IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY **NO B 39 OF 2014**

BETWEEN: **STATE OF QUEENSLAND**
Appellant

AND: **TOM CONGOO, LAYNE MALTHOUSE AND JOHN WATSON ON BEHALF OF THE BAR BARRUM-PEOPLE #4**
First Respondents

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA
Second Respondent

ATTORNEY-GENERAL OF THE NORTHERN TERRITORY
Third Respondent

TABLELANDS REGIONAL COUNCIL
Fourth Respondent

ERGON ENERGY CORPORATION LIMITED ACN 087 646 062
Fifth Respondent

TELSTRA CORPORATION LIMITED
Sixth Respondent

CONSOLIDATED TIN MINES LIMITED
Seventh Respondent

MS LAURELLE URSULA GUNDERSEN
Eighth Respondent

MR GRANT HENRIK GUNDERSEN
Ninth Respondent

THOMAS SAMUEL MAULONI
Tenth Respondent

DIANNE CALMSDEN MAULONI
Eleventh Respondent

Filed on behalf of the Second Respondent by:

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MATHEW JOHN MAULONI
Twelfth Respondent

ROBERT THOMAS MAULONI
Thirteenth Respondent

THOMAS JOHN MAULONI
Fourteenth Respondent

MR ROBERT GRAHAM WHITE
Fifteenth Respondent

MS ROBYN DORIS WHITE
Sixteenth Respondent

STEPHEN JOHN CROSSLAND
Seventeenth Respondent

DALE ALBERT CROSSLAND
Eighteenth Respondent

ELIZABETH HAZEL DAWN CROSSLAND
Nineteenth Respondent

RENATO DOVESI
Twentieth Respondent

LINA DOVESI
Twenty-First Respondent

WILLIAM DAVID MCGRATH
Twenty-Second Respondent

SHARON LESLEY MCGRATH
Twenty-Third Respondent

SUBMISSIONS OF THE SECOND RESPONDENT

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PART I FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the Internet.

PART II ISSUES

2. There are two issues the subject of this appeal:

   2.1. The **extinguishment issue** – whether the legislative scheme and related actions under which the Commonwealth took possession of certain lands during the Second World War evinced a clear and plain intention to extinguish any and all native title rights that subsisted on that land (as the Appellant contends) or whether that scheme operated such that *all* rights subsisting in the land continued to exist but subject to a restriction on their exercise while the Commonwealth was in possession (as the Attorney-General of the Commonwealth (**Commonwealth**) and First Respondents contend). On the latter view, the rights acquired by the Commonwealth were not inconsistent with the continued existence of native title rights in the land and did not effect any extinguishment;

   2.2. The **construction issue** – whether the taking of possession of land (and consequent restrictions on its use) is effected solely by the execution of an order made under reg 54 of the *National Security (General) Regulations* (Cth) (***General Regulations***) (as the Appellant contends), or whether some further act or manifestation is necessary – and if so, of what character.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The Commonwealth has considered whether any notice should be given in compliance with s 78B and has decided it is not necessary to do so.

PART IV FACTS

4. The Commonwealth does not dispute the factual background set out by the Appellant in their submissions filed 16 October 2014, save for the following minor caveats:

   4.1. The summary of the relevant provisions of the *National Security Act 1939* (Cth) (***National Security Act***) set out at paras [5]-[7] of the Appellant's submissions accurately records the provisions in force at the time the military orders were made from 1943 onwards. It incorporates the amendments made in 1940,[1] but does not reflect the original position as at 1939.

[1] By Statutory Rule No. 44 of 1940.

4.2. Similarly, the extracts of the text of regs 54(1) and 54(2), set out at paras [9]-[10] of the Appellant's submissions, are accurate[2] as at 15 November 1943 (prior to the first military order), rather than reflecting the regulations as made.

4.3. A delegate of the Minister of State *for the Army* made the five military orders over the land – see para [11] of the Appellant's submissions.

4.4. The full text of the directions made by the delegate of the Minister of State for the Army is relied upon by the Commonwealth.[3] The Appellant's summary omits important contextual words, including, for example, the preface to direction number 3, "While the said land remains in possession of the Commonwealth...".

PART V LEGISLATIVE PROVISIONS

5. The Commonwealth relies upon the legislative provisions found in the joint book of authorities to be filed by the parties.

PART VI ARGUMENT

A. Extinguishment (Ground 1)

What is not in dispute

6. The following legal principles, identified in the reasoning of the majority of the Full Court of the Federal Court below (**Majority**), are not in dispute:

6.1. Any extinguishment by the military orders is to be determined under the common law and not by reference to the provisions of the *Native Title Act 1993* (Cth).[4]

6.2. Extinguishment by exercise of sovereign power need not occur only by grant of an estate or interest in land granted to a third party.[5]

6.3. For an exercise of power by the Crown to extinguish native title, the legislation must evince a clear and plain intention to extinguish native title. The test is objective and the state of mind of the legislators is irrelevant.[6]

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2 Save as for the incorrect insertion of the word "the" immediately before "prohibiting or restricting the exercise of rights" found in the extract of reg 54(2)(b).

3 As set out at (2014) 218 FCR 358 at [15].

4 (2014) 218 FCR 358 at [20]; Appellant's submissions at [22].

5 (2014) 218 FCR 358 at [55]; Appellant's submissions at [23].

6 (2014) 218 FCR 358 at [45]; Appellant's submissions at [24].

