IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P49 of 2013

BETWEEN:

STATE OF WESTERN AUSTRALIA
Appellant

and

ALEXANDER BROWN, JEFFREY BROWN, CLINTON COOK and CHARLIE COPPIN (on behalf of the Ngarla People)
First Respondents

BHP BILLITON MINERALS PTY LTD, ITOCHU MINERALS & ENERGY OF AUSTRALIA PTY LTD and MITSUI IRON ORE CORPORATION PTY LTD
Second Respondents



**PROPOSED WRITTEN SUBMISSIONS of AUSTRALIAN LAWYERS FOR HUMAN RIGHTS**

## Part I: Certification

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

## Part II: Basis of intervention

2 Australian Lawyers for Human Rights (**ALHR**) seeks leave to be heard as *amicus curiae* by summons dated 16 October 2013. ALHR's submissions focus on human rights law affecting questions about the interaction of native title and mineral rights granted by government.

3 ALHR does not seek to be heard in support of any particular party.

## Part III: Why leave should be granted

4 An *amicus* should be granted leave to address matters which other parties' arguments have not covered[1] where:

(a) there is an issue which the Court ought to take into account in reaching its decision;[2]

1 *Levy v Victoria* [1997] HCA 31; 189 CLR 579, 604 per Brennan CJ.
2 *Re United States Tobacco v Minister of Consumer Affairs* [1988] FCA 317; 20 FCR 520, 534 [31] per Davies, Wilcox & Gummow JJ.

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(b) the other parties do not address that issue;[3] and

(c) the amicus submissions may assist the Court to reach a proper determination.[4]

5 The issue ALHR raises is human rights law relevant to the common law on the interaction between native title and mineral rights. The resolution of questions as to that interaction has significant ramifications for existing and determined native title claims as well as many ongoing mining projects.[5] The issue has not been addressed in the parties' submissions.

## Part IV: Constitutional provision, statutes and regulations

6 There are no relevant constitutional provisions. The second respondent's submissions identify the relevant statutes and regulations.

7 ALHR's submissions use similar nomenclature to the appellant's submissions: *Mt Goldsworthy Act*,[6] Mt Goldsworthy Agreement,[7] *Mining Act*,[8] *Native Title Act*,[9] and *Government Agreements Act*.[10]

## Part V: Submissions

### *Summary*

8 ALHR's submissions, detailed in the following pages, are essentially this. International human rights standards and the presumptive protections of the common law apply to native title. The Full Federal Court's decision is correct. The native title rights here were not extinguished:

(a) the native title rights were not inconsistent with the government grants: paragraphs [31]-[39] of these submissions;

(b) there was no parliamentary authority for extinguishment [40]-[44], and nor was there a parliamentary dictate to extinguish: [59]-[62]; and

(c) extinguishment is unnecessary for the operation of the government grants: [45]-[47].

9 The common law's protection of interests should not be determined on the racial origin of those interests: [48]-[53]. Instead, native title extinguishment under the common law should only result from a government grant which permanently prevents native title rights being recognised: [52]-[56].

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3 eg. *Wurridjal v Commonwealth* [2008] HCATrans 348, per French J; and *Kruger v Commonwealth* [1996] HCATrans 68, per Brennan CJ (and majority of court).
4 *Roadshow Films v iiNet Ltd* [2011] HCA 54, [6] per French CJ, Gummow, Hayne, Crennan & Kiefel JJ.
5 (Western Australia) *Applicant's Summary of Argument*, 2 Jan 2013, [28].
6 *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA).
7 Schedule to the *Mt Goldsworthy Act*.
8 *Mining Act 1904* (WA).
9 *Native Title Act 1993* (Cth).
10 *Government Agreements Act 1979* (WA).

***Relevance of human rights to issues before the Court***

10 International law, including human rights standards, is a legitimate and important influence on the development of the common law,[11] particularly where the common law on an area is uncertain or unsettled.[12] The High Court has used international law to inform the common law's understanding on the existence and content of native title.[13]

11 It is a principle of the common law 'that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or conventions to which Australia is a party'.[14]

12 In addition to human rights conventions, the Court can have reference to the *United Nations Declaration on the Rights of Indigenous Peoples.*[15] Although a declaration and not a treaty, it is a equally relevant for international standards.[16] The New Zealand Court of Appeal considers UNDRIP a legitimate influence on the common law.

> Whilst the Declaration is non-binding, New Zealand announced its support of the Declaration in 2010. It is also a party to the international human rights covenants on which the Declaration is based. ...
>
> We consider that a more modern approach to customary law is to try to integrate it into the common law where possible rather than relying on the strict rules of colonial times. This conclusion is reinforced by the need to develop the common law, so far as is reasonably possible, consistently with ... the importance of recognising the collective nature of the culture of indigenous peoples and the value of their diversity (as recognised in particular by the United Nations Declaration on the Rights of Indigenous Peoples) and by international human rights covenants to which New Zealand is a party.[17]

13 The High Court has often used the work of the treaty-monitoring committees in determining the content of international human rights standards.[18]

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11 *Mabo v Queensland (No 2)* [1992] HCA 23; 175 CLR 1, 42 per Brennan J (Mason CJ & McHugh J agreeing); *Dietrich v R* [1992] HCA 57; 177 CLR 292, 321 per Brennan J; *Minister of State v Ah Hin Teoh* [1995] HCA 20; 183 CLR 273, 288 per Mason CJ & Deane J; *Western Australia v Commonwealth* [1995] HCA 47; 183 CLR 373, 486 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ.

12 *Dietrich* (n11 above), 306 per Mason CJ & McHugh, 360 per Toohey J.

13 eg. *Commonwealth v Yarmirr* [2001] HCA 56; 208 CLR 1, [70] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; *Mabo (No 2)* (n11 above), 42 per Brennan J (Mason CJ & McHugh J agreeing).

14 *Momcilovic v The Queen* [2011] HCA 34, [18] per French CJ (referencing *Zachariassen v The Commonwealth* (1917) 24 CLR 166, 181 per Barton, Isaacs & Rich JJ; *Polites v Commonwealth* [1945] HCA 3; 70 CLR 60, 68-69 per Latham CJ, 77 per Dixon J, 80-81 per Williams J).

15 UN General Assembly resolution A/RES/61/295 (13 Sep 2007). Australia initially opposed UNDRIP but subsequently endorsed it: Minister for Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, 3 Apr 2009 (Canberra: Australian Government).

16 eg. *Cheedy (Yindjibarndi People) v Western Australia* [2011] FCAFC 100; 194 FCR 562, [109] per North, Mansfield & Gilmour JJ; *Lin v Rail Corporation NSW* [2011] FCA 546, [19] per Buchanan J.

17 *Takamore v Clarke* [2011] NZCA 587, [250]-[254] per Glazebrook & Wild JJ.

18 eg. *Maloney v The Queen* [2013] HCA 28, [68 fn110] per Hayne J, [121] per Crennan J, [170] per Kiefel J, [288]-[289] per Gageler J; *Dietrich* (n11 above), 306 per Mason CJ & McHugh.

