EXTINGUISHMENT OF NATIVE TITLE: RECENT HIGH COURT DECISIONS

by Brendan Edgeworth

INTRODUCTION

A number of recent decisions of the High Court of Australia have provided further elaboration of the circumstances in which native title can be extinguished. These decisions jointly and severally appear to point to an approach to the interpretation of statutory provisions and grants of land that gives greater primacy to native title. They do so by in general raising the threshold for non-Indigenous litigants who argue that extinguishment has occurred. This article examines those cases in detail, and in doing so will draw some more general conclusions about the nature of native title and the prospects of defending it against claims of extinguishment in the future. The article first analyses how the High Court has shifted in the way it has defined native title over time. The definitional issue is an important step in rendering native title more or less susceptible to extinguishment. The article then focuses on the detail of the decisions, and draws some general conclusions about the current state of the law. My conclusion is that the current approach to extinguishment represents a fairer balance of the competing interests than was articulated in the last extinguishment case before the High Court, *Western Australia v Ward*.[1]

NATIVE TITLE—DEFINITIONAL CHOICES

A survey of the way in which native title has been defined over the years since the *Mabo v Queensland (No 2)* ('*Mabo (No 2)*') decision[2] indicates something of a pendular swing in the approach of the courts. In the beginning, native title was conceived in *Mabo (No 2)* as a *unitary property right*. Even though it may have been made up of a number of discrete rights, it was nonetheless a title—a distinct type of right over land. Rather like the common law fee simple estate, it comprised a number of rights to use and enjoy the land, but as a composite interest. Despite a general consensus, significant differences were evident among the majority judges in *Mabo (No 2)* in their elaboration of the elements of that title. For Brennan J (with whom Mason CJ and McHugh J concurred), native title was clearly proprietary in character, being possessed by 'a community, a group or an individual' over land that could by supported by whatever 'legal or equitable remedies' were necessary to protect it.[3] By contrast, Deane and Gaudron JJ characterised it as a 'usufructuary', or 'merely a personal right'.[4] This conclusion suggests it was not proprietary at all from the perspective of the common law. But their Honours' later assertion that acquisition of this right without payment of just terms compensation would breach s 51(xxxi) of the *Constitution* indicates that they essentially regarded the right as proprietary in nature. Finally, Toohey J aligned what he described as 'Aboriginal title' with the array of common law interests in land, concluding that in some respects it amounted to a right akin to a possessory interest.[5] What these apparently divergent analyses therefore share at the baseline is that native title, as the term suggests, is a title to land, rather than some indeterminate and purely contingent right or set of rights over land.

By the time a very differently constituted High Court in *Western Australia v Ward* ('*Ward*') came to define native title a decade later, it was a right transformed. By now it had been disaggregated: no longer a unitary title, it was characterised as a 'bundle of rights'.[6] On one level, this definitional choice may be seen to be simply a question of semantics: it represents just another way of describing the same entity. At another level, it might be seen as a high-level conceptual debate between legal philosophers about whether property has some distinct, unique characteristics (the 'essentialist' position), or whether it is not so different from other categories of rights (the 'non-essentialist' position).[7] Either way, whether seen as a semantic or philosophical debate, no practical consequences appear to flow from the classification.

But as a number of writers have pointed out, particularly Lisa Strelein and Simon Young, characterising native title not as a unitary title, but as a bundle of rights tends to have a number of negative consequences for its survival.[8] As a bundle of rights, native title is vulnerable to death by a thousand cuts: extinguishment can be effected progressively as inconsistent rights granted to others, or as regulatory encroachments come to extract various sticks in the bundle of rights. Accordingly, partial extinguishment is typical.[9]