6.4. Legislation can objectively reveal this intention whether or not it is legislation of the polity that holds radical title to the land. The notion of radical title is no more than a tool of analysis.[7]

6.5. A law may prohibit the exercise of native title in such a manner or to such an extent as to involve extinguishment.[8]

6.6. Extinguishment may be effected by the grant of rights over land that are for a limited duration.[9]

7. It is also not disputed that the military orders gave the Commonwealth a right of exclusive possession to the land, understood in the sense that, for the uncertain but necessarily limited duration of the exercise of the power, and for the purposes specified in the legislation, the Commonwealth could exclude any and everyone from accessing the land of which it had taken possession.[10]

8. Finally, it is not in dispute that, subject to any extinguishing effect of the military orders, the First Respondents held then and continue to hold now the native title rights listed at para [41] of the Amended Special Case (**ASC**) in relation to the land. These rights, which are said to be "at least non-exclusive", include rights to access and be present on the land; to camp and live temporarily on it; to hunt, fish and gather on it; to conduct ceremonies on it; and to protect areas of importance under traditional law and custom from physical harm.

The key issues

9. The Appellant's argument that the military orders extinguished all of the native title rights in the land is largely framed as a conclusion stemming from statutory construction. Necessarily, however, it is underpinned by a far broader proposition about *how* the common law recognises native title. That proposition, which the Appellant hints at in places[11] but does not state directly, is that the common law treats native title as extinguished in circumstances where *any* legislative or executive act deprives the native title holders of possession (whether on a temporary or permanent basis and irrespective of context). Put slightly differently, under the common law, native title is so inherently fragile that any exclusive possessory act by the sovereign, whatever its character, must inexorably destroy it.

10. This proposition is false. The terms on which the common law recognises native title interests require respect for the acts of the sovereign, and this respect extends to permitting the sovereign to provide for the contingent continuance of native title in circumstances of its choosing. Relevantly for the present case, the common law principles governing the recognition of native title are flexible enough to allow the Commonwealth to take temporary rights of

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7 (2014) 218 FCR 358 at [36]; Appellant's submissions at [46].

8 (2014) 218 FCR 358 at [39]; Appellant's submissions at [65].

9 (2014) 218 FCR 358 at [47]; Appellant's submissions at [28].

10 See the Appellant's submissions at [39]. Note that the Commonwealth does not agree that exclusion could have been for any or no reason.

11 See, for example, the Appellant's submissions at [59]-[61].

exclusive possession for its own benefit whilst simultaneously leaving in existence native title rights as a burden on the radical title held by the Crown in right of Queensland.

11. Once this false proposition is rejected, and the breadth of the common law recognition rules for native title is appreciated, the process of construing the Commonwealth's interests under the statutory scheme vis à vis the native title rights can proceed on the correct footing.

12. It thus follows that the identification of the right exercised by the Commonwealth under reg 54 of the *General Regulations* as including a species of a right of exclusive possession will no doubt be a relevant and important step in the extinguishment analysis, but it should not be elevated in priority to the beginning of the analysis, nor treated as its end point. The Majority did not err in this statement.[12]

13. The correct way to proceed is to engage in the full exercise of statutory construction so as to:

    13.1. identify with some precision (a) the type of sovereign power that was being exercised by the Commonwealth, and (b) the estate or interest that was generated for the Commonwealth by exercise of that power, and the incidents attaching to it;

    13.2. engage in a comparison of that estate or interest bearing such incidents with the First Respondents' native title rights, being rights recognised by the common law by reference to native law and custom, so as to search for consistency or inconsistency of incidents; and

    13.3. reach the ultimate conclusion about whether the statute's objective intention, revealed sufficiently clearly as would be required for any statute said to take away a common law property right, was to extinguish the common law-recognised native title.

14. The Majority correctly engaged with that richer exercise in analysis so as to reach its conclusion on non-extinguishment. The balance of these submissions will address the issues in more detail following this analytical structure.

The anterior step: the terms of the common law's recognition of native title

15. The starting point is to say a little more about the matter at [10]-[11] above, namely the breadth of the common law rules of recognition of native title. For this purpose, while recognising the important later jurisprudence of the Court, there are some first principles insights to which one may usefully return.

16. *Mabo v Queensland [No 2]* (***Mabo [No 2]***)[13] established the following common law rules:

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12 (2014) 218 FCR 358 at [52].

13 (1992) 175 CLR 1.

16.1. The acquisition of sovereignty by the British Crown over the colony of Queensland gave it a radical title to the land but did not extinguish such rights as existed under native title over land within the colony.[14]

16.2. However, the acquisition of sovereignty had a further effect: native title was exposed to the risk of extinguishment by a "valid exercise of sovereign power inconsistent with the continued right to enjoy native title".[15]

16.3. Examples of such extinguishment are the Crown validly granting to another an interest inconsistent with the continuing right to enjoy native title, or the Crown validly and effectively appropriating land to itself in a manner inconsistent with such continuing right.[16]

16.4. Native title can also be extinguished by the clan or group ceasing to acknowledge its laws or observe its customs so as to lose its connexion with the land, or by surrender to the Crown.[17]

16.5. The content and incidents of native title depend on the laws and customs of those with the connexion to the land. It is thus recognised by the common law, but is not a common law tenure. The common law will make available legal or equitable remedies as are appropriate to the rights or interests established by the evidence.[18]

17. What underpins the above propositions is the common law's measured respect for the sovereign. The common law recognises that native title has survived the advent of the new sovereign, such that the new sovereign obtains a radical title burdened by it. But this recognition comes on terms: the common law respects the power of the new sovereign, provided it has complied with the general rules of law, to engage in such grants, appropriations or other dealings in land which it deems desirable. And when the nature and terms of the sovereign's dealing are necessarily inconsistent with the continuing existence of native title, the common law must conclude that the latter can no longer be recognised. Within the Australian Federation, these principles apply to acts of both the sovereign that holds radical title in particular land (here, the Appellant) and the sovereign that enjoys paramount status in respect of a defined sphere of activity (the Commonwealth).

18. It follows that the common law does not in any way curtail the freedom of the sovereign (whether State or Commonwealth) to devise such terms and conditions for any dealing in land as seem to it fit. So much is implicit in Brennan J's rejection, in *Mabo [No 2]*,[19] of the "misconception that it is the

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14 Brennan J at 69-70, propositions 1-3.

