HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, BELL, GAGELER AND KEANE JJ

STATE OF QUEENSLAND APPELLANT

AND

TOM CONGOO & ORS RESPONDENTS

Queensland v Congoo
[2015] HCA 17
13 May 2015
B39/2014

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

S E Brown QC with G J D del Villar for the appellant (instructed by Crown Law Brisbane)

S A Glacken QC with P D Herzfeld for the first respondents (instructed by North Queensland Land Council)

J T Gleeson SC, Solicitor-General of the Commonwealth and S B Lloyd SC with C J Klease for the second respondent (instructed by Australian Government Solicitor)

No appearance for the third respondent

Submitting appearance for the fourth to twenty-first respondents

No appearance for the twenty-second and twenty-third respondents

CATCHWORDS

Queensland v Congoo

Native title – Native title rights in relation to land – *National Security Act* 1939 (Cth), s 5(1)(b)(i) provided for making of regulations for securing public safety and defence of Commonwealth and for authorising taking of possession or control, on behalf of Commonwealth, of any property – National Security (General) Regulations 1939 (Cth), reg 54(1) provided that if it appeared to Minister of State for Army to be necessary or expedient to do so in interests of public safety, defence of Commonwealth or efficient prosecution of war, or for maintaining supplies and services essential to life of Commonwealth, Minister could, on behalf of Commonwealth, take possession of any land and give such directions as appeared necessary or expedient in connection with taking possession – Where orders were made under reg 54(1) in relation to land authorising officer to do anything in relation to land that holder of estate in fee simple in land could do and prohibiting all other persons from exercising any right of way over land or any other right relating thereto – Whether orders inconsistent with claimed native title rights and interests – Whether clear and plain legislative intention to extinguish native title rights and interests.

Words and phrases – "clear and plain legislative intention", "exclusive possession", "extinguishment", "inconsistency of rights", "possession".

National Security Act 1939 (Cth), s 5(1).
National Security (General) Regulations 1939 (Cth), reg 54.

FRENCH CJ AND KEANE J.

Introduction

1 In September 2001, the Bar-Barrum People lodged an application in the Federal Court for a determination of native title over an area of land in the Atherton Tableland in the State of Queensland, part of which had been used by the Commonwealth during World War II as an artillery range and a live fire manoeuvre range for the training of infantry and armoured units. The Commonwealth took possession of the land and used it pursuant to a series of orders, made between 1943 and 1945, under reg 54 of the National Security (General) Regulations ("the National Security Regulations"). That regulation was made pursuant to s 5 of the *National Security Act* 1939 (Cth) ("the NSA"). The Commonwealth relinquished possession of the land in August 1945. Questions arose in the Federal Court proceedings about whether the orders had the effect of extinguishing the native title rights and interests of the Bar-Barrum People.

2 In August 2013, Logan J referred a Special Case to the Full Court of the Federal Court setting out questions about the effect of the military orders on the native title rights and interests of the Bar-Barrum People. The question in the Special Case relevant to this appeal was Question 3:

> "Did the act of the Commonwealth in:
>
> (a) making the Military Orders wholly extinguish all native title rights and interests that then subsisted on the special case land, and, if not,
>
> (b) being in physical occupation of at least some of the special case land pursuant to the Military Orders wholly extinguish all native title rights and interests that then subsisted on the special case land or that part of the special case land that had been physically occupied?"

The Full Court of the Federal Court by majority (North and Jagot JJ, Logan J dissenting) answered both limbs of Question 3 in the negative[1]. The State of Queensland appeals to this Court by special leave granted on 4 September 2014. For the reasons that follow the appeal should be dismissed.

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1 *Congoo v Queensland* (2014) 218 FCR 358.

The *National Security Act* 1939 (Cth)

3 The NSA was a draconian measure with a sunset clause. The Bill for the Act was described by Prime Minister Menzies in his Second Reading Speech as granting "wide powers to the Executive"[2]. The Prime Minister went on to say, however[3]:

> "That whatever may be the extent of the power that may be taken to govern, to direct, and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort. That, I believe, is the principle that should guide any executive armed with powers of this kind."

That qualification was indicative of a legislative purpose to affect existing rights as little as possible. That was a purpose which, in its application to property rights, was reflected in decisions of this Court construing the Act, reg 54 and orders made under that regulation[4]. It informs their construction in relation to this appeal.

4 The NSA was to continue in operation "during the present state of war and for a period of six months thereafter"[5]. That period was amended in 1940 to end on "a date to be fixed by Proclamation, and no longer, but in any event not longer than six months after His Majesty ceases to be engaged in war"[6]. In 1946 the Act was further amended so that it and all regulations under it and all orders, rules and by-laws made in pursuance of any such regulations would cease to have effect at midnight on 31 December 1946[7].

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2 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 September 1939 at 164.

3 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 September 1939 at 164.

4 *Syme v The Commonwealth* (1942) 66 CLR 413; [1942] HCA 29; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; [1944] HCA 4; *Minister for Interior v Brisbane Amateur Turf Club* (1949) 80 CLR 123; [1949] HCA 31, which are discussed later in these reasons.

5 NSA, s 19.

6 *National Security Act* 1940 (Cth), s 9.

7 *National Security Act* 1946 (Cth), s 2.

5 Section 5(1) of the NSA originally empowered the Governor-General to make regulations for securing the public safety and defence of the Commonwealth and the Territories of the Commonwealth, and in particular:

> "(b) for authorizing—
>
> (i) the taking of possession or control, on behalf of the Commonwealth, of any property or undertaking; or
>
> (ii) the acquisition, on behalf of the Commonwealth, of any property other than land in Australia".

Paragraph (b)(ii) was amended in 1940[8].

6 The term "property" in par (b) was not defined. It is a term which may be used in different senses according to its statutory context. Referring to land, it may mean the physical entity or rights and interests which exist in relation to it[9]. In par (b)(i) it applies to land as a physical entity. The words "possession" and "control" in par (b)(i) are close to synonymous in that context. That view is supported by the observation of Williams J in *Minister of State for the Army v Dalziel* in which he said of the difference between pars (b)(i) and (b)(ii) that[10]:

> "The Parliament ... in enacting the section, intended to distinguish between the taking of temporary possession or control of land and the acquisition of some permanent estate or interest in land".

That distinction did not prevent the characterisation of "possession", taken pursuant to a regulation made under par (b)(i), as an "acquisition" of property for the purposes of s 51(xxxi) of the Constitution. Nevertheless, as construed by Williams J, par (b)(i) conferred a regulation-making power with respect to

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8 *National Security Act* 1940 (Cth), s 5. Section 8 of that Act, which inserted s 13A into the NSA, also authorised regulations under which persons could be required "to place themselves ... and their property at the disposal of the Commonwealth". No regulation based on that section was in issue in these proceedings.

9 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276 per Latham CJ. See generally *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210 at 230–231 [44]; [2008] HCA 7; *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 485 [10]–[12] per French CJ, Crennan and Bell JJ; [2011] HCA 20.

10 (1944) 68 CLR 261 at 306.

property limited to its temporary control. It is the exercise of that power which is in issue in this case.

7 Under s 5(3) of the NSA, the regulations could empower persons, or prescribed classes of persons, to make orders for any of the purposes for which regulations were authorised to be made by the Act. Section 10 of the Act made it an offence for a person to contravene, or fail to comply with, any provision of a regulation made under the Act or any order made pursuant to such a regulation.

8 Queensland submitted that the NSA authorised the making of regulations under which a "right of exclusive possession" could be conferred upon the Commonwealth by military orders made pursuant to the regulations. That "right of exclusive possession" was said to have been conferred in this case and to have extinguished the native title rights and interests of the Bar-Barrum People in the land affected by the orders. The submission directs attention to the difficult concept of "possession" as used in the Act and the important distinction between "exclusive possession", which is a logical incident of actual, factual or physical possession[11], and a "right of exclusive possession". A "right of exclusive possession"[12] in relation to fee simple grants and leases, as discussed by this Court in *Fejo v Northern Territory*[13] and *Western Australia v Brown*[14], involves the right to exclude anyone and everyone from the land for any reason or no reason at all. However, as appears below, the statutory powers conferred upon the Commonwealth as an incident of the grant of "possession" under the military orders were not unqualified merely because that word was used. Broad as they were, they were to be exercised in accordance with the scope, subject matter and purpose of the NSA and the regulations made under it.

9 The scope and limits of those powers may be discerned by reference to the text of reg 54.

The National Security Regulations — Regulation 54

10 Regulation 54 of the National Security Regulations, as it stood in November 1943, provided, inter alia:

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11 Gray and Gray, *Elements of Land Law*, 5th ed (2009), par 2.1.10.

12 See generally Hill, "The Proprietary Character of Possession", in Cooke (ed), *Modern Studies in Property Law, Volume 1: Property 2000*, (2001) 21 at 26–30.

13 (1998) 195 CLR 96 at 128 [47]; [1998] HCA 58.

14 (2014) 88 ALJR 461 at 468 [36]; 306 ALR 168 at 175–176; [2014] HCA 8.

"(1) If it appears to the Minister of State for the Army to be necessary or expedient so to do in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community, he may, on behalf of the Commonwealth, take possession of any land, and may give such directions as appear to him to be necessary or expedient in connexion with the taking of possession of the land.

(2) While any land is in the possession of the Commonwealth in pursuance of a direction given under this regulation, the land may, notwithstanding any restriction imposed on the use thereof (whether by law or otherwise), be used by, or under the authority of, that Minister for such purpose, and in such manner, as he thinks expedient in the interests of the public safety or the defence of the Commonwealth, or for maintaining supplies and services essential to the life of the community; and that Minister, so far as appears to him to be necessary or expedient in connexion with the taking of possession or use of the land in pursuance of this sub-regulation—

(a) may do, or authorize persons so using the land to do, in relation to the land, anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest; and

(b) may by order provide for prohibiting or restricting the exercise of rights of way over the land, and of other rights relating thereto which are enjoyed by any person, whether by virtue of an interest in land or otherwise.

(3) The owner or occupier of any land shall, if requested by the Minister of State for the Army or a person thereto authorized by him so to do, furnish to that Minister or such person as is specified in the request such information in his possession relating to the land (being information which reasonably may be demanded in connexion with the execution of this regulation) as is so specified."

11 Regulation 54(1) empowered the Minister to "take possession of any land". The word "possession" is one for which English law has never worked out a completely logical and exhaustive definition[15]. The question in this case is: what was the nature of the possession which reg 54(1) authorised? There are two

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15 *Tabe v The Queen* (2005) 225 CLR 418 at 423 [7] per Gleeson CJ; [2005] HCA 59.

relevant possibilities. The first is that it authorised a taking of actual or physical possession, which, as noted above, brings with it a notion of exclusivity albeit it must be understood in its statutory setting[16]. The second possibility is that it conferred a "right of exclusive possession", equivalent to the unqualified right of a fee simple owner to exclude anyone and everyone from the land for any reason whatsoever.

12 The text and arrangement of the regulation, read as a whole, suggest that reg 54(1) was concerned with actual possession and did not authorise the conferral upon the Commonwealth of a "right of exclusive possession". Regulation 54(2) conferred statutory power to do the things that a fee simple owner could do and the power, by order, to restrict the exercise of the rights of persons relating to the land, whether by virtue of an interest in the land or otherwise. If reg 54(1) authorised an order conferring a "right of exclusive possession" in the sense used above, the powers in reg 54(2) would be otiose. That suggests that reg 54(1) did not go that far[17]. Moreover, reg 54(2) conferred statutory powers not property rights, albeit it did so in par (a) using the legal fiction of a fee simple grant. Those powers had to be exercised for the purposes of the regulation, which had to accord with those of the NSA. The limiting negative purpose of the NSA apparent from the Second Reading Speech is antithetical to a general discretion to exercise those powers against anyone and everyone for any reason whatsoever.

13 If the preceding construction be correct, there is no necessary legal antinomy between the grant of the rights authorised and the powers conferred by reg 54 on the one hand, and the subsistence of pre-existing rights and interests including native title rights and interests on the other. That conclusion is reinforced by reg 54(3), which assumes a continuing relationship between the land and "the owner or occupier" of it. As appears below, the compensation provisions rest upon a similar premise.

14 When reg 54 was originally promulgated it included reg 54(4) in the following terms:

> "Such compensation shall be payable for any damage or loss sustained by the owner or occupier of the land by reason of the taking of possession of the land, or of anything done in relation to the land in pursuance of this regulation, as is determined by agreement, or in the absence of agreement,

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16 *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 436 [41] per Lord Browne-Wilkinson, 445–446 [70] per Lord Hope of Craighead.

17 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9.

> by action by the claimant against the Minister in any court of competent jurisdiction."

The compensation was not payable by way of "quid pro quo" for the taking by the Commonwealth but for loss or damage sustained by the owner by reason of the taking under reg 54(1) and the exercise of powers under reg 54(2). The loss or damage in contemplation was concerned with the loss or damage to existing rights by the exercise of the overriding right.

15 A new compensation regime was created under the National Security Regulations in 1941[18] for a person who had suffered, or was suffering, loss or damage by reason of anything done in pursuance of reg 54 in relation to[19]:

> "any property in which he has, or has had, any legal interest, or in respect of which he has, or has had, any legal right".

Absent any method of fixing compensation under regulations other than the National Security Regulations, the compensation to be paid would be determined by agreement, or by the Minister or a compensation board on referral by the Minister pursuant to a request by the claimant[20]. Where the claim was in respect of a continuing interference with rights, the claimant could seek compensation by way of a periodical payment during the continuance of the interference. The claimant could also, within two months after the cessation of the interference, submit a further claim in respect of any loss or damage suffered by reason of anything done during the period of the interference (except damage resulting from war operations) which had not been made good and was not covered by the periodical payment[21]. The scheme appears to have assumed, as with the former reg 54(4), the continuation of the underlying rights of the owner or occupier, the enjoyment of which was impaired or prevented for the period of the Commonwealth's occupation of the land.

