IN THE HIGH COURT OF AUSTRALIA
PERTH OFFICE OF THE REGISTRY

No. P49 of 2013

ON APPEAL FROM the Full Court of the Federal Court of Australia

BETWEEN:

10 **STATE OF WESTERN AUSTRALIA**

Appellant

and

ALEXANDER BROWN, JEFFREY BROWN, CLINTON COOK AND CHARLIE COPPIN

First Respondent

20 **BHP BILLITON MINERALS PTY LTD, ITOCHU MINERALS & ENERGY OF AUSTRALIA PTY LTD AND MITSUI IRON ORE CORPORATION PTY LTD**

Second Respondent

APPELLANT'S REPLY

PART I: FORM OF SUBMISSIONS

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

30 PART II: REPLY

The First Respondents' distinction between *rights* and *activities*

2. The principal issue raised by the First Respondents is the relevance, to this matter, of a distinction between a native title right and activities in exercise of this right[1]. The

[1] First Respondent's Submission at [10]-[11], [16], [47], [58], [63].

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central thesis of the First Respondents is that a non-native title right will not be inconsistent with, and thereby extinguish, a native title right if it is inconsistent with the doing of activities by the native title party in exercise of a native title right.

3. French CJ and Crennan J and Hayne, Kiefel and Bell JJ, in their Honours' respective judgments in *Akiba*[2] considered this distinction, in the context of a determined native title right expressed as being "the right to access resources and to take for any purpose resources in the native title areas".[3] The issue in *Akiba* was whether regulatory legislation prohibited a native title right and thereby extinguished it. An issue in this was a disaggregation of the determined right into more specifically articulated rights (that were not reflected in the determination) and to then ask, in respect of these more specific rights - expressed in part by the purpose of their exercise - whether *they* were prohibited by the legislative regime.

4. It was in this context that the distinction between a determined native title right and modes of its exercise arose.

5. French CJ and Crennan J observed:

> "A broadly defined native title right such as the right "to take for any purpose resources in the native title areas" may be exercised for commercial or non-commercial purposes. The purposes may be well defined or diffuse. One use may advance more than one purpose. But none of those propositions requires a sectioning of the native title right into lesser rights or "incidents" defined by the various purposes for which it might be exercised. The lesser rights would be as numerous as the purposes that could be imagined. A native title right or interest defines a relationship between the native title holders and the land or waters to which the right or interest relates. The right is one thing; the exercise of it for a particular purpose is another. That proposition does not exclude the possibility that a native title right or interest arising under a particular set of traditional laws and customs might be defined by reference to its exercise for a limited purpose."[4]

6. Hayne, Kiefel and Bell JJ similarly observed:

> "In this case, the majority in the Full Court identified the starting point for consideration of extinguishment as "whether the *activity* which constitutes the relevant *incident* of native title is consistent with competent legislation relating to that activity" (emphasis added). ...
>
> The relevant native title right that was found to exist was a right to access and to take resources from the identified waters for *any* purpose. It was wrong to single out taking those resources for sale or trade as an "incident" of the right that had been identified. The purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise."[5]

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[2] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33.
[3] *Akiba* at [1].
[4] *Akiba* at [21].
[5] *Akiba* at [65]-[66].

7. It is important, in understanding the significance of *Akiba,* to note that the matter concerned s.211 of the *Native Title Act* and the postulated extinguishing effect of fishing regulatory legislation, the operation of which was premised, to a degree, upon the purpose of fishing; that is, whether it was for commercial or non-commercial purposes. Likewise, it is important to note that French CJ and Crennan J (with respect, correctly) noted that consideration of these issues in *Akiba* did not involve "inconsistency of rights", and that analysis would differ when the extinguishment question was one of "inconsistency of rights", which is of course the issue in this appeal.[6]

8. Similarly, certain observations in *Akiba* have been imported by the First Respondents without sufficient regard to context. In particular, the First Respondents' amplify the distinction between right and activity by eliding common law extinguishment concepts with aspects of certain statutory extinguishment mechanisms in the *Native Title Act.* For instance; Part 2 Division 2B of the Act creates the distinction between previous exclusive possession acts and previous non-exclusive possession acts. In respect of the latter, s.23G(1)(b)(ii) creates a consequence, in certain circumstances, that native title rights that are inconsistent with non-native title rights are "suspended", not extinguished. But, as s.23G(1)((b)(i) (*inter alia)* makes plain, this mechanism does not apply to common law extinguishment, that is extinguishment apart from the Act. As is made plain in the Appellant's Submission, the common law does not recognise suspension of inconsistent native title rights. A further example of the mixing of common law and statutory mechanisms by the First Respondents is reference to the non-extinguishment principle. It operates in respect of the extinguishment mechanism of Part 2 Division 2 of the Act (ss.15, 231, 232 and 238) and applies to category C and category D past acts. The logical underpinning of Part 2 Division 2 of the Act is that, were it not for the statutory creation and imposition of non-extinguishment, the acts to which the non-extinguishment principle is applied would (or would likely) extinguish. But again, the extinguishment mechanism of Part 2 Division 2 of the Act is not relevant to this matter.

9. No party contends that the common law extinguishment process has been doctrinally affected or altered by the subsequent statutory mechanisms.[7] The common law inquiry should not be confused by the mixing of foreign statutory concepts.