15 Brennan J at 69-70, proposition 3.

16 Brennan J at 69-70, propositions 4 and 5.

17 Brennan J at 69-70, propositions 7 and 8.

18 Brennan J at 69-70, proposition 6 (and see also at 60-61).

19 Brennan J in *Mabo [No 2]* at 69.

common law rather than the action of governments" which extinguishes native title.

19. In many cases, the sovereign may employ traditional tenures known to the common law, such as the grant of a freehold, or of a lease for a term whereby the tenant obtains possession with a reversion to the Crown on expiry.[20] But the common law knows no basis to restrict the sovereign's ability to devise different types of dealings, or to condition and structure them in particular ways. The sovereign could decide (as is the case here) that its needs for land are temporary and purpose driven, and that the overall public good is best served by temporary subordination of all existing interests to the sovereign's need for possession, but on the basis that it otherwise leaves all existing interests, whether created or recognised under common law or statute, intact.

20. Where that type of choice is made, the common law simply engages in the same task of comparison as always in an alleged extinguishment case: with a full appreciation of the nature, terms, conditions and limits of the sovereign's dealing, can the native title rights sensibly be said to continue in existence?

21. The common law will be sensitive to the variety of ways, perhaps not closed, in which there can be continuing co-existence. For example, the dealing by the sovereign may remain within the area of regulation or control, but consistent with the continuing co-existence of native title.[21] Similarly, land may be appropriated for a public purpose which can be carried on consistently with continued native title.[22]

22. Noting that the subject matter concerns the potential loss of rights in property, the common law will be astute to find consistency where that is open on the law and facts.[23] And the common law will bear steadily in mind that it is recognising a title derived from a group's continuing acknowledgement of laws and observance of customs, by which it maintains its connexion with the land. If the Crown's dealing is conditioned so that it is not destructive of that connexion, even if it may in part restrict it, the common law has no warrant to find inconsistency or extinguishment.

Step 1: What was the nature of the power exercised by the Commonwealth under reg 54?

23. The aspect of sovereignty being exercised by the Commonwealth under reg 54 was that described by Rich J in *Minister of State for the Army v Dalziel* [24] as "eminent domain": the Commonwealth exercised the right to take to itself property or an interest in property within territory over which it enjoyed

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20 The latter example discussed by Brennan J in *Mabo [No 2]* at 68. Note Brennan J's statement that extinguishment occurs under the traditional common law lease not just because the tenant gains exclusive possession for a term, but also because the Crown's reversion expands its title to a full beneficial one once the term ends.

21 Brennan J in *Mabo [No 2]* at 64.

22 Brennan J in *Mabo [No 2]* at 68.

23 See further *Western Australia v Commonwealth* (1995) 183 CLR 373 at 422-423, and [58] below.

24 (1944) 68 CLR 261 at 284 (***Dalziel***).

constitutionally limited sovereignty, on terms and for a purpose which it deemed appropriate within those limits.

24. While the Appellant had and retained primary sovereignty over the land, reflected by its radical title in it, the Commonwealth was entitled, by reason of ss 51(vi) and 51(xxxi) of the Constitution, to take to itself its particular interest, on its defined terms, for the purpose of defence.

Step 2: What was the nature of the interest that the exercise of power took for the Commonwealth?

The nature of the Commonwealth's interest: summary

25. In summary form, the statutory scheme established by reg 54 and effectuated by the military orders left intact the Appellant's radical title in the land, but:

    25.1. took for the Commonwealth a possessory interest in the land that overrode the exercise of all pre-existing rights for a temporary period, whilst not extinguishing the underlying rights themselves; and

    25.2. in doing so, treated *all* pre-existing rights over the land *in the same fashion.*

The nature of the Commonwealth's interest: detail

26. The essential rights in the land which the Commonwealth took to itself in order to advance the war effort were identified by reg 54 and the military orders as follows:

    26.1. authority to take possession of the land itself (reg 54(1) and the operative part of the military orders);

    26.2. the ability to direct its use, and specifically to identify the person who would control the occupation of the land (reg 54(1) and direction number 1 of the military orders);

    26.3. authority to do anything in relation to the land as if the Commonwealth were the owner of an unencumbered fee simple in the land (reg 54(2)(a) and direction number 2 of the military orders); and

    26.4. authority to prohibit or restrict other persons from exercising rights in relation to the land (reg 54(2)(b) and direction number 3 of the military orders).

27. All of these features were subject to the requirement under s 19 of the *National Security Act* that the rights could only exist during the state of war and up to six months after the cessation of hostilities. Further, the rights set out above at para [26.2] were only exercisable "in connexion with the taking of possession of the land" (reg 54(1)), and those set out at paras [26.3] and [26.4] were only exercisable while the Commonwealth remained in possession of the land (reg 54(2)).

28. It is important to acknowledge that, in defining the estate or interest taken under reg 54, and its incidents, the Commonwealth had a clear choice: it could have, but did not, seek to make itself the full owner of the land by extinguishing any and all pre-existing interests in the land, save perhaps for the radical title of the Appellant. Such a course – which is contemplated under reg 55AA as something that may separately occur under a land acquisition statute – would have exposed the Commonwealth to the maximum possible compensation liability under s 51(xxxi). It also may have raised a question as to whether this was for a purpose properly connected to the war objective.

10 29. Instead, the Commonwealth followed the more restrained course of taking to itself possession and associated rights for the war purpose, on the basis that other rights and interests might (and were very likely to) exist in the land to be possessed, and intending that those other rights and interests *continue but yield* to the Commonwealth's right for the duration of the Commonwealth's exercise of the power under reg 54. The Commonwealth's right, accurately described, was thus a right of exclusive possession to the land for the purposes specified in reg 54, which right was to have no effect on the continuing *existence* of any other rights or interests in the land but only on the temporary *exercise* of those rights.

