HIGH COURT OF AUSTRALIA

Mabo

Vs.

The State Of Queensland

(Mason C.J.(1), Wilson(2), Brennan(3), Deane(4), Dawson(5), Toohey(3) and Gaudron(3) JJ.)

8 December 1988

MASON C.J.

1. I have read the reasons for judgment prepared by Wilson J. I agree with what his Honour says on the various questions debated in the argument on the demurrer, except the so-called "inconsistency questions". In particular, like his Honour, I agree with the construction given by Brennan, Toohey and Gaudron JJ. to the Queensland Coast Islands Declaratory Act 1985 (Q.) ("the Queensland Act").

2. It then remains for me to consider whether s.9 or s.10(1) of the Racial Discrimination Act 1975 (Cth) ("the Commonwealth Act") affects the operation of the Queensland Act. The demurrer is an unsuitable vehicle for the determination of these questions. The plaintiffs' statement of claim asserts that since time immemorial the Murray Islanders (the plaintiffs being Murray Islanders) have maintained a system of laws, customs, traditions and practices of their own for determining questions concerning ownership of, and dealings with, land, seas, seabeds and reefs. The statement of claim alleges that, in accordance with these laws, customs, traditions and practices, the plaintiffs now own, or have proprietary interests in or usufructuary rights in relation to, the lands, seabeds, reefs and fishing waters of the Murray Islands. The statement of claim does not define or describe these rights and interests. The plaintiffs allege that the defendants threaten to infringe these rights and interests by establishing a council under the Land Act 1962 (Q.) and granting the lands of the Murray Islands to the council as trustee with power to lease and power to terminate traditional occupation. For the purposes of the demurrer now before the Court the State of Queensland's defence pleads that the Murray Islands are islands to which the Queensland Act applies (par.4A) and is a substantive defence to the plaintiffs' claims (pars.9A, 10A, 17A, 18A and 22A). The State of Queensland submits that the Queensland Act retrospectively abolished all such rights and interests as the Murray Islanders may have owned and enjoyed before its enactment. The plaintiffs' demurrer to the relevant paragraphs of the defence assumes the existence, immediately before the enactment of the Queensland Act, of the rights and interests asserted by the plaintiffs. The need to make this assumption, when it is unaccompanied by a precise definition or description of the rights and interests said to have been owned and enjoyed by the Murray Islanders presents a formidable obstacle to the resolution of the issues which have been debated. The suggested advantage of resolving these issues at this stage of the proceedings is that it avoids the necessity of determining the existence and nature of the traditional rights and interests claimed by the plaintiffs, the existence of which is denied by the State of Queensland. But, if the plaintiffs ultimately are to succeed in the action, at some stage they must establish the existence and nature of those rights and interests. So the suggested advantage of attempting to provide a dispositive decision on the issues of substance by way of resolving the demurrer is illusory. And, in any event, to do so would require the Court to

make assumptions on matters of fact instead of allowing issues of fact to be determined in the ordinary way.

3. Take, for example, the plaintiffs' argument in so far as it rests on s.9 of the Commonwealth Act. On its face the operation of the Queensland Act does not involve any "distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin". It is possible that as a matter of fact the Queensland Act operates in the manner suggested by the plaintiffs, but that matter of fact is not conceded by the State of Queensland. The assumption underlying the plaintiffs' argument is that the Murray Islanders, a distinct group united by race, descent or ethnic affiliation, have been and are the sole inhabitants of the Murray Islands. The correctness of that assumption remains to be proved as a fact for it is not admitted or established on the pleadings.

4. As it happens, the plaintiffs' argument based on s.9 must be rejected on another and more fundamental ground. Section 9(1) makes it unlawful for "a person to do any act" involving racial discrimination which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise of any human right or fundamental freedom in the field of public life. The references to "a person" and "any act" are inapposite to comprehend the enactment by the Parliament of Queensland of a statute. It would take a bold leap in statutory interpretation to conclude that the Commonwealth Parliament was addressing itself to the State legislatures. And, in any event, the Parliament of the Commonwealth does not possess legislative power to prohibit the Parliament of Queensland from enacting a law on a topic falling within a head of concurrent Commonwealth legislative power. Section 107 of the Constitution expressly preserves the powers of the Parliaments of the States except to the extent that they are exclusively vested in the Parliament of the Commonwealth or are withdrawn. The co-existence of Commonwealth and State legislative power with respect to subject-matter necessarily precludes the existence of a power in the Commonwealth Parliament to prohibit or make unlawful the exercise by a State Parliament of its concurrent legislative power with respect to that subject-matter. Section 109 of the Constitution then resolves any conflicts between the competing laws in favour of the paramountcy of the Commonwealth law; to the extent of that inconsistency the State law is inoperative.

5. It follows that in order that the plaintiffs' argument based on s.9 should succeed, it must establish, among other things, that there is an inconsistency between s.9 of the Commonwealth Act and the Queensland Act, specifically s.3 of that Act. The plaintiffs contend that there is such an inconsistency and that it arises from the provisions of s.3 of the Queensland Act, particularly par.(c) of that section, which deals with the traditional rights and interests of the plaintiffs in relation to the relevant land areas in a manner inconsistent with s.9.

6. A State law which purports to authorize the doing of an act prohibited by a Commonwealth law is inconsistent with that Commonwealth law and, to the extent of the inconsistency, is inoperative. But I would not characterize s.3 of the Queensland Act as a law that purports to authorize the doing of an act or the doing of an act that is inconsistent with s.9. Rather s.3 is declaratory. It declares that the lands were vested in the Crown, freed from pre-existing rights and claims, and became waste lands of the Crown upon annexation. The section goes on to spell out, in pars (b) and (c), the legal consequences of that declaration. This conclusion disposes for all practical purposes of the inconsistency argument based on s.9 according to its true construction.

7. That construction is entirely consistent with the presence in the Commonwealth Act of s.10. Section 10 is aimed at the situation where, by reason of a law, whether it be a Commonwealth, State or Territory law, persons of a particular race, colour or national or ethnic origin do not enjoy a

relevant right that is enjoyed by persons of another race, colour or national or ethnic origin or do not enjoy that right to the same extent as the persons of that other race, etc. In this situation the section operates to confer on the first class of persons the enjoyment of the right to the same extent as that enjoyed by the second class of persons. In other words, if racial inequality under the law in the enjoyment of a relevant right is shown to exist, s.10 remedies that wrong by conferring the relevant right on those who do not enjoy it. To say that s.9 manifests an intention to cover the very field covered by s.10 is to disregard s.10 and its role in the Commonwealth legislative scheme.

8. Whether the grant or refusal or a grant of an interest in land under the Land Act would conflict with s.9 depends, among other things, on whether the grant or the refusal of the grant has the purpose or effect mentioned in s.9. It is not possible to decide this question as an abstract question divorced from a consideration of the particular circumstances in which the grant or the refusal takes place.

9. As for the plaintiffs' principal argument, that based on s.10 of the Commonwealth Act, it too is attended with the same difficulty of determining the questions in the abstract. In essence the plaintiffs' case here is that their traditional rights and interests, that is, the traditional rights of the Murray Islanders, fall within two concepts mentioned in Art.5 par.(d) of the International Convention on the Elimination of All Forms of Racial Discrimination as "Other civil rights", i.e.:
"(v) The right to own property alone as well as in association with others;
(vi) The right to inherit".
by the State of Queensland. In this instance the assumption is rather different from the assumption which was at the core of the s.9 argument. This is because s.10 is designed to bring about equality before the law, whereas the purpose of s.9 is to prohibit racial discrimination. So, s.10 makes no reference to "a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin". The section is simply concerned with the existence of inequality before the law in the enjoyment of a relevant right; the inequality is then remedied by the grant of the right to those to whom it has been denied. But, in order to bring s.10 into operation, the plaintiffs must show that Murray Islanders, being persons of a particular race, colour or national or ethnic origin, do not enjoy a right that is enjoyed by persons of another race, etc. or enjoy a right to a more limited extent than such other persons. It may be that there is substance in the plaintiffs' argument that the traditional rights and interests asserted by the plaintiffs constitute a right to own property or a right to inherit within the meaning of par.(d) of Art.5 of the Convention and that their rights and interests are equivalent to rights and interests enjoyed by persons of another race, etc. However, it is impossible to reach a conclusion on that argument without findings about the precise nature and extent of the rights and interests asserted by the plaintiffs.

10. I would overrule the demurrer.

WILSON J. The history of this litigation is traced in other judgments and it is unnecessary for me to repeat it save in the barest outline.

2. The plaintiffs instituted the action in 1982, seeking legal recognition and protection of the traditional land rights which they claim to possess in and over the Murray Islands in the Torres Strait. It is claimed that those rights have existed in their people from time immemorial and that they have continued in existence notwithstanding the annexation by the Crown of the Murray Islands. It is common ground that the Islands became part of the Colony of Queensland from 1 August 1879.

3. In its defence the first defendant, the State of Queensland, admits that the Murray Islands have been inhabited from time immemorial by people commonly known as Murray Islanders, but it does not admit the existence of the land rights claimed by the plaintiffs.

4. In 1985, the Queensland legislature enacted the Queensland Coast Islands Declaratory Act 1985 (Q.) ("the Queensland Act" or "the Act"). It defines, by reference to the schedule to The Queensland Coast Islands Act 1879 (Q.), the islands which are the subject of the Act as being all the islands within a defined geographical area in the Torres Strait. It is common ground that the Murray Islands are within that area.

5. The material provisions of the Queensland Act are as follows:

"3. For the purpose of removing any doubt that may exist as to the application to the islands of certain legislation upon their becoming part of Queensland, it is hereby declared that upon the islands being annexed to and becoming part of Queensland and subject to the laws in force in Queensland -
(a) the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland for the purposes of sections 30 and 40 of the Constitution Act;
(b) the laws to which the islands became subject included the Crown lands legislation then and from time to time in force;
(c) the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation then and from time to time in force in Queensland.
4. Every disposal of the islands or part thereof purporting to be in pursuance of Crown lands legislation after the islands were annexed to and became part of Queensland shall be taken to have been validly made and to have had effect in law according to its tenor.
5. No compensation was or is payable to any person -
(a) by reason of the annexation of the islands to Queensland;
(b) in respect of any right, interest or claim alleged to have existed prior to the annexation of the islands to Queensland or in respect of any right, interest or claim alleged to derive from such a right, interest or claim;
or

(c) by reason of any provision of this Act."

6. Following the enactment of the Queensland Act, the State of Queensland amended its defence to rely upon the provisions of the Act. The plaintiffs thereupon demurred to the amended defence in respect of that reliance.

7. It is the demurrer which is now before this Court. The existence of traditional rights in the Murray Islands as claimed by the plaintiffs is a question which may raise complex issues of fact and law of fundamental importance to all Australians. But in these proceedings the parties have agreed to put that question aside and the Court is requested to refrain from expressing any view upon it. The hearing of the demurrer has proceeded on the assumption that the traditional rights as claimed in the statement of claim do exist unless they have been validly extinguished by the Queensland Act. I should add that it has also been expressly agreed by the parties that, if the Queensland Act is held to be a valid law having effect in relation to the traditional rights claimed by the plaintiffs in relation to land areas the subject of the action, then the plaintiffs undertake that they will not pursue any further proceedings in the action in relation to such land areas and any areas of seas, seabeds, reefs or cays claimed by them in the proceedings, including any waters between the fringing reefs and any land mass. The effect, if any, of the Queensland Act on the plaintiffs' assumed interests in the land areas of the Murray Islands is the sole question that arises for decision in the present proceedings in this Court.