No less significantly, native title defined in this way has the effect of lowering the bar for the purposes of extinguishment. It becomes

easier to establish a clear and plain intention to extinguish native title for the reason that rather than requiring a general legislative or executive intention to extinguish the title as a whole, or inconsistency at a general level against the native title, the mere finding of 'inconsistencies' between some of the atomised rights and the relevant statutory regime, pastoral lease or mining lease will extinguish them. In consequence, various separate and distinct rights can be struck down, like sticks removed from a bundle. *Ward* showed this approach in operation. Extinguished rights included the native title right to control access to the land, and even those rights that were inconsistent with a short-term lease. Such an interest is enough to extinguish a native title that may have existed from time immemorial: all that is required is temporary 'inconsistency of incidents' for native title to give way.[10] However, recent decisions of the High Court of Australia suggest that a more restrictive approach to the extinguishment of native title is being developed.

RECENT DECISIONS

AKIBA v COMMONWEALTH[11]

Starting with the 2013 High Court decision in *Akiba v Commonwealth* ('*Akiba*'), there have been no less than four High Court decisions on native title, after a gap of over a decade since *Ward*. *Akiba* was soon followed by *Karpany v Dietman*,[12] *Western Australia v Brown*,[13] and most recently *Queensland v Congoo*.[14] All cases examined in detail the question of extinguishment of native title. And all have been resolved in favour of the native title claimants.

In *Akiba*, both the primary judge and a unanimous High Court resisted defining the native title claim over a large area of sea in and around the Torres Strait in an atomised way, whereby it would be made up of a number of discrete, severable rights. Rather, their approach was to seek to identify a singular native title and then see if it was regulated by the relevant fisheries legislation, or whether that legislation demonstrated a 'clear and plain intention' to extinguish it. An important aspect of this approach to conceptualising native title is finding an 'underlying' title, distinct from the particular incidents of that title. According to the primary judge, Finn J, the fisheries legislation as a whole was 'not directed at the underlying rights of the native title-holders'.[15] Rather, the legislation was best understood as imposing on native title-holders a set of 'controls' which were required 'if they were to enjoy their native title rights'.[16] This underlying title/exercise of rights subdivision of native title was taken up in the High Court by French CJ and Crennan J, where they emphasised a presumption in favour of regulation of native title if a statute could be interpreted as affecting the exercise of that title, as opposed to extinguishment of that 'underlying' title.[17] Hayne, Kiefel and Bell JJ essentially agreed with this analysis in their joint judgment where they concluded that regulating the exercise of rights is not pertinent to the question of extinguishment of those rights.[18]

This approach represents a notable departure from conceptualising native title as a bundle of rights, as was the case in *Ward*. Rather than seeing all of the native title rights on the same plane—horizontally, as it were—as separate and in principle equal sticks in the bundle, native title is instead subdivided vertically. It is comprised of an underlying title complemented by a superimposed layer of ancillary rights of exercise. Conceived in this way, it becomes easier for the relevant regulatory regime—such as the licensing regimes at issue in *Akiba*—to be confined to the exercise of native title rights rather than affecting the underlying title.

Regulating the exercise of rights is not pertinent to the question of extinguishment of those rights.

This point is underscored by the approach of the majority of the Full Court in *Akiba* who upheld Queensland's appeal against Finn J's finding that native title extended to the right to trade in marine resources.[19] Keane CJ and Dowsett J (Mansfield J dissenting) concluded that the legislation requiring licences for trading purposes extinguished that particular native title right, while leaving the general native title right to take marine resources intact. They concluded that 'it makes little sense to speak of a right to engage in an activity which is prohibited by law'.[20] This approach disaggregates the general native title right over the Torres Strait into a bundle of inherently severable, activity-related rights: rights of access, rights to exclude, rights to fish, rights to sell and trade and so on. Characterised in this way, it was a straightforward step to interpret the fisheries legislation as directed at extinguishing the right to trade, defined by the majority as 'an incident of native title'.[21]