20 30. Under this statutory regime, the intent was that, at the end of the war, the land would revert fully to its pre-war status. Specifically, the Appellant would continue to hold its radical title, which remained burdened as it had throughout the war by interests created or recognised under common law or statute, and such title and interests would be freed from the Commonwealth's overriding interest.

31. That this is the correct interpretation of the scheme's operation is evident from three sources.

The conclusion follows from Dalziel

32. *First*, this construction is expressly indicated in a number of the majority judgments in *Dalziel*. The most explicit Justice on the point is Williams J. At
30 299, his Honour identified the Commonwealth's right as "an exclusive right to possess the land against the whole world, *including the persons rightfully entitled to possess the land at common law*" (emphasis added). At 300, his Honour described the Commonwealth's statutory right as *overriding* the rights of possession vested in other persons. At 301, his Honour stated that "the entry into possession by the Commonwealth [did] not determine any estate or interest in the land". Relevantly for that case, the Bank of New South Wales continued to be the owner in fee simple of particular land, and Mr Dalziel continued to be a tenant of the Bank from week to week; but those rights "continue[d] to exist subject to the statutory right of the Commonwealth to take possession of the
40 land and use it for the purpose authorised by the regulation." At 301-302, his Honour spoke of the Commonwealth's entry into possession as *divesting* the

rights of possession of other interest holders, but without extinguishing the underlying interest.[25]

The conclusion follows from a textual analysis

33. *Second*, this construction is the most natural reading of reg 54 itself and surrounding provisions. Thus:

33.1. The text of reg 54(2) expressly made it lawful for the Commonwealth to act free of restrictions that would otherwise bind the land, but without extinguishing those restrictions.

33.2. The text of reg 54(2)(b) (replicated in direction number 3 of each of the military orders) spoke of prohibiting or restricting the *exercise* of rights over the land. It thus expressly assumed the continued *existence* of those rights.

33.3. Regulation 54(3) enabled a Minister to request information relating to the land from the owner or occupier of any land in connection with the execution of reg 54. It contemplated that owners and occupiers remained the owners and occupiers, notwithstanding any exercise of powers under reg 54. It presupposed that their rights did not cease.

33.4. In contrast to reg 54's provision for *taking possession* of land, reg 55AA provided that, where the Commonwealth later *compulsorily acquired* land that had been subject to reg 54 (or other powers), compensation would be assessed without reference to any improvements made by the Commonwealth. As *Dalziel* accepted, s 5(1)(b) of the *National Security Act* similarly distinguished between the taking of possession and the acquisition of property.[26] The distinction demonstrates an objective intention not to divest permanently any underlying rights simply by taking possession of land; this would occur only if the full acquisition process were engaged.

33.5. The compensation provisions in reg 60D(1) recognised that persons who had legal interests in the land prior to the Commonwealth's possession continued to hold those rights and were able to exercise them again when the Commonwealth's possession ceased (see, eg, sub-paras (a)-(c), all of which provide for compensation to a person who "has" a legal interest in property, and the last paragraph of reg 60D(1)). Importantly, compensation claims could be made *periodically* during and *after* the Commonwealth's possession.

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[25] See also Starke J at 289-290 and Rich J at 286. See also *Minister of State for the Interior v Brisbane Amateur Turf Club* (1949) 80 CLR 123 where it was held that a lessee could renew a lease during the Commonwealth's possession: at 148-9 per Latham CJ, 162-3 per Dixon J.

[26] *Dalziel* at 289, 295 (although note that this distinction did not govern the meaning of "acquisition of property" in s 51(xxxi) of the Constitution).

The conclusion is supported by the context

34. *Third,* this interpretation is also supported by a number of contextual matters.

35. First, the state of war that justified the creation of the extraordinary power in the Commonwealth is highly relevant to characterising the nature of the right taken under reg 54. The power to make the regulations was recognised as an emergency power, by the heading to s 5 of the *National Security Act*. The *power* to make regulations and the *power* to assert a right to take possession under reg 54 would only exist during the state of war and up to six months after the cessation of war. The statutory *source of power* to assert the right was thus extraordinary and of limited duration (even though the period was not fixed). Both the source of power and the corresponding right were precarious, and liable to determination upon an event outside the control of the Commonwealth.

36. This power to take possession is not comparable to a grant of a short term grazing lease or even a lease for a term of years,[27] where it is the *right* which has a defined short duration, but the power to grant such a right forms part of a land management regime which is stable and enduring. This highlights a fundamental difference between the Commonwealth's right and that of every other right or legislative scheme so far considered by the Courts in the native title jurisdiction. The emergency power comes over the top of all other powers residing in land management regimes to superimpose a right to take possession. Once the basis for the power was removed (the cessation of war plus six months), the overlay of emergency powers (and the rights granted thereunder) was lifted and what existed beforehand continued intact. This supports a finding that an essential characteristic of the Commonwealth's right under the legislation includes that which it did *not* do. It was enacted so as *not* permanently to affect rights already existing in the land. The intent was accurately stated in Parliament: to have "as little interference with individual rights as is consistent with concerted national effort".[28]

37. Secondly, reg 54 did not give any title or interest in land to the Commonwealth or any third party. Specifically, the Commonwealth did not take any steps to give the Appellant a reversion so as to increase its title from a radical one to a contingent full beneficial one. Again, this suggests that the Commonwealth's right was just to sit over the top of other rights, affecting their exercise but not their existence, for the duration of the war.[29]

38. Thirdly, the text of reg 54 imposed *purposive limitations* on the Commonwealth's right to possess and use land, and to restrict others from exercising their rights. In particular, under reg 54(2), the land could only be used for a purpose that the relevant Minister thought was expedient in the interests of public safety, the defence of the Commonwealth or for maintaining

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27 Cf Appellant's submissions at [48], last sentence, and [53]. Further, Starke J in *Dalziel* at 290 remarked that there was nothing to be gained by comparing the right given by reg 54 to the Commonwealth with various estates or interests in land of limited duration: "[I]t is a right created by a statutory regulation and dependent upon that regulation for its operation and effect".