***International human rights standards relevant to this case***

14 Racial discrimination is prohibited in international law.[19] The standard requires equality before the law,[20] including in the enjoyment of property rights 'without distinction as to race, colour, or national or ethnic origin'.[21] This involves guarantees of 'the right of indigenous peoples to own, develop, control and use their lands, resources and communal territories'.[22] Native title rights constitute 'property' within human rights law[23] and cannot be unjustly deprived.[24] Racial discrimination occurs where there is 'any distinction...or preference based...on race which has the purpose *or effect* of...impairing...the enjoyment of certain rights'.[25] Intention or express differentiation is not necessary.

15 A distinction in the treatment of native title rights as compared to government grants may comprise racial discrimination, even though the government grant can be held by a person of any ethnicity. This is because the rights have origins in the legal systems of different 'racial' groups - Indigenous as opposed to European.[26] In particular, where the right against arbitrary property deprivation is impaired for native title holders but not for other rights-holders, that is racial discrimination.[27]

16 When the *Mt Goldsworthy Act* was passed, and the mineral leases were granted, international law standards prohibited racial discrimination. Proscriptions against racial discrimination are some of the earliest and most fundamental human rights law, being customary international law,[28] as well as part of the *UN Charter*,[29] the *Universal Declaration of Human Rights*,[30] and the *Declaration on the Elimination of all Forms of Racial Discrimination*.[31] This last document was adopted by consensus at the General Assembly, over a year before the *Mt Goldsworthy Act* was passed.

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19 Art 2 of *International Covenant on the Elimination of All forms of Racial Discrimination* [1975] ATS 40 (UN Treaty Series, v660 p195; Australia ratified 1975; treaty entered into force 1969) (**ICERD**); arts 2(1) & 26 of *International Covenant on Civil and Political Rights* [1980] ATS 23 (UN Treaty Series, v999 p171; Australia ratified 1980; treaty entered into force 1976) (**ICCPR**).

20 ICCPR (n19 above), art 26.

21 ICERD (n19 above), art 5(d)(v); see also Human Rights Committee, *General Comment No. 18: Non-discrimination,* (UN doc A/45/40(VOL.I)(SUPP), 10 Nov 1989), para 7.

22 Committee on the Elimination of Racial Discrimination, *Concluding Observations: Togo* (UN doc CERD/C/TGO/CO/17, 23 Sep 2008), [17]; see also Committee on the Elimination of Racial Discrimination, *Concluding Observations: Chile* (UN doc CERD/C/CHL/CO/15-18, 7 Sep 2009), [21]; Committee on Economic, Social and Cultural Rights, *Concluding Observations: Ecuador* (UN doc E/C.12/ECU/CO/3, 13 Dec 2012), [9].

23 *Western Australia v Ward* [2002] HCA 28; 213 CLR 1, [116] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

24 *WA v Commonwealth* (n11 above), 436 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ.

25 *Ward* (n23 above), [105] per Gleeson CJ, Gaudron, Gummow & Hayne JJ (emphasis in original); *Mabo v Queensland (No 1)* [1988] HCA 69; 166 CLR 186, 206 per Wilson J.

26 eg. *Mabo (No 1)* (n25 above), 218 per Brennan, Toohey & Gaudron JJ, 230-231 per Deane J; *WA v Commonwealth* (n11 above), 437 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ; *Ward* (n23 above), [111] & [117] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

27 *Mabo (No 1)* (n25 above), 218 per Brennan, Toohey & Gaudron JJ; 230-232 per Deane J.

28 *Koowarta v Bjelke-Petersen* [1982] HCA 27; 153 CLR 168, 205-206 per Gibbs CJ, 220 per Stephen J, 248 per Wilson J; International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (53rd session, UN doc A/56/10) art 26, commentary 5; Lepard, B, 2010. *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press) 7.

29 Art 1(3) of *Charter of the United Nations* [1945] ATS 1 (UN Treaty Series v1 XVI; Australia ratified 1945; treaty entered into force 1945).

30 Arts 2 & 7, *Universal Declaration of Human Rights* (UN General Assembly, 10 Dec 1948, UN doc A/RES/3/217).

31 *Declaration on the Elimination of all Forms of Racial Discrimination* (UN General Assembly, 20 Nov 1963, UN doc A/RES/1904(XVIII)).

17 The fact international standards are directed at the nation state does not mean they are irrelevant for domestic legal proceedings. Divisions of legal responsibility within a country do not justify any failure to follow international treaty requirements.[32] Human rights about racial discrimination apply to sub-national governments and not just the nation state.[33] Australia has informed international treaty bodies that 'The Federal Government, in general, relies on States to give effect to international treaties where the particular obligation assumed affects an area of particular concern to the States'.[34]

18 Human rights standards have application and relevance in domestic courts[35] and are not latent prior to incorporation in national legislation. The High Court has noted the international standard of 'the right to equal treatment before...tribunals and all other organs administering justice'.[36]

19 Limitations on some human rights standards are permitted[37] but any limitations or restrictions must be stipulated in law,[38] necessary in a democratic society[39] and *non-discriminatory*.[40] The requirement for racial equality before the law is non-derogable.[41]

20 The jurisprudence of regional human rights bodies also explicate human rights about property, cultural rights and indigenous people. While these decisions are not international law binding on Australia, because the relevant treaties do not include Australia, they are instructive on the content of human rights. Relevantly, extinguishment of Aboriginal title under US common law has been found contrary to need for equal protection of the law because extinguishment occurs without the requirements for 'the taking of property by the government [which] ordinarily

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32 *Vienna Convention on the Law of Treaties* [1974] ATS 2 (UN Treaty Series v1155 p331; Australia ratified 1974; treaty entered into force 1980), art 27.

33 eg. Committee on the Elimination of Racial Discrimination, *Concluding Observations: Argentina* (UN doc CERD/C/ARG/CO/19-20, 29 Mar 2010), [20].

34 *Core Document forming part of the reports of State Parties: Australia* (UN doc HRI/CORE/1/Add.44, 27 Jun 1994) para 181.

35 eg. Human Rights Committee, *General Comment No. 3: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (UN doc CCPR/C/21/Rev.1/Add.13, 26 May 2004), [4], [7], [12]-[13]; ICERD (n19 above) art 5(a); Human Rights Committee, *General Comment No. 23: The rights of minorities* (UN doc CCPR/C/21/Rev.1/Add.5, 4 Aug 1994), para 7; Committee on Economic, Social and Cultural Rights, *Concluding Observations: Canada* (UN doc E/C.12/CAN/CO/4 E/C.12/CAN/CO/5, 22 May 2006), [36]; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Ethiopia* (UN doc CERD/C/ETH/CO/15, 20 Jun 2007) [14]; Committee against Torture, *Conclusions and recommendations: Argentina* (UN doc CAT/C/CR/33/110, 10 Dec 2004), [7d].

36 *WA v Commonwealth* (n11 above), 435 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ (referencing ICERD, art 5(a)).

