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For immediate use
7 April 2016

High Court interpretation of 'extinguishment' gives greater security to native title

Four recent decisions of the High Court of Australia indicate a shift in the way native title is defined. They suggest a reduction in native title's vulnerability to extinguishment, with the Court advancing an interpretation that better promotes the survival of native title by raising the bar for non-Indigenous litigants seeking to establish that it has been extinguished.

Since *Mabo (No 2)*[1] there has been a pendulum swing in the way courts define native title. It was initially construed as a 'title'; that is, a unitary property right. Later, in *Western Australia v Ward*, native title was disaggregated, defined as a 'bundle of rights'.[2] The latter definition rendered native title liable to 'death by a thousand cuts', according to Brendan Edgeworth, Professor of Law at the University of New South Wales. Because the test for extinguishment is 'inconsistency of rights', extinguishment can be effected progressively as rights granted to third parties, such as pastoralists and mining corporations on the one hand, or encroachments by regulatory enactments on the other, are inconsistent with particular native title rights. The result is that various sticks come to be separately extracted from the bundle of native title rights.

Writing for the latest edition of the *Indigenous Law Bulletin*, Edgeworth explains that the four decisions of the High Court on the question of extinguishment since *Ward* point to a swing back to a *Mabo*-like more restrictive approach to extinguishment. Starting with the 2013 decision in *Akiba v Commonwealth,*[3] and followed by *Karpany v Dietman*,[4] *Western Australia v Brown*[5] and most recently *Queensland v Congoo,*[6] the High Court has re-examined the question of extinguishment, with each case being resolved in favour of the native title claimants.

'Rather than seeing all of the native title rights on the same plane, as separate and in principle equal sticks in the bundle,' Edgeworth says of the most recent cases, 'native title rights appear to be instead divided vertically, comprised of an underlying title complemented by a superimposed layer of ancillary exercise rights.' This means that the exercise of native title rights can be subject to rigorous statutory regulation and limitation, without this being inconsistent with the 'underlying' rights, as was the case with the fisheries licensing regimes in *Akiba v Commonwealth* and *Karpany v Dietman*. In consequence, native title remains unaffected. The result of this approach is to raise the threshold for non-Indigenous litigants

who argue that extinguishment of native title has occurred because they have to find in the relevant legislation the creation of rights that are also inconsistent with the underlying native title rights.

Furthermore, the question of whether native title could survive the array of rights conferred to a third party pursuant to the grant of mineral leases, as in *Western Australia v Brown*, and the creation of rights to pursue military operations pursuant to wartime regulations, as in *Queensland v Congoo,* led the Court to hold that rather than the native title rights being extinguished, they were only *suspended*. In finding so, the Court further restricted the instances where extinguishment would take place.

Edgeworth welcomes the consequences for native title of this quartet of High Court decisions, concluding that they signal that very clear evidence of an intention to extinguish underlying native title, rather than merely its exercise, is now required. They also bring the definition of native title back into line with its formulation in *Mabo (No 2).* No less importantly, this approach advances a fairer balance between native title claimants and others and, in so doing, is likely to lead to more consensual, efficient and equitable resolution of the competing interests of governments, pastoralists, miners and Indigenous owners.

Click here to access a copy of 'Extinguishment of Native Title: Recent High Court Decisions' by Brendan Edgeworth

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The Indigenous Law Bulletin is a publication of the Indigenous Law Centre produced with the in-kind support of UNSW Law.

References

1. *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
2. *Western Australia v Ward* (2002) 213 CLR 1.
3. *Akiba v Commonwealth* (2013) 250 CLR 209
4. *Karpany v Dietman* (2013) 303 ALR 216.
5. *Western Australia v Brown* (2014) 306 ALR 168.
6. *Queensland v Congoo* (2015) 320 ALR 1.