

QUEENSLAND V CONGOO: THE CONFUSED RE-EMERGENCE OF A RATIONALE OF EQUALITY?

ZOE BUSH*

In State of Queensland v Congoo [2015] HCA 17 (13 May 2015), the High Court applied principles of extinguishment to determine the effect of military orders under reg 54 of the National Security (General) Regulations 1940 (Cth) on the native title rights and interests of the Bar-Barrum People. The Court's split decision casts questions of extinguishment back to the 'legal jungle'. Amongst the thicket, the re-emergence of a 'rationale of equality' can be glimpsed in the statutory majority's emphasis on the standard of 'clear and plain intention'. The requirement of a clear and plain legislative intention to expropriate existing property rights without compensation is well established. On the 800th anniversary of the Magna Carta, its extension to the extinguishment of native title would accord with the fundamental rule of law in c 29 that '[n]o Freeman shall... be desseised... but by... the law of the Land'.

I INTRODUCTION

*Queensland v Congoo*¹ is the most recent High Court decision regarding the common law principles of extinguishment of native title. The case concerned the effect of military orders under reg 54 of the *National Security (General) Regulations 1940* (Cth) ('*Regulations*') over land that was later subject to a native title claim by the Bar-Barrum People in 2001. Despite all purporting to apply the test of inconsistency of rights in *Western Australia v Ward*,² the Court delivered a decision split three to three. Pursuant to s 23(2)(a) of the *Judiciary Act 1903* (Cth), the appeal from the decision of the Full Federal Court in *Congoo v Queensland*³ was dismissed. Consequently, the Full Federal Court's decision that the orders did not extinguish native title rights and interests was affirmed. The divide hinged on whether the *Regulations* and orders conferred 'exclusive possession' on the Commonwealth in the sense of an unqualified

* Final year BA/LLB(Hons) student at the University of Western Australia, and recipient of the 2015 Ciara Glennon Memorial Law Scholarship.

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¹ [2015] HCA 17 (13 May 2015) ('*Congoo*').

² (2002) 213 CLR 1 ('*Ward*').

³ [2014] FCAFC 9 (21 February 2014).

right to exclude others from access to the land ‘for any reason or no reason’.

However, the divide was more fundamental than considerations of fact. The relevance of ‘statutory purpose’ or ‘legislative intention’ to questions of extinguishment is unclear in the judgment. The mostly superficial disagreement over the nomenclature of ‘exclusive possession’ is distracting, and its potential to obscure the critical question of extinguishment is exemplified by its erroneous application in the joint judgment of French CJ and Keane J. The utility of past authority regarding the *Regulations* and forms of common law tenure is questionable.

Crucially, the priority afforded to the ‘standard’ of ‘clear and plain intention’ in the judgments of the statutory majority (French CJ, Keane and Gageler JJ) appears to facilitate the use of ‘statutory purpose’ in determining inconsistency. On their Honours’ own admission, this is impermissible on existing authority.⁴ The attempt to reconcile this approach with that required by *Ward*, results in judgments riddled with legal and logical flaws.

Amongst the confusion, the potential re-emergence of a ‘rationale of equality’⁵ can be glimpsed in the statutory majority’s emphasis on ‘clear and plain intention’. As a test founded on the clear and plain legislative intention required to expropriate all property interests without compensation,⁶ *Congoo* holds the potential to afford native title rights and interests equal treatment to those sourced in the common law. On its 800th anniversary, it is poignant to recall the now fundamental rule of law in c 29 of the *Magna Carta*, and expressed in Australia’s constitutional and legal fabric,⁷ that ‘[n]o Freeman shall... be desseised... but by... the law of the Land’.

However, the resulting logical inconsistencies of the judgments forebode the incoherence that a failure to engage in more fundamental principles of extinguishment will bring.

⁴ *Congoo* [2015] HCA 17 (13 May 2015), [27].

⁵ Richard Bartlett, ‘The *Wik* Decision and Implication for Resource Development’ (1997) 16 *Australian Mining and Petroleum Law Journal* 27.

⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ), 195 (Toohey J) (*Mabo (No 2)*); *Wik Peoples v Queensland* (1996) 187 CLR 1, 111 (Gaudron J), 222-223 (Kirby J) (*Wik*).

⁷ Under s 51(xxxi) of the *Commonwealth Constitution*, Commonwealth Parliament only has power to make laws with respect to the acquisition of property on just terms. The payment of compensation for land resumed by the Crown, either in the right of the Commonwealth or a state, is required by legislation: *Land Acquisition Act 1989* (Cth); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW); *Land Acquisition and Compensation Act 1986* (Vic); *Land Administration Act 1997* (WA).

II PRELIMINARY ISSUES

A *Facts and Procedural History*

In 2001, the Bar-Barrum People made an application for a determination of native title over the Artherton Tableland in the State of Queensland. Between 1943 and 1945, the Commonwealth possessed part of the claimed land pursuant to military orders made under the *National Security Act 1939* (Cth) and its *Regulations*.

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 parties accepted that, subject to potential extinguishment, the Bar-Barrum People had native title rights and interests over the land.

