisting of persons then holding ministerial office (*Northern Territory (Self-Government) Act 1978, s.33*). It will be observed at once that the power found its origin in statute, not in the prerogative. In my opinion, the Commissioner has jurisdiction to entertain, in the course of determining whether the Cox Peninsula is unalienated Crown Land within the meaning of the Land Rights Act, an allegation that the regulation in question is invalid because it was not made for the purpose of advancing the policy and objects of the Planning Act, but for the ulterior purpose of placing the Peninsula beyond the reach of a land rights claim. This conclusion is not affected by precise considerations based on the construction of the power to make regulations contained in s. 165; it simply recognises that every Act supplies a perspective in

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which the policy and objects of the legislature can be discerned, and which serves to provide that framework within which the legislature intended the powers which it conferred to be exercised. The scope of judicial review which a statute concedes to a court will vary from Act to Act, depending on the kind of considerations which Dixon J. outlined in the *Vegetable Seeds* case to which I have referred: see also Lord Wilberforce in *Tameside* at p. 1047. I would not expect this understanding of the relevant principles to impede good government. It must be seldom that a regulation in due form and apparently within power will be open to challenge on the ground that it was made for reasons which are unrelated to the intent and purpose of the Act. Nor is there any reason to suppose that the principles of law touching Crown privilege will be inadequate to afford proper protection to the relationship between the representative of the Crown and his ministerial advisers.

It follows from my conclusion in this respect that with all respect I think the Commissioner was wrong when by his decision of 24 July 1979 he refused to allow the claimants to advance the argument of invalidity based on an ulterior purpose.

The Commissioner's decision as to onus and test for validity

Mr. Sher then directs his attention to the rulings made by the Commissioner in the course of the two hearings conducted by him following the making of the Planning Act Regulations on 3 August 1979. He says that the Commissioner was wrong when he ruled that the regulation in question in order to be valid must be capable of fulfilling a town planning purpose, and further that he erred in placing an onus on the applicant to establish its invalidity.

In the light of my conclusion relating to the issue of invalidity by reason of ulterior purpose, it may be unnecessary to examine the actual ruling of which the claimants complain. However, it may be helpful to state briefly why I think, with respect, that the Commissioner erred in postulating as a test of validity the question whether the regulation was capable of fulfilling a town planning purpose.

I agree with Mr. Sher that it is so vague as to be meaningless. Once it be recognised that the test of adjacency to a town which was required in respect of the similar power in the earlier Town Planning Act no longer applies, with the consequence that land in the Territory may be specified as land which is to be treated as a town whether or not it is adjacent to a town, no Court can determine whether or not that land is capable of fulfilling a town planning purpose. The answer might be thought to depend on the existence of proposals under the Planning Act to promote its development as a town rather than as a region. But there is no requirement that any particular steps in that direction

must have been taken before the power to make the regulation is exercised. It may well be considered expedient to make the regulation so as to give advance notice of the designation upon which the projected development may proceed before any details of that development are ready to be published. Although in the present case the Commissioner was furnished with evidence of long-term proposals having a town planning significance touching the land in question, which led him to find the issue against the applicant, it is difficult to see why the validity of the regulation should have depended upon the fact that those proposals happened to be in existence at that time. It would be otherwise if the exercise of the power was tied into the promulgation of a town plan so that the two things were necessarily related in time, but that does not appear to be a requirement of the Act. I have already noted and rejected, in the context of the earlier regulation, the argument of prematurity which was advanced for the applicant. It must also be said of the Planning Act that a regulation which specifies an area to be treated as a town cannot be said to be invalid merely because it precedes other procedures under the Act which when implemented will operate upon the specification.

It follows from this conclusion that it is unnecessary to consider the evidentiary questions which attracted the criticism of the applicant. However, I would observe in passing that the argument that the Commissioner erred in holding that an onus rested on the applicant to establish the fact that the land the subject of the claim was "unalienated Crown land" would seem to be untenable. The applicant asserted that the land was of such a character that the Commissioner had jurisdiction to entertain the claim; in the event of an issue being raised in this regard, it was for the applicant to satisfy the Commissioner of its assertion.