10. In this matter, the First Respondents have sought to invigorate the distinction between a native title right and a mode or circumstance of its exercise to avoid clear inconsistency of rights. Their reasoning is essentially that, where a native title right could be exercised spatially and/or temporally or in a manner or circumstance so as to not interfere with a non-native title right, they are not inconsistent.

11. This reasoning is best illustrated by referring to the Appellant's Submission at [95]-[103]. There it is submitted that the native title right to access, and to camp on, the land and waters of the lease area is (*inter alia)* inconsistent with the rights of the lease holders to construct and use roads, railways, schools, townsites (including permanent housing), mining facilities and pits. The First Respondents' answer to this

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[6] *Akiba* at [35].

[7] see Pound, "Common Law and Legislation" (1907) 21 Harv. L Rev 383 at 385-386, Gummow *Change and Continuity* (1999) chapt.1, *Esso Australian Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67 at [13]-[34] (per Gleeson CJ, Gaudron and Gummow JJ), [64] (per McHugh J), *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 263 (per Priestley JA).

is, in effect, that - so long as a mode or circumstance of the exercise of this native title right can be conceived of as being exercisable over time (temporally) and at any place (spatially) on the lease area so as not to interfere with the lease holders operations, there is no inconsistency and thereby no extinguishment. And so, so long as it can be conceived that a native title holder could walk across some part of the lease area at a time and in a manner that would not interfere with mining and associated activities, there is no inconsistency.

12. Similarly, in respect of the native title rights to take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters of the lease area; so long as they could be exercised at a time and place that would not hinder the lease holder exercising a right to (say) clear land for the purposes of mining, quarrying and building infrastructure, the rights are not inconsistent.

13. The thesis is – so long as any mode or manner of exercise of a native title right can be conceived of that could be done at some place on the lease area at some time over the duration of the lease that would not interfere with the lease rights, there is no inconsistency.

14. The answer to this analysis is - *Fejo*[8]. If the First Respondents' contention is to be applied, *Fejo* would have to be overruled along with the conclusions in *Ward*[9] in respect of the extinguishing effect of special leases. Similarly, the observation of the plurality in *Ward*[10] that a native title right to light fires would be extinguished by the grant of a pastoral lease would be wrong. The First Respondents would doubtless contend that, because a native title holder could avoid lighting fires in places and at times when the pastoral lessee was conducting his or her activities, there is no inconsistency.

Gravity of inconsistency

15. Inconsistency and extinguishment analysis is not assisted by notions advanced by the First Respondents such as; that the exercise is "serious"[11] or that it requires a "high degree of certainty about the presence of inconsistent rights".[12] This type of proposition was advanced by North J in the Full Federal Court in *Ward* and rejected[13]. Epithets like totally, fundamentally or absolutely inconsistent with native title or which "fully eclipse" native title rights add nothing.

The First Respondent's notion of partial inconsistency

16. Underlying certain of the First Respondents' submission is an idea of partial inconsistency, meaning spatial inconsistency in respect of the part of a lease that is mined. This is a re-statement of the *De Rose* notion that the First Respondents abjure. Without repeating what is set out in the Appellant's Submission, the conundrum is how does the common law deal with a non-native title right to build a

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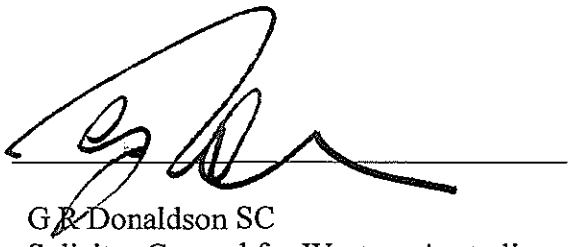
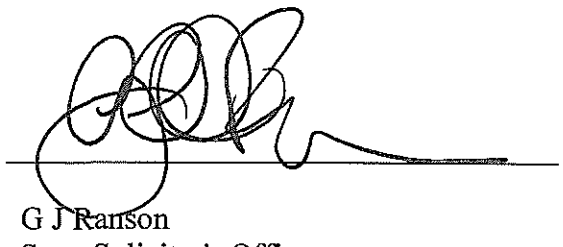
[8] *Fejo v Northern Territory* (1998) 195 CLR 96 at [42]-[47].
[9] *Western Australia v Ward* (2002) 213 CLR 1 at [351] – [357]
[10] But did not decide, given the non-identification of the bundle of native title rights by the Applicant in that case: see *Ward* at [194].
[11] First Respondent's Submission [18] and [19].
[12] First Respondent's Submission [19].
[13] *Ward* at [81]-[82].

mine or a town anywhere on a leased area and the fact that at a point in time (or over time) these rights might not be exercised everywhere. Here, there is no dispute that the lessees' rights to mine and construct infrastructure exist over the whole lease area. The fact that, to date, those rights have not been exercised over every inch of the lease area does not affect the characterisation of those rights as applying to the whole area. The lessees could tomorrow, as of right, commence to excavate a mine or build a dwelling anywhere on the leased areas (subject only to complying with the terms of the Agreement).

17. Inconsistency is not about jostling for space. It is no answer to say that native title holders might enjoy their rights "somewhere" (at [34]) where the lessee may not be present at a particular time, or that a native title holder may suspend enjoying their rights for a period and 'wait out' the inconsistent lessee rights. If this were so, then a fee simple would not extinguish native title.

Dated the 5th day of December 2013





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