A two to one majority of the Full Court of the Federal Court (North and Jagot JJ, Logan J dissenting) held the military orders did not have the effect of extinguishing the Bar-Barrum People's native title rights and interests.

The State of Queensland (*the Appellant*) then applied for special leave to appeal to the High Court. This was granted on 4 September 2014.

B *The Regulations and Orders*

Five military orders of substantially similar form and content were made pursuant to the Regulations over the claimed land between 1943 and 1945. These provided for:

- a) the Commonwealth to take possession of the land;
- b) the Commonwealth's ability to do anything in relation to the land that a 'person having an unencumbered interest in the fee simple in the land would be entitled to do by virtue of that interest'; and
- c) the prohibition on any person exercising a 'right of way over the land or any other right relating' to it.

The potential problems for the Appellant were the purposes for which the powers in reg 54 of the *Regulations* had to be exercised, and its apparent contemplation of the continuance of underlying rights in land possessed by the Commonwealth. Relevantly, reg 54 provided for:

- 1) the Minister of State of the Army to, where it appeared 'necessary or expedient' to do so in the interests of public safety, defence, prosecution

of the war, or the maintenance of supplies and service, take possession of any land;

- 2) the Minister, where it appeared ‘necessary or expedient’ in connection with the taking of possession or use of the land, to –
 - a) do, or authorise persons so using the land to do, anything that a ‘person having an unencumbered interest in the fee simple in the land would be entitled to do by virtue of that interest’; and
 - b) prohibit or restrict the exercise of ‘rights of way over the land, and of other rights relating thereto’.
- 3) the obligations of owners and occupiers of possessed land to provide any information they possessed in relation to the land upon the Minister’s request.

Further, compensation was provided for persons who suffered loss or damage by reason of anything done in pursuance of reg 54 in relation to property that they had a legal interest or right in.⁸ Periodical payments were available in respect of a continuing interference with rights.

Another potential problem was the temporary nature of possession. Section 19 of the *National Security Act 1939* (Cth), the Act under which the *Regulations* were made, provided for the Act’s continued operation ‘during the present state of war and for a period of six months thereafter’.

The Appellant submitted the orders nonetheless conferred ‘exclusive possession’ on the Commonwealth in the sense of an unqualified right to exclude others from access to the land ‘for any reason or no reason’. This right to exclusive possession was inconsistent with, and consequently extinguished, the native title rights and interests of the Bar-Barrum People.⁹

The High Court delivered a decision split three to three. The appeal from the decision of the Full Federal Court in *Congoo v Queensland*¹⁰ was consequently dismissed pursuant to s 23(2)(a) of the *Judiciary Act 1903* (Cth). The military orders did not have the effect of extinguishing the Bar-Barrum People’s native title rights and interests in the land. French CJ, Keane and Gageler JJ compromised the statutory majority.

⁸ *Regulations* reg 60D(1)(a).

⁹ *Fejo v Northern Territory of Australia* (1998) 195 CLR 96, 128 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (*‘Fejo’*).

¹⁰ [2014] FCAFC 9 (21 February 2014).

III LEGAL ISSUES

A *Bird's Eye View of Extinguishment*

Before turning to the judgments in *Congoo*, it is useful to briefly outline the common law principles governing extinguishment of native title. 'Extinguishment' means that 'native title rights and interests cease to be recognised by the common law'.¹¹ This does not affect the native title rights and interests themselves, which may nonetheless continue under the traditional laws and customs in which they are sourced.¹²

1 *Establishing Extinguishment*

The majority in *Mabo (No 2)* held the common law will cease to recognise native title rights and interests where a legislative or executive act evinces a 'clear and plain intention'.¹³ This was confirmed by the High Court after the enactment of the *Native Title Act 1993* (Cth) in *Ward*.¹⁴ The form of a legislative or executive act may be twofold. It may either grant a right or interest in land or waters, or affect the use of land and waters by legislation or legislative instrument.¹⁵

For legislative or executive acts that grant a right or interest in land or waters, the established test for extinguishment is inconsistency between the legislative rights granted and the native title rights and interests claimed.¹⁶ This is 'an objective inquiry which requires identification of and comparison between the two sets of rights'.¹⁷ As a matter of law, inconsistency if not determined by the exercise of the granted right, and is therefore determined at the time of the grant.¹⁸ Inconsistency is established if one right necessarily implies the non-existence of the other due to a logical antinomy between

¹¹ *Akiba v Commonwealth of Australia* (2013) 250 CLR 209, 219 [10] (French CJ and Crennan J) ('*Akiba*').

¹² *Wik* (1996) 187 CLR 1, 213 (Kirby J); Justice Robert French and Patricia Lane, 'The Common Law of Native Title in Australia' (2002) 2 *Oxford University Commonwealth Law Journal* 15 at 28.

¹³ (1992) 175 CLR 1, 64 (Brennan J), 15 (Mason CJ and McHugh J), 111 (Deane and Gaudron JJ), 195 (Toohey J).

¹⁴ *Ward* (2002) 213 CLR 1, 89 [78]-[79] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁵ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 418 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

¹⁶ *Ward* (2002) 213 CLR 1; *Western Australia v Brown* (2014) 306 ALR 168, 175 [33] ('*Brown*').