As a result of the unanimous High Court decision, *Akiba* represents an important elaboration of the doctrine of extinguishment of native title. First, the Court has focused on native title as a title, specifically an 'underlying title', with the Court reluctant to fragment native title into discrete, severable rights, or 'incidents' that are inherently more vulnerable to partial extinguishment. Second, the Court has in effect raised the bar for those claiming that native title can be extinguished, rather than regulated, by statute: where provisions can be read as regulating the exercise of rights as well as extinguishing, the former will be preferred. Finally, *Akiba* represents an emphatic endorsement for the first time by the High Court of the compatibility of commercial rights with native title. In

doing so, it gives scope for significant Indigenous autonomy and empowerment.[22]

KARPANY v DIETMAN[23]

Soon after *Akiba*, the High Court was presented with another opportunity to apply extinguishment doctrine. In *Karpany v Dietman* ('*Karpany*'), the state of South Australia argued that the *Fisheries Act 1971* (SA) had extinguished native title by prohibiting the catching of fish without a licence. Two Narrunga men were prosecuted for taking undersize abalone in breach of the Act. The Full Federal Court by majority held that native title had been extinguished. Following *Yanner v Eaton*,[24] a unanimous High Court held that the prohibitions amounted to regulation of their native title, rather than extinguishment:

> Read as a whole, the FA 1971 (and s 29 in particular [which provided that 'a person shall not take fish unless he hold a fishing licence']) regulated rather than prohibited fishing in the waters governed by that Act.[25]

The Court specifically read the Act in a way that could allow it and native title rights to co-exist. It emphasised the absence of any clear abrogation of native title rights in the legislation, and found that mechanisms set up by the Act 'could be administered consistently with the continuing exercise of native title rights'.[26] As in *Akiba*, the approach of the Court is to find extinguishment only if this was a necessary implication of the legislation.[27]

WESTERN AUSTRALIA v BROWN[28]

A second way in which the latest series of cases represents a modification of the approach to extinguishment in *Ward* is in relation to the question of suspension of native title. The case of *Western Australia v Brown*[29] ('*Brown*') involved the grant of two mineral leases as part of the Mount Goldsworthy Iron Ore Project. Alexander Brown and others (on behalf of the Ngarla People) applied to the Federal Court for native title determinations in respect of land and waters in the Pilbara region of Western Australia. The claimed areas included the areas subject to the two mineral leases. The state argued that the rights conferred on the lessees extinguished native title. The terms of the leases gave the lessees considerable rights to mine within the lease. As a result of mining operations, a town of over 200 houses (and separate single men's quarters) was built, together with roads, a shopping centre, a school, clubs and sporting facilities, a medical centre, a police station and other associated works. The mine covered approximately a third of the area. The extent of the operations was considerable.

As for native title rights, the parties agreed that the Indigenous parties had non-exclusive rights to access and camp on the land, to take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land, to engage in ritual and ceremony on the land as well as caring for particular sites and areas of significance. Could the native title survive the array of rights conferred by the mineral leases? The High Court held that the leases in question were not in the nature of a *Fejo v Northern Territory*-type fee simple grant of exclusive possession.[30] Nor did these leases confer exclusive possession. So they were akin to the pastoral leases considered in *Wik Peoples v Queensland* ('*Wik*').[31] The Court approached the question of inconsistency by looking at the terms of the leases and whether native title could co-exist with them. The difficult feature of these leases is that they conferred a range of rights the exercise of which had the capacity to physically prevent the native title holders exercising their rights, potentially over the entire area covered by the leases. For instance, the lessees could erect buildings or mine anywhere on the land. Had they done so, as they were entitled to do, they would have been able to prevent the exercise of native title rights anywhere on the land.

