NATIVE TITLE EXTINGUISHMENT LAW IN THE HIGH COURT

Extinguishment has loomed large in native title litigation since *Mabo v Queensland (No 2)*[1] was handed down in June 1992. Commonwealth and State government respondents have been tenacious and vigorous advocates of the idea that this executive action or that legislative provision at some point in the last 225 years has extinguished native title. The legal conclusion that native title has been extinguished is blind – avowedly so[2] – to the fact of continued Indigenous attachment to country. Even if a claimant group proves the maintenance of traditional connection according to the high standards of continuity set by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria*,[3] a technical finding of extinguishment has an overriding legal effect. The legal right or rights of a group that occupied land for countless generations are deemed to have been permanently obliterated by the passage of legislation or the stroke of a pen in a land titles office, possibly thousands of kilometres away. That means extinguishment law can look harsh and arbitrary. Common morality suggests that judges should be slow to reach such a conclusion. Legal precedent backs that up, by insisting (at a minimum)[4] on a threshold of necessity before drawing the conclusion of permanent extinguishment on such technical grounds.

New High Court decisions on native title extinguishment are closely watched. In recent months, the French court has granted special leave three times to hear appeals about extinguishment law: *Akiba v Commonwealth*,[5] *Karpany v Dietman*[6] (both decided in 2013) and *Western Australia v Brown*[7] (heard and reserved in February 2014). At the heart of each case is the same question: *when can native title rights co-exist with the consequences of legislative or executive action*, whether that action be the grant of rights to the Crown or a third party (such as a pastoralist or miner), or the creation of a particular legal regime (such as a licensing scheme for offshore commercial fishing). Over the years, a set of rules and principles has emerged in Federal Court appeals and from the High Court. It is a complex area of law, at the centre of which sits the idea that the inconsistency of native title rights with legislative or executive action results in the extinguishment of native title.

One particular difficulty highlighted by *Brown* is in distinguishing native title rights and interests that are consistent with a given legislative or executive act from those that are inconsistent. Recent decisions that found native title had been "regulated" not extinguished (*Akiba* and *Karpany*) illustrate two important propositions with a direct bearing on cases such as *Brown*. First, a high degree of friction can exist between native title and official action without resulting in a fatal finding of "inconsistency". Secondly, if the common law does not recognise "suspension of one set of *rights* in favour of another"[8] (even though the *Native Title Act 1993* (Cth) does),[9] the common law clearly does recognise the temporary diminution of the *full and free exercise* of native title rights and interests. Those propositions, which have not received a great deal of attention, are applicable across a range of potential extinguishment scenarios. They enable a conclusion of co-existence to be drawn, without disturbing the authority of High Court decisions that equate inconsistency of rights with permanent extinguishment and despite the presence of adverse effects on the free exercise of native title that might otherwise be (wrongly) interpreted as inconsistency in the relevant sense.

[1] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[2] *Western Australia v Ward* (2002) 213 CLR 1 at [21] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[3] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

[4] The requirement of a clear and plain intention to extinguish is also discussed below.

[5] *Akiba v Commonwealth* (2013) 300 ALR 1.

[6] *Karpany v Dietman* (2013) 303 ALR 216.

[7] *Western Australia v Brown* (HCA, No P49/2013, special leave granted 12 September 2013).

[8] *Western Australia v Ward* (2002) 213 CLR 1 at [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (emphasis added).

[9] *Native Title Act 1993* (Cth), ss 227, 238.

Before elaborating on that argument, it is important to say that the *Native Title Act 1993* (Cth) is not a "comprehensive code"[10] for dealing with extinguishment questions, even though it contains detailed provisions dealing with extinguishment by various categories of official action, both executive and legislative, taken since 1788. Judges must sometimes engage in common law analysis to determine the "extinguishment consequence", if any, of a particular action, as seen in these three recent cases in the High Court.