¹⁷ *Ward* (2002) 213 CLR 1, 89 [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Brown* (2014) 306 ALR 168, [33].

¹⁸ *Brown* (2014) 306 ALR 168, 178 [51].

them.¹⁹ Consequently, the exclusive possession of land, in the sense of a right to exclude any and everyone from the land for any or no reason, has been held to have the effect of extinguishing native title rights and interests.²⁰

A different test for legislation or legislative instruments that effect the use of land or waters was suggested by French CJ and Crennan J in *Akiba*.²¹ However, their Honours did not articulate the implications of this distinction for determining extinguishment, and it did not effect the test applied by the rest of the Court.²² On existing authority, the test for extinguishment in *Ward* applies to both forms of legislative or executive acts.

2 *The Effect of Extinguishment*

It does not appear possible to revive a native title right or interest once it has been extinguished. In obiter, the Court in *Brown* treated its decision in *Fejo* as authority for this broader proposition, rather than being limited to the effect of a grant of fee simple.²³

However, in obiter, the majority in *Ward* contemplated questions of suspension arising if there is a particular statutory provision to the contrary.²⁴ The bounds of this possibility were tested in *Brown*. The mineral leases concerned expressly required their holders to allow the State and third parties to have access over the land subject to the leases, provided that the access did not ‘unduly prejudice or interfere with’ the lease holders’ operations. The High Court unanimously held the mineral leases were not inconsistent with the native title rights and interests of the Ngarla People. However, to the extent of any competition between the *exercise* of these rights, those under the mineral leases took priority. When the exercise of rights under the mineral leases ceased, the native title rights and interests remained.²⁵ The native title rights and interests were therefore liable to suspension.

B *Characterisation of the Right*

¹⁹ *Ibid* [38].

²⁰ *Ward* (2002) 213 CLR 1, 182 [370], 201 [439], 210 [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 239 [555] (McHugh J), 250 [589] (Kirby J), 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] (Callinan J); *Fejo* (1998) 195 CLR 96, 128 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

²¹ *Akiba* (2013) 250 CLR 209, 231 [35].

²² *Ibid* 237 [51]-[52] (Hayne, Kiefel and Bell JJ).

²³ *Brown* (2014) 306 ALR 168, 176 [39], citing *Fejo* (1998) 195 CLR 96, 127[45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

²⁴ *Ward* (2002) 213 CLR 1, 91 [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

²⁵ *Brown* (2014) 306 ALR 168, 180 [64].

The first step of the inquiry in *Ward* is the characterisation of the granted right. All justices in *Congoo* engaged in this step.

1 *Exclusive Possession*

All justices acknowledged that ‘exclusive possession’, in the sense of a right to exclude any person for any or no reason, would be inconsistent with the Bar-Barrum People’s native title rights and interests.²⁶ Despite significant disagreement regarding the appropriate nomenclature, this concept was captured by both Hayne, Bell and Gageler JJ’s reference to ‘exclusive possession’, and French CJ, Keane and Kiefel JJ’s reference to a ‘right of exclusive possession’. For ease of reference, I adopt the Court’s language of ‘exclusive possession’ in *Brown*.

In concluding the military orders conferred ‘exclusive possession’, Hayne J noted that, upon taking possession of the land, the Commonwealth could exclude any person who may request permission to go on the land for any or no reason.²⁷ Kiefel J relied on *Minister of State for the Army v Dalziel*²⁸ to characterise possession under reg 54 as an ‘exclusive right to possess the land against the whole world’.²⁹ Bell J focused on the use of the word ‘possession’ in reg 54 and the observation that ‘exclusivity is in the nature of possession’.³⁰ In doing so, his Honour appeared to fasten on the word ‘possession’ at the expense of identifying the right actually conferred. This approach was erroneous.³¹

The statutory majority of French CJ, Keane and Gageler JJ held the granted right was not one of ‘exclusive possession’. In reaching this conclusion, Gageler J noted the absence of the word ‘exclusive’ in reg 54, and located support in *Dalziel* and *Minister for Interior v Brisbane Amateur Turf Club*³².³³ The inaccuracy of the latter conclusion will be discussed with regards to the utility of past authority below. More fundamentally, in characterising reg 54(2)(b) as the sole source of the Commonwealth’s power to exclude persons with pre-existing rights,³⁴ his Honour appeared to implicitly acknowledge the ‘exclusive

²⁶ Ibid [8] (French CJ and Keane J), [58] (Hayne J), [91] (Kiefel J), [142] (Bell J), [168] (Gageler J).

²⁷ Ibid [56].

²⁸ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 (*‘Dalziel’*).

²⁹ *Congoo* [2015] HCA 17 (13 May 2015), [99]-[103].

³⁰ Ibid [144].

³¹ *Brown* (2014) 306 ALR 168, 177 [43].

³² *Minister for Interior v Brisbane Amateur Turf Club* (1949) 80 CLR 123 (*‘Brisbane Amateur Turf Club’*).

³³ *Congoo* [2015] HCA 17 (13 May 2015), [161]-[163].