There remains one other matter to be considered. Let it be assumed that the Planning Act regulation is valid, with the result that for the purposes of the application of the word "town" under the Planning Act the Cox Peninsula is to be treated as a town. It is still necessary to see how it measures up to the provisions of s.50 of the Land Rights Act. It will be remembered that that section identified the land which could be the subject of a traditional land claim as including "unalienated Crown land". That term does not include land in a town. "Town" is defined in s.4 as follows -

"'town' has the same meaning as in the law of the Northern Territory relating to the planning and developing of towns and the use of land in or near towns, and includes any area that, by virtue of regulations in force under that law, is to be treated as a town".

This definition is apt to include the Cox Peninsula, provided that the Planning Act, vis-a-vis the relevant regulation, satisfies the description of a law "relating to the planning and developing of towns and the use of land in or near towns". No doubt that Act is capable of satisfying the description in so far as it deals

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with towns and the use of land in or near towns, but in my opinion it could not be so described when it is dealing with other land. If this is so, then, theoretically, it is open to the claimants to assert that the Cox Peninsula is not land "near" the town of Darwin with the consequence that the Commissioner has jurisdiction to entertain their claim because, notwithstanding the regulation under the Planning Act, the land the subject of the claim is unalienated Crown land within the meaning of the Land Rights Act. In my opinion this question must be determined by the Commissioner as a fact on which his jurisdiction would depend; it is not strictly analogous to the issue of "adjacency" which the Commissioner deferred for later consideration when he was dealing with the regulation under the Town Planning Act, and which was relevant to the validity of the regulation rather than to the operation of the Land Rights Act upon it. Notwithstanding that it is a matter for the Commissioner, I propose to express briefly my view upon it, because I do not think that in this case the issue can be resolved favourably to the claimants, and it would be insensitive of me to encourage them to find any comfort in it. The material which is before the Court includes plans which show the area of land to which the regulation in question refers. It appears to extend more or less uniformly out in all directions (excluding the sea) from the boundaries of the town of Darwin to a furthest distance of between thirty and forty miles. In the course of argument, the Court was informed from the Bar table that the nearest point to Darwin of the Cox Peninsula was about six kilometres across the harbour, that the whole of the peninsula was contained within a twenty-five kilometre radius from the town, but that access by road entailed a journey of almost one hundred kilometres by a route that was sometimes impassable. The question of proximity to a town must be a question of fact and degree. Having regard to the facts that -

- (a) the specified area covers an unbroken area of land which is adjacent to the town boundaries,
- (b) the peninsula is readily accessible by sea and air,
- (c) it is already the subject of existing planning proposals which led the Commissioner not to be satisfied that the land was not capable of fulfilling a town planning purpose,

I find inescapable the conclusion that the Planning Act, in relation to the regulation in question, is a law relating to "the planning and developing of towns and the use of land in or near towns" within the meaning of the Land Rights Act.

Having regard to my conclusion on the justiciability of the attack on the validity of the regulation, this matter should be referred -back to the Commissioner for him to proceed to deal with the application according to law. As my brother Aickin demonstrates, there has been a constructive failure to exercise jurisdiction. I would therefore make an order for mandamus.

## KENBI (COX PENINSULA) LAND CLAIM

Application for discovery

Reasons for decision

This application raises questions important to the operation of the Aboriginal Land Rights (Northern Territory) Act 1976 but circumstances dictate that those questions be answered now rather than later.

On 24 December 1981 the High Court, in proceedings brought by the Northern Land Council to which the Attorney-General for the Northern Territory was joined, ordered that a writ of mandamus issue to the Aboriginal Land Commissioner

directing him to proceed to deal in accordance with law with the application made by the prosecutor under section 50(1)(a) of the Aboriginal Land Rights (Northern Territory) Act 1976 and known as the Kenbi Land Claim.

