IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B39/2014

BETWEEN:

STATE OF QUEENSLAND
Appellant

TOM CONGOO, LAYNE MALTHOUSE AND JOHN WATSON ON BEHALF OF THE BAR-BARRUM PEOPLE #4
First Respondents

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA
Second Respondent

ATTORNEY-GENERAL NORTHERN TERRITORY
Third Respondent

TABLELANDS REGIONAL COUNCIL
Fourth Respondent

ERGON ENERGY CORPORATION LIMITED CAN 087 646 062
Fifth Respondent

TELSTRA CORPORATION LIMITED
Sixth Respondent

CONSOLIDATED TIN MINES LIMITED
Seventh Respondent

MS LAURELLE URSULA GUNDERSEN
Eighth Respondent

MR GRANT HENRIK GUNDERSEN
Ninth Respondent

Filed on behalf of	State of Queensland		Date of this document: 20 November 2014
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THOMAS SAMUEL MAULONI
Tenth Respondent

DIANNE CALMSDEN MAULONI
Eleventh Respondent

MATHEW JOHN MAULONI
Twelfth Respondent

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Thirteenth Respondent

THOMAS JOHN MAULONI
Fourteenth Respondent

MR ROBERT GRAHAM WHITE
Fifteenth Respondent

MS ROBYN DORIS WHITE
Sixteenth Respondent

STEPHEN JOHN CROSSLAND
Seventeenth Respondent

DALE ALBERT CROSSLAND
Eighteenth Respondent

ELIZABETH HAZEL DAWN CROSSLAND
Nineteenth Respondent

RENATO DOVESI
Twentieth Respondent

LINA DOVESI
Twenty-First Respondent

WILLIAM DAVID MCGRATH
Twenty-Second Respondent

SHARON LESLEY MCGRATH
Twenty-Third Respondent

APPELLANT'S REPLY

CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

ARGUMENT

(a) Statutory scheme does not preserve all other rights over land

2. As the First and Second Respondents correctly emphasise, questions of inconsistency must begin with identification of the rights created or asserted.[1] At least the Second Respondent accepts that the right conferred by the military orders enabled the Commonwealth, for defence purposes, to exclude any and everyone from accessing the land of which it had taken possession.[2] Yet both Respondents seek to deny that this right produced inconsistency with native title rights. They seek to do so principally because they contend that r 54 and the Security Regulations intended by implication to preserve all prior rights over the land, including native title rights.[3]

3. The contentions of the First and Second Respondents should be rejected. Nowhere does r 54 expressly provide that *all* prior rights over the land possessed by the Commonwealth are suspended or preserved.[4] Nor is there any sound basis for such an implication.[5] It is true that the NSA was made under the defence power under s 51(vi) of the Constitution and that s 19 of the NSA provided that the Act would remain in effect for up to six months after the end of the war. But that only demonstrates that the rights conferred on the Commonwealth under r 54 and the other Security Regulations were designed to secure the defence of the Commonwealth; it does not suggest that the exclusive possessory right conferred by r 54 on the Commonwealth was fundamentally different from the exclusive possessory right conferred by a short term lease.

4. Similarly, the fact that s 5(1)(b) of the NSA distinguished between compulsory acquisition of land and the taking of possession and control of land does not support a different view.[6] While compulsory acquisition vested land in the Commonwealth freed of all other interests, it does not follow that taking possession of land was intended to preserve all prior rights over the land.

5. On the contrary, the claim that r 54 was intended to preserve all such rights is belied by s 60D. It refers to a person who 'has, or has had' a legal right or interest in the land, thereby contemplating that the exercise of powers under specific regulations, including r 54, might adversely affect or even destroy property rights in relation to the land (as well as undertakings and contracts). In other words s 60D(1) recognises that the effect of exercising the powers under r 54 could vary depending on the circumstances.

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1 First Respondent's submissions, para 15; Second Respondent's submissions, para 13.

2 Second Respondent's submissions, para 7.

3 First Respondent's submissions, para 10, 22-33; Second Respondent's submissions, para 25-44. This appears to seek to extend the comments beyond what the plurality stated in *Western Australia v Ward* (2002) 213 CLR 1 at [82] which contemplated an express provision dealing with competing rights.

4 Cf ss 34(1)-(3) *Northern Territory National Emergency Response Act 2007* (Cth), which relevantly provided that any right, title or interest that existed immediately before the time certain leases to the Commonwealth took effect was preserved as a right, title or interest in the land after that time.

5 In this regard the First and Second Respondents misrepresent the Appellant's submissions. The Appellant does not contend an intention to preserve native title rights has to be demonstrated for extinguishment not to occur and was responding to the findings of the Full Federal Court.

6 Cf First Respondent's submissions, paras 22 to 25; Second Respondent's submissions, para 33.4. See also r 55A of the Security Regulations.