37 Only where required for national security, public order/health/morals/safety, or protecting others' rights, eg. ICCPR (n19 above), arts 12(3) (freedom of movement), 13 (expulsion of non-citizens), 14(1) (fair trial), 18(3) (freedom of religion/belief), art 19(3) (freedom of expression), 21 (peaceful assembly), 22(2) (freedom of association). A general collation and explanation of limitations is provided in UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights* (UN doc E/CN.4/1984/4, Annex, 28 Sep 1984).

38 eg. ICCPR (n19 above), arts 18(3), 19(3) & 22(2).

39 eg. ICCPR (n19 above), arts 14(1), 21, 22(2).

40 eg. ICCPR (n19 above), art 4(1) (derogation of rights); UNDRIP (n15 above), art 46(2).

41 An Australian example is the reasoning in *Maloney v The Queen* [2013] HCA 28, [37]-[38] per French CJ, [77]-[85] per Hayne J (with whom Crennan J agreed), [224]-[227] per Bell J, and [361] per Gageler J.

requires a valid public purpose and the entitlement of owners to notice, just compensation, and judicial review'.[42]

***Relevant common law precedent***

21 The High Court has confirmed that 'native title may be protected by such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence'.[43]

22 The common law protects fundamental rights by the principle that statutes are not to impair a party's fundamental rights unless that is specifically indicated by parliament.[44] Relevantly, there are various extant rights to be taken into consideration.

(a) **Property rights**. The creation and disposition of property rights will not be construed from a statute unless such intention is manifest.[45] The concept of property protection has been specifically applied in the context of native title:

> Extinguishment ... of [native title] rights in whole or in part is not a logical consequence of a legislative constraint upon their exercise for a particular purpose, unless the legislation, properly construed, has that effect. To that proposition may be added the general principle that a statute ought not to be construed as extinguishing common law property rights unless no other construction is reasonably open.[46]

(b) **Revival upon removal of statutory prohibition**. Where an Act has displaced the common law, if that Act is repealed then the relevant common law is revived.[47] A related example is that involuntary loss of access to property (eg. through war time requisition) does not automatically 'extinguish' the underlying tenure.[48]

23 Significantly, the protection of these 'rights and fundamental freedoms' is not limited to where there is direct congruence with an existing human right. Common law protections exist even in the absence of a corresponding international human

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42 Inter-American Commission on Human Rights, *Mary & Carrie Dann -v- United States* (Report N° 75/02, Case 11.140, 27 Dec 2002), [143]-[144].

43 *Ward* (n23 above), [21] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; confirming *Mabo (No 2)* (n11 above), 61 per Brennan J (Mason CJ & McHugh agreeing); see also *Commonwealth v Yarmirr* (n13 above), [42] & [76] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; French, R, 2001, 'The Role of the High Court and the Recognition of Native Title: Address in Honour of Ron Castan QC AM' (extracted in *Dialogue about Land Justice: Papers from the National Native Title Conferences*, 2010, Aboriginal Studies Press, 78), 96.

44 eg. *R v Secretary of State, ex p Simms* [1999] UKHL 33; [2000] 2 AC 115, 131 per L Hoffman. See also *Lacey v Attorney-General of Queensland* [2011] HCA 10, [17] per French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ; *Lee v NSW Crime Commission* [2013] HCA 39, [126] per Hayne J, [171] per Kiefel J, [309] per Gageler & Keane JJ; *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46, [529] per Bell J.

45 *American Dairy Queen v Blue Rio* [1981] HCA 65; 147 CLR 677, 683 per Mason J (Gibbs CJ, Murphy, Aickin & Brennan JJ agreeing); see also *Clunies-Ross v Commonwealth* [1984] HCA 65; 155 CLR 193, 199-200 per Gibbs CJ, Mason, Wilson, Brennan, Deane & Dawson JJ.

46 *Akiba (Torres Strait Regional Seas Claim Group) v Commonwealth* [2013] HCA 33, [24] per French CJ & Crennan J; see also *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20; 235 CLR 232, [95] per Kirby J (in minority in that case); *Mabo (No 1)* (n25 above), 216-218 per Brennan, Toohey & Gaudron JJ, 229-231 per Deane J..

47 *Smith v Marshall* [1907] HCA 33; (1907) 4 CLR 1617, 1634, per Barton J. Subject, of course, to the repeal or other enactment not continuing the earlier change to the common law: *Majeau Carrying Co v Coastal Rutile* [1973] HCA 22; (1973) 129 CLR 48, 51-52 per Gibbs J.

48 eg. *Attorney-General v De Keyser's Royal Hotel* [1920] UKHL 1; [1920] AC 508, 571 per Lord Parmoor; *Shaw Savill & Albion Co v Commonwealth* [1940] HCA 40; (1940) 66 CLR 344, 354-355 per Starke J.

right, with examples including the non-authorisation of a tort,[49] protection of reputation,[50] and the right to pass on public roads. This last 'right' is clearly shown, and relevant, in the High Court's decision in *Melbourne v Barry*:

> [The] common law right of the King's subjects to pass through the highways ...[T]here is this common law right; and ...any interference with a common law right cannot be justified except by statute—by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted.[51]

24 There are various, and important, reasons why the common law 'limits' statutory incursions on rights to instances where that has been explicitly identified.

(a) If other laws control what is claimed as the necessity for the purported removal of the common law right, then that right should not be removed. In *Melbourne v Barry*, one reason supposedly requiring the removal of the common law 'right' of processions was that processions might disrupt traffic and public order. But there were other laws which provided that control over processions, meaning this particularly statutory provision was not interpreted to enable the complete extinguishment of the right.[52]

(b) Where people have not been told of the supposed restrictions or removals of their common law rights,[53] this weighs against those rights being removed.

25 At common law, State Governments are unable to grant interests in land except under explicit statutory authority.[54] In relation to native title, this means that legislative sanction is necessary before anything can be done with Crown land which would extinguish or affect native title.[55]

26 An old line of common law cases regulate the impact of mineral rights, which apply to Western Australia.[56] Under the common law, miners must minimise their impacts on those who use the surface of the land. Statute can, of course, expand a miner's rights but if it does not then the common law provides the miner with an implied right to access and use land to extract the ore,[57] but only to the extent strictly necessary for that.[58] There are many cases where miners have been held

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49 *Coco v R* [1994] HCA 15; 179 CLR 427, 436 per Mason CJ, Brennan, Gaudron & McHugh JJ.
50 *Balog v Independent Commission Against Corruption* [1990] HCA 28; 169 CLR 625, 635-636 per Mason CJ, Deane, Dawson, Toohey & Gaudron JJ.
51 *The Mayor & City of Melbourne v Barry* [1922] HCA 56; 31 CLR 174, 206 per Higgins J, see, to similar effect 197 per Isaacs J.
52 *Melbourne v Barry* (n51 above), 207 per Higgins J.
53 *Melbourne v Barry* (n51 above), 200 per Isaacs J.
54 *Cudgen Rutile (No 2) v Chalk* [1974] UKPC 30; [1975] AC 520, 533 per Lord Wilberforce; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404, 456 Isaacs J (Gavan Duffy and Rich JJ agreeing).
55 *Ward* (n23 above), [103] & [167] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; see also *Lansen v Olney* [1999] FCA 1745; 100 FCR 7, [48] per French J.
56 From 18 June 1829, UK laws including the common law 'as far as they are applicable to the circumstances of the case...do immediately prevail and become security for the rights...of all His Majesty's Subjects found or residing in' Western Australia: *WA v Commonwealth* (n11 above), 425 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ.
57 eg. *Earl of Cardigan v Armitage* [1823] EngR 232; 107 ER 356; applied in *Barrett v Federal Commissioner of Taxation* [1968] HCA 59; (1968) 118 CLR 666, 672 per Owen J; *Payne v Dwyer* [2013] WASC 271, [79] per Pritchard J.
58 *Earl of Cardigan v Armitage* [1823] EngR 232 (107 ER 356), 362 per Bayley J for the Court; *Lord Darcy v Askwith* (1618) Hob 234; *Marshall v Borrowdale Plumbago Mines* (1892) 8 TLR 275.