28 (2014) 218 FCR 358 at [6] referring to Second Reading Speech.

29 Cf Appellant's submissions at [48].

supplies and services essential to the life of the community. It is not correct to say that once that state of satisfaction was reached that the Minister's delegate could then use the land for any purpose.[30] Also qualified was the power of the Minister to do (or authorise another to do) anything to the land, which any person holding an unencumbered fee simple interest in the land could do, and the power to prohibit or restrict the exercise of rights of way (etc). It had to be necessary or expedient in connection with the taking of possession or use of the land, which in turn had to be necessary or expedient for the purposes specified in the regulation. Importantly, even after taking possession of land, the Commonwealth did not have power to exclude for any or no reason.

39. Fourthly, as demonstrated by the Majority's reasoning, the fact that the Commonwealth did not hold radical title over the land is a contextual factor that helps to explain *why* the legislative scheme in which reg 54 is found (a) assumed that other rights and interests existed in the land, and (b) created a right premised on the continued existence of those pre-existing interests.

40. Many rights were granted or asserted over land prior to 1992 in the context of the sovereign, Commonwealth or State, incorrectly assuming that no rights or interests existed in the land apart from the (radical) title held by the Crown. This ordinarily involved the polity holding radical title granting an estate to a third party on a basis inconsistent with the continued existence of any other interests in the land.

41. The right asserted by the Commonwealth under reg 54 was, however, different. Because the Commonwealth was not the radical title holder of all the land likely to be taken under the legislation (it holding radical title only in the Territories), the legislative scheme that conferred the power to take possession of land necessarily assumed that other rights and interests already *existed* (or may have existed) in the land and created a right in the Commonwealth that was premised on the continued existence of any underlying rights and interests. In essence, the relevant provisions of the *National Security Act* and the *General Regulations* together comprised a perhaps unusual example of a scheme designed to deal with areas of land potentially covered by a vast array of rights and interests in land, many of which would have been unknown and not readily detectable by the Commonwealth.

42. In accepting this analysis, the Majority did not give radical title any impermissible role in the exercise. The Majority did not suggest that the lack of radical title gives rise to a presumption of a lack of intention to extinguish native title, or that the terms or subject matter of reg 54 give a different effect depending upon whether the Commonwealth held radical title.[31] Rather, radical title was used to understand and explain how the contextual framework of the *National Security Act* differs from that of a land management regime established by a polity holding radical title over the whole of the land regulated by the regime.

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30 Cf Appellant's submissions at [50].

31 Appellant's submissions at [46] and [47].

43. Taking all of these matters into account, a proper construction of the legislative scheme would result in a characterisation of the Commonwealth's right as an emergency right of exclusive possession to land, for the limited specified purposes (of the war), which was to restrict temporarily the *exercise* of any and all rights or interests in the land, but to have no effect on the continuing *existence* of any such rights or interests.[32]

44. And from this construction, one sees that the scheme was non-discriminatory in character: it was not concerned to enquire into the nature of existing rights or interests in the land, whether created or recognised under common law or statute, or the variations between them. All were treated equally: subordinated to the war need, but otherwise left intact. Equally, the Appellant's rights were in no way enhanced. Its radical title was left as such, burdened by whatever interests were there.

Step 3: the 'inconsistency of rights' test

The analysis in brief

45. At this stage of the analysis, the rights taken by the Commonwealth have been fully specified, in all their context and with all their incidents. One turns then to a comparison with the native title rights that the common law would otherwise continue to recognise. Can the latter sit with the former?

46. This comparison takes one beyond the bare fact that the common law would otherwise recognise native title into the details or incidents of that presumptively continuing title and the purpose for which the common law would otherwise recognise it: see paras [11] and [41] of the ASC.

47. Analysed through the prism of *Mabo [No 2]*,[33] it can be said that the First Respondents throughout the war continued to acknowledge their laws and as far as practicable observe their customs, sufficiently so as to continue their connexion with the land. At the level of native title, their rights and interests as expressed at para [41] of the ASC continued. The restrictions arising from the Commonwealth's temporary superior title were real but were not sufficient in fact to "wash away"[34] their connexion to the land.

48. So the question is then framed: was there inconsistency between (a) the Commonwealth taking to itself the superior right of possession, temporarily and for the war effort, on the basis that any and all other rights or interests in the land would be subordinated but remain in existence; and (b) the First Respondents continuing *as of right* under the common law to be persons connected to the land though acknowledgement of law and observance of custom, as expressed in the package of interests stated at para [41] of the ASC; such that (c) the Court must conclude that the objective intent of the scheme was the immediate and irrevocable destruction of the First Respondents' common law-recognised native title rights?

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32 (2014) 218 FCR 358 at [53], last sentence.

33 At 69-70 per Brennan J.

34 Cf *Mabo [No 2]* at 60 per Brennan J.

49. The Majority correctly answered that question "No". A number of more detailed points concerning this stage of the analysis should now be addressed.

Objective intention to extinguish and inconsistency of rights

50. *First*, in identifying whether there is an inconsistency of rights, it should be recalled that the enquiry is a proxy for determining whether the statute evinces an objectively clear intention to extinguish native title. The inconsistency of rights test was developed as an analytical tool to enable the ascertainment of objective legislative intention because of the difficulty in construing a statute enacted before *Mabo [No 2]*, when it was incorrectly assumed that the common law did not recognise native title rights and interests.[35]

51. There are not two separate tests. The Majority was correct in finding that focus on inconsistency of rights could not produce a different result to the ascertainment of objective legislative intention, as they both depend upon the same process and principles of statutory construction.[36] A right granted or asserted cannot be greater than the objective effect of the legislative scheme that created it.