6. The Court in *Minister of State for the Army v Dalziel* and *Minister for the Interior v Brisbane Amateur Turf Club*[7] were concerned with the position of a fee simple owner and leaseholder respectively. Argument was not directed to, nor did the Court consider, the effect of an exclusive possessory right granted to the Commonwealth on every interest in the land in question.

7. Furthermore, the principle of legality does not support the contrary position.[8] That principle does not control the outcome of the objective comparison that determines whether extinguishment has occurred. In this case, the right conferred on the Commonwealth was a right that could be enforced by trespass[9] and that enabled the exclusion of all native title holders, and indeed all others, from the special case land for as long as the Commonwealth was in possession. The principle of legality does not entail that such a right, which is an exclusive possessory right, somehow fails to extinguish native title.

8. In any event, the observation in *Akiba v Commonwealth*[10] that a statute ought not to be construed as extinguishing common law rights unless no other construction is open was made in the context of legislation that conditionally prohibited the exercise of the right in question and provided no compensation for extinguishment.[11] That is not the case here. Thus, even if the principle of legality applied, it would not demand that the right conferred on the Commonwealth is to be read as subject to an implied condition that it only suspended prior rights, regardless of their nature.

9. None of the other factors on which the First and Second Respondents rely supports their conclusions. First, that the Commonwealth may have lacked radical title to 'most' of the land likely to be taken under r 54 does not disclose an intention to preserve all prior rights over such land.[12] This factor is compatible with an intention to grant an exclusive possessory right to the Commonwealth and to leave the consequences for particular types of estates and interests to be determined by the common law, with compensation payable for any loss or damage caused.[13]

10. Secondly, contrary to the First Respondent's submissions,[14] no analogy exists between a change in sovereign control over territory and what occurred under the military orders made under r 54. Those orders conferred a right on the Commonwealth to exclude anyone and everyone while the Commonwealth remained in possession,[15] and, as *Dalziel* made clear, that right was proprietary in nature.[16] By contrast, a mere change in sovereignty confers no such right.

11. Thirdly, there is no analogy between the acquisition of Crown land within a State or Territory and the effect of the military orders.[17] Reg 54 applied in the same way regardless of whether the land possessed was held by the State of Queensland or was held as freehold title by an individual.

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7 (1944) 68 CLR 261 and (1949) 80 CLR 123

8 Cf. First Respondent's submissions, para 14; Second Respondent's submissions, para 58.

9 Compare *Metropolitan Borough and Town Clark of Lewisham v Roberts* [1949] 2 KB 608 at 622 (Denning LJ).

10 (2013) 250 CLR 209 at [24] (French CJ and Crennan J).

11 For the relevant principle, see *Planning Commission (WA) v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at [43].

12 Cf Second Respondent's submissions, para 41.

13 For instance, the doctrine of frustration. Although Williams J in *Dalziel* noted that the lessee was not evicted by title paramount and remained liable to pay the rent, and the doctrine of frustration had been held not to apply by the House of Lords in *Matthey v Curling* [1922] 2 AC 180 to leases, the House of Lords, members of this Court and intermediate appellate courts have since held or suggested that frustration may in principle apply to leases: *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675; *The Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 28-29 (Mason J), 52-53 (Deane J); *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WAR 146 at [68]-[75].

14 First Respondent's submissions, para 31.

15 Second Respondent's submissions, para 7.

16 (1944) 68 CLR 261 at 285 (Rich J), 300, 301-302 (Williams J). Contrast at 278, 282 (Latham CJ) (treating the right conferred as no more than a licence).

17 First Respondent's submissions, para 31.

12. Fourthly, the fact that r 54 was not 'part of a land management regime that is stable and enduring' is irrelevant.[18] Once it is accepted, as it must be, that sovereign acts may take a variety of forms and may create rights inconsistent with native title, it does not matter whether the rights are found in a land management regime, let alone a regime that is 'stable and enduring' (whatever that may mean).[19]

13. Fifthly, and relatedly, the absence of any grant to a third party does not suggest an intention to preserve all prior rights.[20] The Second Respondent's submissions amount to a claim that by not granting a particular kind of interest in land, the legislature must have intended that any exclusive possessory right that it created would preserve prior rights. That is a non-sequitur that ignores the varied ways in which sovereign authority can be exercised. Furthermore, the absence of reversion does not mean that an exclusive possessory right has not been conferred. An estate in fee simple granted to an emanation of the Crown, for instance, does not have a reversion.

14. Sixthly, the purposive limitations on the exercise of powers under r 54 do not suggest an intention to preserve all prior rights. As explained below,[21] the right created was, in substance, a right of exclusive possession. It is that right, rather than the purpose for which the right was conferred, that is relevant.