But the conclusion the Court drew from the nature of the leases was not that native title rights were progressively extinguished as the rights to mine and build were extended, rendering inconsistencies with those rights. Rather, they were *suspended*. Once the buildings were demolished and the mining concluded, the Court held that native title could be exercised just as freely as prior to the suspension of these rights. Importantly, the Court rejected the formula advanced by the Full Court in *De Rose v South Australia (No 2) ('De Rose (No 2)')*, namely that the question of extinguishment of rights was 'incapable of identification in law without the performance of a further act or the taking of some further step beyond that otherwise said to constitute the grant'.[32] In doing so, the Court restricted the instances where extinguishment would take place. According to the *De Rose (No 2)* formulation, the exercise of the right to build and so forth would extinguish native title *pro tanto* after which no revival is possible. After *Brown*, the exercise of such rights can only suspend native title by practically or physically preventing its exercise. If there is no inconsistency identifiable at the moment of the grant of rights, the exercise of rights thereafter, however extensive, will not extinguish native title, but may have the effect of suspending their exercise.

Further evidence of the Court's more accommodating approach to native title in this case lies in their strict interpretation of the terms of the lease to see inconsistency only if necessity required it:

> [O]ne right necessarily implies the non-existence of the other when there is logical antinomy between them: that is, when a statement asserting the existence of one right cannot, without logical contradiction, stand at the same time as a statement asserting the existence of the other right.[33]

This strict approach was evident in the Court's finding that there was no inconsistency in the absence of a right to exclude any and everyone from that land for any reason or no reason at all. In the absence of an express right of exclusive possession, native title would only be extinguished if mineral leases provided that the lessees were under an obligation to use the whole of the land for mining or associated works.[34]

QUEENSLAND v CONGOO[35]

The most recent decision on extinguishment of native title is *Queensland v Congoo* ('*Congoo*'). Possibly because it can be seen as the high watermark in the requirements for extinguishment, it generated the greatest level of judicial disagreement. The case involved military orders under the 1939 *National Security Act* (Cth) to take possession of land over which native title existed. The native title claimants were the Bar-Barrum People who asserted that their title survived the military occupation of their land. Pursuant to the Act's reg 54, orders over the land in question prohibited any persons from entering the land under any circumstances.

The native title holders in this case (the parties having agreed that native title was established over the area covered by the leases) faced a high hurdle. In *Minister of State for the Army v Dalziel* ('*Dalziel*'), an earlier High Court decision concerning such orders in relation to a s 51(xxxi) claim, similar rights conferred on the Commonwealth were held to have reduced a lessee's rights over the land to nothing but an 'empty husk' of an interest, triggering an obligation to pay just compensation for the ensuing 'acquisition' of property.[36] In *Congoo*, the High Court split 3–3 on the question of extinguishment, but the case was decided in favour of the native title holders by virtue of s 23(2)(a) of the *Judiciary Act 1903* (Cth), which provides that in the event of an equal division of High Court justices, the decision below shall stand. By majority, the Full Court had found in favour of the native title holders.[37] Even though the High Court split decision has the effect of reducing the authority of the ultimately successful action by the native title holders, the fact that a majority of judges hearing this matter found in their favour represents an important level of judicial endorsement of their claims.

The central issue in this case was whether the substantial array of rights over the land conferred on the Minister for the Army were inconsistent with any or all native title rights. The considerable extent of the rights can be gauged by reference to the Commonwealth's use of the land. The land was designated for the purpose of military training operations, including the firing of live ammunition. Although the orders did not confer on the Commonwealth 'exclusive possession', but 'possession', they specifically proscribed the exercise by any other person of any rights of access to or over the land, declaring that '[w]hile 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'.[38] The native title holders were faced with the ruling in *Ward*[39] where the High Court emphatically rejected the idea that native title could be suspended, insisting that even a short-term leasehold interest would extinguish native title with no possibility of revival.

The Court specifically read the Act in a way that could allow it and native title rights to co-exist.