52. The Appellant's submissions phrase the enquiry as a search for an objective legislative intent *not* to extinguish native title[37] or a positive intent to *preserve* native title rights[38], absent which extinguishment will be found. That inverts the enquiry. The common law recognises the continuance of the native title rights unless there is a clear intent, whether express or ascertained by necessary implication such as through inconsistency, to extinguish them.

53. That is, "no extinguishment unless clear intent to extinguish" is the overarching test; not "extinguishment unless clear intent to preserve".

Parliament can grant a form of exclusive possession whilst preserving native title rights

54. *Secondly*, in ascertaining that objective legislative intention, the point made above in the context of common law recognition rules applies equally at the level of statutory construction: Parliament has power to establish a regime that takes a right of exclusive possession temporarily over land, and to provide that *all* underlying rights (whatever they may be, and thus including native title rights) yield to that right of possession but that their existence is not otherwise affected. The fact that a legislature may not have been aware of the existence of native title is not a reason for treating native title rights differently from all other rights, where the legislation is non-discriminatory in terms.

55. It is not disputed by the Commonwealth that, under many legislative schemes, the grant or assertion of a right to exclusive possession will extinguish native title. This will commonly occur where the exclusive possession connotes a

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35 (2014) 218 FCR 358 at [49]-[50], referring to *Akiba v Commonwealth* (2013) 250 CLR 209 (***Akiba***) per French CJ and Crennan J at [30]-[35] and Hayne, Kiefel and Bell JJ at [61]-[64].

36 (2014) 218 FCR 358 at [50].

37 Appellant's submissions at [48], [62].

38 Appellant's submissions at [58].

freehold, or a leasehold with a reversion, leaving no room for the continued existence of underlying rights and interests. The same may be true when land is compulsorily acquired and all pre-existing rights in the land are converted into rights to compensation.

56. However, there is no immutable principle by which a polity is incapable of granting or taking a right of exclusive possession without extinguishing underlying native title rights and interests. The "non-extinguishment principle" defined in s 238 of the *Native Title Act 1993* (Cth) is an example of where this has occurred. There is no principle which says that other legislation cannot do the same, whether by explicitly referring to native title, or by implicitly doing so by treating underlying rights and interests in a way that is indifferent to what those rights might be.

57. The Appellant suggests that a detailed comparison of rights is not necessary once a right to exclusive possession is established.[39] However, this approach assumes that there can be no legislative context where any kind of right of exclusive possession is taken (or granted) without necessarily resulting in the extinguishment of all native title rights and interests. The case law relied upon by the Appellant does not establish such a broad proposition. Rather, the language used by the Court in *Fejo* to explain why a grant of fee simple extinguishes native title suggests that the sovereign *can*, by legislative or executive act, qualify a grant of an estate conferring exclusive possession such that native title will not be extinguished.[40] In order to determine whether a right granted or asserted under a legislative scheme confers an *unqualified* right to exclusive possession (unqualified in purpose or effect), a detailed analysis of the legislative scheme creating that right is necessary.

Principle of legality

58. *Thirdly*, "a statute ought not to be construed as extinguishing common law property rights unless no other construction is reasonably open".[41] As French CJ and Crennan J stated in *Akiba*, this principle applies equally to native title, a property right recognised by the common law. And when a scheme confers a qualified right to exclusive possession and evinces an intention that underlying rights and interests continue but yield, as this scheme does, it cannot not be said that there is a clear and plain intention to extinguish or that no other construction is reasonably open.[42]

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39 Appellant's submissions at [29]. The Commonwealth agrees, however, that a detailed analysis is unnecessary in the case of a freehold estate: see *Fejo v Northern Territory* (1998) 195 CLR 96 (***Fejo***).

40 See *Fejo* at 127 [44], quoting *Mabo [No. 2]* per Deane and Gaudron JJ at 89 and 110 (native title is "extinguished by an *unqualified grant*" of an inconsistent estate"); at 127 [45] ("a grant in fee simple *does not have only some temporary effect on native title rights* or some effect that is conditioned upon the land not coming to be held by the Crown in the future"); at 128 [47] ("*subject to whatever qualifications may be imposed by statute or under the common law*, or by reservation or grant, the holder of an estate in fee simple may use the land as he or she sees fit and may exclude anyone and everyone from access to the land"); and at 130 [54] (the answer in the case depended upon "the effect of a grant of *unqualified freehold title to the land*") (emphasis added in all quotations). See also *Western Australian v Brown* (2014) 306 ALR 168 at [46] (describing the "*unqualified right* to exclude any and everyone from access to the land", emphasis added).

41 *Akiba* at [24].

42 *Akiba* at [24].

59. A related issue is that the Appellant urges a discriminatory interpretation of the statutory scheme. The interpretation it urges is that one and only one set of pre-existing rights in the land, common law recognition of native title, should be regarded as extinguished by the Commonwealth's taking of possession, whereas every other right known to or recognised by common law or statute should be treated more favourably: temporarily subordinated to the Commonwealth's right, but otherwise preserved in existence. There is nothing on the face of the statute that supports such a construction. Rather, the best reading of the relevant provisions is that their effect on any and every right known to or recognised by the common law or statute would be the same: temporary subordination, but not extinction. Equally, as observed at para [30] above, the best reading is that the Appellant's radical title would remain as it was before the war: burdened by all pre-existing interests, rather than freed of one set but still burdened by others.

Application

60. Against this backdrop, what is the result when one comes to compare the right taken by the Commonwealth and its incidents with the First Respondents' native title rights recognised by the common law?