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18 National Security (General) Regulations (Amendment) (SR No 291 of 1941), cl 3, inserting National Security Regulations, regs 60B–60M. Those regulations were further amended by the National Security (General) Regulations (Amendment) (SR No 402 of 1942).

19 National Security Regulations, reg 60D(1)(a).

20 National Security Regulations, regs 60D(1), 60E(3)–(5), 60F(1).

21 National Security Regulations, reg 60D(1).

16 The existence of that assumption is supported by observations in *Syme v The Commonwealth*[22], in which the Court was concerned with a claim by a mortgagee, not in possession, for a proportion of the compensation paid by the Commonwealth to the mortgagor, who was in possession at the time of the taking pursuant to reg 54. The mortgagee argued that the periodical compensation was analogous to "rents and profits of the land", which, upon default in payment of principal or interest, the mortgagee was entitled to receive pursuant to s 151 of the *Transfer of Land Act* 1928 (Vic). In rejecting that proposition Latham CJ observed[23]:

> "Compensation under the Regulations is not paid in respect of the taking away of any part of the property or of any incident of the property. It is paid for the loss or damage suffered by the person to whom it is paid — in this case, the mortgagor."

Williams J, who also rejected the proposition that the Commonwealth was in any sense a tenant of the land, said[24]:

> "Its title to possession does not depend upon any express or implied agreement made with any persons interested in the land, but is paramount to and overrides any other statutory or common law or equitable rights existing in any person with respect to possession. It is therefore a right, the exercise of which can cause loss and damage, not only to the person in possession of the land at the date of the entry, but to any persons who become entitled to such possession at any time during the intrusion. The loss or damage arising from time to time from the intrusion is of the same nature as the loss or damage caused from time to time by a continuing trespass." (citation omitted)

17 The exercise of the powers conferred by reg 54 may be said to have overridden pre-existing rights, but that overriding operation, while potentially affecting their enjoyment and exercise, did not involve their extinguishment.

The military orders

18 Five successive orders were made over the native title land between 1943 and 1945, each order revoking or cancelling its predecessor. The form and content of each was substantially similar. Each commenced with a recital that it

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22 (1942) 66 CLR 413.

23 (1942) 66 CLR 413 at 421. See also at 424 per Starke J.

24 (1942) 66 CLR 413 at 429.

appeared to the person making the order "to be necessary and expedient in the interests of the public safety, the defence of the Commonwealth and the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community, on behalf of the Commonwealth to take possession of the land described in the Schedule to this order" and to give the directions set out in the order in connection with taking possession of the land. There followed the substantive exercise of the power conferred by reg 54. The following text is taken from the order signed by Colonel Francis North on 20 December 1943:

> "[Now therefore] I, acting in pursuance of the said Regulation and Instrument of Delegation, [do hereby] on behalf of the Commonwealth, [take possession] of the said land [and do hereby order and direct] as follows:
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> 1. I direct that the Deputy Assistant Quartermaster General Number 17 Lines of Communication Sub Area or any person or persons authorised by him occupy the said land and in so doing and so far as is practicable use the existing means of access to the said land and if necessary cause to be removed therefrom all personal property not the property of the persons occupying the said land in pursuance of this order and not required for Commonwealth purposes.
>
> 2. I authorise the person or persons specified in Paragraph 1 hereof to do in relation to the said land anything which any person having an unencumbered interest in the fee simple in the said land would be entitled to do by virtue of that interest.
>
> 3. While the said land remains in possession of the Commonwealth, no person shall exercise any right of way over the land or any other right relating thereto, whether by virtue of an interest in land or otherwise.
>
> 4. Should the said land be the subject of any previous order such order is hereby cancelled so far as it affects the said land."

A schedule to the order set out a description of the affected land.

19 At about the time the first of the orders was made the Commonwealth physically occupied at least some of the land. It was used as an artillery range and as a live fire manoeuvre range for the training of infantry and armoured units who were preparing to deploy to the South West Pacific area. Occupation by the Commonwealth ceased on or about 31 August 1945.

20 In *Dalziel*, the Court was concerned with the characterisation, for the purpose of s 51(xxxi) of the Constitution, of a military order under reg 54

whereby the Commonwealth took possession of vacant land in Sydney owned by the Bank of New South Wales and occupied by Mr Dalziel under a weekly tenancy. Queensland relied upon *Dalziel* for the proposition that the Commonwealth's possession pursuant to reg 54 and the military orders was "plainly exclusive of the rights of all others". To the extent that this proposition equates the authorisation of exclusive possession as an incident of actual, factual or physical possession with the right of exclusive possession, which is necessarily inconsistent with the continued existence of other rights in the same land, it cannot be accepted. In particular, that equation is not supported by the terms of reg 54 itself. As Williams J explained, notwithstanding its conferment of exclusive possession, the military order did not determine any estate or interest in the land. The owner continued to be the owner in fee simple and the tenant continued to be a tenant from week to week. Their rights continued to exist "subject to the statutory right of the Commonwealth to take possession of the land and to use it for the purpose authorized by the regulation"[25]. His Honour said[26]:

> "Under the regulation, therefore, the Commonwealth acquires by compulsion a right for an indefinite period to the possession and use of land previously vested in some person ... by virtue of some estate or interest in the land which that person owns at common law. That person has therefore been divested of the right to possess the land so long as the Commonwealth continues in possession."

The right of possession was held by the majority to be a property right[27], which informed the affirmative answer to the question whether there had been an acquisition of property within s 51(xxxi) of the Constitution. That answer was nevertheless consistent with the proposition that the military order conferred on the relevant Commonwealth officer control of the land which did not involve the determination of any pre-existing estate or interest in the land.

21 Starke J, who dissented on the question whether the regulations provided for "just terms" but was part of the majority on the question of acquisition, said[28]:

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25 (1944) 68 CLR 261 at 301, although, as Rich J observed at 286, the Minister had seized and taken away from Mr Dalziel everything that made his weekly tenancy worth having and left him with "the empty husk of tenancy".

26 (1944) 68 CLR 261 at 301.

27 (1944) 68 CLR 261 at 285 per Rich J, 290 per Starke J, 295 per McTiernan J, 299 per Williams J.

28 (1944) 68 CLR 261 at 290.

> "Nothing is gained by comparing the right given by reg 54 to the Commonwealth with various estates or interests in land of limited duration or with rights over the land of another recognized by the law, for it is a right created by a statutory regulation and dependent upon that regulation for its operation and its effect."

Latham CJ, who dissented on whether the possession conferred under the regulation could be an acquisition, nevertheless accurately described the operation of reg 54 and orders made under it when his Honour said[29]:

> "The rights of the Commonwealth are to take and remain in possession of the land and to use it for purposes of defence. In such use, *but only for the purposes of such use*, the Commonwealth has the rights of an owner in fee simple." (emphasis added)

22 Consistently with what was said in *Dalziel*, the Commonwealth submitted in this appeal that the right which it had acquired over the land pursuant to the successive military orders was a right of possession for the purposes specified in reg 54, which was to have no effect on the continuing existence of any other rights or interests in the land but only temporarily on their exercise. That characterisation, which accords with a characterisation of the possession under reg 54 as "actual possession", also accords with the approach adopted by this Court in *Minister for Interior v Brisbane Amateur Turf Club*[30], which concerned Commonwealth occupation of land pursuant to an order made under reg 54, and a claim for compensation by the lessee of the land, who, during the occupation, continued to pay the owner rent reserved under the lease. In rejecting a submission that the owner had no power to grant a lease during the period of occupation, Latham CJ rejected an argument, by analogy, based on concurrent leases and said[31]:

> "in the present case the Commonwealth comes in by paramount right for an indefinite period without and independently of any grant by the owner. In my opinion there is no principle of law which prevents the owner granting a lease which will be subject to the rights of the Commonwealth under the regulations."

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29 (1944) 68 CLR 261 at 278.

30 (1949) 80 CLR 123.

31 (1949) 80 CLR 123 at 148.

Dixon J held that the Commonwealth was in "actual possession" under a statutory right enabling it to occupy at its will and said[32]:

> "I see no reason why the right to possession should not be granted by a lease although the Commonwealth was in actual possession."

McTiernan J agreed with both Latham CJ and Dixon J[33].

23 The actual possession or control conferred by the military orders considered in *Dalziel* and in *Brisbane Amateur Turf Club* did not extinguish pre-existing possessory rights. The character of the orders in those cases was inconsistent with the grant of a "right of exclusive possession".

24 Paragraph 3 in each of the military orders does not alter that conclusion. It prohibited the exercise of rights of way over the land or any other right relating to the land. It did not provide for their extinction. Indeed, par 3, like reg 54(2)(b), expressly contemplated their continuing existence.

25 The question that follows is whether the native title rights and interests of the Bar-Barrum People were extinguished by the military orders made in relation to that land under reg 54, in terms similar to those considered in *Dalziel* and *Brisbane Amateur Turf Club*. The question directs attention to the content of the native title of the Bar-Barrum People.

The native title rights and interests

26 It was agreed in the Special Case that, subject to the extinguishing effect of the military orders, the Bar-Barrum People would hold at least non-exclusive native title rights and interests over the Special Case land. Those rights would include rights of access, to be present and move about, travel over, camp and live temporarily on the land as part of camping, and for that purpose to build temporary shelters. Absent extinguishment they would also have a non-exclusive right to hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes. They could take and use natural resources including water from the land and its waters for non-commercial communal purposes. They could conduct ceremonies on the land, be buried and bury native title holders there, maintain places of importance and areas of significance under their traditional laws and customs, protect those places and areas from physical harm, and teach on the land about its physical and spiritual attributes. They could hold meetings on the area and light fires on it for

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32 (1949) 80 CLR 123 at 162.

33 (1949) 80 CLR 123 at 163.

domestic purposes, including cooking, but not for the purposes of hunting or clearing vegetation. The people could use the land in a variety of ways. They could not possess it to the exclusion of others.

The reasoning of the Full Court

27 The majority in the Full Court held that, in making reg 54, the Commonwealth (evidently a reference to the Executive Government) intended that all rights and interests in the land should yield to its exclusive possession for the duration of its exercise of power under reg 54. Those rights should otherwise continue and could found an entitlement to compensation for interference with them[34]. Although the native title rights could not be exercised during the Commonwealth's exercise of power, they were not thereby suspended. The rights which the Commonwealth took to itself were not inconsistent with the continued existence of native title rights[35]. Its exclusive possession was for a limited purpose, for a limited time, and on the premise, apparent from the legislative scheme, that all underlying rights and interests should continue[36]. With respect, the way in which the Full Court approached the question of legislative purpose was erroneous. The criterion of extinguishment is and remains one of inconsistency. The purpose of the statute said to effect or authorise extinguishment plays a part in determining the construction of that statute and, flowing from that construction, the nature and content of the powers it confers and the rights which may be granted under it.

28 Their Honours also accepted a submission by the Commonwealth that the creation of a document styled "military order" did not of itself amount to taking possession of the land which it affected[37]. Given that reg 54 applied throughout Australia, and potentially to all types of land, something more than the completion of a form by a delegate had to be done to take possession. What had to be done might vary depending on the land in question[38]. As appears below, it is not necessary to consider the correctness of that conclusion.

29 Logan J, in dissent, correctly identified the relevant question as one of inconsistency. His Honour held that, objectively viewed, the comprehensive

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34 (2014) 218 FCR 358 at 376 [52].

35 (2014) 218 FCR 358 at 376 [53].

36 (2014) 218 FCR 358 at 376 [53].

37 (2014) 218 FCR 358 at 378 [63].

38 (2014) 218 FCR 358 at 378 [64].

rights enjoyed by the Commonwealth in respect of the land by virtue of reg 54(2) and the terms of the military orders were inconsistent with any continued enjoyment of any of the rights claimed by the Bar-Barrum People[39]. The delegate's direction that "no person shall exercise any right of way over the land or any other right relating thereto" was destructive of the native title rights claimed, not regulatory[40]. There was no relevant distinction to be drawn between a grant, such as a grant of an estate in fee simple or a leasehold estate, giving exclusive possession and the taking of possession by the Commonwealth of the land pursuant to the military orders[41]. Those propositions were, with respect, founded upon an incorrect assessment of the operation and effect of the possession taken by the Commonwealth.

Grounds of appeal

30 The first ground of appeal is that:

- The Full Court erred in holding that the military orders made pursuant to reg 54 of the National Security Regulations did not have the effect of extinguishing all the native title rights and interests with respect to the Special Case land.

The second ground of appeal, which only arises if the first ground fails, is that:

- The Full Court erred in holding that reg 54 of the National Security Regulations did not allow the Commonwealth to take possession of the Special Case land simply by the making of orders purporting to take possession of that land.

Extinguishment at common law

31 The recognition of native title rights and interests translates aspects of an indigenous society's traditional relationship to land and waters into a set of rights and interests existing at common law. The metaphor of "recognition" reflects the proposition that the common law cannot transform traditional laws and customs, the relationships to country which they define, or the rights and interests to which, in their own terms, they give rise. Nor can it extinguish them. "Extinguishment" describes the result of applying principles by which common

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39 (2014) 218 FCR 358 at 391 [110].

40 (2014) 218 FCR 358 at 391 [111].

41 (2014) 218 FCR 358 at 391 [112].

law recognition is withheld or withdrawn in the face of legislative or executive acts affecting the land or waters in which native title is said to subsist.

32 It was held in *Mabo v Queensland [No 2]* that a clear and plain intention is necessary to effect extinguishment whether directly by legislation or by executive act or grant pursuant to legislative authority[42]. Where the alleged extinguishing act or grant is done by the executive pursuant to legislative authority, the necessary intention to authorise such an act must be attributable to the legislature. The high threshold of attributed legislative intention flows from the seriousness of the consequences of extinguishment for indigenous inhabitants[43]. So a law which merely regulates the enjoyment of native title or creates a regime of control consistent with its continued enjoyment does not, on that account only, reveal an intention to extinguish or impair native title rights and interests[44].