15. Finally, the construction advanced by the Appellant is not discriminatory. The essence of the notion of discrimination 'lies in the unequal treatment of equals, and, conversely, in the equal treatment of unequals'.[22] Native title is fragile; it is inherently susceptible to extinguishment from inconsistent sovereign acts.[23] That is a characteristic that distinguishes it from, say, fee simple estates and tenancies.[24] On the Appellant's argument, the military orders made under r 54 conferred an exclusive possessory right in substance no different from a right of exclusive possession conferred by a lease (which has been found to extinguish native title). It is not discriminatory to suggest that such a right would be inconsistent with, and would extinguish, native title but would not necessarily have the same effect on, say, a fee simple.[25]

(b) Purposive limitations do not deny inconsistency with native title

16. The First and Second Respondent also contend that the right conferred by r 54 is different from the right conferred on lessees and owners of fee simple estates because the Commonwealth could not have excluded anyone and everyone from the land for any reason or no reason.[26] However, while an exercise of power pursuant to the Security Regulations cannot rise above its source,[27] all parties to this appeal have accepted that the power was validly exercised in making

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18 Second Respondent's submissions, para 36.

19 As a matter of history, land management regimes in Australia have varied significantly over time. This makes the use of criteria such as 'stable and enduring' problematic.

20 Second Respondent's submissions, para 37.

21 Para 16 to 19.

22 *Castlemaine Tooheys Limited v South Australia* (1990) 169 CLR 436 at 480 (Gaudron and McHugh JJ); *Austin v Commonwealth* (2003) 215 CLR 185 at [118] (Gaudron, Gummow and Hayne JJ).

23 *Western Australia v Commonwealth* (1995) 183 CLR 373 at 439; *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 613 (Gummow J); *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [47].

24 To the extent that the First Respondent suggests otherwise, it is mistaken. *North Charterland Exploration Co (1910) Ltd v The King* [1931] 1 Ch 169 and *Singh v United Provinces* [1946] AC 327, both of which it cites, stand only for the proposition that the Crown, by exercise of the prerogative, cannot fetter its legislative power over property.

25 That is particularly so where those interests are registered under Torrens title legislation.

26 Second Respondent's submissions, para 38.

27 *Stenhouse v Coleman* (1944) 69 CLR 457 at 472; *Shrimpton v The Commonwealth* (1945) 69 CLR 613 at 628-9; *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR at 11-12.

the military orders.[28] The decision-maker was satisfied of the requisite purpose in prohibiting the exercise of all rights of way over and other rights in relation to the land and conferring the rights of an owner in fee simple. It is therefore not relevant to ask after the making of the military orders whether the Commonwealth had an ability to exclude persons for any or no reason at all. The effect of each order was to exclude all persons for its duration.

17. It is true that in *Western Australia v Brown* ('*Brown*'), the Court described a right of exclusive possession as a right to exclude anyone and everyone 'for any reason or no reason'.[29] But that formulation should not be read as a departure from earlier authorities. In *Fejo v Commonwealth,* to which the Court in *Brown* referred, the words '[s]ubject to whatever qualifications may be imposed by statute or common law or by reservation or grant' plainly recognised that the right to exclude may not be absolute.[30] In *Ward*, Gleeson CJ, Gummow, Gaudron and Hayne JJ said:[31] '[T]he holder of a right, as against the whole world, to possession of land, may control access to it by others and in general, decide how the land will be used'.

18. The essence of exclusive possession is thus the right to control access to the land. This was a right that the military orders conferred on the Commonwealth.[32] Under those orders, the Commonwealth could have excluded anyone and everyone—including native title holders—from the entirety of the land possessed and could have vindicated its possession by an action in trespass.[33] To claim that there is a 'fundamental difference'[34] between the right conferred on the holder of a common law lease and the right conferred by the military orders is to ignore these points.

19. The Second Respondent makes various claims about how native title holders could seek to come onto the land and maintain their connection to the land even while the Commonwealth possessed the land.[35] None, however, demonstrates that the right granted to the Commonwealth was consistent with the rights of the Bar Barrum People:

    (i) the example of permission being given by the authorised person does not distinguish the position under the military orders from the position under a lease;[36]

    (ii) the claim that native title holders and indeed others could seek judicial review of 'a capricious denial of access to land' seeks to create an artificial scenario and fails to recognise the prohibition on access by the terms of the orders;

    (iii) to speak of native title holders maintaining a continuing association with the land says nothing about the effect of the military orders.[37] Whether an act extinguishes native title

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28 Para 37(a) Special Case Stated (p8 Appeal Book).

29 (2014) 306 ALR 168 at [36], [45].