liable for damaging the surface rights.[59] The *Mining Act* has been construed in various cases to be read as only altering the common law 'as far as is necessary to give effect to the express provisions of the Act.'[60]

***Current native title law***

27 Indigenous title in the common law has been recognised in many jurisdictions[61] but there are constitutional differences between these, making their cross-jurisdictional authority varied.[62] The only common law referenced below is Australian or has already been accepted in Australian courts.

28 Native title is extinguished, under the common law, by fee simple and by leases giving perpetual exclusive possession.[63] This is because:

> It simply does not permit of the enjoyment by anyone else of any right or interest in respect of the land unless conferred by statute, by the owner of the fee simple or by a predecessor in title. ...[Native title rights] are inconsistent with the rights of a holder of an estate in fee simple. Subject to whatever qualifications may be imposed by statute or 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 any and everyone from access to the land.[64]

29 Native title is not extinguished, under the common law, by laws imposing controls on when and how the public can access a resource, such as wildlife. These laws may curtail, but do not extinguish, native title.[65]

30 Other than the two categories identified above, the common law's position on extinguishment and inconsistency is unsettled. The situation has been thus from 1992.

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59 eg. *Dixon Ltd v White* (1883) 8 App. Cas. 833, 838-839 per Lords Blackburn, Watson & Fitzgerald; *Dand v Kingscote* (1840) 6 M and W 174; 151 ER 370, 379-380 Parke B for the Court (building railway was 'trespassing to a greater extent than was necessary for exercising the reserved [mining] rights') - applied in *Payne v Dwyer* [2013] WASC 271, [79] per Pritchard J.

60 *Hocking v Western Australian Bank* [1909] HCA 68; 9 CLR 738, 746 per Griffith CJ; *Walker v White Feather Main Reef* [1909] WALawRp 52, 12 WALR 25, 29 per McMillan ACJ (Rooth J agreeing); *Curator of Intestate Estates v Graham* [1913] WALawRp 26, 15 WALR 93, 96 per McMillan ACJ.

61 eg. *Geita Sebea v Territory of Papua* [1941] HCA 37; (1941) 67 CLR 544, 557 per Williams J (Rich ACJ agreeing) (**Papua New Guinea**); R v Symonds [1847] NZPCC 387 (**New Zealand**); *Adong bin Kuwau v Kerajaan Negeri Johor* [1997] 1 MLJ 418 (**Malaysia**); *Sesana v Attorney General* [2006] BWHC 129; *Richtersveld Community v Alexkor Ltd* [2003] ZASCA 14; [2003] 2 All SA 27 (**South Africa**); *Calder v. British Columbia (Attorney General)* 1973 CanLII 4; [1973] SCR. 313 (**Canada**); *Johnson v M'Intosh* (1823) 21 US 543 (**United States of America**).

62 Bulkan, A, 2012. 'Disentangling the sources and nature of indigenous rights: a critical examination of common law jurisprudence' 61(4) *International & Comparative L Quarterly* 823-853.

63 *Fejo v Northern Territory* [1998] HCA 58; 195 CLR 96, [44]-[45] & [55]-[58] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ (fee simple); *Wilson v Anderson* [2002] HCA 29; 213 CLR 401, [21] per Gleeson CJ and 116-118 per Gaudron, Gummow & Hayne JJ (lease in perpetuity).

64 *Fejo* (n63 above), [43] & [47] per Gleeson CJ, Gaudon, McHugh, Gummow, Hayne & Callinan JJ.

65 eg. *Yanner v Eaton* [1999] HCA 53; 201 CLR 351, [38] per Gleeson CJ, Gaudron, Kirby & Hayne JJ; *Akiba* (n46 above), [24] (per French CJ & Crennan J) and [64], [69] & [75] (per Hayne, Kiefel & Bell JJ); *Karpany v Dietman* [2013] HCA 47, [5] per French CJ, Hayne, Crennan, Kiefel, Bell, Gageler & Keane JJ.

***Application here***

*A There is no inconsistency*

31 The word 'right' is capable of sustaining several different meanings. Confusion can arise when these meanings are not kept distinct. Legal theorist Wesley Hohfeld set out a framework to assist consistent usage. Hohfeld noted that the word 'right' at the most basic level may refer to a privilege (otherwise called a 'liberty' – defined as the absence of an obligation to refrain from doing a certain act) or a right (otherwise called a 'claim' – defined as the correlate of another person's obligation either to assist or at least not to hinder the right-holder's exercise of the right).[66] A claim-right to do an act also entails a liberty to do the act. Hohfeld also referred to a set of secondary incidents of rights: powers, which are the ability to alter the rights or obligations of others or oneself, and immunities, which exist in respect of rights that are free from any power. With this conceptual framework as a starting point, it can be easily seen that the only thing that could be inconsistent with a native title right is either (a) the *absence* of a corresponding obligation on others to assist or not hinder its exercise; or (b) the existence of an obligation *not* to exercise the right.

32 Native title rights and interests are properly characterised as claim-rights, since the common law and the *Native Title Act* provide remedies for their breach. They also contain relevant liberties, since they can be used as defences.[67] The relevant question in the present case is whether anything in the *Mt Goldsworthy Act* and the related mineral leases either (a) relieved the State or the lease-holder of the obligation not to hinder the exercise of native title rights; or (b) obliged the native title holders to desist from exercising those rights. In both cases, they did not.

33 The Court's reasoning in *Yarmirr* is illustrative of how a general right to access and use an area continues even where another party is entitled to, and does, build in part of that area:

> It may readily be accepted that neither the public right to navigate, nor the right of innocent passage, require free access to each and every part of the territorial sea. Neither right is infringed, for example, by erecting a pier from the shore to a point well out into the territorial sea even though that pier prevents vessels from using the part of the sea on which it stands.[68]

The common law can 'readily accept' there is no infringement between general rights to access and pass through an area, and the construction of infrastructure in that area.

34 The common law rights in question here (access, subsistence, ceremonies, and protecting sites) would only be 'inconsistent' with government grants if:

(a) those native title rights required permanent and continuous use of the land, and

(b) that had been prevented by the government's grant.

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66 Hohfeld, W, 1913. 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' 23 *Yale Law Journal* 16-59; Wenar, L, 2005. 'The nature of rights' 33(3) *Philosophy and Public Affairs* 33(3) 223.