61. The simple answer is that one can see how the two continue to co-exist. The native title holders, for a temporary period and subject to the Commonwealth's proper defence needs, have suffered a *divesture* or an *overriding*, to use the language of Williams J in *Dalziel*[43], of that part of their native title interest as expresses itself in possession of the land. In this, they are in no better or worse position than other holders of pre-existing interests. They have suffered a *subordination* of their common law title to the statutory title of the Commonwealth. But there is nothing that can be gleaned from the scheme itself, or from the manner in which the common law recognises native title, that turns that *subordination* into *extinction.*

62. One can easily conceive of the various ways in which the common law-recognised right continued to exist, notwithstanding its subordination:

    62.1. Even during the period of Commonwealth possession, native title holders could, by permission of the authorised person in control, come onto the land to exercise the rights associated with the title. They might, by this means, exercise a right to hunt or carry on ceremony, just as a freeholder or tenant might by permission come onto the land to collect possessions or ascertain the condition of improvements. In *Akiba* it was meaningful to speak of native title rights being exercised where the necessary fishing licence is obtained;[44] here, it is meaningful to speak of such rights being exercised where the Commonwealth permitted entry onto the land to carry out their expression.

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43 (1944) 68 CLR 261 at 300-301.

44 See *Akiba* at [75].

62.2. As already explained, the various powers taken by the Commonwealth allied to possession were all conferred by reg 54 in purposive terms. The primary act of *possession* could only be taken for the defined war purposes. The *use* power in reg 54(2) was limited to use considered expedient in the defined war effort. And the powers to authorise persons to *do* things on the land, or to *prohibit* exercise of rights, were linked to what is necessary or expedient in connexion with the taking of possession or use. The result is that a capricious denial of access to land, whether to carry out activities connected with the continuing native title rights, or to meet a legitimate need of a freeholder or leaseholder, a denial unrelated to any legitimate defined war purpose, could have been the subject of judicial review.

62.3. Whether access to the land were granted or denied during the period of the Commonwealth's possession, it would again be meaningful, within the terms on which the common law recognises native title, to speak of the native title holders having the continuing association with the land, including duties as custodian and spiritual connexion, which are the reflection of that title. Paragraph [41] of the ASC shows that continuing association occurred in fact.

62.4. To the extent that access to the land was lawfully denied, and this caused partial impairment of their native title rights, the First Respondents could have availed themselves of the compensation provisions in reg 60D ff, just as much as any other interest holder who suffered loss or damage due to the Commonwealth's exercise of power under reg 54. This statutory right to compensation can be viewed as part of the bundle of legal and equitable remedies which the common law recognises as remaining available to vindicate its continuing protection of the native title.[45]

62.5. And finally, once the Commonwealth's possession came to end, the native title holders, as much as any other person with an interest in land recognised or created by common law or statute, could have resumed the full enjoyment of their rights, without need to ask the Commonwealth for permission, and could have pursued their final claims for compensation under reg 60D based on their title having remained intact throughout the war.

63. The Full Court did not have the advantage of this Court's decision in *Western Australia v Brown*[46] at the time it delivered its reasons in this matter, including the Court's statement (at [38]) that:

> "...inconsistency is that state of affairs where 'the existence of one right necessarily implies the non-existence of the other.' And one right necessarily implies the non-existence of the other when there is logical antinomy between them: that is, when a statement asserting the existence of one right cannot,

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45 See *Mabo [No 2]* at 60-61; *Commonwealth v Yarmirr* (2001) 208 CLR 1 (***Yarmirr***) at 49.

46 (2014) 306 ALR 168 (***Brown***).

without logical contradiction, stand at the same time as a statement asserting the existence of the other right."

64. However the Majority's analysis and conclusions were consistent with that statement of principle. As stated by the Majority, and confirmed by the analysis at [61]-[62] above, there was no logical contradiction in the Commonwealth asserting its rights under the scheme and the native title holders asserting that their common law-recognised rights remained alive but subject to temporary subordination ameliorated by compensation rights.

65. The Appellant's reliance at paras [54] and [55] of its submissions upon *Brown* is misplaced. The Court there indicated that, where native title holders were able to exercise their rights on the day of the grant, there was no inconsistency of rights and no extinguishment. It does not follow inexorably that, in every case where the exercise of rights is in some way restricted or even prohibited for a period, extinguishment of native title has occurred. This is especially the case where the legislation authorising the constraints on the exercise of rights is premised upon the continuing existence of those rights.

Step 4: Was the statute's objective intention to extinguish native title?

66. By reason of the above analysis, the ultimate conclusion must be that the statutory scheme did *not* manifest the objective intention to extinguish the First Respondents' native title rights and interests in the land, nor to bring about the necessary corollary of this result: the freeing of the Appellant's radical title from this, and only this, burden. Accordingly, there has been no extinguishment.

B. When and where possession is taken – construction of reg 54 (Ground 2)

67. If, contrary to the above, the Court were to determine that a taking of possession under reg 54 were capable of extinguishing native title rights and interests, ground 2 then directs attention to the process and the extent to which such extinguishment occurred under the legislation.

68. The Majority correctly concluded that possession of land was not taken under the legislation simply by the execution of documents styled "military orders", and that some manifestation of the intention to possess, over and above the administrative act of executing the document, was required.[47] This conclusion has the result that, in native title cases in which land has been the subject of "military orders" under reg 54, a party wishing to establish extinguishment will need to prove not just the making of a "military order" but also that possession was taken in pursuance of such a direction under reg 54(1), the extent of the land that was the subject of such Commonwealth possession, and the extent to which other activities on the land were actually prohibited. In some cases, the directions may not have been acted upon at all (because war priorities changed or the war ended before the directions were acted upon) or, alternatively, not all of the land expressly identified in such directions was ultimately possessed by the Commonwealth or was the subject of effective prohibition of the actions of all others.

[47] (2014) 218 FCR 358 at [63]-[64].

Support for preferred construction

69. Sub-regulation 54(1) conferred two powers upon the Minister of State for the Army (and his delegates), that were exercisable only if a state of satisfaction was reached in relation to the need or expediency of exercising the powers. The first was a power or authority to "*take* possession of any land" and the second a power to "give such directions as appear to him to be necessary or expedient in connexion with the *taking* of possession of the land".