³⁴ Ibid [166].

possession' conferred by the Regulations. The subsequent qualifications that reg 54(2)(b) acknowledged the continued existence of pre-existing rights and only provided for temporary possession,³⁵ are irrelevant in ascertaining the ability to exclude any person for any or no reason. A proper application of the inquiry in *Ward* would therefore compel a characterisation of the possession as 'exclusive'. Instead, Gageler J used the qualifications on the 'sole source' of exclusive possession in reg 54(2)(b) to conclude it was not inconsistent with the Bar Barrum People's native title rights and interests. In addition to introducing impermissible considerations to the determination of inconsistency (which will be discussed later), this approach appears to erroneously conflate the first and final stages of the *Ward* inquiry.

Gageler J also agreed with the reasons of French CJ and Keane J.³⁶ Despite purporting to apply the categorisation of 'exclusive possession' in *Brown*,³⁷ French CJ and Keane J ultimately grounded their conclusion in a characterisation of 'exclusive possession' as 'exclusive of the rights of all others'.³⁸ Their Honours concluded the granted right was not 'exclusive of the rights of all others' due to the legislative purpose gleaned from the text, context and purpose of reg 54 to not disturb subsisting rights and interests in the land.³⁹ The issues with this use of purpose will be discussed shortly. Crucially, the characterisation of exclusive possession by French CJ and Keane J begs the question regarding inconsistency.

The confusion in French CJ, Keane, Bell and Gageler JJ's judgments, questions the utility of a focus on 'exclusive possession'. It elucidates its tendency to obscure and distort the essential question of extinguishment.⁴⁰

2 Use of Past Authority

Five of the justices refer to the Court's decisions in *Dalziel* and *Brisbane Amateur Turf Club* to support their characterisation of the granted right.⁴¹ *Dalziel* concerned 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 land occupied by Mr Dalziel on a weekly tenancy. Relevantly,

³⁵ Ibid.

³⁶ Ibid [167].

³⁷ Ibid [11].

³⁸ Ibid [20]-[23].

³⁹ Ibid at [38] per French CJ and Keane J.

⁴⁰ *Wik* (1996) 187 CLR 1, 131 (Toohey J), 204 (Gummow J).

⁴¹ *Congoo* [2015] HCA 17 (13 May 2015), [6], [20]-[23] (French CJ and Keane J), [99]-[100], [120]-[123] (Kiefel J), [144]-[145] (Bell J), [161]-[162] (Gageler J).

the majority (Rich, McTiernan and Williams JJ) and Starke J (in dissent with regards to whether the acquisition was on just terms) held the taking of exclusive possession for an indefinite period under reg 54 constituted an acquisition of property. *Brisbane Amateur Turf Club* concerned a claim for compensation by the lessee of land possessed by the Commonwealth under such an order. As acquisition was assumed, the only issue for the Court was the quantum of compensation. Relevantly, this included a consideration of the owner's capacity to grant a lease during the Commonwealth's possession. The statutory majority's use of these decisions to support the conclusion that the orders under reg 54 not confer 'exclusive possession', is affected by two flaws – firstly, inconsistency with the relevant ratio decidendi of the decisions, and secondly, impermissible use of past authority concerning common law tenure.

French CJ and Keane J cited the decisions in *Dalziel* and *Brisbane Amateur Turf Club* in support for the characterisation of the granted right as one of actual, rather than exclusive, possession.⁴² Particularly, their Honours quoted William J's conclusion in *Dalziel* that, although subject to the statutory right of the Commonwealth to take possession, the interests of the owner and tenant were not determined,⁴³ and Latham CJ's (in dissent) statement that the Commonwealth's rights as an owner in fee simple were limited to the purposes of defence.⁴⁴ Their Honours also referred to the conclusion of Latham CJ and Dixon J in *Brisbane Amateur Turf Club*, McTiernan J agreeing, that a lease, subject to the rights of the Commonwealth, could be granted during the Commonwealth's possession.⁴⁵

Gageler J similarly used the decisions as authority for the granted right being one of 'possession' rather than 'exclusive possession'.⁴⁶

This contrasts with the approach of Kiefel and Bell JJ who treated *Dalziel* as authority for reg 54 conferring 'exclusive possession'.⁴⁷ Their Honours both cited William J's conclusion, as representative of the majority, that the granted right constituted an acquisition of an interest in land due to the Commonwealth's exclusive right to possess the land against the whole world, including the persons rightfully entitled to possession at common law.⁴⁸

⁴² Ibid [23].

⁴³ Ibid [20], quoting *Dalziel* (1944) 68 CLR 261, 301.

⁴⁴ Ibid [21], quoting *Dalziel* (1944) 68 CLR 261, 278.

⁴⁵ Ibid [22], citing *Brisbane Amateur Turf Club* (1949) 80 CLR 123, 148 (Latham CJ), 162 (Dixon J).

⁴⁶ Ibid [161]-[162].

⁴⁷ Ibid [99] (Kiefel J), [144] (Bell J).

⁴⁸ Ibid [99] (Kiefel J), [145] (Bell J), citing *Dalziel* (1944) 68 CLR 261, 299.