67 Such as in *Yanner* (n65 above) and *Karpany* (n65 above).

68 *Yarmirr* (n13 above), [96] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

35 Mining is generally regulated through a general prohibition on any mining,[69] with parties only allowed to mine if they have a 'permit', which in this case takes the form of the *Mt Goldsworthy Act* and its related lease.[70] In effect, this is a structure to give parties' strict controls on when and how they can access that resource. These grants may curtail (but do not extinguish) the native title rights. The reasoning from *Yanner*, applying to regulations of fauna control, are relevant to the regulations of mineral control in this case:

> Regulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land (whether or not prohibiting the exercise of that relationship altogether might, or might to some extent). That is, saying to a group of Aboriginal peoples, "You may not hunt or fish without a permit", does not sever their connection with the land concerned and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.[71]

*B The common law is robust in protecting rights*

36 Native title rights which have been recognised by the Federal Court are 'common law rights' for the purposes of common law protection and remedies. This is apparent from the High Court's reasoning in *Yarmirr* which noted native title 'is neither an institution of the common law nor a form of common law tenure',[72] but concluded that 'the common law will recognise rights and interests which are of the kind the subject of the determination in this matter and it will do so by affording remedies for their enforcement and protection'.[73]

37 'Extinguishment', and the relationship between different parties' rights, are concepts which exist outside native title.[74] The requirement to 'fragment' native title arises under the *Native Title Act*, not under the common law, as is clear from *Ward*:

> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.[75]

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69 *Mining Act*, s290 & 293-294; the contemporary equivalent is *Mining Act 1978* (WA), s155 (see *Re Minister for Resources; ex p Cazaly Iron* [2007] WASCA 175, [71] per Buss JA (Wheeler & Pullin JJA agreeing))

70 'Mining leases' are not really leases but more permission to extract minerals and own them on extraction: *Wade v New South Wales Rutile Mining* (1969) 121 CLR 177, 192 per Windeyer J; *Newcrest Mining v Commonwealth* (1997) 190 CLR 513, 616 per Gummow J (Gaudron J agreeing at 561); *ChongHerr Investments v Titan Sandstone* [2007] QCA 167, [42] per Keane JA (de Jersey CJ agreeing).

71 *Yanner* (n65 above), [38] per Gleeson CJ, Gaudron, Kirby & Hayne JJ.

72 *Yarmirr* (n13 above), [11] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

73 *Yarmirr* (n13 above), [76] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

74 eg. *Ward* (n23 above), [26] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; *SZOQQ v Minister for Immigration and Citizenship* [2013] HCA 12, [31] per Keane J (all other Justices agreeing).

75 *Ward* (n23 above), [14] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

By contrast, the common law's approach to native title is evident in the majority decision in *Yanner*:

> [I]n deciding whether an alleged inconsistency is made out, it will usually be necessary to keep well in mind that native title rights and interests not only find their origin in Aboriginal law and custom, they reflect connection with the land. ...Aboriginal ownership is primarily a spiritual affair rather than a bundle of rights.[76]

38 Common law rights can be easily lost if fragmented into pieces to test whether each piece fits through a hole presented by some statutory puzzle. In approaching 'inconsistency', the common law must be informed by how it approaches 'inconsistency' outside of native title. The common law[77] is able to deal with differing rights to the same property, without one set of rights having to be extinguished, in many other areas such as easements,[78] leases,[79] bailment,[80] trusts,[81] dower,[82] and testatory estates[83]. To suggest that an inconsistency of rights must, of necessity, result in the extinguishment of one of those rights (the native title rights)[84] does not reconcile with how common law approaches many other conflicting rights. Particularly where the common law accepts *profit a prendre* rights can exist on freehold,[85] and can impose a hierarchy where rights might interfere with freehold (eg. in nuisance cases) so that rights can co-exist through 'common sense appreciation, which cannot be rigidly defined, of practical feasibility'.[86]

39 Statute can, of course, modify the common law's operation but that has not occurred here. Many rights were extinguished as part of the 1993 enactment and provisions in the *Native Title Act* and the 1998 parliamentary amendments following the High Court's *Wik* decision. But where statutory extinguishment has not occurred, the common law should not operate to do what statute has not. The *Mining Act* and the *Mt Goldsworthy Act* gave the miner extensive rights, altering the normal common law regarding surface rights, but only 'as far as is necessary to give effect to the express provisions of the Act'.[87] It was not necessary for the native title rights to be extinguished in order for these statutory provisions to have effect.[88]

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76 *Yanner* (n65 above), [38] per Gleeson CJ, Gaudron, Kirby & Hayne JJ (internal citations omitted).
77 Here meaning 'common law' as opposed to 'statutory law'. That is, 'common law' encompassing both equitable and common law concepts because both are relevant to protecting native title: see [21] of these submissions.
78 eg. *McGrath v Campbell* [2006] NSWCA 180; 68 NSWLR 229, [33]-[34] per Tobias JA (Giles & Hodgson JJA agreeing).
79 eg. *Moore v Dimond* [1929] HCA 43; 43 CLR 105, 117 per Knox CJ, Rich & Dixon JJ.
80 eg. *Penfolds Wines v Elliott* [1946] HCA 46; 74 CLR 204, 214-216 per Latham CJ.
81 eg. *DKLR Holding Co (No 2) v Commissioner Stamp Duties* [1982] HCA 14; 149 CLR 431, 442 per Gibbs CJ, 474 per Brennan J.
82 *Smith v Marshall* [1907] HCA 33; (1907) 4 CLR 1617, 1625 per Barton J
83 eg. *Allen v Roughley* [1955] HCA 62; 94 CLR 98, 105 per Dixon CJ, 141 per Kitto J, 144 per Taylor J.
84 See *Ward* (n23 above), [82] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.
85 eg. *Mason v Clarke* [1955] AC 778, 790 per Viscount Simonds; *Mills v Stokman* [1967] HCA 15; 116 CLR 61, 77 per Kitto J.
86 *Manchester Corporation v Farnworth* [1930] AC 171, 183 per Lord Dunedin; *Benning v Wong* [1969] HCA 58; (1969) 122 CLR 249, 309 per Windeyer J, 334 per Owen J.
87 Per [26] of these submissions.
88 See [46] of these submissions.

*C Mt Goldsworthy Act and Mining Act did not 'extinguish' native title rights*

40 Mining leases under the *Mining Act* 'are granted, always subject to whatever rights of possession of the surface are already vested in other persons'.[89] Native title rights which already existed in land are not, therefore, extinguished by virtue of the mining lease provisions in the *Mining Act*.