8. Counsel for the plaintiffs advanced a number of arguments in support of the proposition that the Queensland Act is invalid or otherwise ineffective to impair traditional rights possessed by the plaintiffs. The arguments may be summarised broadly as follows:

1. As a matter of construction, the Act lacks the specificity required to extinguish the traditional rights of the plaintiffs;
2. As a matter of power -
(a) the Act is not a law for the "peace welfare and good government" of Queensland (s.2, Constitution Act 1867 (Q).);
(b) there are limits on the power of the Queensland legislature to deal with the waste lands of the Crown;
(c) the Queensland legislature lacks power to interfere with the judicial process;
(d) the Queensland legislature is without power to deprive a person of property rights without compensation.
3. As a matter of inconsistency -
(a) the Act is inconsistent with s.9 of the Racial Discrimination Act 1975 (Cth) ("the Commonwealth Act") in so far as the Act authorizes the grant of interests in land in the Murray Islands in accordance with the Land Act 1962 (Q.);
(b) section 10(1) of the Commonwealth Act has the effect of enabling the plaintiffs to continue to enjoy their traditional rights notwithstanding the

provisions of the Queensland Act.

9. I will discuss the inconsistency questions in some detail because I have the misfortune to be of a different opinion to that expressed by a majority of the members of the Court. However, with respect to the other grounds advanced for the plaintiffs, it will be sufficient for me to express my views summarily.

10. I am unable to accept the submissions of the plaintiffs based on the construction of the Queensland Act. In this regard, I agree with the reasons contained in the joint judgment of Brennan, Toohey and Gaudron JJ. There is no escape from the conclusion that, in s.3 of the Act, the legislature has made its intention transparently clear. As to the wisdom or justice of that intention, the responsibility must rest squarely with the legislature.

11. With respect to the questions of legislative power, five things may be said. First, the Murray Islands were effectively annexed to and became part of Queensland in 1879: cf. Wacando v. The Commonwealth [1981] HCA 60; (1981) 148 CLR 1. They thereby became subject to the laws of Queensland. Secondly, for the reasons expressed by Dawson J., the Queensland legislature is not limited in its power to deal with the waste lands of the Crown. Thirdly, for present purposes it is enough to say that the power to legislate for the "peace welfare and good government" of Queensland is, subject to the Constitution of the Commonwealth, a plenary power, the exercise of which lies within the discretion of the legislature itself. See the recent discussion of the scope of the power in the judgment of the Court in Union Steamship Company of Australia Pty. Ltd. v. King (unreported, 26 October 1988). Fourthly, it is wrong to describe the Queensland Act as interfering with the judicial process. One example of that kind of statute was the subject of the decision of the Judicial Committee of the Privy Council in Liyanage v. The Queen [1965] UKPC 1; (1967) 1 AC 259. The most that can be said of the Queensland Act is that it extinguishes the rights of persons who happen to be litigants seeking a vindication of those rights. It is not directed to the judicial process itself. If the Act is otherwise valid and effective, then the legal action will take its course in the context of the applicable law. See Australian Building Construction Employees' and Builders Labourers' Federation v. The Commonwealth [1986] HCA 47; (1986) 161 CLR 88; B.LF v. Minister for Industrial Relations (1986) 7 NSWLR 372. In any event, it may be doubted whether the doctrine of separation of powers, upon which the principle applied in Liyanage appears to depend, is entrenched in the constitutional framework of Queensland: cf. B.LF v. Minister for Industrial Relations, at pp 398-401, 409-412, 417-420. Finally, however much its exercise may be deprecated, it is not beyond the power of a State legislature to deprive a person of property without compensation, provided the deprivation is otherwise effected according to law.

12. I turn now to the remaining ground of substance to be considered, namely, the question whether ss.9 or 10 of the Commonwealth Act affect the operation of the Queensland Act. So far as material, those sections read as follows:

"9.(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other

field of public life.
(2) The reference in sub-section (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention.
...
10.(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
(3) Where a law contains a provision that
(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
(b) revents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander,
not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which sub-section (1) applies and a reference in that sub-section to a right includes a reference to a right of a person to manage property owned by the person."

The Convention referred to in the sections is the International Convention on the Elimination of All Forms of Racial Discrimination. It is the object of the Commonwealth Act to give effect to the

Convention, and it was held in Koowarta v. Bjelke-Petersen [1982] HCA 27; (1982) 153 CLR 168 that the legislative power of the Commonwealth extended to the implementation of the Convention.

13. It is not suggested, and could not be suggested, that the passage of the Queensland Act was itself an "act" of the kind referred to in s.9(1) of the Commonwealth Act. The Commonwealth Parliament does not have the power to make it unlawful for a State Parliament to pass a law of a particular kind. As Gibbs C.J. observed in Gerhardy v. Brown [1985] HCA 11; (1985) 159 CLR 70, at p 81:

"Section 109 of the Constitution, which provides
for the consequences of inconsistency between State
and Commonwealth laws, operates only when both laws
are in existence and s.107 preserves the powers of
the Parliaments of the States unless exclusively
vested in the Parliament of the Commonwealth or
withdrawn from the Parliament of the State."

See also per Brennan J., at pp 120-121.

14. Counsel for the plaintiffs directed his attack under s.9 to the exercise of the authority granted by s.3(c) of the Queensland Act for the making of grants of interests in land under the Land Act. It was submitted that in so far as the Queensland Act authorizes conduct which would dispose of land without regard to the traditional interests of the Murray Islanders, it falls foul of s.9. The short answer to the submission is that such a result cannot be predicated in advance. Whether or not a grant or a refusal to grant is rendered unlawful by s.9(1) will depend upon whether the power is exercised in a discriminatory way within the meaning of the section. Koowarta was such a case, although in a different statutory context.

15. Reliance was next placed on s.10(1) of the Commonwealth Act. It was argued that the Queensland Act denied the plaintiffs equality before the law within the meaning of s.10(1) because it deprived them, being persons of a particular race, of rights enjoyed by persons of another race. The rights in question were rights of the kind referred to in Art.5(d) of the Convention, namely, the right to own property alone as well as in association with others (sub-par.(v)) and the right to inherit (sub-par.(vi)).

16. In dealing with this submission, it is necessary to examine the terms of the Convention in some detail. First, however, it must be said that the success of the submission depends upon the plaintiffs establishing the existence of other persons, being persons of another race to that of the plaintiffs, who enjoy the rights of which the latter have been deprived. As we have seen, the demurrer is being argued on the assumption that the plaintiffs, prior to the commencement of the Queensland Act, were possessed of interests in their traditional lands which antedated the annexation of the Murray Islands in 1879. The Queensland Act purports to deny, retrospectively, the survival of those rights after the annexation and to exclude any question of compensation in respect of the loss of them. But if there are no other persons of another race who are shown to enjoy rights of the same kind as those of which the plaintiffs have been deprived, then it will be impossible to find a foothold for s.10(1) of the Commonwealth Act.

17. The dominant theme that runs throughout the Convention is equality before the law. The preamble refers to one of the purposes of the United Nations as being "to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without

distinction as to race, sex, language or religion". It also refers to the fact that "all human beings are equal before the law and are entitled to equal protection of the law against any discrimination". Article 1(1) defines the term "racial discrimination" to mean:

"any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life" (my emphasis).

Article 5 begins with the following words:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ..." (my emphasis).

Then follows a list of rights which include, in pars.(d)(v) and (d)(vi), the rights to which I have already referred.

18. The origins and history of the Convention are traced by Egon Schwelb in an article in (1966) 15 International and Comparative Law Quarterly 996. The author concludes, at p 1057, that the provisions of the Convention:

"represent the most comprehensive and unambiguous codification in treaty form of the idea of the equality of races. With ever-increasing clarity this idea has emerged as the one which, more than any other, dominates the thoughts and actions of the post-World War II world. In our time, the idea of racial equality has acquired far greater force than its eighteenth-century companions of (personal) liberty and fraternity."

See Koowarta at pp 219-220, 248, 260, 265. The role of s.10 in the scheme of the Commonwealth Act is described succinctly by Mason J. in Gerhardy, at p 94:

"Section 10 is not aimed at striking down a law which is discriminatory or is inconsistent with the Convention. Instead it seeks to ensure a right to equality before the law by providing that

persons of the race discriminated against by a discriminatory law shall enjoy the same rights under that law as other persons."

See also at pp.97 and 125.

19. It is in this context that the plaintiffs' submission based on s.10 must be addressed. The immediate difficulty confronting the submission is that there is no suggestion in the statement of claim that there are any persons of another race who enjoy the same rights of which the plaintiffs have been deprived by the Queensland Act. In those circumstances there is nothing to attract the operation of s.10. It may be accepted that the Queensland Act purports, on the assumption that underlies the hearing of the demurrer, to deprive the plaintiffs of certain of the human rights and fundamental freedoms which are referred to in Art.5(d) of the Convention. But the practical effect of that deprivation is not to create an inequality between them and persons of another race which is then removed by the operation of s.10 of the Commonwealth Act. On the contrary, its effect is to remove a source of inequality formerly existing between the plaintiffs and persons of another race because, on the facts as disclosed in the statement of claim, the plaintiffs were alone in the enjoyment of traditional rights. Henceforth, by virtue of the assumed operation of the Queensland Act, the plaintiffs will enjoy the same rights with respect to the ownership of property and rights of inheritance as every other person in Queensland of whatever race. There will be equality before the law.

20. Of course, a deep sense of injustice may remain. This is because formal equality before the law does not always achieve effective and genuine equality. The latter will only be achieved by reason of the former when the factual circumstances in which the different groups are placed are comparable. The extension of formal equality in law to a disadvantaged group may have the effect of entrenching inequality in fact. See the discussion and citations by Brennan J. in Gerhardy, at pp 128-131. It is sufficient to cite the passage referred to by his Honour (at p.128) from a decision of the Supreme Court of India:

"It is obvious that equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations."

The Convention recognises that formal equality before the law may nevertheless result in factual discrimination because of racial or other disadvantage. Article 2(2) imposes an obligation on States Parties, when the circumstances so warrant, to take:

"special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the

objectives for which they were taken have been achieved."

Article 1(4) provides in effect that the special measures of the kind referred to in Art.2(2) will not be deemed racial discrimination. The protection of disadvantaged groups in this way is then completed by s.8(1) of the Commonwealth Act which provides, subject to an exception which is not material, that Part II of the Act (which includes ss.9 and 10) does not apply to, or in relation to the application of, the special measures referred to in Art.1(4) of the Convention.

21. But the Convention's recognition that special measures may be necessary in order to prevent the unequal operation of laws directed to formal equality of all races before the law is of no assistance to the plaintiffs in the present case. Section 10(1) of the Commonwealth Act is not directed to the question of special measures. Its operation is only to destroy the effect of a law that deprives persons of one race of a right that is enjoyed by persons of another race. It destroys that effect by providing that the first mentioned group will enjoy the right of which they have been deprived to the same extent as that same right is enjoyed by the last-mentioned group.

22. My understanding of the operation of s.10(1) may be illustrated in another way. Let it be supposed that the Queensland legislature passed a law which expressly recognized and entrenched the traditional rights claimed by the plaintiffs. By preserving, inter alia, rights of inheritance enjoyed from time immemorial by a distinct racial group - rights which were not enjoyed by persons of European descent living elsewhere in Queensland - the law would, but for Art.1(4) of the Convention, be classed as racially discriminatory because it preserved a distinction or preference based on race which had the purpose or effect of impairing the recognition, enjoyment or exercise, on an equal footing, of the right to inherit. The recognition, enjoyment or exercise of the right, on an equal footing, would be impaired because the law would secure to the plaintiffs an entrenched and enlarged right to inherit compared with that enjoyed by other racial groups in Queensland. Underlying their special right would be the rights accorded to all Queenslanders by the general inheritance laws. Of course, in the circumstances I have postulated, the law would probably be upheld as a special measure within the meaning of Art.1(4) of the Convention, as a somewhat analogous measure was in Gerhardy.