(a) *Consistency with the Ratio Decidendi*

The conclusion of the statutory majority that *Dalziel* supports a characterisation of the granted right as actual, rather than exclusive, possession is inconsistent with the ratio decidendi of the case. Latham CJ was the sole dissenter in holding the possession did not constitute an acquisition of an interest in land. The statement of Williams J concerning the effect of the possession on the pre-existing lease does not go to whether the granted right was one to exclude any person for any or no reason. Rather, as previously discussed, it contemplates whether the possession was 'exclusive of the rights of all others'. It is the first consideration that is relevant to characterising the granted right as one of 'exclusive possession'.⁴⁹ In that regard, Kiefel and Bell JJ correctly cite Williams J as reflective of the majority.

(b) *The Utility of Authority on Common Law Tenure*

The erroneous treatment of *Dalziel* highlights a more fundamental flaw in the statutory majority's use of past authority concerning common law tenure. By considering the Court's conclusions on the effect of the granted right on pre-existing common law forms of tenure, French CJ, Keane and Gageler JJ impliedly equate the requirement of clear and plain statutory intention required to abrogate common law property rights and interests, with the actual inconsistency required to extinguish native title. As noted by Kiefel J in distinguishing *Brisbane Amateur Turf Club*,⁵⁰ common law tenure has consistently been held to be different from native title rights and interests, which are sui generis and cannot be suspended in the way a lease can. Consequently, prior determinations of the effect of possession under reg 54 on common law forms of tenure are of no utility.

The implications of the sui generis nature of native title observed by Kiefel J is consistent with established authority. This nature has grounded its susceptibility to extinguishment,⁵¹ and facilitated the development of the test of actual inconsistency in *Ward*.

However, these conclusions are not compelled by its sui generis nature itself. McNeil notes the fundamental aspect of the rule of law that the Crown, in its executive capacity, cannot derogate from or interfere with the vested rights

⁴⁹ *Fejo* (1998) 195 CLR 96; *Ward* (2002) 213 CLR 1; *Brown* (2014) 306 ALR 168.

⁵⁰ *Congoo* [2015] HCA 17 (13 May 2015)[120]-[123].

⁵¹ Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95, 120.

of its subjects without *unambiguous* statutory authority or prerogative power to do so.⁵² Statutory authority requires ‘clear and plain legislative intention’ to abrogate rights and interests. This applies to rights and interests regardless of their source.⁵³ The standard of racial equality espoused by the majority in *Mabo (No 2)* to reject the application of the doctrine of terra nullius, thereby required the application of this fundamental principle to native title.⁵⁴ This was explicitly acknowledged by Brennan, Toohey and Gaudron JJ in *Mabo (No 1)*:⁵⁵

However, it is not the source or history of legal rights which is material but their existence. It is the arbitrary deprivation of an existing legal right which constitutes an impairment of the human rights of a person in whom the existing legal right is vested. Leaving aside the 1985 Act [the Queensland Coast Islands Declaratory Act], the general law leaves unimpaired the immunity of each person in whom any legal right in and over the Murray Islands is vested from arbitrary deprivation of that person's legal right. The relevant human right is immunity from arbitrary deprivation of legal rights in and over the Murray Islands.

The standard did in fact ground the direct relationship drawn by Deane, Gaudron and Toohey JJ in *Mabo (No 2)*,⁵⁶ and Gaudron and Kirby JJ in *Wik*,⁵⁷ between the ‘clear and plain intention’ required to extinguish native title rights and interests, and the fundamental rule of law applicable to all vested rights.

These considerations reveal that the *sui generis* source of native title rights and interests does not require their susceptibility to extinguishment. The inconsistency of such a conclusion with fundamental principles of common law highlights that the approach adopted by Brennan J in *Mabo (No 2)*, and subsequently applied in *Ward*, was only compelled by a perceived need for ‘pragmatism’.⁵⁸

French CJ, Keane and Gageler JJ’s use of past authority concerning common law tenure was therefore not precluded by the *sui generis* source of

⁵² Kent McNeil, ‘Racial Discrimination and Unilateral Extinguishment of Native Title’ (1996) 1(2) *Australian Indigenous Law Reporter* 181, 187, citing *Magna Carta* (1215) 17 John, c 29; *Attorney-General v De Keyser’s Royal Hotel* [1920] AC 508, 569 (Parmoor LJ); *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 230-1 (Williams J); *Clunies-Ross v Commonwealth* (1984) 155 CLR 193, 201; *Mabo v Queensland* (1988) 166 CLR 186, 226 (Deane J) (*‘Mabo (No 1)’*).

⁵³ *Ibid* 193 & 218; Strelein, above n 44, 120.

⁵⁴ *Ibid* 216 & 219.

⁵⁵ (1988) 166 CLR 186, 218.

⁵⁶ (1992) 175 CLR 1, 111 (Deane and Gaudron JJ), 195 (Toohey J).

⁵⁷ (1996) 187 CLR 1, 111 (Gaudron J), 222-223 (Kirby J).