41 Equally, the native title rights were not extinguished by the Mt Goldsworthy Agreement because most of its content is simply a contract between two parties (the executive and the miner) which does not impact third party rights. This is apparent from examining the State's chosen wording in the agreement and associated statute. Some state agreements are directly transposed into statutory terms, which was the case in the state agreement in *Wik*.[90] That statutory status was significant in how the Court understood that agreement's effect.[91] It is a form used in some state agreements still operative in Western Australia today.[92] In this case, however, the Parliament chose not to transpose the entire agreement into statute, but merely 'approved' the agreement.[93] A similar structure, in another WA state agreement Act which 'ratified' the annexed agreement, was examined by the WA Court of Appeal. The unanimous Court viewed the agreement's terms as 'contractual provisions, binding, insofar as their terms create binding legal obligations, as such on the parties to the State Agreement by the force of the common law, and having no binding legal force on those who are not parties'.[94]

42 The Mt Goldsworthy Agreement, therefore, did not have statutory effect because the *Mt Goldsworthy Act* did not so provide. The Mt Goldsworthy Agreement must be construed as a contract,[95] and therefore lacks the legislative empowerment to destroy native title rights.[96]

43 There is, however, a complexity because the Mt Goldsworthy Agreement purports to give some of its clauses statutory force,[97] which the *Mt Goldsworthy Act* says 'takes effect'.[98] This creates a distinction between the two leases in this litigation[99] because one of them was granted under a clause purporting to have statutory

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89 *Stephen v Bell* [1934] WALawRp 24; 37 WALR 52, 54 per Dwyer J. The Second Respondent is incorrect that these mineral leases 'demise' land to the lease-holder and give possession to the exclusion of all other interests. Regulations which purported to amend the common law, without that authority in the *Mining Act*, are *ultra vires* of the *Mining Act*: eg. *Walker v White Feather* (n60 above), 29 per McMillan ACJ (Rooth J agreeing); see also *Wells v Finnerty* [1910] WALawRp 10; 12 WALR 41.

90 *Commonwealth Aluminum Corporation Agreement Act 1957* (Qld); see *Wik Peoples v Queensland* [1996] HCA 40; 187 CLR 1, 5.

91 *Wik* (n90 above), 251-252 & 256 per Kirby J (with concurrence, on this point, of Toohey J at 131, Gaudron J at 135 and Gummow J at 170).

92 eg. *Hancock Prospecting v Wright Prospecting* [2012] WASCA 216, [12] & [148] per McLure P (Newnes JA & Le Miere J agreeing).

93 *Mt Goldsworthy Act*, s4(1).

94 *Re Michael; ex p WMC Resources* [2003] WASCA 288; 27 WAR 574, [30] per Parker J (Templeman & Miller JJ agreeing).

95 eg. *Hancock Prospecting v BHP Minerals* [2003] WASCA 259, [67]-[69] per Hasluck J (Murray J agreeing); approved in *Mineralogy P/L v Western Australia* [2004] WASC 275, [36]-[37] per Pullin J and *Mineralogy P/L v Western Australia* [2005] WASCA 69, [13] per McLure JA (Steytler & Roberts-Smith JJ agreeing).

96 Per [25] of these submissions.

97 Mt Goldsworthy Agreement, cl 3(2)(a).

98 *Mt Goldsworthy Act*, s4(2)(b).

99 *Ward* indicates the 'necessity ...of analysing the legal effect of particular grants by or pursuant to a range of statutes...enacted for the particular purposes of the establishment of the enterprise identified as the Project': *Ward* (n23 above), [147] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

force (lease 235[100]) and the other was not (lease 249[101]). There may be a question whether the executive's allocation of statutory force to some clauses is constitutionally valid.[102] However, if the Court finds that neither the *Mt Goldsworthy Act*, nor acts done under it, operate to extinguish the native title rights in this case then the issue does not require resolution.

44 The reasons for limiting statutory incursion on common law rights[103] are relevant here. The 'mischief' sought to be addressed is native title rights being exercised to interfere or conflict with the mining rights or operations. If such a mischief exists, it is already averted under other statutory provisions. The *Government Agreements Act* and the *Mining Act* specify the mining rights and preventions from their interference. Additional extinguishment of native title, through the Mt Goldsworthy Act, is unnecessary.

*D Common law goes no further than necessary*

45 The common law operates through courts applying the law to the facts as found, and not exercising a broader legislative function.[104] This is evident in the response, nearly 20 years ago, to the claim by the WA Government that the Court must find general extinguishment of all native title because that was what the British colonists had intended.[105] The Court disagreed.

> Extinguishment would have been seen to be an unnecessary step to take. The Crown's colonial policy was capable of being implemented without a general extinguishment of native title. ... One should assume that the object was to achieve the desired result with as little disruption as possible, and without affecting accrued rights and existing status any more than was necessary.[106] [citations omitted]

46 That same approach holds here. Extinguishment is an unnecessary step to take: the policy and aims of the *Mining Act* and the *Mt Goldsworthy Act* are capable of being implemented without extinguishment of the native title rights in question. The second respondent's rights are not impeded in any way by the native title - as consistently ruled at trial[107] and appeal[108] and not challenged in the proceedings in

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100 *Brown (Ngarla People) v Western Australia (No 2)* [2010] FCA 498, [10] per Bennett J. Clause 8 of the Agreement purports to have statutory force (see provision in n97 &98 above).

101 *Brown* (n100 above), [11] per Bennett J.

102 A challenge that state agreements elevated executive action to the status of legislation, thereby abrogating the legislative authority of the Parliament, was dismissed in Wik and *Commonwealth Aluminium Corporation v Attorney General* [1976] Qd R 231. However both those decisions involved an Act which specifically gave the agreement's terms direct statutory force. Whether the reasoning holds for the different statutory structure adopted here is unclear given the executive has no constitutional power to alter statutory law by itself: *Port of Portland v Victoria* [2010] HCA 44, [9]-[10] & [13] French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel & Bell JJ.

103 Per [7] of these submissions.

104 *State Government Insurance Commission v Trigwell* [1979] HCA 40; 142 CLR 617, 634 per Mason J (Gibbs, Stephen & Aickin JJ in agreement). See also *Roxborough v Rothmans of Pall Mall* [2001] HCA 68; 208 CLR 516, [72] per Gummow J.

105 *WA v Commonwealth* (n11 above), 432.

106 *WA v Commonwealth* (n11 above), 433 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ.

107 *Brown (Ngarla People) v Western Australia* [2007] FCA 1025, order 10 per Bennett J; *Brown (Ngarla People) v Western Australia (No 2)* [2010] FCA 498, [201] & [209] per Bennett J.

108 *Brown (Ngarla People) v Western Australia (No 2)* [2013] FCAFC 18, order 9 per Mansfield, Greenwood & Barker JJ.

this Court. Accordingly, the only effect of native title being extinguished would arise after the second respondent's rights have ended.