The starting point for French CJ and Keane J (with whom Gageler J concurred) was a presumption against extinguishment, emphasising that '[t]he high threshold of attributed legislative intention flows from the seriousness of the consequences of extinguishment for indigenous inhabitants'.[40] Despite the evidently extensive rights acquired by the Commonwealth, they were held to not extinguish but merely 'impair' the native title rights. They had this limited effect because the rights conferred by the orders, though expansive—as was the case in *Dalziel*—were nonetheless 'not unconfined'.[41] Relying on the reasoning of the High Court in *Dalziel* where it was held that despite the Commonwealth's extensive rights to possession, that the tenant's interest in the land remained, the Court concluded that: '[The orders] did not extinguish pre-existing possessory rights. The character of the orders . . . was inconsistent with the grant of a "right of exclusive possession"'.[42] Likewise, as the wording of the relevant order made clear, 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' [emphasis added].[43] The difference between the grant of a fee simple or a lease conferring rights of exclusive possession, and this statutory right to possession, is that in the former cases inconsistency is clearly present. This conclusion follows from the reasoning in *Fejo* and *Wik*.[44] But a statutory right of possession expressed to limit only the exercise of native title rights displayed no such characteristic. Instead:

> 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 [emphasis added].[45]

In addition to concurring with the reasoning of French CJ and Keane J, Gageler J added that the possession conferred on the Commonwealth was akin to the mining leases considered in *Ward* and *Brown* which suspended the enjoyment of native title rights, but did not extinguish them.

By contrast, for Hayne, Bell and Kiefel JJ, the focus on whether extinguishment had occurred was dependent on the nature of the rights that the orders conferred on the Commonwealth and whether native title could consistently operate alongside them. In separate judgments, they each made the point that the Commonwealth's rights to possession were, from the moment the orders came into effect, inconsistent with the claimed native title rights to enter and use the land. As Hayne J concluded:

> 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.[46]

In particular his Honour emphasised that:

> 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*.

In particular, *Ward* specifically rejected three other formulations for extinguishment, namely, the adverse dominion test suggested in *Delgamuukw v British Columbia*,[47] a test dependent upon so-called 'permanent' adverse dominion,[48] and a test dependent upon *degrees* of inconsistency.[49]

According to Bell J, relying on *Fejo*:[50]

> 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.

Her Honour drew a direct comparison between the rights of the Commonwealth in this case, and the holders of the mining leases in *Brown*. In this instance, the Commonwealth had a right to possession of all the land from the moment the order was made, which was inconsistent with any native title rights on the land from that moment on. By comparison, the mining leases in *Brown* gave the lessees no substantive rights over the land at the moment of the grant, instead conferring rights which arose when mining and building operations authorised by the leases took place. Kiefel J agreed, emphasising that the limited duration of the rights of the Commonwealth conferred by the military orders was irrelevant to the question of inconsistency. The plenitude of those rights had the effect of extinguishing native title.

Although the respondents were successful, the question as to the authoritative weight of *Congoo* is a difficult one. Not only was the High Court split 3–3, as noted above, but all six members of the High Court rejected the reasoning of the majority of the Full Court (North and Jagot JJ). Their Honours found in favour of the native title holders on the basis that there was no clear and plain 'objective' legislative intention to extinguish, derived from the limited duration of the possessory rights.[51] This line of reasoning was held to be flawed because it made the test of inconsistency of rights subsidiary to a broader inquiry as to 'objective legislative intention'. It follows that there is no clear majority in favour of the reasoning adopted by French CJ, Keane and Gageler JJ.