33 Where legislation empowers the Crown to dedicate land for a public purpose the question whether the power reflects a clear and plain intention that native title affected by its exercise would be extinguished may sometimes be a question of fact, sometimes a question of law and sometimes a mixed question of fact and law. Where the exercise of the power does not involve the grant of an interest in land or the reservation or dedication of land inconsistently with the right to continued enjoyment of native title by the indigenous inhabitants, native title survives and is legally enforceable[45].

34 The clear and plain intention standard for extinguishment formulated in *Mabo [No 2]* is an important normative principle informing the selection of the criterion for determining whether a legislative or executive act should be taken by the common law to have extinguished native title. That standard has not been displaced by any subsequent decision of this Court. The settled criterion for its satisfaction, which has been established in the case of the grant of rights over

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42 (1992) 175 CLR 1 at 64 per Brennan J (Mason CJ and McHugh J agreeing at 15), 195 per Toohey J; [1992] HCA 23.

43 (1992) 175 CLR 1 at 64 per Brennan J.

44 (1992) 175 CLR 1 at 64 per Brennan J. See also *Yanner v Eaton* (1999) 201 CLR 351 at 397 [115] per Gummow J; [1999] HCA 53; *Akiba v The Commonwealth* (2013) 250 CLR 209 at 230 [33] per French CJ and Crennan J; [2013] HCA 33; *Karpany v Dietman* (2013) 88 ALJR 90 at 92 [5], 95 [22], 97 [32]; 303 ALR 216 at 218, 222, 224; [2013] HCA 47.

45 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 68 per Brennan J.

land or waters pursuant to a statute, as explained in *Western Australia v Ward*[46], is inconsistency between the rights granted and the propounded native title rights and interests. Application of that criterion involves "an objective inquiry which requires identification of and comparison between the two sets of rights"[47]. An analogous criterion is applicable where legislation or a legislative instrument affecting the use of land or waters is concerned. The question of extinguishment is able to be answered by determining whether or not the provisions of the legislation or legislative instrument were inconsistent with the continuing recognition by the common law of the particular native title holders' rights and interests[48]. Where a grant of an estate in fee simple or a lease in perpetuity conferring a right of exclusive possession is concerned, inconsistency is readily demonstrable. Where a right or power is conferred for a statutory purpose and is to be exercised for that purpose, inconsistency is not demonstrated by the fact that the repository of the right or the power may use it to prevent the native title holders from exercising or enjoying their rights.

35 The enquiry as to inconsistency begins with the construction of the statute, an exercise which is properly informed by its purpose[49]. In this case the limiting negative purpose to which reference has been made earlier is important to the construction of the NSA, reg 54 and the military orders. The comparison between the statutory rights and powers created and exercisable over the Bar-Barrum People's land, with their asserted native title rights and interests, follows upon the constructional exercise. That process is not to be confused with the normative question, answered by way of conclusion from the consideration of inconsistency, namely whether the statute discloses a clear and plain intention to extinguish native title.

36 The "clear and plain intention", demonstrated by the inconsistency of statutory rights and powers and native title rights and interests, and necessary to a finding of extinguishment, is not the subjective intention of the relevant legislature, nor is it that of the executive authority making a grant. Nor is it an intention, the presence or absence of which is to be determined by reference to the awareness or otherwise of the existence of native title rights and interests

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46 (2002) 213 CLR 1; [2002] HCA 28.

47 (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

48 *Karpany v Dietman* (2013) 88 ALJR 90 at 94 [19]; 303 ALR 216 at 221.

49 *Wilson v Anderson* (2002) 213 CLR 401 at 417–418 [7]–[8] per Gleeson CJ; [2002] HCA 29.

when the statute was enacted or the grant made[50]. That approach is consistent with the approach of this Court to the place of legislative intention in statutory interpretation in *Project Blue Sky Inc v Australian Broadcasting Authority*[51], *Zheng v Cai*[52] and *Lacey v Attorney-General (Qld)*[53]. Attributed legislative intention is a conclusion arising from the application of accepted rules of construction, both common law and statutory.

37 In the case of the claimed extinguishment of native title, the settled approach to determining extinguishment by operation of legislation or a legislative instrument, reflected in earlier decisions of this Court, was restated in the joint judgment of Hayne, Kiefel and Bell JJ in *Akiba v The Commonwealth*[54]:

> "This Court held in *Western Australia v The Commonwealth (Native Title Act Case)* that, at common law, native title rights and interests can be extinguished by 'a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title'." (footnotes omitted)

The normative force of the clear and plain intention standard is reflected in the inconsistency criterion. So much appears from *Yanner v Eaton*, in which the plurality said that the "extinguishment of such rights must, by conventional theory, be *clearly established*" (emphasis added)[55]. That criterion is not satisfied merely by the identification of restrictions or controls placed on the use of the land by statute or executive act done pursuant to statutory authority. Queensland submitted that the Commonwealth had a right of exclusive possession inconsistent with the continued existence of native title rights and interests. That approach lifts the statutory conferment of "possession" out of its context, disconnects it from its statutory purpose, and thereby misconceives its legal effect.

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50 *Western Australia v Ward* (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

51 (1998) 194 CLR 355; [1998] HCA 28.

52 (2009) 239 CLR 446 at 455–456 [28]; [2009] HCA 52.

53 (2011) 242 CLR 573 at 591–592 [43] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 10.

54 (2013) 250 CLR 209 at 240 [61].

55 (1999) 201 CLR 351 at 372 [35] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

38 The possession granted to the Commonwealth, and the powers conferred as an incident of that possession, authorised the preclusion of native title holders for a time, or from time to time, from entering onto the land or waters. It may be taken to have impaired their enjoyment of their native title. However, where the law, as in this case, imposes a control regime which has a limiting purpose of not disturbing subsisting rights and interests, and where that purpose limits the scope of the rights granted and the powers conferred by the law, the impairment cannot be said to be inconsistent with the subsistence of native title rights and interests. It cannot support the conclusion that there was a "clear and plain legislative intention" to extinguish native title.

39 In this case the position is clear. The military orders authorised, although they did not mandate, the preclusion, for their duration, of the exercise of the native title rights and interests of the Bar-Barrum People. The powers which they conferred were not unconfined. They could not support a finding of inconsistency between the statutory scheme and the native title rights and interests of the Bar-Barrum People which would lead to the conclusion that their rights or interests were extinguished.

Conclusion

40 For the preceding reasons, the first ground of appeal fails. Having regard to the basis upon which it fails, the second ground of appeal does not arise. The appeal should be dismissed with costs.

HAYNE J.

The issue

41 During World War II, pursuant to regulations made under the *National Security Act* 1939 (Cth), a delegate of the Minister of State for the Army made orders ("the reg 54 orders") directing a particular officer to occupy certain land, authorising that officer to do anything in relation to the land that the holder of a fee simple could do by virtue of that interest and prohibiting all other persons from exercising "any right of way over the land or any other right relating thereto". Did the reg 54 orders extinguish native title rights and interests in respect of that land?

42 A majority of the Full Court of the Federal Court of Australia (North and Jagot JJ, Logan J dissenting) held[56] that the reg 54 orders did not extinguish native title rights and interests. By special leave, the State of Queensland appeals against so much of the orders made by the Full Court as answered a question raising that issue in a special case reserved for the consideration of the Full Court. The appeal should be allowed. Other questions reserved by the special case, including a question about the application of s 51(xxxi) of the Constitution to the extinguishment of native title, were not the subject of the appeal and are not considered in these reasons.

The determinative point

43 The majority in the Full Court held[57], and in this Court the first and second respondents (the Bar-Barrum people and the Commonwealth) submitted, that the objective intention, or statutory purpose, of the reg 54 orders (and the provisions pursuant to which they were made) was that "all rights and interests in the land should yield to the Commonwealth's exclusive possession" for the duration of the war (and up to six months beyond) "but should otherwise continue and found rights of compensation for the interference to those rights thereby resulting".

44 Part of that proposition is plainly right. *All* rights and interests in the land were to yield to the Commonwealth's taking of exclusive possession. And the Commonwealth was to take exclusive possession of the land *only* for the duration of the war (and up to six months beyond).

45 But the remainder of the proposition, however expressed, does not follow. It is both legally and logically wrong to say that the "objective intention" or

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56 *Congoo v Queensland* (2014) 218 FCR 358.

57 (2014) 218 FCR 358 at 376 [52] per North and Jagot JJ.

"statutory purpose" of the reg 54 orders or the laws pursuant to which they were made was to "*preserve*" all previously existing rights.

46 The conclusion that native title rights and interests were not extinguished by the reg 54 orders is legally flawed. It takes as its premise a legal proposition for which there is no support: that native title rights and interests are extinguished *only* if an intention to extinguish is discernible in the reg 54 orders and the provisions pursuant to which they were made. That premise, and the conclusion which is drawn from it, are both contrary to the accepted doctrine established and unfailingly applied in this Court in a succession of cases decided over more than 20 years. And no party made any submission suggesting that any of those cases was not rightly decided. These reasons will show that the conclusion reached by the majority in the Full Court, and urged by the Bar-Barrum people and the Commonwealth, can be reached only by applying tests for the extinguishment of native title rights and interests which this Court has expressly rejected.

47 The statement of "intention" or "purpose" is also logically flawed. It is no more than an unfounded assertion that there was no extinguishment of native title rights and interests *because* those rights and interests were not extinguished. Even if it is accepted as a premise that native title rights and interests are extinguished *only* if an intention to extinguish is discernible in the reg 54 orders and the provisions pursuant to which they were made, to state that there was an "intention" or a "purpose" to *preserve* all rights and interests (including native title rights and interests) leads to circular reasoning. Assuming or asserting as a second premise that there was an "intention" or "purpose" to *preserve* all rights and interests (then recognised or not) assumes the answer to the question that must be answered. It assumes the answer by conflating two separate inquiries. The first is an inquiry about the effect of the reg 54 orders and the provisions which authorised their making. That inquiry is answered by concluding that the Commonwealth took exclusive possession of the land for only a limited but uncertain time. The second, and separate, inquiry to make is about the effect of that taking on native title rights and interests. Assuming or asserting that there was an "intention" or "purpose" of preserving *all* rights and interests (then recognised or not) leads to circular reasoning. And those problems would be compounded if the statement about "intention" or "purpose" were to be understood as inviting attention[58] to what the Parliament, the Executive or the Commonwealth as a polity "wanted" to achieve. Any inquiry of that kind would be anachronistic. Native title rights and interests were not recognised in the 1940s.

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58 cf (2014) 218 FCR 358 at 361 [6] per North and Jagot JJ.

48 These reasons proceed as follows. First, the relevant legislative provisions and the terms of the reg 54 orders are described. Next, the native title rights and interests and the rights of possession taken by the orders are identified. The principles governing extinguishment of native title rights and interests are then stated and applied to this case. Finally, the content and utility of notions of "intention" and "purpose" in this field of discourse are examined and particular reference is made to those tests for the extinguishment of native title rights and interests which this Court has rejected.

National Security (General) Regulations 1939 (Cth)

49 Section 5(1)(b) of the *National Security Act* 1939 authorised the Governor-General to make regulations authorising the taking of possession or control on behalf of the Commonwealth of any property or the acquisition on behalf of the Commonwealth of any property other than land. Regulation 54(1) of the National Security (General) Regulations 1939 (Cth) ("the Regulations") provided that, if it appeared to the Minister of State for the Army to be necessary or expedient to do so in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, the Minister "may, on behalf of the Commonwealth, take possession of any land, and may give such directions as appear to him to be necessary or expedient in connexion with the taking of possession of the land". Regulation 54(2) permitted the Minister to "authorize persons so using the land to do, in relation to the land, anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest". It further permitted the Minister, by order, to "provide for prohibiting or restricting the exercise of rights of way over the land, and of other rights relating thereto which are enjoyed by any person, whether by virtue of an interest in land or otherwise".

The reg 54 orders

50 Between 1943 and 1945, a delegate of the Minister of State for the Army, acting under reg 54 of the Regulations, made five orders with respect to land in which the Bar-Barrum people have since claimed native title rights and interests. Each order related to land in the same general area near Herberton and Atherton in North Queensland, but the borders of the land affected were not identical. The first order covered 167.4 square kilometres. The second order did not include all of the eastern part of the land covered by the first order and covered 153.3 square kilometres. The third, fourth and fifth orders covered 186.1 square kilometres, 199.4 square kilometres and 254.9 square kilometres respectively. The last three orders covered all the land which was subject to the second order but included more land to the south-west and west. Each order was annotated in a manner which indicated that the land was to be used by the Army as an artillery range.

51 Each of the reg 54 orders stated that the officer making the order, acting in pursuance of the Regulations and the instrument delegating authority to him to make the order, "[DOES] HEREBY on behalf of the Commonwealth, TAKE POSSESSION of the said land". Each of the orders directed an officer (or persons whom that officer authorised) to occupy the land and authorised that officer (and other authorised persons) "to do in relation to the said land anything which any person having an unencumbered interest in the fee simple in the said land would be entitled to do by virtue of that interest". Each order further provided that, while the land remained in the possession of the Commonwealth, "no person shall exercise any right of way over the land or any other right relating thereto, whether by virtue of an interest in land or otherwise".

52 No party to the appeal alleged that the reg 54 orders were made beyond power or are otherwise infirm. All said, rightly, that the reg 54 orders must be read and understood against the background of the *National Security Act* 1939 and the Regulations. But it is not necessary to trace that background in any detail. It is enough to observe that the parties accepted that each of the reg 54 orders would have ceased to take effect no later than the time fixed by s 19 of the *National Security Act* 1939 as the period of operation of that Act: the duration of the war and six months thereafter.

Some agreed facts

53 The proceedings in the Full Court of the Federal Court were by way of special case. For the purposes of that special case, the Bar-Barrum people and the State agreed that, subject to the effect of the reg 54 orders, the Bar-Barrum people hold "at least non-exclusive native title rights and interests" over the land (in effect) to go onto the land, to camp there, to hunt, fish and gather for personal, domestic and non-commercial communal purposes, to conduct ceremonies, to be buried there, to maintain places of importance and areas of significance, to teach the physical and spiritual attributes of the area, to hold meetings there and to light fires for domestic purposes. Those parties further agreed that, at about the time of the first order, "the Commonwealth physically occupied at least some of the [land] in that the Commonwealth used at least some of the [land] as an artillery range and a live fire manoeuvre range for the training of infantry and armoured units preparing to deploy to the South West Pacific area". The parties agreed that the Commonwealth ceased physically to occupy any part of the land on or about 31 August 1945.