EXTINGUISHMENT ANALYSIS: A LEGAL CALCULUS BASED ON POSTULATED EFFECTS

Perhaps to forestall lengthy case-by-case factual disputes, the High Court has long emphasised the essentially *legal* character of extinguishment questions brought about, for example, by the executive (pursuant to statutory authority) granting rights to a third party to do certain things on land.[11] Extinguishment is a question of law pertaining to the rights created at the time of grant. The litmus test is not meant to be whether rights were actually exercised in a way that brought about inconsistency with native title in a *realised* way. The task of comparing two sets of rights is a *conceptual* one involving legal logic and construction of specific legislation and other legal instruments.

But this exercise in construction and legal logic cannot avoid grappling with *practical* implications. The presence or absence of inconsistency typically can be assessed only by considering the scope of the newly created rights and their effects on particular native title rights: for example, can the pastoralist fence the property and how does that affect a native title right to hunt? What extinguishment law aspires to, though, is a legal calculus based on *postulated* practical effects, not on factual assessment of the extent if any to which such rights have interacted in a particular case.

Federal Court judges have not found it easy entirely to quarantine from extinguishment analysis consideration of things that occur after the date of grant. Confronted by the complexity of extinguishment questions, they have from time to time struggled to reconcile the relevant principles handed down by the High Court.[12] Different approaches can emerge as a result. Consider, for example, that a grantee may have a legal right to carry out an activity somewhere on the relevant land, such as creating an airstrip on a large pastoral lease. If the right is deemed inconsistent with the existence of a native title right, it may nonetheless fall short of evincing an intention to extinguish that native title right across *all* of the granted land. If so, perhaps the actual carrying out of the activity, possibly many years after the original creation of the statutory right, will crystallise the precise location of the area where extinguishment pursuant to that right occurs.[13] These putative outcomes (let us call them "totalising" extinguishment and "crystallising" extinguishment respectively) are premised on *inconsistency*. Alternatively, the issue may be resolved on the other side of the consistency/inconsistency ledger with a "suppression of the exercise of native title rights to the extent necessary" approach – that is, the creation of the statutory right can enable the full and free exercise of native title rights on the relevant land to be temporarily diminished during the life of the grant, but without extinguishing the rights themselves.

This variety of possible approaches was reflected at trial and appellate level in the Federal Court in *Brown*, and presents a challenge for the High Court in deciding that appeal. *Brown* concerns the effect of granting a mining lease, on specified non-exclusive native title rights held by the Ngarla people of the Pilbara region of Western Australia. A large iron ore mine at Mt Goldsworthy operated within the lease area from the late 1960s until it shut down in 1982, after which most of the associated infrastructure was dismantled and substantial rehabilitation works were undertaken. The project was

[10] *Brown v Western Australia* (2012) 208 FCR 505 at [24] (Mansfield J).

[11] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[12] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [154].

[13] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [148]-[157].

the subject of one-off or "bespoke"[14] legislation that gave legal effect to an agreement between the State and the joint venturers and so the leases granted pursuant to the legislation went beyond standard terms provided in State Mining Acts. The particular circumstances in *Brown* necessitate a sharp focus on some fundamental tools of extinguishment analysis.

LEGAL RULES AND PRINCIPLES GOVERNING EXTINGUISHMENT

The central concept in extinguishment doctrine for determining the fate of native title is inconsistency with the legal effect of an official action, whether legislative or executive.

Inconsistency is concerned with the friction, if any, created when two things – native title and official action – come into (postulated) interaction. There are at least three dimensions to bear in mind, which can operate independently or simultaneously. The *breadth of rights* may be an operative issue: a fee simple typically goes further than the grant of a pastoral lease in creating inconsistency with native title.[15] The *spatial* dimension can also be relevant to questions of friction: a grant of exclusive possession might be applicable across the entirety of the land concerned, whereas the right to build a homestead on a pastoral lease may be capable of exercise at only one point in space and time. Finally, the *duration of rights* may possibly be a consideration: the perpetual nature of the grant in *Wilson v Anderson* seemed relevant to assessing its inconsistency with native title,[16] though the status of arguments about inconsistency where official action has finite or temporary effects is uncertain.[17] The High Court may have to grapple with all three dimensions in resolving the *Brown* litigation.