So, which line of reasoning is the most convincing? One difficulty with the analogy drawn by French CJ and Keane J between the continuance of the lessee's tenancy in *Dalziel* and native title in the face of the rights conferred on the Commonwealth by the same military orders, is that at common law, a tenant's right to possession always survives dispossession, at least until any statute of limitations provisions come into play.[52] Native title by contrast, as was held in *Ward*, is extinguished to the extent of any inconsistent rights *ab initio* and can never be revived. As Logan J in the Full Court concluded in response to this very argument by the native title claimants:

> What this submission ignores is that neither the Bank's estate in fee simple nor Mr Dalziel's tenancy had about them the fragility, vulnerability and susceptibility to extinguishment which was an incident of the common law recognition of the native title rights claimed by the Bar-Barrum People.[53]

Nonetheless, it is the author's position that the reasoning of French CJ, Keane and Gageler JJ is the more compelling of the High Court's divergent approaches in this case. First, their analysis is more consistent with the general policy of interpreting statutory instruments restrictively where native title rights risk extinguishment. Second, their reasoning draws on, and closely follows, the approach to extinguishment of native title rights affirmed in the earlier decisions noted above. French CJ, Keane and Gageler JJ all identified both expansive impairments on the exercise of native title rights, but at the same time distinct limitations on the Commonwealth's rights in relation to general native title rights.

This argument evokes the reasoning from *Akiba* onwards whereby the distinction between rights of exercise of native title rights on the one hand and the underlying title on the other is critical. Only if rights are inconsistent with the latter will native title be extinguished. Of course, this argument is harder to sustain where specific, immediately exercisable and extensive rights of exclusion, rights to the use of and rights to the possession of land are granted either by legislation or executive act on non-Indigenous persons, as the military orders in this case demonstrate. But there were

positive, if admittedly slight, indications in the reg 54 military orders in this case that the Commonwealth's rights were directed to *the exercise* rather than *the continued existence* of rights over the acquired land. As Gageler J concluded, 'the existence of that prohibition was logically consistent with (indeed it was premised on) the continued existence of the rights the exercise of which was temporarily prohibited.'[54]

By contrast, where regulatory legislation is concerned, or where interests which provide for future use and development such as mining leases are granted, it will generally be clear that only the exercise of native title rights is affected. In such cases, as *Akiba*, *Karpany* and *Brown* indicate, the underlying title will remain unaffected.

CONCLUSION

The consequences for native title from this quartet of High Court decisions are very welcome. After the leading decision of *Ward* over a decade ago, where native title was defined as a 'bundle of rights', extinguishment of native title appeared to be much easier for the legislature and executive to achieve. Moreover, the line of reasoning that a short-term lease confers exclusive possession simply because of inconsistency of rights was never particularly convincing. As Richard Bartlett has argued, this amounted in effect to adopting the dissent of Brennan CJ in *Wik*, who argued that regardless of the terms of the lease, the underlying 'reversion expectant' of the landlord, being in the nature of a fee simple, would unfailingly extinguish native title.[55]

Importantly, the High Court has signalled in these cases that courts will require very clear evidence of intention to extinguish. If legislation can be seen to be regulating an activity that is the exercise of a native title right (the right to fish for commercial and other purposes in *Akiba*, or take abalone in *Karpany*), as opposed to modifying or extinguishing the 'underlying' title, native title will survive. Likewise, the 'underlying' native title will remain intact in the case of grants of rights to third parties if they affect only the exercise of rights of access, use and enjoyment as in *Brown* (mining leases not conferring exclusive possession) or as in *Congoo* (non-exclusive possession for military exercises) reflecting the interpretive principle that leans in favour of preserving the rights of property holders.

And *Congoo*, rather than being at odds with *Ward* as Hayne, Kiefel and Bell JJ argued, may best be seen as simply another application of the 'vertical' conceptual distinction between the exercise of native title and the underlying entitlement to it. This subdivision of native title rights can sit squarely with *Ward* as the unanimous High Court decisions in *Akiba*, *Karpany* and *Brown* held. Furthermore, this post-*Ward* reformulation of native title does no violence to the basic idea of native title as a unitary title established in *Mabo (No 2)*. Finally, and most importantly, it advances a fairer balance between native title claimants and others. In consequence, it may very well contribute beneficially to more agreed and efficient solutions between pastoralists, miners, governments and Indigenous owners, rather than costly and inefficient conflict in the courts.