The reasons underlying that order were expressed in different ways by the members of the Court, but it is enough, I think, to quote from the judgement of the Chief Justice at pages 17 to 18 of the print I hold of the Court's judgement. His Honour said:

In the present case the appellant was, in my opinion, entitled to challenge the Planning Regulations, and if necessary also the Town Planning Regulations, on the ground that they were made for a purpose which was not a planning or a town planning purpose. The challenge might be made either on the ground that the regulations were invalid on their face or on the ground that evidence would show that they were in fact designed to defeat the traditional land claims of Aboriginals. It was necessary for the Commissioner to decide on the validity of the Planning Regulations to enable himself to determine whether the application was made in respect of land to which section 50(1)(a) of the Land Rights Act applied. If the regulations were invalid, there was no justification for him to fail to continue to exercise his function under section 50(1)(a).

The order of the High Court enjoins the Land Commissioner to deal with an application by the Northern Land Council concerning an area of land said to be unalienated Crown land but which the Government of the Northern Territory says is land within a town, hence outside the jurisdiction of the Commissioner. The resolution of that issue involves the validity of certain town planning and planning regulations. Their validity in turn involves the matters to which the Chief Justice referred. It is against that background that the present application must be determined.

The Northern Land Council seeks an order that the Northern Territory Government and the Administrator give discovery of documents relating - and I look now not so much to the application itself but to the Land Council's letter of 1 April 1982 - to reg. 5 and schedule 3 Part I of Regulation No. 13 of 1979 made under the Planning Act, and reg. 3 and schedule I para. (1) of Regulation No. 53 of 1978 made under the Town Planning Act.

Without limiting the generality of that order, the application itself identifies various categories of documents said to be relevant. The orders sought do not foreclose argument as to what may be relevant to the issues to be determined, nor do they shut out any objection that may properly be taken to the production of documents on the ground of privilege or otherwise. It has not been suggested in argument that the categories set out in the application are on their face irrelevant or that there are not or have not been in existence documents relating to the issues seen by the High Court as bearing upon the validity of the regulations.

The Northern Land Council prays in aid of its application s. 51 of the Land Rights Act which reads: 'The Commissioner may do all things necessary or convenient to be done for or in connection with the performance of his functions.'

It does not suggest that the Commissioner has an inherent power to make the orders sought, and as he is a creature of statute, it is in the statute that his powers must be found.

It seems to me that the submissions of counsel were to some extent bedevilled by the use in the application of the term 'discovery', a word which has a precise meaning in courts of law and which is surrounded by a great deal of learning. It is true that what is sought is in the nature of discovery, but the real question is whether to make the orders applied for is to do something necessary or convenient to be done in connection with the performance of the Commissioner's functions.

That does not mean functions at large; the matter is not to be resolved in some abstract way. I am not asked to lay down practice directions or define the ambit of my powers. What I have to determine is whether in the circumstances of the present case such an order is necessary or convenient in connection with the performance of the function spelled out in s. 50(1)(a) of the Act, ascertaining whether there are traditional Aboriginal owners of an area of unalienated Crown land. The scope of that determination must, of course, reflect the reasons for judgement of the High Court. Put another way, in determining whether the land claimed is unalienated Crown land as that term is defined in s. 3 of the Land Rights Act, I must consider the purpose for which certain regulations were made. Counsel for the Attorney drew no distinction between the two sets of regulations for present argument, and I draw none.