⁵⁸ McNeil, above n 46, 219-220; Bartlett, above n 5, 27 & 43;

native title itself. Instead, it was precluded by the now ‘firmly established’⁵⁹ ‘pragmatic’ approach that fails to extend the standard of racial equality to questions of extinguishment. It provides a sliding door for the ‘rationale of equality’⁶⁰ glimpsed in *Wik* that could have guided the Australian jurisprudence.

3 *Role of Purpose in Characterising the Right*

Purpose was relevant to the Court’s decision in two ways – firstly, in determining whether the Commonwealth’s possession was one for a ‘limited purpose’ akin to *Brown* and, secondly, in ascertaining the effect of this possession on the Bar-Barrum People’s native title rights and interests. In keeping with the inquiry required by *Ward* and *Brown*, the relevance of statutory purpose to determining extinguishment will be considered shortly.

The Regulations in *Congoo* posed an opportunity to clarify the bounds of the Court’s distinction between ‘exclusive possession’ and possession for a ‘limited purpose’ in *Ward* and *Brown*. The Commonwealth was only empowered to take possession under reg 54 if it was ‘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’. However, the military orders allowed the Commonwealth to use the land as it ‘were the owner in fee simple’ and prohibited the exercise of pre-existing rights of way over the land. This differed from the mining leases in *Brown*, which required the joint venturers to use the land ‘bona fide exclusively for the purposes of the Agreement, and to allow the State and third parties to have access over the land subject to the leases. Consequently, the Court concluded the granted right was not one of ‘exclusive possession’ as the joint venturers could only prevent anyone else from using the land for mining purposes.⁶¹

Hayne, Kiefel and Bell JJ held the Commonwealth’s possession under reg 54 was not analogously limited in purpose. As noted by Hayne J, once the Commonwealth took possession of the land, it was empowered to deny permission to any person to go on the land for any or no reason.⁶² It was this right, as opposed to the purposes of defence pre-conditioning its grant, that was held to be relevant.⁶³ As the validity of the military orders was not an issue, these purposes were irrelevant.

⁵⁹ *Brown* (2014) 306 ALR 168, 178 [51].

⁶⁰ Bartlett, above n 5, 43.

⁶¹ *Brown* (2014) 306 ALR 168, 177 [46].

⁶² *Congoo* [2015] HCA 17 (13 May 2015), [56].

⁶³ *Ibid* [74] (Hayne J), [116] (Kiefel J), [150] (Bell J).

However, French CJ, Keane and Gageler JJ's characterisation of the granted right as one for a limited purpose did not focus on the purposes of defence in reg 54. Rather, their Honours drew on the Minister's second reading speech and the continuation of pre-existing rights contemplated by reg 54(2)(b) and (3), to identify the purpose 'of not disturbing subsisting rights and interests'.⁶⁴ The inconsistency of this reasoning with established authority concerning extinguishment, and its resulting circularity, will be discussed below. The attempt to mask this impermissible consideration in the 'limited purpose' of the granted right results in logical incoherence. In *Brown*, the Court focused on the purpose for which the land could be used and third parties consequently excluded.⁶⁵ The analogy that the land possessed by the Commonwealth in *Congoo* could be used, and third parties excluded, for the purpose of 'not disturbing subsisting rights and interests' is logically incoherent. Possession solely for this purpose would be best effected by not taking possession at all. This highlights that there must have been another purpose for which the land could be used.

C Comparison of Rights

The second stage of the *Ward* inquiry requires the identification of the native title rights and interests. In *Congoo*, these were agreed by the parties and not in issue. Consequently, the next issue for the Court was the comparison of these rights with the granted right.

The conclusions of the justices concerning the nature and content of the Commonwealth's possession under reg 54 foreclosed their Honours' determinations on inconsistency. The 'exclusive possession' of the land by the Commonwealth identified by Hayne, Kiefel and Bell JJ was inconsistent with the Bar-Barrum People's native title rights and interests.⁶⁶

In contrast, French CJ, Keane and Gageler JJ's characterisation of the granted right as one for the limited purpose 'of not disturbing subsisting rights and interests' necessitated the conclusion that it was not inconsistent with the Bar-Barrum People's native title rights and interests. As stated by Hayne J with regards to the Full Court of the Federal Court's identification of a purpose 'to

⁶⁴ *Ibid* [38] (French CJ and Keane J), [168] (Gageler J).

⁶⁵ *Brown* (2014) 306 ALR 168, 177 [44]-[46].

⁶⁶ *Ward* (2002) 213 CLR 1, 182 [370], 201 [439], 210 [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 239 [555] (McHugh J), 250 [589] (Kirby J), 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] (Callinan J); *Fejo* (1998) 195 CLR 96, 128 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

preserve all rights and interests', this reasoning assumed the answer by conflating the first and final steps of the *Ward* inquiry.⁶⁷ French CJ and Keane J's (Gageler J agreeing) conclusion that there was no inconsistency because reg 54 'impose[d] a control regime which ha[d] a limiting purpose of not disturbing subsisting rights and interests'⁶⁸ was circular.