Taking possession

54 The Bar-Barrum people and the Commonwealth submitted that there had to be some "manifestation of the intention to take possession" of the land beyond the making of the reg 54 orders. The Commonwealth's intention to take possession of this land to the exclusion of all others was evidently made plain by bombarding the land with live artillery fire and using it for live fire military

manoeuvres. But the proposition that there must be some manifestation of an intention to take possession beyond the making of the relevant reg 54 order is not right.

55 The reg 54 orders took effect according to their terms. The orders were the assertion by the Commonwealth of rights over the land, not the grant of any right or bundle of rights to a third person. The assertion of those rights was for a limited time of uncertain duration. It was an assertion which could be made only upon the decision-maker being satisfied of the matters stated in the Regulations. But, being satisfied of those matters, the officer who made an order, by making it, took possession on behalf of the Commonwealth of the land specified in it.

56 The possession which the Commonwealth thus took was possession to the exclusion of all others. Each order authorised an identified officer (and persons whom that officer authorised) to occupy the land. Not only was this officer (and other authorised persons) authorised "to do in relation to the said land anything which any person having an unencumbered interest in the fee simple in the said land would be entitled to do by virtue of that interest", others having "any right of way over the land or any other right relating thereto" were not permitted to exercise that right. No doubt anyone *could* have asked for permission to go onto the land. But if, as all parties have assumed in this litigation, the reg 54 orders were valid, that permission could be refused for any reason or no reason. Permission could be refused because the Commonwealth had taken possession of the land. And taking possession had been judged to be necessary and expedient in the interests of the public safety, the defence of the Commonwealth and the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community. The connection between using the land as an artillery range and live fire manoeuvre range and the defence of the Commonwealth is evident. By the reg 54 orders the Commonwealth took exclusive possession of the land.

Extinguishment of native title

57 In *Western Australia v The Commonwealth* (*Native Title Act Case*)[59] the six members of this Court who had constituted the majority in *Mabo v Queensland [No 2]*[60] said that "[a]t common law ... native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title". That valid exercise of sovereign power may take the form of creating rights in third parties (for example, by the grant of an interest in land). But it may also take the

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59 (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1995] HCA 47.

60 (1992) 175 CLR 1; [1992] HCA 23.

form of the relevant sovereign authority itself asserting or taking rights in or over the land (for example, by some forms of dedication of land to public purposes[61]). The determinative question in either kind of case is whether the rights granted or asserted are inconsistent with native title rights and interests over the land.

58 Hence, in *Fejo v Northern Territory*[62] this Court held that native title is extinguished by a grant in fee simple and is not revived if the land is later held again by the Crown. As the plurality pointed out[63] in *Fejo*, native title is extinguished by a grant in fee simple "because the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title". That conclusion "follows not from identifying some intention in the party making the later grant *but because of the effect that that later grant has on the rights which together constitute native title*"[64] (emphasis added).

59 It is against this background, then, that the decision in *Western Australia v Ward*[65] must be understood. And despite the degree of attention given in argument in this case to only one paragraph of what was written in *Ward*[66], what was said by the plurality in that case cannot be read as altering or detracting from what was then, and remains, the established doctrine of this Court.

60 Common law extinguishment of native title rights and interests depends upon only one test: inconsistency of rights. As the plurality said[67] in *Ward*, "[t]wo rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment." And "[a]bsent *particular* statutory provision to the contrary, questions of *suspension* of one set of rights in favour of another do not

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61 *Mabo [No 2]* (1992) 175 CLR 1 at 68 per Brennan J; *Western Australia v Ward* (2002) 213 CLR 1 at 136 [214]-[215] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2002] HCA 28.

62 (1998) 195 CLR 96; [1998] HCA 58.

63 (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

64 (1998) 195 CLR 96 at 128 [47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, citing *Mabo [No 2]* (1992) 175 CLR 1 at 68 per Brennan J.

65 (2002) 213 CLR 1.

66 (2002) 213 CLR 1 at 91 [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

67 (2002) 213 CLR 1 at 91 [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

arise"[68] (emphasis added). Rather, questions of inconsistency require identification of, and comparison between, the two sets of rights, recognising always that one set of rights derives from traditional law and custom and the other set derives from the exercise of the new sovereign authority that came with European settlement.

61 No case decided after *Ward* holds to the contrary. It is enough, for present purposes, to refer only to *Western Australia v Brown*[69]. All five members of the Court agreed[70] that the principles to be applied are those that have been stated.

Application of the principles

62 By taking exclusive possession of the land, the Commonwealth asserted rights which were inconsistent with the native title rights and interests in issue in this case. The Commonwealth's acts extinguished the native title rights and interests claimed by the Bar-Barrum people.

63 Contrary to the submissions of the Bar-Barrum people and the Commonwealth, the effect of the reg 54 orders on native title rights and interests was more radical than working only some temporary suspension of their enjoyment, whether with or without some concomitant grant of a right to compensation for loss of enjoyment of the rights. Analysis in terms of suspension of either the native title rights and interests or their exercise (with or without the addition of a right to monetary compensation) fails to recognise the manner in which the common law and native title rights and interests intersect. In particular, analysis of the kind described does not take into account the facts[71] that native title rights and interests are rooted in the laws and customs observed by the claimant people and that while native title is recognised by the common law it is neither an institution of the common law nor a form of common law tenure.

64 The failure to recognise the manner in which the common law and native title rights and interests intersect results in seeking to attach incidents of

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68 (2002) 213 CLR 1 at 91 [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

69 (2014) 88 ALJR 461; 306 ALR 168; [2014] HCA 8.

70 (2014) 88 ALJR 461 at 467-468 [34]-[38] per French CJ, Hayne, Kiefel, Gageler and Keane JJ; 306 ALR 168 at 175-176.

71 *Mabo [No 2]* (1992) 175 CLR 1 at 58-59 per Brennan J; *Fejo* (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 439 [31] per Gleeson CJ, Gummow and Hayne JJ; [2002] HCA 58.

suspension and monetary compensation deriving from the common law of real property and trespass to native title rights and interests deriving from a different normative system. As was pointed out[72] in *Yorta Yorta Aboriginal Community v Victoria*, native title rights and interests "may not, and often will not, correspond with rights and interests in land familiar to the Anglo-Australian property lawyer" and "[t]he rights and interests under traditional laws and customs will often reflect a different conception of 'property' or 'belonging'". The error of seeking to transfer common law ideas about real property and trespass to native title rights and interests is most starkly exemplified by the attempt to transform the spiritual attachment to land which underpins native title rights and interests into money damages for the tort of trespass.

65 It is convenient to assume that competent legislation could validly suspend the exercise of native title rights and interests and attach to those rights and interests, first, some statutory right to resume their exercise on the happening of some event and, second, some right to compensation for interruption in their exercise. In *Ward*, the plurality referred[73] to the possibility of a "particular statutory provision" suspending native title rights and interests. It may greatly be doubted that legislation could achieve these results except by express and detailed provision to the desired effect. But assuming, for the purposes of argument, that legislation could inferentially or impliedly superimpose such incidents upon, or attach such incidents to, native title rights and interests, the legislation at issue in this case cannot be understood as having that effect. That legislation validly authorised the Commonwealth to take to itself rights over the land which were inconsistent with the native title rights and interests that have been described. The view that the legislation worked only a temporary suspension of the exercise of the native title rights and interests depends upon assuming or asserting either that the applicable statutory and regulatory provisions *intended* to preserve *all* other interests or that they should be construed as having that effect. There is no basis for making an assumption or assertion of that all-encompassing generality. None was identified in argument.

66 It is important, however, to say something more about the content and utility of notions of "intention" and "purpose" in this field of discourse.

"Intention" and "purpose"

67 The metaphors of "intention" and "purpose" will mislead if they are understood as permitting or requiring identification of some actual or constructed objective for the act which it is alleged extinguished native title rights and

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72 (2002) 214 CLR 422 at 442 [40] per Gleeson CJ, Gummow and Hayne JJ.

73 (2002) 213 CLR 1 at 91 [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

interests. Hence, as the plurality said[74] in *Ward*, "referring to an '*expression* of intention' is apt to mislead" (original emphasis).

68 As the plurality also said[75] in *Ward*, references to expression of "intention" and "purpose" are apt to mislead because the subjective thought processes of those whose act is alleged to have extinguished native title are irrelevant. It matters not whether those who made the reg 54 orders did or did not think about what rights and interests the Bar-Barrum people would claim in the land. And it matters not whether those who made the reg 54 orders did or did not think about what rights or interests in the land would survive beyond the expiration of the orders.

69 It is irrelevant, therefore, to observe, as the majority did in the Full Court[76], that in the course of the second reading of the Bill for what became the *National Security Act* 1939, the Prime Minister spoke[77] of the Executive being guided in the exercise of the powers given by that Act by the principle that there be "as little interference with individual rights as is consistent with concerted national effort".

70 There are fundamental reasons why references to "intention" and "purpose" may mislead. As has already been explained, native title is neither an institution of the common law nor a form of common law tenure, but is recognised by the common law. There is, therefore, an intersection of two normative systems[78].

71 Identifying the intersection may be assisted[79], in some cases, by using the idea of radical title as a tool of legal analysis. But the concept of radical title does not have a controlling role[80]. And as the decisions in *The Commonwealth v*

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74 (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

75 (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

76 (2014) 218 FCR 358 at 361 [6] per North and Jagot JJ.

77 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 September 1939 at 164.

78 *Yorta Yorta* (2002) 214 CLR 422 at 441-443 [39]-[42] per Gleeson CJ, Gummow and Hayne JJ.

79 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 51 [48]-[49] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2001] HCA 56.

80 *Yarmirr* (2001) 208 CLR 1 at 51 [49] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

Yarmirr[81] and subsequent cases[82] show, an inquiry about extinguishment of native title rights and interests must begin by examining the allegedly inconsistent rights and interests which have been created and asserted since the Crown's acquisition of sovereignty.

72 It is, therefore, irrelevant to notice, as the majority in the Full Court did[83], that the Commonwealth was not the holder of the radical title in the land the subject of the reg 54 orders. To say, as their Honours did[84], that the Commonwealth "was a stranger to the land and indifferent to the nature and extent of pre-existing interests which might be held in relation to the land" suggests, wrongly, that radical title to the land is the controlling concept, and deflects attention from the central and determinative issue of whether the rights asserted by the Commonwealth were inconsistent with the claimed native title rights and interests.

73 Reference to purpose may mislead in another way. It is, of course, well established that the legislative power, given by s 51(vi) of the Constitution, to make laws with respect to "the naval and military defence of the Commonwealth and of the several States" is purposive[85]. And it is equally clear that the powers given by reg 54(1) of the Regulations had to be exercised for the purposes described in the regulation.

74 It by no means follows, however, from either of these observations about *power* that the *rights* which the Commonwealth asserted over the land were not rights of exclusive possession of the land for the duration of the war. What was said in *Ward*[86] does not support the proposition that a power conferred for a statutory purpose, to be exercised for that purpose, may not create rights which are inconsistent with native title rights and interests.

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81 (2001) 208 CLR 1 at 48-49 [41]-[42], 60-61 [76], 68 [99]-[100] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

82 See, for example, *Ward* (2002) 213 CLR 1 at 91 [82], 115 [151]-[152], 136 [215] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

83 (2014) 218 FCR 358 at 375 [51].

84 (2014) 218 FCR 358 at 375 [51].

85 See, for example, *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 273 per Kitto J; [1951] HCA 5; *Thomas v Mowbray* (2007) 233 CLR 307 at 359-364 [132]-[148] per Gummow and Crennan JJ; [2007] HCA 33.

86 (2002) 213 CLR 1 at 165-166 [307]-[308], 172 [326], 174 [331].

75 Nor does it follow from the observations about the purposive nature of the relevant legislative power or the purposes for which the power given by the Regulations could be exercised that any analogy can be drawn between the reg 54 orders and the mining interests that were considered in either *Ward* or *Brown*. What was said[87] in *Ward* about the mining interests in issue in that case illustrates the fundamental importance of identifying what are the rights and interests which it is said are inconsistent with native title rights and interests. Any supposed analogy between the reg 54 orders and the mining interests considered in *Ward* and *Brown* founders on the rock of the radical difference between the two kinds of right. The reg 54 orders gave the right to take possession of land to the exclusion of all others, albeit for a limited time. The mining interests in issue in *Ward* and *Brown* gave the holder exclusive rights only to search for and win whatever minerals were to be found on the relevant land.

76 In this case, the majority in the Full Court treated[88] inconsistency of rights as no more than "an analytical tool enabling objective legislative intention to be ascertained". At the very least, an approach of this kind inverts the proper order of inquiry, for it appears to suggest that deciding that there is inconsistency of rights requires some further inquiry into what is called an "objective intention". But, as used by the majority in the Full Court, that approach led to the legal and logical errors identified at the commencement of these reasons. It is necessary to amplify that conclusion.

77 The majority identified[89] the relevant "objective legislative intention" as being "that native title rights no longer be recognised by the common law". Their Honours accepted[90] that "the Commonwealth took to itself a right of exclusive possession" but concluded[91] that "the Commonwealth cannot be imputed with an objective intention to extinguish native title rights and interests". And their Honours founded[92] that conclusion on the proposition that "[t]he context and language of the statute does not disclose any intention, let alone a clear and plain intention, that any rights or interests in the land no longer be

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87 (2002) 213 CLR 1 at 159-160 [290].

88 (2014) 218 FCR 358 at 375 [50].

89 (2014) 218 FCR 358 at 375 [50].

90 (2014) 218 FCR 358 at 375 [52].

91 (2014) 218 FCR 358 at 375 [52].