47 The appellant's claim for an order of extinguishment[109] is not about how the current mining rights may operate. Those rights are unimpeded by native title. Rather, the appellant is interested in how it might deal with the land far in the future, after the current mining rights have finished. Six Judges of the High Court answered the WA Government in 1995, and the answer still applies today: 'land subject to native title is not the unburdened property of the State to use or to dispose of as though it were the beneficial owner'.[110]

*E Extinguishment should not be determined on racial grounds*

48 The Court has previously accepted that the impairment of native title rights can constitute discriminatory conduct.[111] 'Extinguishment', as currently understood, requires the comparison of two sets of rights and, when there is found to be an inconsistency, the Indigenous rights are permanently extinguished.[112]

49 Many rights existed in the land covered by the leases. The *Mining Act*, and judicial consideration of it, identifies various rights which other parties could hold in the same land covered by a mineral lease,[113] including: a miner's right,[114] 'townsite, suburban area, or other reserve',[115] 'any authorised holding' (meaning any mineral tenement other than a lease)[116]; and houses.[117] The *Mt Goldsworthy Act* indicates that parties could exercise other rights in the same land covered by the mineral leases, including: mining tenements,[118] easements,[119] public use of roads,[120] and access (including with stock).[121] The common law does not deem any of these other rights to be extinguished by the grant of the mineral leases to the Second Respondent.

50 For the common law to deem the native title rights as extinguished by the mining leases, while leaving unaffected other rights in that land, appears 'draconian'[122] and discriminatory as that concept was understood in *Mabo (No 1)*:

> *[T]he...operation and effect ... 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*

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109 *Appellant's submissions*, [109].
110 *WA v Commonwealth* (n11 above), 480-481 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ.
111 Summarised in [15] of these submissions.
112 *Ward* (n23 above), [82] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.
113 Similarly a miner's right under the *Mining Act*, which entitled the holder to 'take possession of, mine and occupy Crown land' (s26), existed with other interests and did not empower the holder to enter and use land for any purpose; its rights were only to be used for mining purposes: *Vaughan v Gooch* [1926] WALawRp 17; 29 WALR 34, 35 per McMillan CJ (Northmore & Draper JJ agreeing).
114 *Mining Act*, s49(2) (for a mineral lease to be granted over land subject to a miner's right, that requires the consent of the holder of the miner's right).
115 *Mining Act*, s61(1).
116 *Mining Act*, ss61(1) & 3 (definition of 'authorised holding').
117 *Stephen v Bell* (n89 above), 54 per Dwyer J.
118 Mt Goldsworthy Agreement, cl 8(5)(a) (where rights do not interfere with the Joint Venturers' operations).
119 Mt Goldsworthy Agreement, cl 8(5)(b), (where rights do not interfere with the Joint Venturers' operations).
120 Mt Goldsworthy Agreement, cl 9(2)(b), (where rights do not interfere with the Joint Venturers' operations).
121 Mt Goldsworthy Agreement, cl 9(2)(g), (where rights do not interfere with the Joint Venturers' operations).
122 *Mabo (No 1)* (n25 above), 213 per Brennan, Toohey & Gaudron JJ.

> ... 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. *...[T]he operation and effect ... is... to distinguish between proprietary rights and interests ... 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.*
>
> ...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...are denied ("do not enjoy") "rights", including the entitlement to immunity from being arbitrarily dispossessed, which are enjoyed by those other persons.[123] [emphasis added]

51 The permanent extinguishment of Indigenous rights from interaction with non-Indigenous rights has been identified as discriminatory by various human rights bodies,[124] UN experts,[125] and academics.[126] The Inter-American Commission on Human Rights considers the US common law of extinguishment does not meet requirements for equality before the law.[127]

*F When should extinguishment occur?*

52 Questions must arise as to the rationale for the extinguishment of native title from the existence of other types of tenure. In answer to these questions, several touchstones may be observed.

53 'Extinguishment' does not mean the traditional rights and connection have ceased, but rather that the common law's recognition and protection will not continue.[128] The determination of when that recognition and protection stops should be consistent with broader common law concepts and relevant human rights.

54 The courts have previously confirmed that native title rights can exist even when the holder is not currently on the land,[129] or cannot exercise those rights,[130] or

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123 *Mabo (No 1)* (n25 above), 231-232 per Deane J. This reasoning was confirmed in *WA v Commonwealth* (n11 above), 437 per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ.

124 eg. Human Rights Committee, *Concluding observations: Canada* (UN doc CCPR/C/CAN/CO/5, 20 Apr 2006), [8]; Committee on the Elimination of Racial Discrimination, *Decision 1 (66): New Zealand Foreshore and Seabed Act 2004* (UN doc CERD/C/DEC/NZL/1, 27 April 2005), [6]; and Human Rights Committee, *Concluding Observations: Canada* (UN doc CCPR/C/79/Add.105, 7 April 1999), [8].

125 eg. Special Rapporteur of Sub-Commission, *Indigenous People and their Relationship to Land* (UN doc E/CN.4/Sub.2/1997/17, 20 Jun 1997), [31]; Special Rapporteur on Racism, *Report on Mission to Australia* (UN doc E/CN.4/2002/24/Add.1, 26 Feb 2002), [59] & [92].

126 eg. Gilbert, J, 2007. 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title' 56(3) *International & Comparative L Quarterly* 583, 604; Bulkan 2012 (n above), 846.

127 Para [20] of these submissions.

128 *Akiba* (n46 above), [10] per French CJ & Crennan J.

129 eg. *Ward* (n23 above), [465] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; *De Rose v SA (No 2)* [2005] FCAFC 110; 145 FCR 290, [63] per Wilcox, Sackville & Merkel JJ (the High Court refused leave to appeal this decision: *Fuller v De Rose* [2006] HCATrans 49 per Gummow, Hayne and Crennan JJ).

130 *Yanner* (n65 above), [38] per Gleeson CJ, Gaudron, Kirby & Hayne JJ.

cannot enforce the rights.[131] What is essential is that relevant cultural basis for the right is extant.[132] Where a government grant prevents native title rights from being exercised for a certain time, that of itself is not inconsistent (and therefore does not 'extinguish') the rights. If the cultural basis for the rights continues then, when the grant ceases, the native title rights can be exercised and meet the requirements for protection under the common law.

55 If there is an inescapable inconsistency (eg. a grant of exclusive possession), consideration should turn to temporal aspects of the granted right. Native title extinguishment arising solely because of a grant of exclusive possession does not conform to how the common law deals with other rights. There is a common law rationale to extinguishment from *permanent* exclusive possession (ie. fee simple): the grant means the State has no certainty of the land returning, leaving any common law remedy 'moot'. However, any grant less than permanent exclusive possession, need not work extinguishment. This approach would:

(a) be more consistent with human rights, because it would not result in the rejection of Indigenous rights where another interest is granted;

(b) be more consistent with the common law that, where a statutory impairment of the common law is removed, the common law rights revive;[133]

(c) not impede currently granted rights to any other parties, because it does not impair them in any way; and

(d) provide greater clarity over what is extinguished and when, rather than depending on subsequent events, or leaving an undocumented and sometimes undiscoverable 'Swiss Cheese' of extinguishment caused by particular structures and uses at various points in a tenement.

56 ALHR acknowledges such an approach conflicts with previous reasoning of this Court. The majority in *Ward* expressly rejected a temporal aspect.[134] Their Honours' reasoning, however, did not explain why the common law could not accommodate conflicting interests, and so provide limited guidance. This is evident in varied reasons of the Full Federal Court here and in *De Rose*.[135]

57 The High Court has repeatedly stated that native title is extinguished by a common law lease.[136] Again, the references are brief and the rationale difficult to discern because the common law lease provides exactly an illustration of how the common law can accommodate two conflicting interests (fee-holder and lease-holder) without either being destroyed.