30 Similarly, in *Wilson v Anderson* (2002) 213 CLR 401 at [52] and [189], the rights of entry by certain persons for particular purposes and the other restrictions did not deny that what was involved was a statutory grant of a lease in perpetuity including the right to exclusive possession.

31 (2013) 213 CLR 1 at [52]. In the same case, their Honours accepted that statutory leases granted for various purposes such as taking guano, quarrying and grazing conferred a right of exclusive possession: at [356].

32 By prohibiting the exercise of rights in relation to land and providing for the rights of the fee simple owner to be exercised by the authorized person. So much was recognised by Williams J in *Dalziel* who regarded the closest analogy with an interest under general law was a tenancy at will: (1944) 68 CLR 261 at 299.

33 Compare *Metropolitan Borough and Town Clark of Lewisham v Roberts* [1949] 2 KB 608 at 622 (Denning LJ). The First Respondent's claim (at para 33 of its submissions) that there is no analogue with the general law because the Commonwealth's intention was not 'self-regarding' ignores *Dalziel* and other authorities.

34 First Respondent's submissions, para 42.

35 Second Respondent's submissions, para 62.

36 Nor is it analogous to a conditional prohibition as was considered in *Akiba*.

37 Particularly where the association is unconnected with the non-exclusive rights of native title claimed. All of the rights of the Bar Barrum People required access to the land.

depends on inconsistency, not on whether the native title holders can otherwise maintain an association with land.[38]

(c) Construction of r 54

20. The Second Respondent contends that the principle of legality would require clear words in order for the mere execution of an instrument without notice to be sufficient to expose an occupier to prosecution.[39] As to that:

    (i) the principle of legality would be relevant to s 10 of the NSA (which creates the offence), not r 54; and

    (ii) in any event, there would be a presumption that s 10 is not an offence of strict liability but requires the establishment of *mens rea*.[40]

21. Neither the First Respondent nor the Second Respondent proffer a construction answering what would be required to take possession. The First Respondent, for example, refers to powers under the regulations for affixing notices[41] while simultaneously claiming that taking possession must be considered by reference to a multitude of factors: 'the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests'.[42] Such an open-ended inquiry only highlights the uncertainty produced by the Full Federal Court's construction.

22. In neither *Dalziel* or *In Re Fish Steam Laundry*[43] was the question of how possession could be taken in dispute or considered.[44]

23. In *James Macara Ltd v Barclay* ('*Barclay*'),[45] the Court of Appeal did not have to consider whether possession could be taken by making an order. The issue was different: whether it was sufficient to have taken possession by giving notice to a person affected by the making of the order, or whether actual occupation was necessary. Justice Uthwatt, who wrote for the Court, rejected the need for actual occupation and pointed out that the regulations contained no provision determining the manner in which the power to take possession was to be exercised.[46] To the extent that *Barclay* is relevant,[47] it does not support a requirement to manifest intention that depends on the nature of the land.[48]

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38 Furthermore, the Second Respondent's submissions (at paragraph 62.4) ignore the fact that the remedy is purely statutory and cannot be confined to cases where native title might have been impaired as opposed to extinguished. In any event, extinguishment is the withdrawal of recognition at common law and does not mean that the continuing relationship of native title holders ceases to exist: see *Ward* (2002) 213 CLR 1 at [82].

39 The First Respondent raises a related point at para 47 of its submissions.

40 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 529-530 (Gibbs CJ), 566-568, 584-585 (Brennan J), 594-595 (Dawson J). Various safeguards, moreover, existed in relation to the bringing of any prosecution: s 10(4) of the NSA.

41 First Respondent's submissions, para 47 (referring to r 72 of the Security Regulations). In this regard none of the other regulations referred to by the First Respondent bear upon this question of construction.

42 First Respondent, para 50 (referring to *The Lord Advocate v Lord Lovat* (1880) 5 App Cas 273 at 288).

43 [1945] St R Qd 96.

44 Furthermore, in *Dalziel* and *In Re Fish Steam Laundry* physical occupation was likely to have been more relevant in terms of the question of any loss and damage suffered.

45 [1945] 1 KB 148. This concerned r 51 of the Defence (General) Regulations (UK).

46 [1945] 1 KB 148 at 154. For another decision holding that possession was taken before any actual occupation, see *Cramp v Henry Hughes and Son Ltd* [1944] WN 181.

47 Further, the reference to the requisite notice being sufficient depended on the context of the regulation in question.

48 To the extent that Denning LJ in *Metropolitan Borough and Town Clerk of Lewisham v Roberts* [1949] 2 KB 608 at 623 suggested that possession could not be taken by issuing a notice if someone else was previously in possession, that view is irreconcilable with *Cramp v Henry Hughes and Son Ltd* [1944] WN 181 and *Barclay*, was not followed by any other member of the Court of Appeal and appears to be mistaken.

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