92 (2014) 218 FCR 358 at 375 [52].

recognised". Rather, the objective intention of the Commonwealth was said[93] to be "that all rights and interests in the land should yield to the Commonwealth's exclusive possession for the duration of the Commonwealth's exercise of power under reg 54 but should otherwise continue and found rights of compensation for the interference to those rights thereby resulting". For the reasons already given, the proposition takes its conclusion as its premise. It is circular.

Reverting to rejected tests of extinguishment

78 An important part of the ratio decidendi of *Ward* is[94] the rejection of tests of extinguishment other than the inconsistency of rights test which had been established in earlier decisions of this Court. Three particular forms of other test were specifically rejected: (a) the adverse dominion test suggested in *Delgamuukw v British Columbia*[95], (b) a test dependent upon so-called "permanent" adverse dominion, and (c) a test dependent upon *degrees* of inconsistency.

79 No party submitted that any of these tests could or should be applied. Yet the repeated reference in this case to the temporary nature of the rights taken by the Commonwealth and the temporary nature of the circumstances which permitted that step can be explained only as seeking to revive one or other of the tests that were expressly rejected in *Ward*.

80 As has already been explained, the rights which the Commonwealth took for itself over the land were rights of exclusive possession. The temporal duration of those rights was not certain. But the rights were no different in kind or duration from those a tenant would have under a lease granted for the term of the life of another. And it was not, and could not be, disputed that a lease of that kind would extinguish native title. Yet a constant thread, running through both the reasoning of the majority in the Full Court and the arguments advanced on behalf of the Bar-Barrum people and the Commonwealth, was that the Commonwealth took possession of the land for a limited time and could do that only because circumstances which would not continue permanently were found then to exist. It followed, according to this thread, that the native title rights and interests could not have been, and were not, extinguished, because the rights which the Commonwealth had asserted over the land were not permanent and were occasioned by extraordinary circumstances.

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93 (2014) 218 FCR 358 at 376 [52].

94 (2002) 213 CLR 1 at 88-91 [74]-[82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

95 (1993) 104 DLR (4th) 470 at 670-672 per Lambert JA.

81 The premise for that argument can only be that native title rights and interests cannot be extinguished without some exercise of adverse dominion over the land[96] (perhaps some exercise of permanent adverse dominion[97]) or cannot be extinguished unless the rights which are taken "totally replace" or "fully eclipse"[98] the claimed native title rights and interests. And, as already explained, those tests were rejected in *Ward*. None of them is now to be reintroduced into the law in Australia by taking it as an unstated premise for argument. The question of extinguishment is to be decided according to established principles.

82 That the Commonwealth took exclusive possession for a limited but uncertain time does not deny that the rights which were taken were inconsistent with the native title rights and interests described earlier in these reasons. And because the Commonwealth's rights over the land were inconsistent with those native title rights and interests, the native title rights and interests were extinguished. The fact that the Commonwealth ceased asserting exclusive possession of the land on or about 31 August 1945 did not revive those native title rights and interests. As cases like *Fejo* demonstrate, cessation of inconsistent rights does not revive native title rights and interests.

Conclusion

83 By taking exclusive possession of the land, the Commonwealth asserted rights which were inconsistent with the native title rights and interests in issue in this case. The Commonwealth's acts extinguished the native title rights and interests of the Bar-Barrum people.

84 Question 3 of the questions reserved for the consideration of the Full Court of the Federal Court should have been answered as follows:

> Did the act of the Commonwealth in
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> (a) making the Military Orders wholly extinguish all native title rights and interests that then subsisted on the special case land, and, if not,

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96 cf *Ward* (2002) 213 CLR 1 at 88-90 [74]-[79] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

97 cf *Ward* (2002) 213 CLR 1 at 90 [80] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

98 cf *Ward* (2002) 213 CLR 1 at 90-91 [81]-[82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also *Western Australia v Ward* (2000) 99 FCR 316 at 489 [689] per North J.

(b) being in physical occupation of at least some of the special case land pursuant to the Military Orders wholly extinguish all native title rights and interests that then subsisted on the special case land or that part of the special case land that had been physically occupied?

Answer:

(a) Yes.

(b) Unnecessary to answer.

85 The appeal to this Court should be allowed. The orders of the Full Court of the Federal Court of Australia made on 21 February 2014 should be varied by setting aside par 1(c) and substituting the answers to question 3 set out above. Consistent with the terms on which special leave to appeal was granted, the appellant should pay the first respondents' costs of the appeal to this Court. There should be no other order as to the costs of the appeal to this Court.

86 KIEFEL J. The land in question in this appeal falls within the boundaries of an application brought by the Bar-Barrum People for a determination of native title with respect to land in North Queensland and has been the subject of a determination of a Special Case by a Full Court of the Federal Court. It is accepted by the parties to the Special Case that some native title rights over the land were extinguished by the grants of a pastoral lease and mineral leases in the late 19th and early 20th centuries. Between 1943 and 1945 part of the land was the subject of Military Orders issued pursuant to regulations made under the *National Security Act* 1939 (Cth). That Act provided for extraordinary war time powers of possession and control of property and it did so at a time when the common law had not yet recognised native title rights and interests. It is accepted by the parties that, subject to the effect of the Military Orders, the Bar-Barrum claimants (the first respondents) hold at least non-exclusive native title rights and interests over the land. The question raised by the Special Case, the subject of this appeal, is whether the Military Orders extinguished those native title rights and interests.

The test for extinguishment of native title

87 The question whether native title rights and interests are extinguished by the grant of rights over the same land is answered by a consideration of whether the rights granted are inconsistent with the native title rights and interests, in the sense that the two sets of rights cannot be exercised at the same time. Although inconsistency of rights was identified as central to the question of extinguishment in *Mabo v Queensland [No 2]*[99], the method by which it was to be tested was not resolved until later. In *Western Australia v Ward*[100], the joint judgment was able to say that:

> "As *Wik*[101] and *Fejo*[102] reveal, where, pursuant to statute, be it Commonwealth, State or Territory, there has been a grant of rights to third parties, the question is whether the rights are inconsistent with the alleged native title rights and interests. That is an objective inquiry which requires identification of and comparison between the two sets of rights."

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99 (1992) 175 CLR 1 at 68, 69-70; [1992] HCA 23.

100 (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; see also at 250 [589] per Kirby J; [2002] HCA 28.

101 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185-186; [1996] HCA 40.

102 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43]; [1998] HCA 58.

88 In *Western Australia v Brown*[103], a Full Court of this Court pointed out that this inquiry involves at the first stage the identification of the property rights granted. This stage involves the ascertainment of the legal nature and content of those rights. The second stage involves identifying the claimed native title rights and interests. The final stage involves the determination of whether there is an inconsistency between the two sets of rights. Each stage of the inquiry is objective.

89 A determination of whether there is an inconsistency between the rights granted and the native title rights is to be decided by reference to the nature and content of the rights as they stood at the time of the grant[104]. In *Wik Peoples v Queensland*[105], Brennan CJ said:

> "If the rights conferred on the lessee of a pastoral lease are, at the moment when those rights are conferred, inconsistent with a continued right to enjoy native title, native title is extinguished." (footnote omitted)

In *Brown*[106], it was reiterated that the question is: "[a]t *that* time, were the rights as granted inconsistent with the relevant native title rights and interests?" (emphasis in original) Logically, the two sets of rights must be tested for inconsistency at the time of the grant of the later set, because the question of inconsistency is directed to whether the native title rights can continue after the grant is made.

90 Inconsistency, the Court said in *Brown*[107], is "that state of affairs where 'the existence of one right necessarily implies the non-existence of the other'." Where the Crown creates rights inconsistent with "a continuing right to enjoy native title", native title is extinguished to the extent of the inconsistency[108]. If

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103 (2014) 88 ALJR 461 at 467-468 [33]-[38] per French CJ, Hayne, Kiefel, Gageler and Keane JJ; 306 ALR 168 at 175-176; [2014] HCA 8.

104 *Western Australia v Brown* (2014) 88 ALJR 461 at 468 [37]; 306 ALR 168 at 176.

105 (1996) 187 CLR 1 at 87, Dawson and McHugh JJ agreeing.

106 (2014) 88 ALJR 461 at 468 [37]; 306 ALR 168 at 176.

107 (2014) 88 ALJR 461 at 468 [38]; 306 ALR 168 at 176, quoting from submissions by counsel for the first respondents.

108 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69-70 per Brennan J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-86, 87 per Brennan CJ, Dawson and McHugh JJ agreeing.

the right granted prevents the lawful exercise of native title rights, the latter are extinguished.

91 It was made clear in *Ward*[109], *Wilson v Anderson*[110] and *Fejo v Northern Territory*[111] that a right of exclusive possession of land leaves "no room for the continued existence of [native title] rights and interests"[112]. The native title rights spoken of are those the exercise of which depends upon access to the land. Native title rights cannot continue because the right of exclusive possession affords the holder the right to "exclude any and everyone from access to the land."[113]

92 In *Ward*, a pastoral lease, granted for one year and renewable from year to year, was held to be inconsistent with native title rights and interests because it gave a right of exclusive possession to the land in question with the result that the native title rights and interests were extinguished[114]. By contrast, the grant of a mining lease might not be inconsistent with all native title. In this respect it was observed in *Ward*[115] that a lease for mining purposes might not require the exclusion of all others from all parts of the land but, inferentially, only from those parts necessary to its exercise. A right to mine may prevent the exercise of some native title rights and interests, but it was not possible there to identify those which might be subject to extinguishment and those which were not. The exception was a native title right to control access to land, which would have been extinguished by the grant of the mining leases.

93 The test of inconsistency is admittedly strict. It requires the identification of the native title rights and interests and the rights and interests which are said to be inconsistent with them. The joint judgment in *Ward*[116] described as false the

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109 (2002) 213 CLR 1 at 182 [370], 201 [439], 210 [468], 239 [555], 250 [589], 263 [617], 264-266 [620]-[624], 267-268 [627], 302 [699], 320 [753], 322 [757], 368 [887], 371 [901], 376 [926], 383 [938], 392 [964].

110 (2002) 213 CLR 401 at 419 [11]-[12], 455 [131], 466 [165]; [2002] HCA 29.

111 (1998) 195 CLR 96 at 151 [105].

112 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 73; see also at 155.

113 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [47], quoted in *Western Australia v Brown* (2014) 88 ALJR 461 at 468 [36]; 306 ALR 168 at 175.

114 *Western Australia v Ward* (2002) 213 CLR 1 at 181 [368], 182 [370].

115 (2002) 213 CLR 1 at 165-166 [306]-[309].

116 (2002) 213 CLR 1 at 91 [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

premise that "there can be degrees of inconsistency of rights, only some of which can be described as 'total', 'fundamental' or 'absolute'." The joint judgment went on to say:

> "Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment."

94 It was further said that, when testing for inconsistency, no question of the suspension of one set of rights in favour of another can arise, absent particular statutory provision. It follows that if an inconsistency is found to arise when a right is granted over land, because the right granted prevents the exercise of native title rights, the fact that it may be temporary in its effect will not prevent the extinguishment of native title rights and interests. Extinguishment does not depend on the inconsistency between the rights enduring permanently or even for a particular period.

The Commonwealth Regulations and Orders

95 The relevant provisions of the *National Security Act* 1939, the National Security (General) Regulations (Cth) made under that Act and the Military Orders made under reg 54 are set out in full in the reasons of other members of the Court.

96 There is no issue in these proceedings that reg 54 of the Regulations was made pursuant to s 5(1)(b)(i) of the Act, which provided for the making of regulations "for securing the public safety and the defence of the Commonwealth ... and in particular ... (b) for authorizing — (i) the taking of possession or control, on behalf of the Commonwealth, of any property". The Second Reading Speech described the Act as a "far-reaching measure which gives extensive powers to the Government"[117]. The Act was to continue in operation for the duration of the Second World War and for a period of six months thereafter[118]. At the time the Act was passed, the cessation of hostilities could not be predicted.

97 Regulation 54(1) provided that the Minister of State for the Army, when it appeared necessary or expedient for the defence of the Commonwealth or the efficient prosecution of the war, could take possession of any land and give such directions as appeared necessary or expedient in connection with taking possession. Regulation 54(2) provided that the Minister could also (a) authorise

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117 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 7 September 1939 at 163.

118 *National Security Act* 1939 (Cth), s 19. Section 19 was repealed and replaced by s 9 of the *National Security Act* 1940 (Cth), which was to relevantly similar effect.

persons using the land for the purpose of the regulation to do anything which a person having an unencumbered interest in fee simple in the land would be entitled to do; and (b) by order prohibit or restrict the exercise of rights relating to the land, including rights of way.

98 On five occasions between 1943 and 1945, a Minister's delegate made Military Orders under reg 54 ("the Military Orders") with respect to the land in question, which was then used as an artillery range and live fire manoeuvre range for the training of infantry and armoured units to be deployed to the South West Pacific. By the Military Orders, possession was taken of the land, and a person was authorised to occupy and use it to do anything an owner of the land would be entitled to do. It was further ordered that, whilst the land remained in the Commonwealth's possession, "no person shall exercise any right of way over the land or any other right relating thereto, whether by virtue of an interest in land or otherwise".

The nature of the right under reg 54(2)

99 Regulation 54 provided a right of exclusive possession, in the nature of a property right, for an indefinite period. The judgments of the majority in *Minister of State for the Army v Dalziel*[119] are to this effect. Mr Dalziel was the tenant and occupier of land in central Sydney, upon which he conducted a car park. The Commonwealth took possession of the land by notice under reg 54. The issue was whether the taking amounted to an acquisition of property within the meaning of s 51(xxxi) of the Constitution. Williams J, in concluding that the Commonwealth acquired an interest in the land, said[120]:

> "possession under a statutory title which gives the Commonwealth for an indefinite period, which may last during the war and for six months thereafter, an exclusive right to possess the land against the whole world, including the persons rightfully entitled to the possession of the land at common law, must be, *a fortiori*, an acquisition of an interest in the land."

100 Starke J said[121]:

> "the operation and effect of the regulation gives the Commonwealth the right to possession of the land of another for a period, limited only as already mentioned, and to do in relation to the land anything which any

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119 (1944) 68 CLR 261; [1944] HCA 4.