1 *Role of Purpose in Determining Extinguishment*

The attempt by French CJ, Keane and Gageler JJ to reconcile the elevation of legislative purpose with the established test of inconsistency resulted in confused intermediate reasoning. French CJ and Keane J reiterated the 'criterion' of extinguishment as one of inconsistency.⁶⁹ However, their Honours distinguished between inconsistency of a granted right, and inconsistency of legislation or a legislative instrument effecting the use of land or waters.⁷⁰ This distinction appeared to ground the inquiry into legislative purpose concerning the effect on other rights that is impermissible when determining inconsistency of a granted right. Gageler J engaged in this inquiry despite rejecting the relevance of this distinction.⁷¹

Despite the different 'criterion' that French CJ and Keane J purported to adopt, their Honours characterised reg 54 and the military orders as conferring 'exclusive possession' rather than a 'right to exclusive possession', stated the agreed native title rights and interests, and then determined their inconsistency. In doing so, their Honours implicitly applied the test in *Ward*. All members of the statutory majority therefore injected the 'standard' of clear and plain intention into the framework of the *Ward* 'criterion' (particularly, the characterisation of the granted right). This made clear and plain intention determinative of the criterion's satisfaction.

The focus on legislative purpose evokes the test for 'necessary implication' in *Delgamuukw v R*.⁷² For a finding of extinguishment, this requires legislative or executive action to not only be inconsistent with native title rights and interests, but also make it clear and plain by necessary implication that, to the

⁶⁷ *Congoo* [2015] HCA 17 (13 May 2015), [47].

⁶⁸ *Ibid* [38] (French CJ and Keane J), [167]-[168] (Gageler J).

⁶⁹ *Ibid* [27], [34] and [37].

⁷⁰ *Ibid* [34].

⁷¹ *Ibid* [157].

⁷² (1993) 104 DLR (4th) 470 (British Columbia Court of Appeal) (*Delgamuukw (BCCA)*).

extent of inconsistency, the legislative or executive action prevails.⁷³ This necessary implication is gleaned from legislative purpose and historical context. In emphasising this test of ‘clear and plain intention’, Lambert JA explicitly rejected that of ‘actual inconsistency’ espoused by Brennan J in *Mabo (No 2)*.⁷⁴ This speaks to the distinction between the approach adopted by the statutory majority and the now established principles of extinguishment in Australia.

In rejecting this approach to questions of extinguishment, Hayne, Kiefel and Bell JJ cited the majority’s warning in *Ward* that a focus on ‘clear and plain intention’ is likely to mislead.⁷⁵ Relevantly, it will do so if understood to require an actual objective for the relevant act to extinguish native title, or allow consideration of the subjective thought processes of those responsible for the act. The issue of focusing on actual objectives or subjective intentions lies in the reality observed by Gummow J in *Wik* that many legislative or executive acts occurred at a time when the ‘existing state of the law was perceived to be the opposite of what it is now’.⁷⁶

The concern would be legitimate if the test adopted was akin to the test of ‘clear and plain intention’ in the American jurisprudence, which requires evidence that Congress actually considered the conflict between the action taken and Indian treaty rights.⁷⁷ In such a situation, the different historical context of Australia would render the establishment of ‘clear and plain intention’ a near practical impossibility. However, such an approach has never been adopted by an Australian court, and is explicitly rejected by French CJ and Keane J in *Congoo*.⁷⁸ Given the clear demarcation between the two tests, it is unclear why the difficulties affecting the American test eliminates the objective approach to ‘clear and plain intention’ that is afforded to the expropriation of other property rights and interests.

Hayne J suggested the Full Court of the Federal Court’s conflation of purposive statutory powers with rights for a limited purpose as another ‘fundamental reason’ why intention is prone to mislead.⁷⁹ His Honour appears to be correct to the extent that such a focus *within* the *Ward* inquiry of

⁷³ Ibid 524-525, 529-531 (Macfarlane JA with Taggart JA agreeing), 668 (Lambert JA) (not in issue on appeal).

⁷⁴ Ibid 681.

⁷⁵ *Congoo* [2015] HCA 17 (13 May 2015), [67] (Hayne J), [109]-[116] (Kiefel J), [139] (Bell J), citing *Ward* (2002) 213 CLR 1, 89 [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

⁷⁶ Ibid [114] (Kiefel J), citing *Wik* (1996) 187 CLR 1, 184 (Gummow J).

⁷⁷ *South Dakota v Bourland* 508 US 679 (1993).

⁷⁸ *Congoo* [2015] HCA 17 (13 May 2015) [36].

⁷⁹ Ibid [73]-[76].

inconsistency is prone to circular reasoning. This was evinced by the statutory majority's characterisation of the Commonwealth's possession as one for the limited purpose of 'not disturbing any subsisting rights and interests'. However, such logical inconsistencies are not the consequence of a consideration of statutory purpose itself. If the statutory majority had explicitly stated the application of a test of 'clear and plain intention' akin to that in *Delgamuukw* (*BCCA*), the statutory purpose gleaned from the text and context of the Regulations would not be logically flawed. As detailed above, this results from the attempt to reconcile this purpose with the first and final stages of the test of inconsistency in *Ward*.