23. It follows that the only conclusion to which I can come is that the Commonwealth Act does not have the effect of rendering the Queensland law invalid or ineffective. Whether it may be possible for the Commonwealth to exercise the legislative power conferred by s.51(xxvi) of the Constitution to enact a law which would have the effect of rendering the Queensland Act inoperative by virtue of s.109 of the Constitution is a matter which is not open to be considered in these proceedings.

24. I conclude that I have no alternative but to overrule the demurrer.

BRENNAN, TOOHEY AND GAUDRON JJ. This is a demurrer to certain paragraphs of the defence of the State of Queensland which raise and rely on the Queensland Coast Islands Declaratory Act 1985 (Q.) ("the 1985 Act") as an answer to certain paragraphs of the plaintiffs' statement of claim. The demurrer raises two principal questions: the effect of the 1985 Act and any material inconsistency between it and ss.9 and 10 of the Racial Discrimination Act 1975 (Cth).

2. The plaintiffs bring the action on their own behalf and on behalf of the members of their respective family groups. The plaintiffs are Murray Islanders and members of the Miriam people. They are the respective heads of their family groups. By their statement of claim, the plaintiffs

allege that, since time immemorial, the Miriam people have continuously inhabited and exclusively possessed the Torres Strait Islands of Mer (known as Murray), Dawar and Waier and their surrounding seas, seabeds, fringing reefs and adjacent islets in the Torres Strait. The area may be collectively described as the Murray Islands. Paragraphs 4 and 5 of the statement of claim read as follows (omitting particulars):

"4. Since time immemorial the said laws, customs, traditions and practices of the Miriam people have included rights to land on the said Islands and rights to sea and seabeds extending to the fringing reefs surrounding the said Islands, and to the Great Barrier Reef, and the rights to the fringing reefs surrounding the said Islands and to the Great Barrier Reef.
5. According to the said laws, customs, traditions and practices since time immemorial, the Plaintiffs and their predecessors in title have owned and have had rights in, and the Plaintiffs continue to own and have rights in, particular areas of land on the said Islands and particular parts of the surrounding sea and seabeds and surrounding reefs. Further, the Plaintiffs and their predecessors in title have continued without interruption to enjoy the ownership, use and occupation of such land, surrounding sea, seabeds and reefs and to have questions decided concerning the same, in accordance with the laws, customs, traditions and practices of the Miriam people."

Paragraph 7 of the statement of claim pleads that the islands "were annexed to and became part of the Colony of Queensland from 1 August, 1879 and became subject to the laws in force therein". It is common ground that her Majesty Queen Victoria extended her sovereignty over the whole of the Murray Islands, but the plaintiffs allege (par.12) that she did so-

"subject to the rights of the Miriam people and in particular subject to the rights of the predecessors in title of the Plaintiffs to the continued enjoyment of their rights in their prespective lands, seas, seabeds and reefs ... according to
(a) their local custom (hereinafter called 'ownership by custom');
(b) their original native ownership (hereinafter called 'traditional native title');
(c) their actual possession, use and enjoyment of the said Islands (hereinafter called

'usufructuary rights')
until such time as the said
(i) ownership by custom;
(ii) traditional native title;
(iii) usufructuary rights
were lawfully extinguished, purchased, acquired,
interfered with, derogated from, disturbed,
detracted from, subjected to inconsistent action,
or surrendered (all of which are hereinafter
referred to as 'impaired')."

The statement of claim asserts that although the rights of the Miriam people as pleaded in par.12 have not been lawfully impaired, the State of Queensland now denies those rights: par.15. The plaintiffs claim, inter alia, a

"(d)eclaration that the Plaintiffs are
(a) owners by custom;
(b) holders of traditional native title;
(c) holders of usufructuary rights
with respect to their respective lands."

The plaintiffs' claim is not merely for a declaration that the plaintiffs' rights are recognized by the native law or custom of the Murray Islands from which those rights take their origin; it is a claim for a declaration that the rights which are vested in the Miriam people - and, in particular, the plaintiffs - according to the native law and custom of the Murray Islands are recognized by the present law of Queensland. They are alleged to be enforceable legal rights. Those rights (which we shall call "traditional legal rights") are alleged to be vested in persons who are members of the Miriam people.

3. Some three years after the action was commenced, the Queensland Parliament enacted the 1985 Act. Sections 3, 4 and 5 of the 1985 Act provide as follows:

"3. For the purpose of removing any doubt that may
exist as to the application to the islands of
certain legislation upon their becoming part of
Queensland, it is hereby declared that upon the
islands being annexed to and becoming part of
Queensland and subject to the laws in force in
Queensland
(a) the islands were vested in the Crown in
right of Queensland freed from all other
rights, interests and claims of any kind
whatsoever and became waste lands of the
Crown in Queensland for the purposes of
sections 30 and 40 of the Constitution
Act;
(b) the laws to which the islands became
subject included the Crown lands
legislation then and from time to time in

force;
(c) the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation then and from time to time in force in Queensland.
4. Every disposal of the islands or part thereof purporting to be in pursuance of Crown lands legislation after the islands were annexed to and became part of Queensland shall be taken to have been validly made and to have had effect in law according to its tenor.
5. No compensation was or is payable to any person
(a) by reason of the annexation of the islands to Queensland;
(b) in respect of any right, interest or claim alleged to have existed prior to the annexation of the islands to Queensland or in respect of any right, interest or claim alleged to derive from such a right, interest or claim; or
(c) by reason of any provision of this Act."

The effect of the 1985 Act for which the State of Queensland contends was stated concisely by its counsel in these words:

"It has the effect that those rights which might otherwise have survived annexation in 1879 are deemed not to have survived and, for the purposes of 1985, never to have survived."

4. After the passing of the 1985 Act, the State of Queensland amended its defence to plead it. Paragraphs 4A, 9A and 17A of its amended defence read:

"4A. The Murray Islands are islands to which the Queensland Coast Islands Declaratory Act 1985 applies."
"9A. In further answer to paragraphs 4 and 5 of the Statement of claim, by Section 3 of the Queensland Coast Islands Declaratory Act 1985 the islands the subject of that Act are deemed to have been vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever upon the islands being annexed to and becoming part of Queensland."
"17A. In further answer to paragraphs 12, 13, 14 and 15 of the Statement of Claim, the First Defendant pleads and relies upon the provisions

of Section 3 of the Queensland Coast Islands
Declaratory Act 1985."

Paragraphs 10A, 18A and 22A of the amended defence also set up and rely on the 1985 Act in answer to particular paragraphs in the statement of claim. The plaintiffs demurred to pars 4A, 9A, 10A, 17A, 18A and 22A of the amended defence.

5. The first question is whether the 1985 Act, on its true construction, does extinguish the traditional legal rights of the Miriam people "which might otherwise have survived annexation in 1879". There is, of course, a preliminary question: did any rights of the kind pleaded in the statement of claim survive the annexation of the islands? That is a question of the greatest importance which remains unresolved in this Court. It remains unresolved because what is presently before the Court is the plaintiffs' demurrer to the defence in so far as it relies on the 1985 Act. In the present proceedings issues as to the existence of traditional legal rights and their survival were put aside without full argument and we were earnestly requested not to express any view on them. For present purposes, it was agreed by the parties that the statement of claim should be assumed to have pleaded correctly that the traditional legal rights specified in the statement of claim are in existence unless they have been validly extinguished by the 1985 Act. Making that assumption, we can address the questions raised by the demurrer.

6. The declarations set out in pars (a), (b) and (c) of s.3 are expressed to apply to the islands from the time when the islands became ("upon ... becoming") part of Queensland. The islands to which the 1985 Act applies are described in a schedule to The Queensland Coast Islands Act 1879 (Q.). Those are islands situated off the coast of Queensland north of Sandy Cape and in the Torres Strait between Queensland and Papua New Guinea. They include the Murray Islands which were annexed to Queensland. (The manner and the date of annexation are immaterial for present purposes.) The correspondence between the words "upon the islands being annexed" etc. which introduce s.3 and the words in par.7 of the statement of claim shows that the 1985 Act applies to the legal consequences of the annexation of the Murray Islands. The Act declares what those consequences were so far as they relate to rights in and over the Murray Islands. The declarations of what the law was upon annexation may be historically false but that does not deny them legal effect. A declaratory Act may declare the law to be different from what, apart from the Act, the law is. Indeed, declaratory Acts are frequently passed in order to override a judicial decision as to what the law is: see Craies on Statute Law, 7th ed. (1971), pp.58-59. The effect of such a statute is to change the law and the courts are thereafter bound to take the law as the statute declares it to be. If the statute declares what the law has been, the courts are commanded to decide future cases in conformity with the declaration though the circumstances to which the declaration applies occurred prior to the enactment of the statute: The Attorney-General v. Marquis of Hertford [1849] EngR 588; (1849) 3 Ex 670, at pp 688-689 [1849] EngR 588; (154 ER 1014, at p 1022); Attorney-General v. Theobald (1890) 24 QBD 557. The statute does not, however, affect final judgments already given pursuant to the earlier law: Day v. Kelland (1900) 2 Ch 745; Federated Engine-Drivers and Firemen's Association of Australasia v. Broken Hill Proprietary Co. Ltd. [1913] HCA 71; (1913) 16 CLR 245, at p 270. The operation of a declaratory statute, like the operation of any other statute, depends upon the intention of Parliament ascertained by construction of its terms: see, for example, Young v. Adams (1898) AC 469.

7. The 1985 Act therefore operates to extinguish any legal rights the existence of which is inconsistent with the law as the Act declares the law to be or to have been. The traditional legal rights pleaded and claimed by the plaintiffs depend upon the traditional legal rights allegedly vested

in their predecessors in title. It is alleged in the statement of claim that the predecessors' rights survived annexation but, if the traditional legal rights of the predecessors must now be taken to have been extinguished upon annexation, the plaintiffs' traditional legal rights, as they are pleaded and claimed, are extinguished too.

8. Assuming for the moment the effective operation of the 1985 Act, the first declaration in par.(a) of s.3 requires the Court to treat the Murray Islands from the time of annexation as "freed from all ... rights ... of any kind" save the title of the Crown in right of Queensland. The scope of this declaration is central to the issues to be decided in this case. The next declaration, in the second part of par.(a), makes the Murray Islands from the time of annexation "waste lands" of the Crown, and from that time vests in the Queensland legislature their management and control. By declaring the applicability of s.30 of the Constitution Act 1867 (31 Vic. No.38), the 1985 Act declares that the Queensland legislature has had the power since annexation to make laws for the sale or other disposition of interests in the islands: see Williams v. Attorney-General for New South Wales [1913] HCA 33; (1913) 16 CLR 404. The third declaration, in par.(b), applies the Crown lands legislation to the Murray Islands. The fourth declaration (par.(c)) makes the Murray Islands "Crown lands" for the purposes of the Crown lands legislation. Construing s.3 by itself, the declarations it makes extinguish any legal rights vested in any person upon annexation and treat the islands as thereafter entirely under the control and management of the Queensland legislature, the only power to grant any rights or interests in any part of the islands being the power conferred by the Crown lands legislation in force from time to time.

9. Section 4 then validates every disposal "purporting to be in pursuance of Crown lands legislation" after annexation. The rights confirmed by s.4 are not rights which may have survived annexation; they are rights which owe their origin to a purported exercise of the power to dispose of interests in land pursuant to the Crown lands legislation in force from time to time. Section 4 follows logically on the declarations contained in s.3 and, in that context, a disposal "purporting" to be in pursuance of Crown lands legislation means a disposal which was in intended exercise of the powers of disposal conferred by Crown lands legislation but which might not have been in pursuance of Crown lands legislation had the declarations contained in s.3 not been effective. Section 5 denies any right of compensation which may have arisen by reason, inter alia, of the extinction of any right by annexation or the statutory extinction of any right which survived annexation.