120 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 299.

121 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 290.

person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest".

101 Rich J[122] considered that the Minister had taken away "everything that made [Mr Dalziel's] weekly tenancy worth having, and has left him with the empty husk of tenancy", implying that the Minister had the right to do so by virtue of the regulation.

102 In the present case, neither the Full Court of the Federal Court[123] nor the Commonwealth denied that the Commonwealth had been granted rights in the nature of exclusive possession. In this Court, the first respondents submitted that this aspect of the rights was "something of a distraction". This submission is to be understood in light of the submission made by the Commonwealth, which was accepted by the Full Court, that the rights given to the Commonwealth should nevertheless be viewed as limited in duration and limited to the purposes of the legislation. A consequence of the impermanent nature of the Commonwealth's rights, on the Commonwealth's argument, was that all other rights were intended to continue[124].

103 It was recognised in *Dalziel*[125] that, although the Commonwealth's possession at the time was to be considered indefinite, it was nevertheless a temporary possession. However, the observation there made was relevant to a submission that for there to be an acquisition of land, a taking of it must be permanent. It is not relevant to the question of inconsistency between property rights and native title rights.

104 On the current state of authority, the impermanent nature of the Commonwealth's right of possession is irrelevant to the question whether, at the time of the grant, that right is inconsistent with a continuing right to enjoy native title; yet it is this aspect of the Commonwealth's right which lies at the heart of the submissions of the Commonwealth and the reasoning of the Full Court of the Federal Court.

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122 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 286.

123 *Congoo v Queensland* (2014) 218 FCR 358 at 375-376 [52]-[53], 377 [57], 392 [115].

124 *Congoo v Queensland* (2014) 218 FCR 358 at 368-369 [27]-[28].

125 (1944) 68 CLR 261 at 290 per Starke J; see also at 286 per Rich J.

The native title rights and interests

105 It is agreed that the native title rights and interests of the Bar-Barrum People comprise at least non-exclusive rights to go onto the land in question, to camp there, to hunt, fish and gather for personal, domestic and non-commercial communal purposes, to conduct ceremonies, to be buried there, to maintain places of importance and areas of significance, to teach the physical and spiritual attributes of the area, to hold meetings there and to light fires for domestic purposes.

106 The exercise of these rights requires access to the land. It is difficult to see that a grant to the Commonwealth of a right to exclude all others from the land, which had been carried into effect by the Military Orders, could co-exist with native title rights of this kind.

Extinguishment?

107 The majority in the Full Court of the Federal Court (North and Jagot JJ, Logan J dissenting) accepted that the Commonwealth took to itself a right of exclusive possession[126] and that a consequence of the grant of rights to the Commonwealth was that the native title rights could not be exercised[127]. The majority also accepted[128], given what had been said in *Ward*, that the matter could not be approached on the basis that the native title rights and interests were suspended during the exercise of the Commonwealth's power.

108 The answer, in the view of the majority, lay in legislative intention. Their Honours[129] considered that:

> "the Commonwealth cannot be imputed with an objective intention to extinguish native title rights and interests. The context and language of the statute does not disclose any intention, let alone a clear and plain intention, that any rights or interests in the land no longer be recognised."

109 Before turning to consider the basis for this legislative intention, it is as well to recall that this Court has repeatedly warned against a misunderstanding of legislative intention in this context. In *Ward*[130], immediately preceding the

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126 *Congoo v Queensland* (2014) 218 FCR 358 at 375-376 [52].

127 *Congoo v Queensland* (2014) 218 FCR 358 at 376 [53].

128 *Congoo v Queensland* (2014) 218 FCR 358 at 376 [53].

129 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [52].

130 (2002) 213 CLR 1 at 89 [78].

statement, which is set out earlier in these reasons, regarding the question of inconsistency revealed by *Wik* and *Fejo*, Gleeson CJ, Gaudron, Gummow and Hayne JJ observed:

> "The cases often refer to the need for those who contend that native title has been extinguished to demonstrate a 'clear and plain intention' to do so. That expression, however, must not be misunderstood. The subjective thought processes of those whose act is alleged to have extinguished native title are irrelevant. Nor is it relevant to consider whether, at the time of the act alleged to extinguish native title, the existence of, or the fact of exercise of, native title rights and interests were present to the minds of those whose act is alleged to have extinguished native title. It follows that referring to an '*expression* of intention' is apt to mislead in these respects." (emphasis in original; footnotes omitted)

And in *Fejo*[131], six members of this Court explained that native title is not extinguished because of any intention in the party making the grant of later rights, but because of the effect that the later grant has on the rights which constitute native title.

110 The majority in the Full Court said that the basis for the intention which was to be imputed to the legislature was to be derived from the legislative scheme and the premise apparent from it that "all underlying rights and interests should continue."[132] This reflects acceptance of the Bar-Barrum claimants' and the Commonwealth's submissions to that Court[133], which also pointed out that it followed from that premise that "[o]nce the Commonwealth's possession ... ceased, all rights, including native title rights, could once more be exercised."

111 The legislative intention that all rights, including native title rights, continued to exist[134] was considered by the majority in the Full Court to result in there being no inconsistency. After acknowledging that such rights could not be exercised over the land whilst reg 54 and the Military Orders remained in effect, the majority said[135]:

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131 (1998) 195 CLR 96 at 128 [47].

132 *Congoo v Queensland* (2014) 218 FCR 358 at 376 [53].

133 *Congoo v Queensland* (2014) 218 FCR 358 at 366 [21]-[22].

134 *Congoo v Queensland* (2014) 218 FCR 358 at 376 [53]-[54].

135 *Congoo v Queensland* (2014) 218 FCR 358 at 376 [53].

> "But this does not mean that the rights which the Commonwealth took to itself were inconsistent with the continued existence of native title rights. This is because, as the Commonwealth submitted, it took to itself exclusive possession for a limited purpose for a limited time on the objectively ascertainable premise apparent from the legislative scheme that all underlying rights and interests should continue."

112 This does not appear to be an application of the test of inconsistency of rights, nor did the majority suggest that it was. The inconsistency of rights test was relegated to the status of an "analytical tool enabling objective legislative intention to be ascertained."[136] The majority said[137]:

> "The reasons of French CJ and Crennan J at [30]-[35] in *Akiba* explain the development of inconsistency as the criterion for extinguishment, *inconsistency being a tool to determine legislative objective intention* in circumstances where the purposive approach to statutory construction might otherwise be confounded by the fact that statutes enacted before *Mabo (No 2)* incorrectly assumed that the common law did not recognise native title rights and interests. The analysis of Hayne, Kiefel and Bell JJ at [61]-[64] is to the same effect." (emphasis added)

113 It should not be understood from the words emphasised in this passage that the judgments in *Akiba v The Commonwealth*[138] there referred to support the proposition there stated. They do not.

114 In the passages from the judgment of French CJ and Crennan J in *Akiba* to which the majority referred, the history of the development of the test of inconsistency was traced. Their Honours pointed[139] to the "early approach of this Court in *Mabo v Queensland*[140] and *Mabo v Queensland [No 2]*" (footnote omitted). In those cases it was said that native title is not extinguished unless there be a clear and plain intention to do so[141]. French CJ and Crennan J in *Akiba*

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136 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [50].

137 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [49].

138 (2013) 250 CLR 209; [2013] HCA 33.

139 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 229 [30].

140 (1988) 166 CLR 186; [1988] HCA 69.

141 *Mabo v Queensland* (1988) 166 CLR 186 at 213-214; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 64, 195; see also at 111.

observed that the difficulty with a purposive approach to construction is identifying such an intention, given the reality, identified by Gummow J in *Wik*[142], that many statutes were enacted at a time "when the existing state of the law was perceived to be the opposite of that which it since has been held then to have been." Their Honours explained[143] that the Court came to focus upon inconsistency as the criterion for extinguishment and that the pre-eminence of inconsistency as the criterion was restated in *Ward*, where the joint judgment also warned against[144] a misunderstanding of the criterion of "clear and plain intention".

115 It is difficult to see that a legislative intention could be derived by applying the common law test of inconsistency of rights. That test involves the comparison of two sets of rights. This process is not one of statutory construction, by which legislative intention may be inferred. The conclusion to be reached by the comparison is inconsistency or not and this conclusion is not the legislative intention to which the majority in the Full Court referred.

116 It is not meant, by the foregoing, to deny that legislative intention may be relevant to the test of inconsistency of rights. But that intention would assist only in reaching a conclusion as to the nature of the rights granted under the legislation and would be ascertained by ordinary processes of statutory construction, by reference to text and context. As Gummow J said in *Wik*[145], adopting the statement of Holmes: "[w]e do not inquire what the legislature meant; we ask only what the statute means"[146].

117 The Commonwealth and the majority in the Full Court identified two principal features of reg 54 and the *National Security Act* 1939 as relevant to an intention that pre-existing rights in the land continue, namely that the rights granted to the Commonwealth were limited by legislative purpose and they were limited in duration.

118 The first respondents also sought to draw a limitation from the war time purposes of reg 54. It was said that the Commonwealth did not have an unqualified right to exclude others from access to the land "for any reason or no

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142 (1996) 187 CLR 1 at 184.

143 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 231 [35].

144 *Western Australia v Ward* (2002) 213 CLR 1 at 89 [78].

145 (1996) 187 CLR 1 at 169.

146 Holmes, "The Theory of Legal Interpretation", (1899) 12 *Harvard Law Review* 417 at 419.

reason", which is an aspect of a right of exclusive possession at common law. The Commonwealth could only exclude for a reason consistent with the purposes of the *National Security Act* 1939. However, it was not suggested that reg 54 and the Military Orders were not made consistently with that purpose. The first respondents did not explain why they say that the fact that the right of exclusive possession is limited to particular statutory purposes means that this possession is not inconsistent with native title rights.

119 It is the limited duration of reg 54 which assumes importance to the argument that it may be seen as intended that "all rights" continued. The real question is whether that feature of the regulation and the Military Orders is relevant to the continuance of native title rights and interests and to the question of their extinguishment.

120 It may be inferred that some rights and interests in the land continued in effect during the currency of reg 54 and the Military Orders. In *Minister for Interior v Brisbane Amateur Turf Club*[147], Dixon J observed that a right of possession could be granted under a lease, despite the Commonwealth being in actual possession under reg 54. Of course that right could not be exercised whilst the regulation and Military Orders remained in force. However, upon their cessation, rights of possession could be taken up or resumed and rights respecting the land which had been interfered with might be the subject of orders for compensation.

121 It is rights of these kinds, those of owner or tenant, which may be said to continue and be capable of resumption. The rights of such persons to possession and to access the land may be regarded, in a sense, as suspended by reg 54 and the Military Orders. Such rights cannot be equated with native title rights and interests and it is not possible to regard native title rights and interests as suspended by the grant of further interests.

122 Native title rights and interests are different from forms of common law tenure. Whilst native title rights and interests are recognised by the common law, they have an origin distinct from it. In *Fejo*[148], in the reasons of six members of this Court, it was explained that:

> "The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title. And yet the argument that a grant in fee simple does not extinguish, but merely suspends, native title is an

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147 (1949) 80 CLR 123 at 162; [1949] HCA 31.

148 (1998) 195 CLR 96 at 128 [46] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

> argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection." (emphasis in original)

123 The test of inconsistency of rights is predicated upon the fact that native title rights and interests are different from others and that they are affected by the grant of further rights over the land in a way different from other rights and interests in the land.

124 On the present state of the law it is irrelevant to the question of extinguishment of native title rights and interests that a right granted with respect to land is impermanent. As the majority in the Full Court observed[149], *Ward* establishes that even if temporary, a lease granting exclusive possession results in extinguishment. The majority accepted[150] that it was not possible to treat the native title rights as suspended by the Military Orders made under reg 54.

125 The majority sought to distinguish *Ward* on the basis of an imputed legislative intention. It was not suggested that reg 54 was of the exceptional kind of provision to which *Ward* referred[151], which might actually provide for suspension. For the reasons given above, the approach by the majority in the Full Court was incorrect.

Conclusion

126 It may be accepted that the legislative provisions in question were extraordinary war time powers and were limited in their duration. These features do not affect the test of inconsistency of rights which previous decisions of this Court apply as the criterion of extinguishment. The decisions of this Court do not permit native title rights and interests to be regarded as suspended when applying the test of inconsistency of rights, yet this appears to me to be the effect of the argument put for non-extinguishment. No challenge was made to what was said in *Ward* and other cases. It was not put in argument on this appeal that the test of inconsistency of rights should be revisited.

127 The appeal should be allowed. Question 3 in the Special Case should have been answered in the terms proposed by Hayne J. The orders of the Full Court of the Federal Court should be varied accordingly.

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149 *Congoo v Queensland* (2014) 218 FCR 358 at 376 [54].

150 *Congoo v Queensland* (2014) 218 FCR 358 at 376 [53].

151 *Western Australia v Ward* (2002) 213 CLR 1 at 91 [82].

128 BELL J. The facts, procedural history and terms of the relevant provisions of the *National Security Act* 1939 (Cth) ("the NSA") and the National Security (General) Regulations 1939 (Cth) ("the Regulations") are set out in the reasons of other members of the Court and need not be repeated save to the extent necessary to explain my reasons.

129 In issue is whether the making of the military orders extinguished all native title rights and interests then subsisting on the land the subject of the special case in the sense that recognition of those rights and interests under the common law was withdrawn. For the reasons that follow, I consider that the orders did have that effect.