It has not been suggested by the Crown that documents of the sort categorised in the application now before me do not exist or that they may not throw some light on the purpose that the High Court held to be open to investigation. If I make an order directing that the Government of the Northern Territory disclose whether relevant documents exist, am I in the particular circumstances of this matter doing something which is necessary or convenient in connection with the performance of the function of deciding whether the land claimed is unalienated Crown land? I should interpolate that counsel for the Attorney drew no distinction in this respect between the Government as a body politic and the Administrator who is charged by s. 32(2) of the Northern Territory Self-Government Act with the duty of administering the government of the Northern Territory. In my view, the answer to the question is 'yes' because the existence of those documents may be crucial in determining those matters which the High Court has said are relevant and which it has directed the Commissioner to inquire into and determine.

The judgements of the members of the High Court do not throw much light upon the procedures they envisaged might be followed, although the judgement of Mr Justice Stephen at p. 39 of my print of the report at least contemplates that discovery might take place. However, there is authority and support for the view I have expressed. I refer first to *Shanahan v. Scott* (1956-57) 96 CLR 245 at p. 250. The passage has been read in argument and I do no more than read a couple of sentences from that page. The case was concerned with a comparable power which the Court said:

. . . will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions.

What is enacted in the Land Rights Act is an obligation to ascertain the traditional Aboriginal owners when a claim is made to unalienated Crown land. That obligation directly concerns the rights of certain persons. At the heart of that inquiry, at least in the present case, is whether the land claimed is unalienated Crown land. A direction or order aimed at eliciting an answer to that question seems to me to be incidental to the execution of the specific provisions of the Act.

More authority is to be found in *Kursell v. Timber Operators and Contractors Limited*, (1923) 2 KB 202. A provision in the first schedule to the English Arbitration Act 1895 empowering an arbitrator 'to do all things which during the reference the arbitrators or umpire may require' was held to be wide enough to warrant an order for discovery or interrogatories. The language of that provision is close enough, I think, to be a guide, and the other components of cl. (f), the relevant provision, have to some extent their counterpart in ss. 54 and 54A of the Land Rights Act.

I refer finally in this connection to the recent judgement of the full court of the Federal

Court in *Territory Ford Pty Ltd v. Michalowsky*, a decision handed down on 30 October 1981, and in particular to p. 15 where their Honours dealt with a rule making power, in regard to which they said:

... such provisions (the provisions being concerned with subpoenas issued to strangers) plainly come within the rule making powers conferred upon the Judges of the Supreme Court by s. 86(1)(ii) in that they deal with matters and things which are incidental to or relating to such practice and procedure or which are necessary or convenient to be prescribed for the conduct of the business of the Court.

Mr Barker submitted that the absence in s. 51 of any express sanction pointed to a lack of power to make the order now sought. I do not accept this. That submission virtually emasculates s. 51 for it may be urged against the existence of any power sought to be exercised under that section. And there is in the present case an indirect sanction through the use of s. 54 to compel the production of documents and the answers to questions.

Furthermore, it must be remembered that what I have before me is an application addressed primarily to the Northern Territory Government which is not a stranger to the proceedings but a body which has consciously assumed a significant role in the proceedings by its challenge to the jurisdiction of the Commissioner to entertain the application. In that situation there may well be other sanctions relating to the right of the government to be heard further, but I say no more about that. Essentially my view is that the absence of an express sanction is no bar to the existence and exercise of a power. As I see it, the question is one of exercise of power not of jurisdiction, a distinction I sought to draw in *St Justins Properties Pty Ltd v. Rule Holdings Pty Ltd* (1980) 40 FLR 282.

Mr Sher referred to several authorities, *Grant v. Downs*, (1976) 135 CLR 674, and *Sankey v. Whitlam* (1978) 142 CLR 1, in particular. Those decisions emphasise the desirability in judicial proceedings of a full and free exchange of documents and the need for impartial justice to be done between citizen and Crown. For the purposes of the present application they express a philosophy but do not of themselves answer the basic question of whether power exists. However, for the reasons given I am of the opinion that it does. I propose to hear from counsel now as to the orders that should be made in the light of those reasons.

Mr Justice Toohey  
Aboriginal Land Commissioner  
Darwin  
2 April 1982