10. The effect of the 1985 Act for which the State of Queensland contends is to extinguish the rights which the plaintiffs claim in their traditional homeland and to deny any right to compensation in respect of that extinction. So draconian an effect can be attributed to the 1985 Act only if its terms do not reasonably admit of another. The plaintiffs submit that the terms of the statute are not sufficient to extinguish the rights claimed by the plaintiffs and that "specific legislation dealing in terms with the precise interests of specific persons" is required before traditional native title to land can be held to be extinguished. In support of this submission, reference was made to the judgment of Hall J. in the Supreme Court of Canada in Calder v. Attorney-General of British Columbia (1973) SCR 313, where his Lordship had insisted that native title could be extinguished by legislation only if the legislation were "specific" and the legislation expressed a "clear and plain" legislative intention to extinguish the native title (at pp 402,404). The submission was put as a gloss upon, if not an exception to, the general principle that a statute has the effect which the legislature intends it to have. But if a statute expresses clearly and plainly an intention that all native title is to be extinguished, there is no principle of construction by which the Court can refuse to give effect to that intention and can disregard the general scope of the legislation. The Court cannot refuse to give effect to the legislature's intention merely because the legislature has failed to identify precisely

particular interests which are to be extinguished. A want of specificity may be an indication of legislative intention but, once the intention is ascertained, a want of specificity does not frustrate the legislature's intention and deny effect to the statute. Hall J. and the authorities he cited went no further.

11. One purpose of the 1985 Act is to confirm the validity of disposals of interests in the islands after annexation and to ensure that the interests disposed of are free of any unstated encumbrance: each disposal is accorded legal effect "according to its tenor" (s.4). The declarations in s.3 are calculated to extinguish any right which might encumber or affect the enjoyment of an interest disposed of in purported pursuance of Crown lands legislation. Is this the sole purpose of s.3? If it were, the first declaration in s.3 would be construed to apply only to those parcels of land in which an interest had been disposed of in purported pursuance of Crown lands legislation. The text of the Act appears to be opposed to so restricted a construction. The first declaration extends to "the islands" as a whole, but the disposals to which s.4 relates may be disposals of "the islands or part thereof". The first declaration is expressed to free the title "vested in the Crown in right of Queensland" - a title extending to the whole of the islands - of all other rights, etc. If the first declaration were read down to free the title of the Crown from other rights only in respect of the parts disposed of, the Crown title must have been left encumbered or affected after annexation pending disposal. Yet the introductory words of par.(a) show that the Crown's title was freed of other rights when the islands "were vested" in the Crown on annexation. The first declaration on its true construction declares that all rights which would otherwise have survived annexation to encumber or affect the Crown's title to the whole of the islands were extinguished. It follows that the 1985 Act on its true construction would extinguish the traditional legal rights on which the plaintiffs rely in their statement of claim. As the Minister's second reading speech evidences, this was the objective which the passing of the 1985 Act was intended to secure.

12. The next question is whether the 1985 Act is inconsistent with the Racial Discrimination Act and is therefore ineffective by reason of s.109 of the Constitution. The answer to that question depends on whether the operation of the 1985 Act is inconsistent with the operation of the Racial Discrimination Act. As we have seen, the 1985 Act extinguishes without compensation all traditional legal rights in or over the Murray Islands which would otherwise have survived annexation, and it confirms all rights in or over the Murray Islands which were purportedly disposed of under Crown lands legislation after annexation. (As the islands are declared to have been Crown lands for the purposes of the Crown lands legislation, no interests in the islands could have been disposed of except in pursuance of the Crown lands legislation in force from time to time: O'Keefe v. Williams (1907) 5 CLR 217, at p 225; Cudgen Rutile (No.2) Ltd. v. Chalk (1975) AC 520, at p 533). The 1985 Act thus extinguishes all legal rights which take their origin from native law and custom while confirming all legal rights which take their origin from the relevant statutory law of Queensland, namely, Crown lands legislation.

13. The material provisions of the Racial Discrimination Act are as follows:

"9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental

freedom in the political, economic, social, cultural or any other field of public life.
(2) The reference in sub-section (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention.
...
(4) The succeeding provisions of this Part do not limit the generality of sub-section (1).
10. (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
(3) Where a law contains a provision that
(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander,
not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which sub-section (1) applies and a reference in that sub-section to a right includes a reference to a right of a person to manage property owned by the person."

14. Section 9 proscribes the doing of an act of the character therein mentioned. It does not prohibit the enactment of a law creating, extinguishing or otherwise affecting legal rights in or over land: Gerhardy v. Brown [1985] HCA 11; (1985) 159 CLR 70, at pp 81,120-121. It is arguable that the operation of a law which brings into existence or extinguishes rights in or over land is not affected by s.9 merely because a consequence of the change in rights is that one person is free to do an act which would otherwise be unlawful or another person is no longer able to resist an act being done. It is not necessary to decide that question now. Section 10 of the Racial Discrimination Act has a more direct effect on the operation of the 1985 Act than does s.9.

15. Section 10 relates to the enjoyment of a right, not the doing of an act. The "right" referred to in s.10(1) is not, or is not necessarily, a legal right. Sub-section (2) directs attention to rights "of a kind referred to in Article 5 of the Convention", each of which may be a "right" for the purposes of s.10(1). The Convention is the International Convention on the Elimination of All Forms of Racial Discrimination. Article 5 provides, inter alia -

" In compliance with the fundamental obligations
laid down in article 2 of this Convention, States
parties undertake to prohibit and to eliminate
racial discrimination in all its forms and to
guarantee the right of everyone, without
distinction as to race, colour, or national or
ethnic origin, to equality before the law,
notably in the enjoyment of the following rights:
...
(d) (v) The right to own property alone as well
as in association with others;
(vi)The right to inherit".

The rights referred to in Art.5 are human rights for which, as the Preamble to the Convention testifies, "universal respect ... and observance" are encouraged. Human rights are calculated to preserve and advance "the dignity and equality inherent in all human beings". The Preamble states that the Convention was agreed to in furtherance of the purpose of the United Nations "to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion".

16. Section 10 of the Racial Discrimination Act is enacted to implement Art.5 of the Convention and the "right" to which s.10 refers is, like the rights mentioned in Art.5, a human right - not necessarily a legal right enforceable under the municipal law. The human rights to which s.10 refers include the right to own and inherit property. In the development of the international law of human rights, rights of that kind have long been recognized. Thus, the Universal Declaration of Human Rights 1948 Art.17 included the following:

"1. Everyone has the right to own property alone
as well as in association with others.
2. No one shall be arbitrarily deprived of his
property."

(The word "arbitrarily" has been interpreted to mean not only "illegally" but also "unjustly"; see Meron (ed.), Human Rights in International Law: Legal and Policy Issues (1984), vol.1, p 122, fn

40.)

17. Although the human right to own and inherit property (including a human right to be immune from arbitrary deprivation of property) is not itself necessarily a legal right, it is a human right the enjoyment of which is peculiarly dependent upon the provisions and administration of municipal law. Inequality in the enjoyment of that human right may occur by discrimination in the provisions of the municipal law or by discrimination in the administration of the municipal law or by both. When inequality in enjoyment of a human right exists between persons of different races, colours or national or ethnic origins under Australian law, s.10 operates by enhancing the enjoyment of the human right by the disadvantaged persons to the extent necessary to eliminate the inequality. As the inequality with which s.10 is concerned exists "by reason of" a municipal law, the operation of the municipal law is nullified by s.10 to the extent necessary to eliminate the inequality.

18. The question which s.10 poses in the present case is whether, under our municipal law, the Miriam people enjoy the human right to own and inherit property - a right which includes an immunity from arbitrary deprivation of property - to a more limited extent than other members of the community. ("Property" in this context must embrace rights of any kind in or over the Murray Islands.) In respect of property rights arising under the Crown lands legislation, the answer must be no. A person who is a member of the Miriam people is entitled to own and inherit those property rights in the same way and to the same extent as any other Australian. Section 10(3) was enacted to override laws which might have restricted the capacity of Aboriginals and Torres Strait Islanders to manage their own property.

19. But the 1985 Act destroys the traditional legal rights in and over the Murray Islands possessed by the Miriam people (and particularly by the plaintiffs) and, by an arbitrary deprivation of that property, limits their enjoyment of the human right to own and inherit it. If the assumption be made that traditional rights survived the annexation of the islands and were thereafter recognized by the common law, and if the effect of the 1985 Act be left aside, the general law of Queensland would now recognize two categories of legal rights to be enjoyed under the Crown in and over the Murray Islands: traditional rights and rights granted in pursuance of Crown lands legislation. Traditional rights are characteristically vested in members of the Miriam people; rights under Crown lands legislation are vested in grantees who may be of any race, colour or national or ethnic origin. However, it is not the source or history of legal rights which is material but their existence. It is the arbitrary deprivation of an existing legal right which constitutes an impairment of the human rights of a person in whom the existing legal right is vested. Leaving aside the 1985 Act, the general law leaves unimpaired the immunity of each person in whom any legal right in or over the Murray Islands is vested from arbitrary deprivation of that person's legal right. The relevant human right is immunity from arbitrary deprivation of legal rights in or over the Murray Islands. The 1985 Act operates in this context.

20. By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people. If we accord to the traditional rights of the Miriam people the status of recognized legal rights under Queensland law (as we must in conformity with the assumption earlier made), the 1985 Act has the effect of precluding the Miriam people from enjoying some, if not all, of their legal rights in and over the Murray Islands while leaving all other persons unaffected in the enjoyment of their legal rights in

and over the Murray Islands. Accordingly, the Miriam people enjoy their human right of the ownership and inheritance of property to a "more limited" extent than others who enjoy the same human right.

21. In practical terms, this means that if traditional native title was not extinguished before the Racial Discrimination Act came into force, a State law which seeks to extinguish it now will fail. It will fail because s.10(1) of the Racial Discrimination Act clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native group cannot prevail over s.10(1) of the Racial Discrimination Act which restores the immunity to the extent enjoyed by the general community. The attempt by the 1985 Act to extinguish the traditional legal rights of the Miriam people therefore fails.

22. As already noted, the question whether traditional native title was extinguished before the Racial Discrimination Act came into force has not been addressed in these proceedings. That question, which is of the greatest importance, involves consideration of the legal effect upon native title of both annexation and subsequent alienation by the Crown of rights in and over land. Although it is inappropriate to express a view on that question, it should be noted that s.4 of the 1985 Act, which confirms disposals made after annexation, invites attention to the possibility of competing interests. The principles for resolving the competition do not concern us in these proceedings which are confined to the effect of the 1985 Act. In these proceedings, the defence pleads the 1985 Act in answer to paragraphs of the statement of claim which assert the existence of traditional legal rights unimpaired by any anterior disposal of rights in and over the same land in purported pursuance of Crown lands legislation. As the attempt of the 1985 Act to extinguish the traditional legal rights pleaded in the statement of claim is undone by s.10(1) of the Racial Discrimination Act, the paragraphs of the defence which set up the 1985 Act as an answer to the plaintiffs' claim are demurrable. The demurrer should be allowed.

DEANE J. For so long as history records, the Murray Islands of the Torres Strait have been inhabited by people now known as the Miriam people or, more commonly, Murray Islanders. There are three of the islands, Meer (or Murray or Mer), Daua (or Dawar) and Waua (or Waier). They are part of a number of islands in the Torres Strait whose traditional inhabitants are collectively described as Torres Strait Islanders.

2. It is common ground between the parties to the present action that the Murray Islands (and other Torres Strait Islands) were annexed to and became part of Queensland by reason of the cumulative operation of: (i) Letters Patent (under the Great Seal of the United Kingdom) of 10 October 1878; (ii) The Queensland Coast Islands Act 1879 (Q.), s.1; (iii) Proclamation of the Governor of Queensland published on 21 July 1879; and, if validation of the purported alteration of the boundaries of Queensland by, or pursuant to, the above was necessary, (iv) the Colonial Boundaries Act 1895 (Imp.). Whether they wanted it or not, the Murray Islanders, like other Torres Strait Islanders, were included among the people of the Colony of Queensland who united with the people of the other Australian colonies under the Constitution. Upon Federation, they became citizens, albeit initially unfranchised, of the new Commonwealth of Australia. It would, however, also appear to be common ground between the parties that the Murray Islanders have retained their identity as a distinct people.