130 The principles governing the withdrawal of the recognition of native title are firmly established. Native title rights and interests are extinguished by a sovereign act that is inconsistent with the continuing existence of those rights and interests[152]. Extinction may be brought about by rights conferred under laws of the Commonwealth Parliament or a State or Territory Parliament, or by valid executive act[153]. The test of inconsistency is objective: native title is extinguished by the conferral of rights that are inconsistent with continuance of the native title rights and interests regardless of whether the legislature or executive adverted to the existence of those rights and interests[154] ("the inconsistency of incidents test"). Application of the test requires the court to

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152 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69 per Brennan J, 110 per Deane and Gaudron JJ; [1992] HCA 23; *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; [1995] HCA 47; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-85 per Brennan CJ; [1996] HCA 40; *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 155 [112] per Kirby J; [1998] HCA 58; *Yanner v Eaton* (1999) 201 CLR 351 at 371-372 [35] per Gleeson CJ, Gaudron, Kirby and Hayne JJ; [1999] HCA 53; *Western Australia v Ward* (2002) 213 CLR 1 at 91 [82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; [2002] HCA 28; *Akiba v The Commonwealth* (2013) 250 CLR 209 at 240 [61] per Hayne, Kiefel and Bell JJ; [2013] HCA 33; *Western Australia v Brown* (2014) 88 ALJR 461 at 467 [33]; 306 ALR 168 at 175; [2014] HCA 8.

153 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 63-64 per Brennan J, 110-111 per Deane and Gaudron JJ, 195-196 per Toohey J; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84 per Brennan CJ.

154 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 85 per Brennan CJ, citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 68 per Brennan J and *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 422 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

identify and compare the incidents of the right granted with the native title rights that are asserted[155]. If continuation of the native title rights is logically inconsistent with the rights conferred or assumed by sovereign act, native title is extinguished.

131 The grant of an estate in fee simple extinguishes native title because 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[156]. Absent some reservation or qualification, the grant of an estate in fee simple is wholly inconsistent with any right of native title[157]. For the same reason, absent some reservation or qualification, the grant of a leasehold estate is wholly inconsistent with the continuance of native title rights and interests[158]. Native title rights do not "spring[] forth again" when land that has been the subject of a freehold or leasehold estate comes to be held again by the Crown[159]. Such is the vulnerability of native title that the grant of a lease for a term of short duration will extinguish it as effectively as the grant of an estate in fee simple.

132 Section 5(1)(b)(i) of the NSA empowered the Governor-General to make regulations for securing the public safety and defence of the Commonwealth, and the Territories of the Commonwealth, by taking possession or control, on behalf of the Commonwealth, of any property or undertaking. Regulation 54(1) of the Regulations empowered the Minister of State for the Army ("the Minister"), in a case in which it appeared to the Minister to be necessary or expedient in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community (collectively, "the interests of defence"), to take possession of any land on behalf of the Commonwealth and to give such directions as appeared to the Minister to be necessary or expedient in that connection.

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155 *Western Australia v Ward* (2002) 213 CLR 1 at 89-91 [78]-[82] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Western Australia v Brown* (2014) 88 ALJR 461 at 467 [33]; 306 ALR 168 at 175.

156 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

157 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

158 *Western Australia v Ward* (2002) 213 CLR 1 at 182 [369]-[370] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

159 *Fejo v Northern Territory* (1998) 195 CLR 96 at 131 [58] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

133 While land was in the Commonwealth's possession under reg 54(1), the land could be used for such purposes and in such manner as the Minister considered expedient in the interests of defence, notwithstanding any restriction imposed on its use by law or otherwise[160]. The Minister was empowered by reg 54(2)(a) so far as he considered it to be necessary or expedient in connection with the taking of possession or the use of the land to authorise persons to do anything in relation to the land which a person having an unencumbered interest in fee simple in the land would be entitled by virtue of that interest to do. The Minister was empowered by reg 54(2)(b) to prohibit or restrict the exercise of rights of way over the land, and any other rights relating to the land enjoyed by any person, whether by virtue of an interest in the land or otherwise.

134 The Commonwealth took possession of the land under the military orders and conferred the fullest powers on an identified officer (and persons authorised by that officer) under reg 54(2)(a) and (b).

135 For the purposes of the special case, it was accepted that at the time sovereignty was acquired over the land, the Bar-Barrum People held native title rights and interests in relation to the land. These were non-exclusive native title rights and interests including the right to access and move about on the land, to camp, hunt, fish and gather on the land and waters, to take and use natural resources from the land and waters, to conduct ceremonies, to maintain places of significance under the traditional laws and customs of the Bar-Barrum People and to protect those places from physical harm, to teach the physical and spiritual attributes of the land, to hold meetings and to be buried on the land.

136 How is it suggested that the Bar-Barrum People's native title rights and interests, all of which depended upon access to the land, survived the making of the military orders by which the Commonwealth took possession of the land?

137 Each of the members of the Full Court of the Federal Court of Australia (North, Logan and Jagot JJ) accepted that the right taken by the Commonwealth under the military orders was a right of exclusive possession of the land[161]. The majority, North and Jagot JJ, distinguished the Commonwealth's right of exclusive possession from the right of exclusive possession that is conferred by the grant of an estate in the land[162]. Their Honours took into account that the Commonwealth's statutory right was assumed for a limited purpose and was of limited duration under a regulatory scheme which recognised the continuation of

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160 Regulations, reg 54(2).

161 *Congoo v Queensland* (2014) 218 FCR 358 at 375-376 [52] per North and Jagot JJ, 391 [112], 392 [115] per Logan J.

162 *Congoo v Queensland* (2014) 218 FCR 358 at 375-376 [52].

existing rights and interests in the land[163]. The latter recognition was evident in the requirement of reg 54(3) that the owner or occupier of the land supply information relating to the land[164]. It was also evident in the provision in reg 60D for compensation in the case of loss or damage occasioned by the Commonwealth's exercise of its rights under reg 54[165].

138 It was not necessary to the Full Court majority's analysis to compare the incidents attaching to the Commonwealth's right of possession with the incidents of the native title rights and interests claimed by the Bar-Barrum People. Their Honours characterised the inconsistency of incidents test as an analytical tool that assists the court to ascertain objective legislative intention[166]. Their Honours identified the requisite intention as an intention that native title rights are no longer recognised by the common law[167]. They rejected the proposition that applying the inconsistency of incidents test might produce a different result to ascertainment of legislative intention because "rights granted or asserted by the Crown cannot rise above their statutory source"[168]. By way of illustration, their Honours pointed out that the grant of an estate conferring exclusive possession by the Crown as radical title holder evinces the intention to extinguish native title because the grant of exclusive possession is inconsistent with the continued recognition of native title; whereas here, the Commonwealth did not hold the radical title to the land and was "indifferent to the nature and extent of pre-existing interests" in it[169]. Their Honours concluded that the Commonwealth had taken to itself a right of possession, prohibiting others from exercising their rights in relation to the land, in circumstances in which the regulatory scheme recognised underlying rights and interests[170]: in the circumstances, the Commonwealth was not to be imputed with an objective intention to extinguish native title rights and interests[171].

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163 *Congoo v Queensland* (2014) 218 FCR 358 at 376 [53].

164 *Congoo v Queensland* (2014) 218 FCR 358 at 368 [27].

165 *Congoo v Queensland* (2014) 218 FCR 358 at 369 [27].

166 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [50].

167 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [50].

168 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [50].

169 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [51].

170 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [51].

171 *Congoo v Queensland* (2014) 218 FCR 358 at 375 [52].

139 The Full Court majority's analysis cannot stand with authority, predicated as it is upon the view that extinguishment of rights conferred by or under statute turns upon the existence of an objective legislative intention to effect extinguishment. The joint reasons in *Western Australia v Ward* caution that the need to demonstrate a "clear and plain intention" that native title is extinguished is apt to mislead[172]. In the case of rights granted by or under statute, consideration of legislative intention is directed to the nature and content of the right. The test for extinguishment under common law does not depend upon identification of an ahistorical legislative intention to extinguish rights which before 1992 were not understood to have survived European settlement[173]. As Gleeson CJ put it in *Wilson v Anderson*, extinguishment of native title arises from the inconsistency in the incidents of the two sets of rights and not from the existence of a purpose of abrogating native title rights or interests[174].

140 That the test for extinguishment is as stated in the joint reasons in *Ward* was most recently affirmed by the Court in *Western Australia v Brown*[175].

141 The Bar-Barrum People and the Commonwealth rely on the same features of the regulatory scheme as were identified by the Full Court majority: possession was assumed for a limited purpose, and was of limited duration, under a scheme which recognised the continuation of existing rights and interests in the land. The Bar-Barrum People and the Commonwealth seek to rely on these features not for ascertainment of legislative intention but because they are said to define the nature of the right that the Commonwealth took.

142 The Bar-Barrum People and the Commonwealth acknowledge that on the day the Commonwealth took possession of the land it assumed the right to refuse access to the land to all persons, including those having an interest in the land. Each distinguishes the Commonwealth's right of possession under the military orders from the possession conferred on the holder of an estate in fee simple by reason of the purpose of the possession. They argue that the Commonwealth's right did not permit it to exclude persons from the land "for any reason or no

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172 (2002) 213 CLR 1 at 89 [78] per Gleeson CJ, Gaudron, Gummow and Hayne JJ. See also *Akiba v The Commonwealth* (2013) 250 CLR 209 at 240 [62] per Hayne, Kiefel and Bell JJ.

173 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 184-185 per Gummow J; *Akiba v The Commonwealth* (2013) 250 CLR 209 at 229-230 [31] per French CJ and Crennan J.

174 (2002) 213 CLR 401 at 417 [6]; [2002] HCA 29.

175 (2014) 88 ALJR 461 at 467 [33]; 306 ALR 168 at 175.

reason". The submission evokes the statement in *Brown* with respect to the mineral leases that were there under consideration[176].

143 In *Brown*, the grant under each "mineral lease" was expressed to be subject to the terms, covenants and conditions set out in the agreement between Western Australia and the joint venturers[177]. This agreement required the joint venturers to allow Western Australia and third parties access to the land covered by the mineral leases provided that access did not unduly prejudice or interfere with the joint venturers' operations[178]. The provision precluded construing the mineral leases as providing a right of exclusive possession[179]. The rights under the mineral leases were not relevantly different from the rights under the pastoral leases considered in *Wik Peoples v Queensland*[180]. The capacity for the non-exclusive native title rights and interests of the Ngarla People to co-exist with the rights conferred on the joint venturers under the mineral leases in *Brown* was demonstrated by consideration of the position that would have obtained on the day following the grant of the first mineral lease: on that day the Ngarla People could have exercised all of the rights that were the subject of their native title claim anywhere on the land without breach of any right granted to the joint venturers[181].

144 What rights were assumed by the Commonwealth under the military orders? Each conferred rights on the Commonwealth to the full extent of the powers provided by reg 54. As earlier noted, reg 54 was made pursuant to s 5(1)(b)(i) of the NSA, which authorised the making of regulations for "the taking of possession or control, on behalf of the Commonwealth, of any property or undertaking". "Possession" was not defined in the NSA or the Regulations. In *Minister of State for the Army v Dalziel*[182], possession was treated as having its general law meaning in the law of property. Possession consists of an element of

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176 (2014) 88 ALJR 461 at 469 [46]; 306 ALR 168 at 177.

177 (2014) 88 ALJR 461 at 465 [13]; 306 ALR 168 at 171.

178 *Western Australia v Brown* (2014) 88 ALJR 461 at 464 [8]; 306 ALR 168 at 170.

179 *Western Australia v Brown* (2014) 88 ALJR 461 at 469 [46]; 306 ALR 168 at 178.

180 (1996) 187 CLR 1. See *Western Australia v Brown* (2014) 88 ALJR 461 at 471 [57]; 306 ALR 168 at 179. See also *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69 per Brennan J.

181 (2014) 88 ALJR 461 at 471 [57]; 306 ALR 168 at 180.

182 (1944) 68 CLR 261; [1944] HCA 4.

control over, and the intention to possess, that which is possessed[183]. Possession of land exists where a person is in a position to "control access to [land] by others and, in general, decide how the land will be used"[184]. By its nature, the concept of possession carries with it the ability to exclude others: "Exclusivity is of the essence of possession."[185] It follows, as McHugh J has observed, that the adjective "exclusive" does not add to an understanding of the concept of possession in law because possession that is not exclusive is a contradiction in terms[186].

145 In *Dalziel*, Williams J characterised the right taken by the Commonwealth under a military order (in relevantly the same terms as the military orders with which this appeal is concerned) as giving the Commonwealth, for an indefinite period, an exclusive right to possess the land against the whole world, including against persons rightfully entitled to the possession of the land at common law[187]. This description of the nature of the Commonwealth's right is consistent with the statements of the other Justices who formed the majority in concluding that it was a right of property and within the reach of s 51(xxxi) of the Constitution[188].

146 On 20 December 1943, by an order ("the first military order") made pursuant to reg 54(1) under an instrument of delegation, Francis Roger North, Colonel, did "HEREBY on behalf of the Commonwealth, TAKE POSSESSION of the [land described in the Schedule to this order]". By the same order, under reg 54(1), Francis Roger North, Colonel, directed in connection with the taking of possession of the land that personnel were to occupy the land using as far as

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183 *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 445 [70] per Lord Hope of Craighead; Lightwood, *A Treatise on Possession of Land*, (1894) at 9-20; Holmes, *The Common Law*, (1882) at 216; Pollock and Wright, *An Essay on Possession in the Common Law*, (1888) at 11-14, 28-36.

184 *Western Australia v Ward* (2002) 213 CLR 1 at 82 [52] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

185 *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at 445 [70].

186 *Western Australia v Ward* (2002) 213 CLR 1 at 214-215 [477], 223 [502]-[503]. See also *Clement v Jones* (1909) 8 CLR 133 at 139 per Griffith CJ; [1909] HCA 11; *Georgeski v Owners Corporation SP49833* (2004) 62 NSWLR 534 at 547 [41]; Hill, "The Proprietary Character of Possession", in Cooke (ed), *Modern Studies in Property Law, Volume 1: Property 2000*, (2001) 21 at 26-27.

187 (1944) 68 CLR 261 at 299.