> [T]he common law...lease for a term...[gives] powers of use and enjoyment with respect to certain profits or produce derived from the land. Under the

131 *Yarmirr* (n13 above), [16] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422, [41]-[42] per Gleeson CJ, Gummow & Hayne JJ.

132 *De Rose v SA* [2003] FCAFC 286; 133 FCR 325, [173]-[176] per Wilcox, Sackville & Merkel JJ.

133 Per [22(b)] of these submissions.

134 *Ward* (n23 above), [80] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

135 *De Rose* (n132 above); *De Rose (No 2)* (n129 above).

136 eg. eg. *Mabo (No 2)* (n above), 68-69 per Brennan J (Mason CJ & McHugh J agreeing), 110 per Deane & Gaudron JJ; *Fejo* (n63 above), [44] per Gleeson CJ, Gaudon, McHugh, Gummow, Hayne & Callinan JJ; *Wilson* (n63 above), [36] per Gaudron, Gummow & Hayne; *Ward* (n23 above), [81] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.

common law **as developed in England**, this included game and other *ferae naturae* captured within the limits of the land and a general property in underwood and trees.[137] [emphasis added]

58 For interests deriving from this 'law developed in England' to extinguish native title, while at the same time not extinguishing other common law interests, appears discriminatory.[138] The Court's references to common law leasehold extinguishing native title is obiter (in no decision has the Court actually had to deal with a common law lease and its effect on native title[139]) and should not be followed.

*G No statutory mandate for discriminatory treatment of Aboriginal land use*

59 The WA Parliament could and did legislate to the detriment of Aboriginal and other races. However, the particular statutory provisions here - the grant of mining lease and conditions on that lease - contain no intention nor effect of extinguishing Aboriginal access or use of land (access/use being the most visible aspects of native title[140]).

60 The *Mining Act*, and leases granted under it, impaired Aboriginal personal rights in the provision that 'the labour of any aboriginal native of Australia shall not be accounted bona fide work in fulfilment of the labour conditions upon any mining tenement'.[141] Lease-holders were obligated to spend certain amounts in working their lease but the Parliament perceived that 'native labour...could be hired for virtually nothing [and accordingly] It was feared...that some mine owners might take advantages of this fact to defeat the spirit, if not the letter, of the law by engaging natives to fulfil the labour conditions imposed by the Act'.[142] Rather than direct that Aboriginal workers should be paid an appropriate wage, however, Parliament decided expenditure was only valued by the State when paid to white workers,[143] and that 'native labour' could continue to be used for 'virtually nothing'. This situation continued until the relevant section was repealed in 1964.[144]

61 Mineral leases could not be granted to 'Asiatic or African' races,[145] and 'no Asiatic or African alien shall be employed...in any capacity whatever in or about any mine'.[146] These provisions existed in WA's mining law up until 1973,[147] including at the time the *Mt Goldsworthy Act* was passed and Lease 235 was granted.

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137 *Wik* (n90 above), 176 per Gummow J.
138 Per analysis in paragraphs [48] & [50] of these submissions.
139 The one case where High Court has fully examined the interaction of native title and a lease is *Wilson* (n63 above), regarding the NSW Western Lands Leases. The Court's finding of extinguishment in that case was, however, dependent on the lease's existence in perpetuity: [21] per Gleeson CJ, and [72], [109]-[110], [112], [116] per Gaudron, Gummow & Hayne JJ.
140 *Ward* (n23 above), [57]-[64] per Gleeson CJ, Gaudron, Gummow & Hayne JJ.
141 *Mining Act*, s291.
142 Minister for Native Welfare (Hon E Lewis MLA), 'Mining Act Amendment Bill (No. 2), Second Reading' *Assembly Hansard*, 21 November 1963, 3055-3056.
143 Aboriginal workers were allowed but no pay required (*Mining Act*, s291) and 'Asiatic and African' workers were prohibited (*Mining Act*, s290).
144 *Mining Act Amendment Act (No 2) 1963* (WA), s3.
145 *Mining Act*, ss23, 42, 48.
146 *Mining Act*, s290.
147 *Mining Law Amendment Act 1973* (WA), ss2-4.

62 Despite such provisions, no parliamentary intention to terminate Aboriginal use of land is revealed in the second reading speech, nor the content, of the *Mining Act* nor the *Mt Goldsworthy Act*. Had the Parliament chosen to terminate Aboriginal use of land, then the Court would have to implement Parliament's intention. But the Parliament did not specify such an impact, and so the common law should not effect that end itself.[148]

*H Changing the law*

63 To the extent that the Court's resolution of this case involves any 'change' to the law, modifications to existing determinations can occur under section 13(5) of the *Native Title Act*. But there are considerable differences in what is being put to the Court.

64 The appellant suggests every native title right is extinguished if it cannot 'be exercised coextensively on the same land at the same time' as any statutory entitlement to do something in the same area.[149] This, the appellant suggests, results in 'substantial extinguishment by virtually all titles'.[150] The second respondent is not so clear, but its submissions head the same direction.[151] Many determinations have been made, recognising native title, in areas where the appellant's submissions now say native title should not exist (eg. areas covered by mining leases). This includes determinations to which the appellant has consented.[152] Again, this raises an equality before the law issue: previous native title parties received government agreement to their native title rights; future native title parties may not.

65 By contrast, ruling that native title rights are not so extinguished has less implication. If it is a 'change' in the common law, its effect is more limited than may at first appear. For those Government-granted rights that have continued from before a determination, their position will not change from the fact that a native title right 'changes' from being permanently extinguished to being inoperative for the extent of that grant. This is because the *Native Title Act* prioritises the granted interests,[153] which is usually confirmed in the determination - as occurred in this case.

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148 That rights are not overridden by general words has deep historical roots and 'respects the distinct contemporary functions, enhances the distinct contemporary processes, and fulfils the shared contemporary expectations of the legislative and the judicial branches of government': *Lee v NSW Crime Commission* [2013] HCA 39, [311]-[312], per Gageler & Keane JJ.

149 Appellant's submissions, [80].

150 Appellant's submissions, [80].

151 Second Respondent's submissions, [73] & [75].

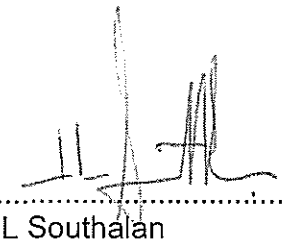
152 eg. *Cheinmora v Western Australia (No 3)* [2013] FCA 769, Determination (attachment A) orders 12 & 13 and sch 4 item 5; *Sharpe v Western Australia* [2013] FCA 599, Determination (attachment A) orders 12 & 13 and sch 8 item 7; *Peterson v Western Australia* [2013] FCA 518, Determination (attachment A) orders 7 & 8 and sch 3 item 2.

153 Part 2, Divisions 2-2B.

**Part VI: Oral argument**

66 ALHR does not seek to present additional oral argument at the hearing but will be able to address any matters raised by the bench.

Dated: 26 November 2013



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