3. By statement of claim filed in the Brisbane registry of the Court in 1982, the plaintiffs, who claim

to be Murray Islanders, instituted the present action against the State of Queensland and the Commonwealth seeking injunctions (against Queensland) and declarations and damages (against Queensland and the Commonwealth). The statement of claim, in its present amended form, asserts that the plaintiffs sue on behalf of themselves and their respective family groups. It alleges that, since time immemorial, the Murray Islanders have established and maintained a social and political organization upon their islands that included:

"a system of law and, inter alia, laws, customs,
traditions and practices of their own for
determining questions concerning
...
(ii) the ownership of and dealings with land, seas,
seabeds and reefs".

The plaintiffs claim that they now own (or, alternatively, have lesser proprietary interests in or usufructuary rights in relation to) the lands, seabeds, reefs and fishing waters of the Murray Islands which have been owned, occupied, used and exploited by their predecessors and themselves "since time immemorial" according to "the laws, customs, traditions and practices" of their people. While this is not spelt out in any detail in the statement of claim, it would seem that the traditional rights and interests, which the plaintiffs assert to have survived annexation, include private rights and interests of particular individuals or family groups and communal rights and interests of the Murray Islanders as a community. The plaintiffs claim that the defendant State of Queensland intends and threatens to infringe those traditional rights and interests by the establishment of a council under the Land Act 1962 (Q.) and the purported grant of the lands of the Murray Islands to that council as trustee with power to lease and with power to determine traditional occupation.

4. By its defence, in its present amended form, the State of Queensland either denies or does not admit the existence of the various community, group and individual rights and interests which the plaintiffs assert. For its part, the defendant Commonwealth does not admit the existence of those rights and interests. If the action proceeds to a full trial, fundamental questions concerning the existence, nature and extent of any such rights and interests will need to be resolved. Those questions are not, however, presently before the Court.

5. The issue which is now before the Court is a more narrow one. It arises upon a demurrer by the plaintiffs to pars. 4A, 9A, 10A, 17A, 18A and 22A of the amended defence of the State of Queensland. Those six paragraphs of the defence were added, by amendment, after the enactment in 1985, that is some three years after the institution of the proceedings, of the Queensland Coast Islands Declaratory Act 1985 (Q.) ("the Act"). In par.4A, the State of Queensland alleges that the Murray Islands are islands to which the Act applies. In the other paragraphs, the Act is relied upon as a substantive defence to the claims advanced by the plaintiffs. In the course of argument on the hearing of the demurrer, Mr. Davies Q.C. who appeared for the State of Queensland concisely identified the basis upon which the Act is propounded as an answer to those claims as being that "the rights which are claimed by the plaintiffs in this action are extinguished ... because ... (the Act) has the effect that those rights which might otherwise have survived annexation (of the Murray Islands) in 1879 are deemed not to have survived", in other words, that the Act has retrospectively abolished any surviving traditional communal or personal proprietary rights or interests of the Islanders in or to land on the Murray Islands. That being so, the issue raised by the demurrer is whether, to adopt the words of Mr. Castan Q.C. who appeared for the plaintiffs, the Act constitutes "a complete bar ... to the plaintiffs' claims".

6. The definitions in s.2 of the Act include the following definitions of "Crown lands legislation", "disposal" and "the islands":

"'Crown lands legislation' means legislation of Queensland relating to the alienation, sale, letting, disposal and occupation of lands of the Crown within Queensland;
'disposal' means an exercise of a power conferred by Crown lands legislation whether by way of alienation, sale, leasing, letting, licensing, reservation and setting apart, grant in trust or in any other way whatsoever;
'the islands' means the islands referred to in the schedule to The Queensland Coast Islands Act of 1879."

The effect of the above definition of "the islands" is that, for the purposes of the Act, that phrase refers to all the Torres Strait Islands, including the Murray Islands, which were annexed to Queensland in 1879. I shall, subsequently in this judgment, use the phrase "the islands" in that defined sense.

7. Sections 3, 4 and 5 contain the substantive provisions of the Act. Sections 3 and 4 read:

"3. For the purpose of removing any doubt that may exist as to the application to the islands of certain legislation upon their becoming part of Queensland, it is hereby declared that upon the islands being annexed to and becoming part of Queensland and subject to the laws in force in Queensland -
(a) the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland for the purposes of sections 30 and 40 of the Constitution Act;
(b) the laws to which the islands became subject included the Crown lands legislation then and from time to time in force;
(c) the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation then and from time to time in force in Queensland.
4. Every disposal of the islands or part thereof purporting to be in pursuance of Crown lands legislation after the islands were annexed to and became part of Queensland shall be taken to

have been validly made and to have had effect in
law according to its tenor."

Section 5 provides that no compensation was or is payable to any person - "by reason of the annexation of the islands", "in respect of any right, interest or claim alleged to have existed prior to the annexation ... or in respect of any right, interest or claim alleged to derive from such a right, interest or claim", or "by reason of any provision" of the Act.

8. On the hearing of the demurrer, the plaintiffs supported their attack upon the particular paragraphs of the defence by a variety of arguments. It is necessary to refer to but two of them. The first is that, as a matter of construction, the Act does not extinguish the traditional communal and personal proprietary rights and interests upon which the plaintiffs rely. The second is that, if the Act would, according to its terms, have that effect, it is, to that extent, invalidated by the operation of s.109 of the Constitution for the reason that it is, to that extent, inconsistent with the provisions of the Racial Discrimination Act 1975 (Cth).

9. It is convenient to turn at once to the argument that, as a matter of construction, the Act does not have the effect of extinguishing the proprietary rights and interests which the plaintiffs assert. The question raised by that argument can only be determined on the basis of an assumption of the existence, apart from the effect of the Act, of those proprietary rights and interests. There are obvious difficulty and artificiality involved in dealing with the matter on such an assumption. On balance, however, the circumstances of the case are such as to make that course preferable to the alternative one of requiring the question whether such proprietary rights or interests would otherwise exist to be first resolved by what would undoubtedly be lengthy proceedings involving complicated questions of law and disputed issues of fact. It would, to put it mildly, be wasteful of judicial and professional time and effort and unfairly burdensome on the parties to require questions about the existence, nature and extent of traditional rights and interests prior to annexation and about the effect of annexation and subsequent events to be resolved before the Court was prepared to determine whether the effect of the Act was to make the determination of those questions a matter of academic interest only.

10. It should be said at once that the material before the Court contains nothing to suggest that the defendant State of Queensland intends to actually deprive any of the Torres Strait Islanders of the opportunity of continuing to reside upon and use the lands which they presently occupy and use. Nor does that material indicate the extent of support among other Torres Strait Islanders for the future establishment of a new council in which the land of the islands would be vested as trustee. Nonetheless, the operation of the Act would be harsh indeed if, assuming that the plaintiffs would otherwise be entitled to the traditional rights and interests which they claim, its effect is as suggested by the State of Queensland. If the Act did have that effect, its operation would be to compulsorily deprive the plaintiffs and those whom they represent, without compensation, of all traditional personal and communal proprietary rights and interests to and in their ancestral homelands. The general provisions of the Act should not, as a matter of settled principles of construction, be construed as intended to bring about such a compulsory deprivation of proprietary rights and interests without compensation if they are susceptible of some other and less burdensome construction (see, e.g., Clissold v. Perry [1904] HCA 12; (1904) 1 CLR 363, at p 373; Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Commissioners [1927] HCA 1 [1927] UKPCHCA 1; ; (1927) 38 CLR 547, at p 559).

11. The argument for the plaintiffs on the question of construction went further than mere reliance

upon the presumption, in the construction of a statute, against the existence of a legislative intent to confiscate or extinguish proprietary rights or interests without compensation. It involved an assertion that the presumption against a legislative intent to confiscate or extinguish particular vested proprietary rights or interests in land without compensation is so strong that it can never be rebutted, however unambiguous the words and unmistakable the legislative intent, in the case of legislative provisions which, like the Act, are framed in general terms and do not specifically identify the particular proprietary rights and interests which are confiscated or extinguished. In the result, the plaintiffs' argument did not deal in detail with the relationship between the various provisions of the Act nor concede that, as a matter of construction, the Act had any residual effect at all. To the extent that it went that far, the plaintiffs' argument must be rejected in that it mistakenly attributes to a prima facie rule of construction, however strong, a status equivalent to a constitutional constraint upon legislative power. The question whether, as a matter of construction, the general provisions of the Act would extinguish all or any of the alleged traditional proprietary rights and interests can only be determined by reference to the legislative intent to be discerned in the words which the Parliament of Queensland has enacted. That legislative intent must, in the present case, be ascertained by construing the words of the relevant provisions in the context of the Act as a whole and in the light of the strong presumption against a legislative intent to confiscate or extinguish vested proprietary rights or interests in land without compensation.

12. Sections 3 and 4 of the Act should be read together. Section 3 is declaratory of the applicability of Crown lands legislation. Section 4 operates to cure any invalidity which might otherwise exist in any "disposal" of any part of the islands in purported pursuance of such legislation. The phrases "taken to have been" and "taken ... to have had effect" (without the addition of the present tense) in s.4 indicate that the section is concerned with past disposals. This indication is supported by the words "included" and the non-subjunctive "could" (again without the addition of the present tense) in s.3 (pars. (b) and (c)). When the two sections are read together, their essential purpose and primary operative effect can be seen to be to validate any past "disposal" of any part of the islands, made in purported pursuance of "Crown lands legislation", which might otherwise be wholly or partly ineffective by reason of the survival (after annexation) of traditional proprietary rights and interests.

13. Examination of the provisions of ss.3 and 4 also discloses that the provisions of the Act must, in at least one important respect, be given a narrower meaning than the words used are, as a matter of language, capable of bearing. Obviously, the provision that every disposal of any part of the islands "purporting to be in pursuance of Crown lands legislation ... shall be taken to have been validly made and to have had effect in law according to its tenor" should not be construed as validating and giving effect to forged or completely unauthorized dealings with such land merely because they purport to be in pursuance of such legislation. Section 4 of the Act should, in the context of s.3, be construed as giving statutory validity and effectiveness to such purported dealings only if they would have been valid and effective if the property to which they refer had been vested in the Crown in right of Queensland freed from any surviving traditional "rights, interests and claims" (the Act, s.3(a)). To that extent, the operation of s.4 is confined by reference to the context provided by s.3. The real question of construction which the demurrer raises is whether s.3 should, in its turn, be confined by reference to the context provided by s.4.

14. As a matter of construction, there are two arguable views about the scope and operation of the provisions of s.3. One is that s.3 should be seen as operating independently, albeit by way of declaration, to extinguish any surviving traditional rights, interest and claims to the islands or any part of them regardless of whether such rights, interests or claims would, in any way, jeopardize or

invalidate any past dealings with the land. The other is that, in the context of the Act as a whole, s.3 is concerned only to lay a declaratory foundation for the validation (by s.4) of past dealings under Crown lands legislation upon the basis of which interested parties would have acted and which might otherwise be placed in jeopardy or invalidated by any traditional proprietary rights, interests or claims which survived annexation. To construe s.3 as having that more confined effect of providing a declaratory foundation for the operation of s.4 would not be to deprive it of real content and operation. The pleadings indicate that there has been a number of past dealings with land on the islands pursuant to Crown lands legislation which could conceivably be jeopardized and invalidated by the survival of traditional rights, interests and claims. In particular, some two acres of land on Meer Island have been the subject of a series of grants of Crown lease, successively to the London Missionary Society and the Corporation of the Synod of the Diocese of Carpentaria, stretching back to 1882. There may well have been other dealings with parts of other islands. In addition, the pleadings indicate that there has been at least one "disposal" pursuant to "Crown lands legislation" (as defined) affecting the balance of the Murray Islands. By a proclamation made pursuant to The Land Act 1910 (Q.) in 1912 and continued under the Land Act 1962, the Governor in Council "permanently reserved and set apart" the Murray Islands, with the exception of the abovementioned two acres, "for use by the Aboriginal Inhabitants of the State".