188 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 286 per Rich J, 290 per Starke J, 295 per McTiernan J.

was practicable existing means of access and that all personal property on the land was to be removed. By the same order, pursuant to reg 54(2)(a), Francis Roger North, Colonel, authorised the persons occupying the land to do in relation to the land anything which any person having an unencumbered interest in the land would be entitled to do by virtue of that interest and, pursuant to reg 54(2)(b), directed that no person should exercise any right of way over the land or any other right relating to the land whether by way of an interest in land or otherwise. The reg 54(2)(a) direction served, among other things, to permit the removal of structures from the land or the erection of structures upon it. The reg 54(2)(b) direction denied the holders of any incorporeal hereditaments the exercise of their rights while the Commonwealth remained in possession of the land[189].

147 The Commonwealth submits that it did not take possession of the land by the making of the first military order and that some further manifestation of the intention to possess was required. It submits that a party wishing to establish extinguishment of native title rights and interests must prove not just the making of a military order under reg 54 but also that "possession was taken in pursuance of such a direction under reg 54(1)". It is unnecessary to address the Commonwealth's submission in circumstances in which, were some manifestation of intention required in addition to the intention manifest by the making of the order, that intention is plainly supplied on the facts of the special case. At about the time the first military order was made, the Commonwealth physically occupied at least some of the land. The Commonwealth used the land as an artillery range and a live fire manoeuvre range for training infantry and armoured units.

148 The Commonwealth was in possession of the whole of the land identified in the Schedule to the first military order on and from 20 December 1943. Each succeeding order cancelled any previous order so far as it affected the land. The second order did not cover all of the land covered by the first and to that extent it would seem the first order remained in force. The last three orders covered all the land covered by the second order together with additional land. The Commonwealth ceased to occupy any part of the land on or about 31 August 1945.

149 The Bar-Barrum People's native title rights and interests based upon their traditional laws and customs were not rights of the kind to which the direction under reg 54(2)(b) was directed. The logical inconsistency between the Bar-Barrum People's native title rights and interests and those of the Commonwealth was the Commonwealth's right of possession under reg 54(1). The fact that the right was conferred under the authority of a legislative

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189 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 301 per Williams J.

instrument and not as an incident of the grant of an estate in the land does not alter relevantly the nature of the possession that the Commonwealth took.

150 The Bar-Barrum People's and the Commonwealth's submissions, which dispute that the Commonwealth's possession of the land was a right to exclude persons from it for any reason or no reason, conflate the condition for the exercise of the power under reg 54(1) with the right of possession which valid exercise of the power conferred. The delegate was satisfied that possession of the land was necessary or expedient in the interests of defence. That being so, the delegate took possession of the land on behalf of the Commonwealth and thereby assumed the right to exclude the whole world from it.

151 The Bar-Barrum People's and the Commonwealth's submissions which seek to qualify the Commonwealth's right of possession by reference to its limited, if indefinite, duration and the provision for compensation for loss and damage occasioned by its exercise must be rejected. Inconsistency in the incidents of the two sets of rights is to be determined as a matter of law at the date the Commonwealth took the right. The logical inconsistency between the two sets of rights is demonstrated by considering the position which would have obtained on the day following the making of the first military order[190]. On that day, the Bar-Barrum People could not in law have exercised any of the native title rights and interests that are the subject of their claim.

152 The Commonwealth proposes that common law recognition of native title is not so infirm that it cannot conceive of "a distinction between the tree and the fruit". This is in aid of the submission that the Commonwealth took its right of possession upon the footing that native title rights and interests, along with all other interests in the land, were subsisting during the interval of the war and that money compensation was substituted for the ability to exercise the rights. Conceptually, the argument confronts the same difficulty as the contention that native title is suspended during an interval created by the conferral of a freehold estate. That contention was rejected in *Fejo v Northern Territory*. In their joint reasons in that case, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ observed that it is an argument that seeks to convert the fact of continued connection with the land into a right to maintain that connection[191].

153 Settled authority, which no party in this appeal seeks to challenge, is against acceptance that the Bar-Barrum People's native title rights and interests survived the Commonwealth's possession of the land taken under temporary war-time powers.

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190 See *Western Australia v Brown* (2014) 88 ALJR 461 at 471 [57]; 306 ALR 168 at 180.

191 (1998) 195 CLR 96 at 128 [46].

154 The appeal should be allowed and orders made in the terms proposed by Hayne J.

155 GAGELER J. The ultimate issue in the appeal is whether the rights and interests possessed by the Bar-Barrum people under their traditional laws and customs "are recognised by the common law of Australia" within the meaning of s 223(1)(c) of the *Native Title Act* 1993 (Cth). The common law "recognises" native title rights and interests in the sense that "by the ordinary processes of law and equity, [it will] give remedies in support of the relevant rights and interests to those who hold them"[192]. Native title rights and interests once but no longer so recognised by the common law are said to be "extinguished"[193].

156 It must now be treated as settled that the common law ceases to recognise a native title right at the point in time of the creation of an "inconsistent" right by or pursuant to legislation[194]. The common law test is one of "logical antinomy" of rights[195]. The test involves asking whether the existence of the right created by or pursuant to legislation necessarily implies the non-existence of the native title right[196]. The test is not adequately captured merely by asking whether the two rights could be exercised concurrently[197]. The test is more appropriately captured by asking whether the existence of the right created by or pursuant to legislation is "inconsistent with the native title holders *continuing to hold* any of the rights or interests which together make up native title"[198].

157 There is no reason in principle why the common law should adopt any different approach when it comes to consideration of the effect of legislation imposing a prohibition on the continued recognition of native title rights. The only question should be whether a particular prohibition is necessarily inconsistent with the continued existence of a particular native title right. That

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192 *The Commonwealth v Yarmirr* (2001) 208 CLR 1 at 49 [42]; [2001] HCA 56.

193 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 219-220 [10]; [2013] HCA 33.

194 *Fejo v Northern Territory* (1998) 195 CLR 96 at 131 [58]; [1998] HCA 58.

195 *Western Australia v Brown* (2014) 88 ALJR 461 at 468 [38]; 306 ALR 168 at 176; [2014] HCA 8.

196 *Western Australia v Brown* (2014) 88 ALJR 461 at 471 [56]; 306 ALR 168 at 179.

197 *Western Australia v Brown* (2014) 88 ALJR 461 at 470 [50]-[53]; 306 ALR 168 at 178-179.

198 *Fejo v Northern Territory* (1998) 195 CLR 96 at 126 [43] (emphasis added). See also *Yanner v Eaton* (1999) 201 CLR 351 at 371-372 [35]; [1999] HCA 53.

would not ordinarily be so in the case of a prohibition of the exercise of the native title right which is partial, temporary or conditional[199].

158 The statement in *Western Australia v The Commonwealth* (*Native Title Act Case*)[200] that, at common law, "native title can be extinguished or impaired by a valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title" must be understood in light of the footnoted reference to the reasons for judgment of Brennan J in *Mabo v Queensland [No 2]*[201]. Having explained (as he later summarised it) that "[t]he rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title"[202], his Honour said (in the passage referenced in the *Native Title Act Case*) that "[a] clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control that is consistent with the continued enjoyment of native title"[203].

159 There are many references in the native title case law to the need to discern a "clear and plain intention" to extinguish native title in a valid exercise of sovereign power in order to conclude that native title has been extinguished at common law. They are to be understood as directed to the judicial determination of the scope of legal change wrought by an exercise of sovereign power – relevantly, for present purposes, to the judicial determination of the incidents of a legislatively conferred right or of the ambit of a legislatively imposed prohibition. So understood, they have, as French CJ and Keane J put it in the present case, "normative force"[204]: they inform constructional choice. They are

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199 *Akiba v The Commonwealth* (2013) 250 CLR 209 at 229 [29]; *Karpany v Dietman* (2013) 88 ALJR 90 at 94-96 [18]-[27]; 303 ALR 216 at 221-223; [2013] HCA 47.

200 (1995) 183 CLR 373 at 439; [1995] HCA 47.

201 (1992) 175 CLR 1 at 64; [1992] HCA 23. See (1995) 183 CLR 373 at 439 footnote 208.

202 (1992) 175 CLR 1 at 69. See (1992) 175 CLR 1 at 58-64.

203 (1992) 175 CLR 1 at 64 (footnotes omitted).

204 At [37].

not inherently in tension with the common law test being one of "logical antinomy" of rights[205]. To the contrary, they inform one aspect of its application.

160 In my opinion, nothing in the regime of control created by reg 54 of the National Security (General) Regulations 1939 (Cth) was inconsistent with the continued existence of native title rights (or of any other rights) in connection with the land in respect of which the Minister, on behalf of the Commonwealth, took "possession" under reg 54(1) and, "by order" under reg 54(2)(b), made provision "prohibiting or restricting the exercise of … rights relating thereto which are enjoyed by any person".

161 The word "possession", standing alone, connotes a high degree of intentional control over the thing possessed, but the word has never acquired a more definite connotation in law or in ordinary speech[206]. There is, in my opinion, no reason to equate "possession" in reg 54(1) with "exclusive possession" ("the right to exclude any and everyone from any and all parts of the land for any reason or no reason"[207]). The regulation did not say "exclusive possession". *Minister of State for the Army v Dalziel*[208] does not support reading "possession" to mean "exclusive possession". *Minister for Interior v Brisbane Amateur Turf Club*[209], holding that a lease could be granted for a term which commenced while the Commonwealth remained in possession under the regulation, is against it.

162 *Dalziel* is relevantly authority for the proposition that, by taking "possession" under reg 54(1), the Commonwealth obtained a "qualified right to possess ... in the nature of property which [was] valid against everyone who [could not] show a prior and better right"[210]. The nature and extent of the qualified right of possession under reg 54(1) was necessarily dependent on the statutory incidents which reg 54(2) attached to that possession.

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205 *Western Australia v Ward* (2002) 213 CLR 1 at 89 [78]; [2002] HCA 28, referring to *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; [1996] HCA 40; *Wilson v Anderson* (2002) 213 CLR 401 at 416-419 [4]-[10]; [2002] HCA 29.

206 See Douglas, "Is Possession Factual or Legal?", in Descheemaeker (ed), *The Consequences of Possession*, (2014) 56.

207 *Western Australia v Brown* (2014) 88 ALJR 461 at 471 [57]; 306 ALR 168 at 179.

208 (1944) 68 CLR 261; [1944] HCA 4.

209 (1949) 80 CLR 123; [1949] HCA 31.

210 (1944) 68 CLR 261 at 285, quoting Pollock and Wright, *An Essay on Possession in the Common Law*, (1888) at 93.

163 Accordingly, as Starke J put it in *Dalziel*[211]:

> "Nothing is gained by comparing the right given by reg 54 to the Commonwealth with various estates or interests in land of limited duration or with rights over the land of another recognized by the law, for it is a right created by a statutory regulation and dependent upon that regulation for its operation and its effect."

164 The first of the statutory incidents which reg 54(2) attached to possession of land under reg 54(1), set out in the introductory words of reg 54(2), was a power to "use" any (but not necessarily all) of the land "for such purpose, and in such manner, as [the Minister] thinks expedient in the interests of the public safety or the defence of the Commonwealth". The second, set out in reg 54(2)(a), was a power (similarly limited as to purpose) to do, or authorise the doing of, in relation to the land, "anything which any person having an unencumbered interest in fee simple in the land would be entitled to do by virtue of that interest". The third was that set out in reg 54(2)(b).

165 The language of reg 54(2)(a) constructed a legal fiction and ought not in principle be construed as having had a legal operation beyond that required to achieve the object of its inclusion[212]. To the extent that reg 54(2)(a) allowed the Minister to exclude other persons from the land, it ought not be read as having allowed for the exclusion of persons who had pre-existing rights to be on the land. Those persons were to be excluded, if at all, by the making of an order of prohibition or restriction under reg 54(2)(b)[213].

166 That construction of reg 54(2)(b), as providing the sole source of power to exclude persons having pre-existing rights to be on the land, is significant in two respects. One is that, by the terms in which it was expressed as well as by the nature of the power it conferred, reg 54(2)(b) expressly acknowledged the continuing existence of all such pre-existing rights irrespective of the source of those rights. The other is that the most that reg 54(2)(b) permitted to happen by order was prohibition of the exercise of those rights for the inherently temporary period which defined the maximum life of the regulations: "not longer than six months after His Majesty ceases to be engaged in war"[214]. The existence of that

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211 (1944) 68 CLR 261 at 290.

212 *Wellington Capital Ltd v Australian Securities and Investments Commission* (2014) 89 ALJR 24 at 37 [51]; 314 ALR 211 at 227; [2014] HCA 43.

213 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9.

214 *National Security Act* 1940 (Cth), s 9.

prohibition was logically consistent with (indeed it was premised on) the continued existence of the rights the exercise of which was temporarily prohibited.

167 If I were to interpret reg 54 as having conferred a right on the Commonwealth (under reg 54(1)) or a power on the Minister (under reg 54(2)(a)) to exclude persons who had pre-existing rights to be on the land, I would still not hold the regime of control created by reg 54 to have extinguished the rights and interests possessed by the Bar-Barrum people under their traditional laws and customs. In those circumstances, I would agree with the reasoning in the antepenultimate paragraph of the reasons for judgment of French CJ and Keane J[215].

168 The right of the Commonwealth or power of the Minister to exclude persons who had pre-existing rights to be on the land, on that alternative interpretation of reg 54, would still not have been to exclude anyone from any or all of the land for any purpose. It would at most have been a limited purposive right or power to exclude, relevantly indistinguishable from those conferred on the lessees of the mining leases whose "exclusive possession" for mining purposes was held not to extinguish native title rights in *Western Australia v Ward*[216]. That holding illustrates the proposition that a right or power conferred for a statutory purpose, to be exercised for that purpose, is not inconsistent with native title holders continuing to hold rights or interests under their traditional laws and customs which remain recognised by the common law merely because an exercise of that right or power might prevent native title holders from exercising or enjoying those rights or interests[217].

169 For these reasons, I agree with French CJ and Keane J that the appeal should be dismissed with costs.

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215 At [38].

216 (2002) 213 CLR 1 at 165-166 [307]-[308], 172 [326], 174 [331].

217 See also *Western Australia v Brown* (2014) 88 ALJR 461 at 464 [8], 468 [36], 469 [46], 471 [55]-[57], 472 [63]; 306 ALR 168 at 170, 175-181.