Brendan Edgeworth is a Professor of Law at the University of New South Wales. *The author thanks his colleague Sean Brennan for helping clarify some of the issues in these cases.*

1 *Western Australia v Ward* (2002) 213 CLR 1.
2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
3 Ibid, 51–2.
4 Ibid, 86, 89.
5 Ibid, 211–14.
6 *Western Australia v Ward* (2002) 213 CLR 1, [95].
7 For details of this debate, see James Penner, *The Idea of Property in Law* (Oxford University Press, 1997); Gregory S Alexander and Eduardo M Penalver, *An Introduction to Property Theory* (Cambridge University Press, 2012), 2–7, 135–41.
8 Lisa Strelein, 'Conceptualising Native Title', (2001) 23 *Syd L Rev* 95; Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008).
9 Lisa Strelein, 'Conceptualising Native Title', (2001) 23 *Syd L Rev* 95. See also, Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2nd ed., 2004), 299.
10 *Western Australia v Ward* (2002) 213 CLR 1, [80].
11 *Akiba v Commonwealth* (2013) 250 CLR 209.
12 *Karpany v Dietman* (2013) 303 ALR 216.
13 *Western Australia v Brown* (2014) 306 ALR 168.
14 *Queensland v Congoo* (2015) 320 ALR 1.
15 *Akiba v Queensland (No 3)* (2010) 204 FCR 1, [859].
16 Ibid, [850], [859].
17 *Akiba v Commonwealth* (2013) 250 CLR 209, [29].
18 Ibid [68].
19 *Commonwealth v Akiba* (2012) 204 FCR 260.
20 Ibid, [85].
21 Ibid.
22 Sean Brennan, 'The Significance of the Akiba Torres Strait Regional ea Claim Case', in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015), 29–43.
23 *Karpany v Dietman* (2013) 303 ALR 216.
24 *Yanner v Eaton* (1999) 201 CLR 351.
25 *Karpany v Dietman* (2013) 303 ALR 216, [27].
26 Ibid, [31].
27 Above n 22, 29, 40–1.
28 *Western Australia v Brown* (2014) 306 ALR 168.
29 Ibid.
30 *Fejo v Northern Territory* (1998) 195 CLR 96.
31 *Wik Peoples v Queensland* (1996) 187 CLR 1.
32 *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [156].
33 *Western Australia v Brown* (2014) 306 ALR 168, [38].

34 Ibid, [63].

35 *Queensland v Congoo* (2015) 320 ALR 1.

36 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 per Rich J at 286.

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

38 *Queensland v Congoo* (2015) 320 ALR 1, [18].

39 *Western Australia v Ward* (2002) 213 CLR 1, [82].

40 *Queensland v Congoo* (2015) 320 ALR 1, [32].

41 Ibid, [39]; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261.

42 Ibid, [23].

43 Ibid, [24].

44 *Wik Peoples v Queensland* (1996) 187 CLR 1; *Fejo v Northern Territory* (1998) 195 CLR 96.

45 *Queensland v Congoo* (2015) 320 ALR 1, [39].

46 Ibid, [46].

47 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

48 *Ward v Western Australia* (1998) 159 ALR 483, 508 per Lee J.

49 *Western Australia v Ward* (2002) 213 CLR 1, [82].

50 *Fejo v Northern Territory* (1998) 195 CLR 96.

51 *Congoo v Queensland* (2014) 218 FCR 358, [49] per North and Jagot JJ.

52 See also *Queensland v Congoo* (2015) 320 ALR 1, [161]–[163] per Gageler J.

53 *Congoo v Queensland* (2014) 218 FCR 358, [113], referring to *Mabo (No 2)* above n 2, at 64 per Brennan J.

54 *Queensland v Congoo* (2015) 320 ALR 1, [166].

55 Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2nd ed., 2004), 299. See also the excellent analysis of Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Hart Publishing, 2014), 166–80.

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