15. Section 3 itself contains indications which support the more confined construction of its provisions. The introductory words of the section make clear that the declarations which it contains are made for the limited "purpose of removing any doubt that may exist as to the application to the islands of certain legislation" - i.e. the Crown lands legislation - "upon their becoming part of Queensland". The contents of the actual declarations indicate that they are made to set the stage for the validation of past transactions under that applicable legislation in that they are generally framed in the past tense and culminate in the declaration that, after annexation, the islands "could ... be dealt with as Crown lands for the purposes of Crown lands legislation" (s.3(c)). Plainly enough, it is strongly arguable that the function of s.3 is to lead into s.4 which validates every past "disposal" of any part of the islands "purporting to be in pursuance of" such legislation.

16. Moreover, there are several related considerations which support that more confined construction of s.3. First, the strong presumption against a legislative intent to confiscate or extinguish proprietary rights and interests without compensation favours acceptance of the more limited and less onerous of the alternative constructions of s.3. That ordinarily strong presumption is further strengthened in circumstances where, as here, the confiscation or extinction of such proprietary rights and interests is made retrospective and would even apply to claimed rights and interests which are the subject of pending litigation (cf., Maxwell v. Murphy [1957] HCA 7 [1957] HCA 7; ; (1957) 96 CLR 261, at p 267; Doro v. Victorian Railways Commissioners (1960) VR 84, at pp 85-86). Secondly, on the assumption that the claims of the plaintiffs to traditional proprietary rights and interests to and in their homelands are well founded, the less onerous construction of the section is supported by long-established notions of justice that can be traced back at least to the guarantee of Magna Carta (25 Edw 1 c 29) against the arbitrary disseisin of freehold (cf., Clunies-Ross v. The Commonwealth [1984] HCA 65 [1984] HCA 65; ; (1984) 155 CLR 193, at p 201; and see, more generally, Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1 at p 231). Finally, to the extent that traditional rights, interests and claims survived annexation, the declarations of s.3 represent a legislative denial of historical fact. Common sense would support the approach that declaratory provisions creating such a legislative denial of fact should be narrowly construed by reference to any related provisions having an immediate practical operation.

17. Even in the context of the considerations mentioned in the preceding paragraph, it is not, as I have indicated, possible properly to read down the words of ss.3 and 4 in the manner suggested by the plaintiffs, that is to say, to deprive them of any operation at all in relation to any surviving traditional rights and interests. In the context of those considerations, however, it seems to me that the correct construction of s.3 of the Act is the more confined one to which reference has been made. On that construction, s.3 does not confiscate or extinguish, without compensation, all traditional proprietary rights or interests of the Torres Strait Islanders to or in their traditional homelands which may have survived annexation regardless of whether such rights or interests would undermine past dealings or acts. Its function is to lay a declaratory foundation for the provisions of s.4; its operation is to extinguish any such surviving traditional proprietary rights or interests only to the extent that they would adversely affect the validity of any past "disposal" of any part of the Torres Strait Islands in pursuance of Crown lands legislation.

18. The effect of the plaintiffs' approach that, as a matter of construction, the Act did not extinguish any surviving traditional rights or interests at all was that there was no real examination in the course of argument of the effect, for the purposes of the present proceedings, of the provisions of s.3 when they are given the construction which I have concluded is the correct one. Presumably, their effect, on that construction and if they be otherwise valid, is to provide an answer to the plaintiffs' claims only to the extent that those claims would, if otherwise well founded, be inconsistent with some specific past "disposal" of any part of the Murray Islands pursuant to Crown lands legislation. If that be so, the effect of the Act would be at least to invalidate the traditional proprietary rights or interests asserted by the plaintiffs to the extent that they would conflict with the dealings, under Crown lands legislation, with the two acres purportedly leased to the Diocese of Carpentaria. The pleadings do not suggest that there has been any "disposal" pursuant to Crown lands legislation of any other specific part of the Murray Islands. As has been said, the Governor in Council has purported permanently to reserve and set apart the balance (apart from those two acres) of the Murray Islands "for use by the Aboriginal Inhabitants of the State". It would, however, seem unlikely that the operation of the Act to the extent necessary to validate that proclamation would defeat specific traditional proprietary rights and interests. Indeed, such a proclamation might arguably be seen as providing a convenient general framework for the accommodation of such specific traditional rights and interests in a common law system by the recognition of a fiduciary relationship, analogous to a trust, under which the land is reserved or set apart for traditional owners according to their communal or individual entitlements under their traditional law and custom (cf., Guerin v. The Queen (1984) 13 DLR (4th) 321, esp. at pp 339-341). In that regard, the particulars included in the plaintiffs' amended statement of claim (see par.15 particulars (a) and (c)) indicate that the plaintiffs themselves seek to preserve the reservation and setting apart of the Murray Islands and other Torres Strait Islands as a reserve under the Land Acts. It is, however, unnecessary to pursue these matters since I have come to the conclusion that, even if the provisions of s.3 of the Act be given the more confined effect which I would give them as a matter of construction, they are inconsistent with the provisions of the Racial Discrimination Act ("the Commonwealth Act") to the extent that they would operate to extinguish surviving traditional proprietary rights and interests of the Murray Islanders to or in their ancestral homelands. I turn to explain the reasons which lead me to that conclusion. Again, it is necessary to assume, for the purposes of argument, that the hypothesis upon which the particular paragraphs of the statement of defence are pleaded is correct, namely, that traditional proprietary rights and interests of the Murray Islanders to the whole or particular parts of the Murray Islands otherwise survived annexation.

19. Section 10 of the Commonwealth Act is in the following terms:

"10. (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
(3) Where a law contains a provision that --
(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander,
not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which sub-section (1) applies and a reference in that sub-section to a right includes a reference to a right of a person to manage property owned by the person."

The reference in s.10(2) to a "right of a kind referred to in Article 5 of the Convention" directs attention to the provisions of Art.5 of the International Convention on the Elimination of All Forms of Racial Discrimination ("the International Convention") which is set out in a schedule to the Commonwealth Act. For present purposes, that Article provides:

"In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...
(d) ...
(v) The right to own property alone as
well as in association with others;
(vi) The right to inherit;
...".

20. Three related points need to be made about s.10 of the Commonwealth Act. The first is that, in the context of the specific statement in s.10(2) that a reference in s.10(1) "to a right includes a reference to a right of a kind referred to in Article 5" of the International Convention, it is clear that the "rights" to which s.10(1) refers are not restricted to enforceable legal rights under local law. The word "right" is used in s.10(1) in the same broad sense in which it is used in the International Convention, that is to say, as a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights (cf., the preamble to the International Convention). In that sense, the moral entitlement to own property alone as well as in association with others and the moral entitlement to inherit which are referred to in Art.5 of the International Convention are "rights" for the purpose of the guarantee against racial discrimination contained in s.10 of the Commonwealth Act. Implicit in those moral entitlements is the "right" to enjoy immunity from being "arbitrarily dispossessed of (one's) property" which is expressly recognized by Art.17(2) of the Universal Declaration of Human Rights 1948. The second point to be made about s.10 is that the section is not to be given a legalistic or narrow interpretation. As its opening words ("If, by reason of ...") make clear, it is concerned with the operation and effect of laws. In the context of the nature of the rights which it protects and of the provisions of the International Convention which it exists to implement, the section is to be construed as concerned not merely with matters of form but with matters of substance, that is to say, with the practical operation and effect of an impugned law. The third point is that the word "race" and the phrase "national or ethnic origin" are not to be given a pedantic or unduly narrow meaning. In particular, as s.10(3) plainly enough indicates, the Torres Strait Islanders as a group constitute persons of a distinctive "national or ethnic origin" for the purposes of the Commonwealth Act. So also do the Miriam people as a sub-group.

21. On the assumption that must be made for the purpose of determining the demurrer, namely, that traditional communal and personal proprietary rights and interests of Murray Islanders (and, presumably, other Torres Strait Islanders) in and to the land, seas, seabeds and reefs of their islands survived annexation to Queensland in 1879, the subsequent law of Queensland applicable to the islands recognized two distinct categories of proprietary rights or interests. The first such category, on that assumption, involved proprietary rights and interests which were ultimately founded on traditional claims to ancestral lands which predated the application of the new imposed law (including Imperial and local statutes) of Queensland, that is to say, proprietary rights and interests whose ultimate source lay in native law or custom. The second category consisted of proprietary rights and interests whose foundation lay solely in that new law ("European law").

22. The traditional rights and interests which the Act purports to extinguish are confined to rights and interests falling within the first category. They alone could comprise the "other rights, interests and claims" (emphasis added) from which s.3 declares that the islands were "freed" "upon their ... being annexed to and becoming part of Queensland" (the Act, s.3). In other words, on the postulated assumption, the practical operation and effect of the Act would be to extinguish only traditional proprietary rights and interests whose ultimate source predated annexation while leaving intact rights and interests whose ultimate source lay in the European law which became applicable upon

annexation and which included the common law rules and statutory provisions relating to waste lands of the Crown. In that sense, it is accurate to say that the purpose, operation and effect of the Act would, on the confined construction which I would give it, be to extinguish traditional proprietary rights and interests of the Torres Strait Islanders which survived annexation to the extent that their existence would invalidate or render ineffective subsequent dealings or acts "purporting to be in pursuance of Crown lands legislation" (the Act, s.4). On the broader construction which the State of Queensland would give s.3 of the Act, the purpose, operation and effect of the Act would be to extinguish any such traditional proprietary rights and interests completely. And it would do that in a context where other proprietary rights and interests claimed under the European law, including Crown lands legislation, which became applicable to the islands upon annexation (and subsequently) would not be adversely affected but would be enhanced to the extent that their validity or efficacy would otherwise be impugned by surviving traditional proprietary rights and interests. On the assumption that traditional proprietary rights and interests survived annexation, the operation and effect of the Act is, on either construction, to distinguish between proprietary rights and interests to and in the islands according to whether they are ultimately founded in pre-annexation traditional law and custom or post-annexation European law. It discriminates against the former by singling them out for impairment or extinction while leaving the latter unaffected or enhanced.

23. The question therefore arises whether the practical effect of the Act would, upon the assumption made for the purposes of the demurrer, be to produce a situation where the Torres Strait Islanders or the Miriam people (being "persons of a particular race, colour or national or ethnic origin") "do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than" such other persons within the meaning of those words as used in s.10 of the Commonwealth Act. In the light of what has been said above, the answer to that question must, in my view, be in the affirmative. The practical operation and effect of the Act, even on the correct and more confined construction of s.3, are to single out the Torres Strait Islanders (including the Miriam people) for discriminatory treatment in relation to traditional proprietary rights and interests to and in their homelands. The confiscation or extinction of such rights and interests without any compensation or any procedure for ascertaining or assessing the existence and extent of the claims of particular individuals is a denial of the entitlements to ownership and inheritance of property, including the implicit immunity from arbitrary dispossession, which are "rights" for the purposes of s.10(1) of the Commonwealth Act. That denial of rights is confined to the Torres Strait Islanders. It does not extend to persons of "another race, colour or national or ethnic origin". Its effect is that the Torres Strait Islanders, including the Miriam people, are denied ("do not enjoy") "rights", including the entitlement to immunity from being arbitrarily dispossessed, which are enjoyed by those other persons. That being so, that denial attracts the protective provisions of s.10(1) of the Commonwealth Act. In the context of the provisions of s.10(3), it would be anomolous if it were otherwise.