The most important point about inconsistency for present purposes is that it entails a high legal threshold. With the majority of Australian legislation pre-dating the recognition of native title in 1992, an extinguishment conclusion will be typically a matter of implication rather than express intention. The threshold for establishing such an implication is frequently expressed in terms of "legal necessity".[18] As Gummow J put it in *Yanner v Eaton*,[19] "[t]he question to be asked in each case is whether the statutory right necessarily curtails the exercise of the native title right such that the conclusion of abrogation is compelled, or whether to some extent the title survives, or whether there is no inconsistency at all". The requirement of necessity makes sense when one appreciates the priority rule embedded in native title law. The existence of native title cannot derogate from rights granted by the Crown or by Parliament.[20] With non-native title interests secured by this bedrock principle, the pressure is off extinguishment law in this respect. It is right that the legal threshold for inconsistency should be high.

Another brake on finding "inconsistency" in the relevant sense is the distinction between a *right* to do something and an *activity* done in the exercise of that right. This distinction too functions to impose a high threshold on the proponent of an argument that native title has been extinguished. It is a reminder that an allegedly extinguishing act must address an existential matter – the continued survival of the native title right itself – and not, or at least not merely, a surface manifestation of the right. Extinguishment involves the inconsistency of official action with "the continued existence of a

[14] *Western Australia v Ward* (2002) 213 CLR 1 at [147] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[15] Where a case involves legislation rather than a grant to a third party by the Crown then the analogous consideration is the breadth of statutory coverage.

[16] *Western Australia v Ward* (2002) 213 CLR 401 at [117]. See also Del Villar G, "Pastoral Leases and Native Title: A Critique of Ward and Wik" (2004) 16 Bond LR 29 at 39-40, 64.

[17] Compare paragraphs [80] and [308] in *Western Australia v Ward* (2002) 213 CLR 1 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[18] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 166 (Gaudron J).

[19] *Yanner v Eaton* (1999) 201 CLR 351 at [109]. See also *Akiba v Commonwealth* (2013) 300 ALR 1 at [31], [39] (French CJ and Crennan J); *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group* (2005) 145 FCR 442 at [131].

[20] Pearson N, "Where We've Come From and Where We're At With the Opportunity that is Koiki Mabo's Legacy to Australia" (Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June 2003) p 3, http://www.cyp.org.au/downloads/noel-pearson-papers/where-weve-come-from-and-where-were-at-030603.pdf.

native title right".[21] The right must be "abrogated" and not merely regulated as to its exercise.[22] This proposition was crucial to the outcome in *Akiba*, concerning native title rights held over sea country in the Torres Strait, and it was also applied in the South Australian case of *Karpany*, where two Narrunga men successfully pleaded a native title defence to a prosecution for possession of undersize abalone.

Akiba concerned fisheries legislation that imposed a conditional prohibition on taking fish for *commercial* purposes, coupled with a regime of statutory licences permitting that activity. The native title right was (importantly) characterised in broad terms as one to "take for any purpose resources in the native title areas". The statutory prohibition against fishing for a particular purpose without a licence was found to have "regulated the exercise of the native title right by prohibiting its exercise for *some*, but not all, purposes without a licence. It did not extinguish the right to any extent."[23] The distinction between a right and an activity done in exercising a native title right was material to the finding by all five judges of regulation not extinguishment.[24] French CJ and Crennan J said that "when a statute purporting to affect the exercise of a native title right or interest for a particular purpose or in a particular way can be construed as doing no more than that, and not as extinguishing an underlying right, or an incident thereof, it should be so construed".[25]

That last statement also embodies another principle that puts a constraint on too readily finding inconsistency. The imputed intention to extinguish native title by legislative or executive means must be clear and plain. That proposition and its variants have been repeated many times in the High Court and below,[26] and though concerned to warn against that interpretive principle being misunderstood, the majority's comments in the key case of *Ward* assumed its applicability.[27] That is not surprising, given that it is closely allied to the threshold of necessity and that it reflects the courts' traditional interpretive regard for property rights.