2 *Relevance of Duration*

The temporary nature of the Commonwealth's possession for the emergency purposes of war provided an ideal test case to contrast the protection afforded to native title rights and interests by a test of actual inconsistency, with that of 'clear and plain intention'. The test of inconsistency of rights at the time the grant was made does not permit an inquiry into how the granted right was subsequently exercised or its duration.⁸⁰ Once inconsistency is established, native title rights and interests cannot be revived by the subsequent cessation of the inconsistent right.⁸¹ In contrast, an approach centred on 'clear and plain intention' permits such considerations to go to extinguishment. This comparative ability to accommodate a short-term right or interest not intended to extinguish pre-existing rights was foreseen by French CJ in extra-curial writings prior to the decision in *Ward*.⁸² His Honour also noted the framing of 'revival' and potential suspension in terms of continuity of connection obscures its true nature as an issue of extinguishment.⁸³ This has resulted in a failure by Australian courts to explicitly consider why non-revival is the consequence of extinguishment.⁸⁴

Gageler J in *Congoo* was the only judge to factor the temporal nature of the Commonwealth's possession into his Honour's reasoning. However, rather than contemplating the potential for the native title rights and interests to be 'revived' if extinguished, the temporary nature of the possession went to the

⁸⁰ *Brown* (2014) 306 ALR 168, 176 [37].

⁸¹ *Fejo* (1998) 195 CLR 96, 131 [56]-[58] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁸² French and Lane, above n 11, 41.

⁸³ *Ibid* 34.

⁸⁴ *Ibid* 35.

granted right being a mere ‘prohibition of the exercise’ of native title rights and interests.⁸⁵ In doing so, Gageler J impermissibly incorporated a consideration of statutory purpose concerning the effect on pre-existing rights.

IV THE RE-EMERGENCE OF RATIONALE OF EQUALITY

The facts of *Congoo* provided an ideal test case for the comparison of the protection of native title rights and interests afforded by the tests of extinguishment in the Australian and Canadian jurisprudence. The Court split three to three on the role of ‘clear and plain intention’ fundamental to the difference between these two tests. The text, context and structure of reg 54 contemplated the continued existence of pre-existing rights and interests. Consistent with the Court’s decisions in *Dalziel* and *Brisbane Amateur Turf Club*, the *Regulations* therefore did not evince the ‘clear and plain legislative intention’ required to extinguish property rights and interests sourced in the common law.⁸⁶ Conducting the same inquiry, the statutory majority of French CJ, Keane and Gageler JJ identified the statutory purpose of reg 54 to ‘not disturb subsisting rights and interests’. This emphasis on ‘clear and plain intention’ grounded their conclusion that the Commonwealth’s possession under the military orders did not extinguish the Bar-Barrum People’s native title rights and interests. The reasoning of the statutory majority therefore evinces a move towards the fundamental common law rule against the derogation of, or interference with, existing rights and interests in the absence of a ‘clear and plain’ legislative intention to do so. The inadequacy of existing reasons for not extending this rule to native title rights and interests have been detailed.

To this extent, the judgments of the statutory majority are reminiscent of the ‘rationale of equality’ that underpinned the rejection of the doctrine of terra nullius in *Mabo (No 2)*. The sui generis source of native title does not justify its heightened vulnerability to extinguishment.⁸⁷ Yet such a source continues to justify its exception from principles fundamental to the rule of law. In *Mabo (No 2)*, the rejection of the ‘unjust and discriminatory’ doctrine of terra nullius was compelled by the imperative that the ‘common law not be seen to be frozen

⁸⁵ *Congoo* [2015] HCA 17 (13 May 2015), [166].

⁸⁶ McNeil, above n 46, 183-4, citing *Commonwealth v Hazeldell Ltd* (1918) 25 CLR 552, 563; *Attorney General for Canada v Hallet & Carey Ltd* [1952] AC 427, 450 (Radcliffe LJ)

⁸⁷ *Ibid* 217; Strelein, above n 44, 120.

in an age of racial discrimination'.⁸⁸ The same imperative now requires a reconsideration of the principles governing extinguishment. On its 800th anniversary, it is poignant to recall the now fundamental rule of law in c 29 of the *Magna Carta*, and expressed in Australia's constitutional and legal fabric,⁸⁹ that '[n]o Freeman shall... be disseised... but by... the law of the Land'.

However, the logical inconsistencies that proliferate the judgments of the statutory majority forebode the incoherence that will result from a continued failure to explicitly engage with the principles governing extinguishment. The tests of 'clear and plain intention' and 'inconsistency' are sourced in different conceptions of the interaction of aboriginal laws and the common law. The first is premised on the acknowledgement that, once established, the sui generis nature of native title does not render it particularly susceptible to extinguishment. The latter uses this sui generis source to afford native title rights and interests less protection than those sourced in the common law. The clarity and cogency needed to emerge from the 'legal jungle'⁹⁰ of principles governing the interaction of aboriginal laws and the common law compels the Court to explicitly address these considerations.

⁸⁸ *Mabo (No 2)* (1992) 175 CLR 1, 41-42 (Brennan J).

⁸⁹ See above n 7.

⁹⁰ *Wilson v Anderson* (2002) 213 CLR 401, 457 [139] (Kirby J).