24. The Commonwealth Act, in s.10(3), specifically targets one particular type of provision for inclusion within the ambit of s.10(1). That particular type of provision is one which, while not applying to persons generally without regard to their race, colour or national or ethnic origin, authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed, without his consent, by another person or prevents or restricts an Aboriginal or a Torres Strait Islander from terminating such management. It would be anomolous if, in a context where the Act singles out Aboriginals and Torres Strait Islanders for protection from a discriminatory law providing for compulsory management of their property by another, it left Torres Strait Islanders unprotected from a law which went further and compulsorily confiscated or extinguished without compensation

some or all of their traditional rights, interests or claims to or in that property.

25. There remains to be considered the effect of the application of the provisions of s.10(1) of the Commonwealth Act in the circumstances of the present case. Section 10(1) does not in terms invalidate a law which produces the discriminatory result to which it refers. In terms, it provides that the persons of a particular race, colour or national or ethnic origin who are disadvantaged by the discriminatory operation of the impugned law shall, by force of s.10 itself, enjoy the relevant "right" to the same extent as persons of another race, colour or national or ethnic origin who are not so disadvantaged. In a case such as the present where the operation of the discriminatory law is to impose a liability or to deny or impair "rights" on discriminatory grounds, the only way that s.10 can operate to procure the result which the section is designed to guarantee is by overriding the provisions which would otherwise impose the liability or deny or infringe the relevant "rights". That being so, the operative provisions of the Act are, to the extent that they would confiscate or extinguish traditional proprietary rights and interests of the Torres Strait Islanders in general or the plaintiffs and other Murray Islanders in particular, inconsistent with the provisions of s.10(1) of the Commonwealth Act and invalid by reason of the provisions of s.109 of the Constitution.

26. In the result, the demurrer should be allowed and pars. 4A, 9A, 10A, 17A, 18A and 22A of the amended defence should be struck out.

DAWSON J. In this action the plaintiffs allege in their statement of claim that they are Murray Islanders and members of the Miriam people. They claim that the Miriam people have, since time immemorial, inhabited and exclusively possessed the Murray Islands in Torres Strait and have rights in the land on those islands as well as in parts of the surrounding sea, seabeds and reefs. They allege that upon the annexation by the Crown of the Murray Islands those islands became part of the Colony of Queensland from 1 August 1879 and were subject to the laws in force in that colony. But they say that this extension of sovereignty by the Crown was subject to the land rights of the Miriam people which were based upon local custom, original native ownership or traditional native title, or taking the form of usufructuary rights, by way of actual possession, use and enjoyment of the land. They seek by way of relief certain declarations concerning the existence of those land rights and injunctions restraining the first defendant, the State of Queensland, from impairing them.

2. In its defence, the State of Queensland admits that the Murray Islands have been inhabited by people, commonly known as Murray Islanders, during the whole of their known history. The defence goes on to identify Murray Islanders as part of a group of people commonly known as Torres Strait Islanders. It does not admit the existence of a people known as the Miriam people, the existence of the land rights claimed by the plaintiffs or the exclusivity of those people's possession of the islands.

3. The action was commenced in 1982 and in 1985 the Queensland legislature passed the Queensland Coast Islands Declaratory Act 1985 (Q.) ("the Declaratory Act"). That Act defines the islands to which it refers as being "the islands referred to in the schedule to The Queensland Coast Islands Act of 1879." The schedule to the latter Act refers to "Certain Islands in Torres Straits and lying between the Continent of Australia and Island of New Guinea", being all the islands within a certain defined geographical area. It is common ground that the Murray Islands are within that area. Sections 3, 4 and 5 of the Declaratory Act provide:

"3. Effect of annexation of islands to
Queensland. For the purpose of removing any doubt

that may exist as to the application to the islands of certain legislation upon their becoming part of Queensland, it is hereby declared that upon the islands being annexed to and becoming part of Queensland and subject to the laws in force in Queensland -
(a) the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland for the purposes of sections 30 and 40 of the Constitution Act;
(b) the laws to which the islands became subject included the Crown lands legislation then and from time to time in force;
(c) the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation then and from time to time in force in Queensland.
4. Disposals after annexation. Every disposal of the islands or part thereof purporting to be in pursuance of Crown lands legislation after the islands were annexed to and became part of Queensland shall be taken to have been validly made and to have had effect in law according to its tenor.
5. Claims to compensation. No compensation was or is payable to any person -
(a) by reason of the annexation of the islands to Queensland;
(b) in respect of any right, interest or claim alleged to have existed prior to the annexation of the islands to Queensland or in respect of any right, interest or claim alleged to derive from such a right, interest or claim; or
(c) by reason of any provision of this Act."

4. After the enactment of the Declaratory Act, the State of Queensland amended its defence to rely upon the provisions of that Act. The plaintiffs demurred to those paragraphs of the amended defence which placed reliance upon the provisions of the Declaratory Act on the ground that those paragraphs do not show a ground of defence to which effect can be given by the Court as against the plaintiffs.

5. It is the demurrer proceedings which are now before the Court. Whatever the outcome of these proceedings it will be for the plaintiffs in later proceedings to establish, if they can, the land rights which they claim. These proceedings are concerned with only one aspect of the State of

Queensland's defence, namely, the reliance placed by it upon the Declaratory Act. In effect, it is said by the plaintiffs that the Declaratory Act is invalid, being beyond the power of the Queensland Parliament, or inoperative under s.109 of the Commonwealth Constitution because it is inconsistent with the Racial Discrimination Act 1975 (Cth).

6. The plaintiffs submit that unqualified power to deal with waste lands was never conferred on the Parliament of Queensland. Such power as it has, was, so the submission goes, conferred subject to the reservation of any interests formerly held of the Crown.

7. The plaintiffs do not, as I have said, contest the annexation of the Murray Islands to Queensland. They accept without challenge the decision of this Court in Wacando v. The Commonwealth [1981] HCA 60; (1981) 148 CLR 1. That case decided that the State of Queensland includes Darnley Island which, like the Murray Islands, is one of the group of islands in Torres Strait referred to in The Queensland Coast Islands Act of 1879 (Q.). No distinction for present purposes can be drawn between Darnley Island and the Murray Islands. The course by which the annexation was effected is traced in Wacando. The boundaries of Queensland were originally drawn when the Colony of Queensland was separated from the Colony of New South Wales in 1859. They are contained in letters patent dated 6 June 1859. There were various alterations to the boundaries but none which included the Murray Islands as part of Queensland until 1878. By letters patent passed on 10 October that year, the Governor of Queensland was authorized to declare by proclamation that certain islands, among them those in Torres Strait and including the Murray Islands, should be annexed to Queensland. There was, however, a proviso to the letters patent that no proclamation should be made until the Queensland legislature should pass a law providing that the islands should become part of the colony and subject to its laws.

8. In 1879 the Queensland legislature did pass a law - The Queensland Coast Islands Act of 1879 - complying with the requirements of the proviso to the 1878 Letters Patent and on 18 July 1879 the Governor of Queensland proclaimed that as from 1 August 1879 the islands in question should be annexed to Queensland and become subject to its laws.

9. However, various opinions were expressed by a number of advisors to the Colonial Office which threw some doubt upon the effectiveness of the annexation thought to have been brought about by the combination of the Letters Patent of 1878, The Queensland Coast Islands Act of 1879 and the proclamation of 1879. The doubts, upon which there is no need to dwell here, arose from the view that, since the boundaries of Queensland, a self-governing colony, had been fixed by or under an Imperial Act, the prerogative had been displaced and another Imperial Act was required to alter them. To resolve these doubts, the Colonial Boundaries Act 1895 (Imp) (58 & 59 Vict. c.34) was passed. The effect of s.1 of that Act was that the boundaries of Queensland, as drawn by the Letters Patent of 1878, were deemed from 1 August 1879 to have been the boundaries of the colony, even if as a matter of law they had not been its boundaries before the Act was passed.

10. The plaintiffs do not dispute this history. What they say is that the power to deal with Crown lands, or waste lands, which has been inherited by the Queensland Parliament, is subject to the limitations which were imposed upon that power when it was first bestowed upon the legislature of New South Wales.

11. The steps by which the New South Wales legislature acquired the capacity to deal with waste lands and the revenue arising from their sale are traced by Isaacs J. in Williams v. Attorney-General for New South Wales [1913] HCA 33; (1913) 16 CLR 404, at p 449 et seq. See also Randwick

Corporation v. Rutledge [1959] HCA 63; (1959) 102 CLR 54, at pp 71-78; New South Wales v. The Commonwealth [1975] HCA 58[1975] HCA 58; ; (1975) 135 CLR 337, at pp 369-370, 438-440; The Tasmanian Dam Case (1983) 158 CLR 1, at pp 208-211. There can be no doubt, and it is not contested in this case, that colonial lands which remained unalienated were owned by the British Crown. Whether the ownership sprang from a prerogative right, proprietory in nature, or from the feudal principle which was extended to the colonies upon settlement does not much matter, as Stephen J. pointed out in New South Wales v. The Commonwealth at pp 438-439. The result is the same: Australian land vested in the Imperial Crown. The imperial authorities were reluctant to relinquish control over the disposal of waste lands and saw the revenue arising from that source as being a means of realizing the policy of the home government with respect to the development of the colonies. Thus in 1842 legislation (5 & 6 Vict. c.36) appropriated the gross proceeds of the sale of waste lands in each of the Australian colonies to the public service of each colony, provided one half was applied to assist emigration from the United Kingdom to the colonies (s.19). It was not until 1855 that this policy was reversed and all control over waste lands was relinquished to the relevant colonial government.

12. In 1855 the earlier legislation was repealed by The Australian Waste Lands Act 1855 (Imp.) (18 & 19 Vict. c.56, s.1). That Act was to come into force in New South Wales upon the proclamation of an Act entitled "An Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of New South Wales, to confer a Constitution on New South Wales, and to grant a Civil List to Her Majesty" (The New South Wales Constitution Act 1855 (Imp.) (18 & 19 Vict. c.54)). Power was given to the legislature of New South Wales to legislate with respect to waste lands but this power was subject to the provisions in The New South Wales Constitution Act, yet to be proclaimed, "for the Preservation and enabling the Fulfilment of Contracts, Promises, and Engagements made by or on behalf of Her Majesty with respect to Lands situate in (the colony)" (s.4).

13. The New South Wales Constitution Act was an imperial enactment giving assent to the Constitution of New South Wales. That constitution was in the form of an Act of the New South Wales legislature which was set out in a schedule to The New South Wales Constitution Act. Section 2 of The New South Wales Constitution Act repealed certain previous imperial statutes and provided that:

"the entire Management and Control of the Waste
Lands belonging to the Crown in the said Colony,
and also the Appropriation of the gross Proceeds of
the Sales of any such Lands, and of all other
proceeds and Revenues of the same, from whatever
Source, arising within the said Colony, including
all Royalties, Mines, and Minerals, shall be vested
in the Legislature of the said Colony: ...
provided, that nothing herein contained shall
affect or be construed to affect any Contract or to
prevent the Fulfilment of any Promise or Engagement
made by or on behalf of Her Majesty, with respect
to any Lands situate in the said Colony, in Cases
where such Contracts, Promises, or Engagements
shall have been lawfully made before the Time at
which this Act shall take effect within the said
Colony, nor to disturb or in any way interfere with

or prejudice any vested or other Rights which have accrued or belong to the licensed Occupants or Lessees of any Crown Lands within or without the settled Districts, under and by virtue of the provisions of any of the Acts of Parliament so repealed as aforesaid, or of any Order or Orders of Her Majesty in Council issued in pursuance thereof."