Two important features of extinguishment doctrine emerge from this brief survey of rules and principles. First, the central concept of inconsistency demands that proponents of extinguishment satisfy a high legal threshold. Secondly, the lesson from "regulation" cases like *Yanner*, *Akiba* and *Karpany* is that legislative or executive action can go a long way in authorising suppressive legal effects on the exercise of native title rights without extinguishing the rights themselves: "a particular use of a native title right can be restricted or prohibited by legislation without that right or interest itself being extinguished."[28] As French CJ and Crennan J said in *Akiba*, that is "a logical proposition of general application".[29] Indeed, it would explain the comments about a mining lease having a similarly suppressive effect to the extent necessary to uphold the rights of the mining during the currency of the lease, made by the majority in *Ward*.[30]

[21] *Western Australia v Ward* (2002) 213 CLR 1 at [222] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[22] *Western Australia v Ward* (2002) 213 CLR 1 at [26] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). See also *Yanner v Eaton* (1999) 201 CLR 351 at [106]-[115] (Gummow J).

[23] *Akiba v Commonwealth* (2013) 300 ALR 1 at [67] (Hayne, Kiefel and Bell JJ).

[24] *Akiba v Commonwealth* (2013) 300 ALR 1 at [29] (French CJ and Crennan J), [65]-[68] (Hayne, Kiefel and Bell JJ).

[25] *Akiba v Commonwealth* (2013) 300 ALR 1 at [29].

[26] For example, *Western Australia v Commonwealth* (1995) 183 CLR 373 at 422-423 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ); *Yanner v Eaton* (1999) 201 CLR 351 at [35] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), [110] (Gummow J); *Akiba v Commonwealth* (2013) 300 ALR 1 at [30], [35] (French CJ and Crennan J); *Brown v Western Australia* (2012) 208 FCR 505 at [61] (Mansfield J), [293] (Greenwood J), [479] (Barker J).

[27] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

[28] *Akiba v Commonwealth* (2013) 300 ALR 1 at [26] (French CJ and Crennan J).

[29] *Akiba v Commonwealth* (2013) 300 ALR 1 at [26] (French CJ and Crennan J).

[30] *Western Australia v Ward* (2002) 213 CLR 1 at [308] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

CONCLUSION

The High Court's insistence that, at common law, there are no degrees of inconsistency and that inconsistency of rights automatically equates to extinguishment[31] is not unproblematic – certainly the *Native Title Act* contemplates suspension as an alternative conclusion.[32] But that is beside the point for the argument put here. Australian courts should not rush to the conclusion that age-old land and sea rights have been permanently wiped out by the shifting actions of government at particular points in historical time, when traditional connection to country may remain strong on the ground. On current authority, that amounts to resisting a conclusion of inconsistency. The foregoing analysis shows that the leading High Court cases on extinguishment, including notably *Ward* and the recent regulation cases of *Akiba* and *Karpany*, provide a copious rational basis for resisting that conclusion in many cases (such as *Brown*) and finding, instead, in favour of co-existence.

Sean Brennan
Associate Professor and Director
Gilbert + Tobin Centre of Public Law, University of New South Wales

[31] *Western Australia v Ward* (2002) 213 CLR 1 at [82].

[32] *Native Title Act 1993* (Cth), ss 227, 238. Note the reference in both provisions to inconsistency with "the continued existence" of native title rights, not just with the enjoyment or exercise of such rights.