70. When the Minister or a delegate held the relevant state of satisfaction in relation to an area of land, there was then authority to "take possession" of the land, in the sense of *taking* possessory control over the land (from whomever previously held such control). Directions could be given to an appropriate officer in connexion with taking possession of the land (such as a direction to do a physical act like occupying the land). In pursuance of those directions, practical steps could be (and presumably usually were) taken to take possession of the land (in the sense of taking control of it) from any previous right-holders. While any such land was in the possession of the Commonwealth, it could be used for the specified defence purposes and existing rights-holders in the land could be prevented or restricted in the exercise of any rights relating to the land. It was an offence for any person to contravene or fail to comply with the Regulations or an order made under them: s 10, *National Security Act*.

71. When the Commonwealth ceased to be in possession of the land, its control over the land effected by reg 54(2) ceased to apply. This occurred in the present case when the Commonwealth ceased physically to occupy any portion of the land in August 1945: ASC at para [35]. There is, therefore, symmetry in the scheme whereby the Commonwealth's taking of possession, being a question of fact as to when and to what extent it came *into* possession, is matched at the end with the factual question of when the Commonwealth *ceased* to be in possession.

72. The Majority was correct to conclude that this legislative scheme did not result in the Commonwealth being *in* possession merely by *executing* a document and no more. No existing persons in possession of the land were removed from their own possessory control of the land by any such documentary execution alone. Land could not be *in the possession* of both the Commonwealth and the rights-holder in possession at the same time; the Commonwealth had to exclude or eject the rights-holder in possession in order to obtain possession for itself.[48] This required some physical manifestation of dispossessing or some form of immediate demand for possession communicated to that person or persons.[49]

73. The principle of legality would require clear and plain words in order for the mere execution of an instrument, without any notice, to turn existing owners,

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48 See *Hills (Patents) Ltd v University College Hospital* [1956] 1 QB 90 at 99.

49 Just as historically a landlord, who had elected to forfeit the lease due to a breach of covenant, could re-enter either physically or by service of a writ of possession (so long as it contained an unequivocal demand for immediate possession): *Dee-Tech Pty Ltd & Anor v Neddam Holdings Pty Limited* (2010) 15 BPR 29,021; [2010] NSWCA 374 at [51]-[53].

occupiers and right-holders into trespassers and facing possible criminal prosecution as such or under s 10 of the *National Security Act*. The language used was not sufficient to support the contention that the Commonwealth came to be *in* possession (or that the exercise of all other rights was *prohibited*) merely by the private or secret[50] execution of documents.

74. This construction, according to which possession was taken by some form of physical entry onto the land authorised by (and thus pursuant to) directions, is supported by contemporaneous authority. In *Dalziel*, Latham CJ found that the Minister "took possession of the land on 12th May 1942" (at 283) and Williams J noted that the Commonwealth "entered into possession" on that date (at 297); this being "pursuant to a notice in writing dated 5th May 1942". While not in dispute, the Court apparently proceeded on the basis that the Commonwealth took possession when the tenant was ejected, not when the military order was executed.[51]

Response to the Appellant's arguments

75. The Appellant contends that the construction of the Majority leads to "uncertain and arguably absurd outcomes".[52] It is neither uncertain nor absurd to construe an authority to "take" possession as requiring some step capable of notifying persons formerly in control of the land that the Commonwealth was henceforth in control of the land (in possession); nor to construe a power (as in reg 54(2)(b)) to by order restrict the exercise of other rights in the land as requiring the order effectively to be brought to the attention of the persons prohibited. Moreover, the Appellant cannot rely upon "uncertainty" that flows only from the passage of time and the difficulties in proving long past events; as this is not uncertainty in the operation of the legislation.

76. The Appellant contends that the Majority erred in considering that it would be "inherently impractical and unlikely" for persons to be dispossessed of land by execution of a document without any practical manifestation of the intention to take possession. Their Honours' view was formed in the knowledge of the broad range of types of land that could be the subject of the power in reg 54(1). It was open to consider that private or secret dispossession was "unlikely".

77. The Appellant contends that the failure of the legislation to state expressly that dispossession could be effected by private or secret order alone means only that this form of dispossession among any other was open to the Minister. This fails to grapple with the notion that possession is being taken *from* somebody. The principle of legality requires plain words to permit the taking of common law rights, such as property. While reg 54(1) does authorise the Minister (or delegate) in specified circumstances to take possession of land and give

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50 Noting that the statutory scheme apparently did not require notification of the taking of possession by publication in the *Gazette* or service on affected persons: see Appellant's submissions at [76], and s 5(4) of the *National Security Act*.

51 See also *In re Fish Steam Laundry Pty Ltd* (1945) QSR 96, where the Court spoke of the order purporting to take possession and distinguished that date from the date that actual possession was taken: see at 98-99.

52 Appellant's submissions at [70].

directions in connexion with that taking, it does not authorise private or secret dispossession.

78. Finally, the Appellant seems to rely upon what is said to be a practical difficulty if more than execution of a document is required to dispossess right-holders. However, it is not apparent that there were any practical difficulties. If a person lived on land the subject of a military order without ever knowing about the order or the Defence interest in his or her land, he or she presumably suffered no inconvenience and the land was not "in the possession" of the Commonwealth. If Defence Force personnel appeared and required an owner or occupier to leave, possession would be taken and the person would henceforth be liable to prosecution if he or she contravened the order not to exercise all underlying rights in the land. If no one was present on the land, the authorised Defence personnel were nonetheless authorised to occupy the land and would, when that occurred, thereby be in control of it and the land would be in the possession of the Commonwealth. If the unknowing former possessor of the land returned, he or she would quickly discover if the Commonwealth was in possession and would be required to act accordingly.

PART VII NOTICE OF CONTENTION OR CROSS-APPEAL

79. Not applicable.

PART VIII ESTIMATED HOURS

80. It is estimated that 1.5 hours will be required for the presentation of the oral argument of the Second Respondent.

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