14. Power was given to the Queen by The Australian Constitutions Act 1842 (Imp) (5 & 6 Vict. c.76) and The Australian Constitutions Act 1850 (Imp.) (13 & 14 Vict. c.59) to erect a separate colony in what was then the northern part of New South Wales. This power was continued by The New South Wales Constitution Act, which in s.7 provided that it should be lawful for Her Majesty by letters patent or by Order in Council to erect into a separate colony or colonies any territories which may be separated from New South Wales by the alteration of that colony's northern boundary and by such letters patent or Order in Council "to make Provision for the Government of any such Colony, and for the Establishment of a Legislature therein, in manner as nearly resembling the Form of Government and Legislature which shall be at such Time established in New South Wales as the Circumstances of such Colony will allow".

15. In 1859 letters patent were issued separating the Colony of Queensland from the Colony of New South Wales. The southern boundary of Queensland was a line commencing on the eastern coastline at latitude 28 8'. At the same time an Order in Council was made providing for the constitution of the new colony. See Lumb, The Constitutions of the Australian States, 4th ed. (1977), pp 34-35.

16. The Order in Council, which was made on 6 June 1859, refers to The New South Wales Constitution Act and in cl.17 provides that, subject to that Act and The Australian Waste Lands Act, the legislature of the Colony of Queensland shall have power to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown within the colony.

17. In 1867 the Queensland Parliament, pursuant to power conferred upon it by the 1859 Order in Council, passed a consolidating Act, the Constitution Act 1867 (Q.), which incorporated Queensland constitutional legislation passed between 1860 and 1867. Section 30 of that Act provides that, subject to the provisions of The New South Wales Constitution Act and of The Australian Waste Lands Act "which concern the maintenance of existing contracts", the legislature of the colony has power to make laws for regulating the sale, letting, disposal and occupation of the waste lands within the colony. Section 40 provides that the entire management and control of waste lands in the colony shall be vested in its legislature subject to a proviso which is the same as that contained in s.2 of The New South Wales Constitution Act.

18. Thus certain rights were preserved by the proviso to s.2 of The New South Wales Constitution Act, that being the section which first gave power to the legislature of New South Wales to deal with waste lands. The preservation of those rights was repeated in enactments leading to and including the Queensland Constitution Act from ss.30 and 40 of which the Queensland Parliament derives its power to deal with waste lands and, therefore, such power as it had to pass the Declaratory Act.

19. As I understand the plaintiffs' submission, it is not that the land rights claimed by them are rights which are preserved by any of the various enactments relating to waste lands to which I have

referred. Plainly that could not be so, the Murray Islands having been annexed only as from 1 August 1879. What is submitted is that the power of the Queensland Parliament is subject to an express limitation and that, since the Declaratory Act in dealing with waste lands is not expressed to be subject to that limitation, it must be beyond power.

20. Of course, if the waste lands dealt with by the Declaratory Act are not and cannot be subject to any of the limitations imposed by the legislation culminating in ss.30 and 40 of the Queensland Constitution Act, the failure to restrict the operation of the Declaratory Act by reference to those limitations involves no transgression of legislative power.

21. It is quite clear that in 1855, the year in which The New South Wales Constitution Act and The Australian Waste Lands Act were passed, there was no Crown contract, promise or engagement with respect to the lands comprising the Murray Islands. They were not annexed until 1879. For the same reason there were in 1855 no vested or other rights in those lands under or by virtue of any statute or Order in Council. In any event, any contracts, promises or engagements or rights of the type referred to in the proviso to s.2 of The New South Wales Constitution Act have long since ceased to exist and are not, nor were they in 1985, the source of any limitation upon the power of the Queensland Parliament to deal with waste lands.

22. The rights referred to are those rights of occupation under lease or licence which were introduced in New South Wales to cope with the problem of squatting, the reference to settled districts arising from an Order in Council of 9 March 1847 which had divided the colony into unsettled, intermediate and settled districts and introduced leases of varying duration in these districts. It is unnecessary to examine the history of land use and occupation in New South Wales before or after this measure, but an account may be found in Melbourne's Early Constitutional Development in Australia, ed. R.B. Joyce, 2nd ed. (1963), Pt IV Ch.IV. As Isaacs J. observed in Williams v. Attorney-General for New South Wales, at p 454, the limiting provisions upon the power to deal with waste lands "long ago became exhausted". For this reason, when the Constitution Act 1902 (N.S.W.) was passed, s.8, which repealed the power of the New South Wales legislature to make laws regulating the sale, letting, disposal and occupation of waste lands, omitted any reference to the limitation upon that power imposed by s.2 of The New South Wales Constitution Act.

23. It should be added that by cl.22 of the Order in Council of 6 June 1859 providing for the constitution of the Colony of Queensland, the legislature was given power, subject to two exceptions which are not relevant for present purposes, to make laws altering or repealing all or any of the provisions of the Order in Council, including the limitation in cl.17 upon the power to deal with waste lands. The power of alteration or repeal has not in fact been exercised with respect to cl.17, which was replaced by ss.30 and 40 of the Queensland Constitution Act. Because of the conclusion which I have reached that the limitation upon the power to deal with waste lands cannot, in any event, affect that power in relation to the Murray Islands, it is unnecessary to consider the extent to which the limitation has ever been effective in view of the power of the Queensland legislature to amend its constitution without regard to manner or form.

24. Nor is it necessary to examine further a contention made on behalf of the plaintiffs that no express imperial grant of power was ever made to the Queensland legislature to deal with waste lands of the Murray Islands. Plainly, the power of the legislature is ultimately derived from s.7 of The New South Wales Constitution Act, which authorized the erection of a separate colony to be governed in a manner as nearly resembling the government of New South Wales as circumstances would allow. In pursuance of that authority, the words of the Order in Council of 1859 were

sufficient to confer the specific power. Upon the annexation of the islands referred to in The Queensland Coast Islands Act of 1879, that power extended to the Murray Islands. That is to say, immediately after annexation was effected (an event not contested by the plaintiffs) the legislative power of the Queensland legislature extended to the Murray Islands as a part of Queensland. That legislature then had power to deal with the waste lands of those islands and no further or other authorization by imperial enactment was necessary. There were limits upon the particular power but, for the reasons which I have given, they had no application to the Murray Islands.

25. Whether, notwithstanding the existence of a power to deal with waste lands, there is nevertheless available to the plaintiffs an argument that the particular rights claimed by them were of such a nature as to be incapable of being affected, for whatever reason, by the provisions of the Declaratory Act, depends upon the precise character and extent of those rights, if any. Questions of fact are involved and until those questions are determined it is not possible to say whether the defences impugned by the demurrer are entitled to succeed or not. Those questions are unaffected by the conclusion which I have reached that the Declaratory Act is not on its face beyond power because it is not expressed to be subject to the limitations to which I have referred.

26. This deals with the main submission of the plaintiffs, questions of inconsistency aside. But counsel for the plaintiffs also put a number of other submissions by which it was argued that the Act was not specific enough to extinguish effectively the traditional rights of the plaintiffs; the Queensland legislature did not have power to deprive a person of property rights without compensation; and the Queensland legislature could not interfere in the judicial process which it was said it was doing in this case. For my part I see nothing in these submissions and agree with the reasons of Wilson J. in respect of each of them.

27. That leaves the question of inconsistency to be dealt with. The only inconsistency alleged in these proceedings is the inconsistency of the Declaratory Act with the Racial Discrimination Act. The provisions of that Act which were said to give rise to inconsistency are ss.9(1) and 10(1). Section 9(1) and s.10 are as follows:

"9.(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

...

10.(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the

first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
(3) Where a law contains a provision that
(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
(b) revents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander,
not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which sub-section (1) applies and a reference in that sub-section to a right includes a reference to a right of a person to manage property owned by the person."

28. In my view, s.9(1) gives rise to no inconsistency. That sub-section prohibits persons from doing acts of the kind which it describes. As Gibbs C.J. pointed out in Gerhardy v. Brown [1985] HCA 11; (1985) 159 CLR 70, at p 81, the prohibition imposed by s.9(1) does not extend to the steps taken to pass a Bill into law. Not only are the words inapt for that purpose, but it is clear from s.10 that the manner in which State laws were intended to be affected is otherwise. See also Gerhardy v. Brown, per Mason J. at pp 92-93. In so far as the plaintiffs sought to challenge s.9 on the basis of the manner of the exercise of the authority granted by s.3(c) of the Declaratory Act, I agree with the view expressed by Wilson J.

29. Section 10(1) has a limited operation. Section 10(3) does not appear to me to affect the proper construction of s.10(1). The question which s.10(1) poses for the purpose of this case is whether persons of the race, colour or national or ethnic origin of the plaintiffs are deprived by the Declaratory Act of rights that are enjoyed by persons of another race, colour or national or ethnic origin. The application of the Declaratory Act is not expressed to be based upon race, colour or national or ethnic origin but it could, no doubt, fall within the section if it could be demonstrated that it was in fact so based. In other words, if the only application which the Act could have was to persons of the race, colour or national or ethnic origin of the plaintiffs then it may fall within s.10(1). These proceedings are by way of demurrer to the defence and in its defence Queensland does not admit that the Murray Islands have been inhabited or possessed exclusively by Murray Islanders. The demurrer must be considered on the basis that it puts the plaintiffs to their proof upon these facts. Thus it cannot be assumed for the purposes of the demurrer that land rights of the kind alleged by the plaintiffs, if they exist at all, are exclusively possessed by persons of the same race,

colour or national or ethnic origin as the plaintiffs. Until questions of fact are determined, it cannot be said whether upon this basis the Declaratory Act, in purporting to destroy rights of the kind alleged by the plaintiffs, is doing so in a way which falls within s.10(1). It is therefore impossible to allow the demurrer while these issues remain.

30. More fundamentally, even if land rights of the kind alleged by the plaintiffs are enjoyed only by persons of the same race, colour or national or ethnic origin, when the Murray Islands became subject to Queensland law (as the plaintiffs admit they did) those rights were not rights enjoyed generally by persons in Queensland. To deprive the plaintiffs of those rights would not necessarily be to deprive them of rights enjoyed by persons of another race, colour or national or ethnic origin. I say that it would not necessarily be the case because I am conscious of the possibility of an argument along the lines that, if the land rights alleged by the plaintiffs in fact amount to the form of ownership in which land is enjoyed by them and other persons of their race, colour or national or ethnic origin, to deprive them of those rights may be to deprive them of rights of ownership equivalent to the rights of ownership enjoyed by others, albeit in a different form. It is unnecessary and undesirable in the present proceedings to comment upon the soundness of such an argument, but, in order to lay the foundation for it, it would be necessary to reach a conclusion upon evidence concerning the nature and extent of the rights alleged by the plaintiffs. Those rights have not been admitted and it would be incorrect to assume the truth of the allegations in the statement of claim in proceedings by way of demurrer to a defence. For these reasons, the plaintiffs' argument upon the inconsistency of the Declaratory Act with the Racial Discrimination Act can only be dealt with upon the trial of the action.

31. I should add that both sides proceeded in argument upon the basis that s.10(1) of the Racial Discrimination Act was capable of raising questions of inconsistency and no attack was made upon its validity. In Gerhardy v. Brown it was pointed out that there is no decision of the Court upon the validity of s.10. Its validity was assumed for the purpose of that case: see at pp.85, 94-95. Not only does it remain to be determined whether s.10 can be said to have been passed in the implementation of the Convention, but the form of the section may also raise the question whether it does no more than operate as a limitation upon State power. As Gibbs C.J. pointed out in Gerhardy v. Brown, at p 81, a provision denying power to a State legislature would be of very doubtful constitutional validity. That is something which the draftsman evidently sought to avoid in casting the section in the form in which it is. Whether he succeeded may have to be determined at some other time.

32. I would overrule the demurrer.

ORDER

Demurrer allowed.

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