Federal Court of Australia

Griffith Local Aboriginal Land Council v Attorney General of New South Wales [2020] FCA 1501

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| File number: | NSD 1223 of 2019 |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 16 October 2020 |
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| Catchwords: | **NATIVE TITLE** – non-claimant application that native title does not exist in respect of certain land in New South Wales – application not opposed – where there was a previous exclusive possession act – where native title was extinguished - application granted  |
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| Legislation: | *Aboriginal Land Rights Act 1983* (NSW) ss 36, 50*Evidence Act 1995* (Cth) s 140*Native Title Act 1993* (Cth) ss 13, 23B, 23C, 23E, 61, 63, 66, 81, 86G, 223, 225, 253*Native Title (New South Wales) Act 1994* (NSW) s 20 |
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| Cases cited: | *Awabakal Local Aboriginal Land Council v Attorney-General of New South Wales* [2018] FCA 1249*Bahtabah Local Aboriginal Land Council v Attorney General of New South Wales* [2020] FCA 1236*Brown v Western Australia* [2012] FCAFC 154; (2012) 208 FCR 505*CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2016] FCAFC 67; (2016) 240 FCR 466*Darkinjung Local Aboriginal Council v Attorney-General of New South Wales* [2018] FCA 1136 *Deerubbin Aboriginal Land Council v Attorney-General of New South Wales* [2017] FCA 1067 *Fejo v Northern Territory* [1998] HCA 58; (1998) 195 CLR 96*Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2003] FCA 1127 *Lightning Ridge Local Aboriginal Land Council v Premier of NSW in his capacity as the State Minister pursuant to the Native Title Act (1993) Cth* [2012] FCA 792*Mace v State of Queensland* [2019] FCAFC 233; (2019) 375 ALR 717*Roberts on behalf of the* *Widjabul Wia-Bal People v Attorney-General of New South Wales* [2020] FCAFC 103*State of Western Australia v Brown* [2014] HCA 8; (2014) 253 CLR 507*The Wik Peoples v The State of Queensland* [1996] HCA 40; (1996) 187 CLR 1*Tweed Byron Local Aboriginal Land Council v Attorney General of New South Wales* [2019] FCA 936; (2019) 373 ALR 667*Western Australia v Commonwealth* [1995] HCA 47*;* (1995) 183 CLR 373*Western Australia v Ward* [2002] HCA 28;(2002) 213 CLR 1*Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3; (2010) 181 FCR 320  |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Native Title |
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| Number of paragraphs: | 44  |
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| Date of hearing: | Determined on the papers  |
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| Solicitor for the Applicant: | Norton Rose Fulbright Australia |
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| Solicitor for the First Respondent: | Legal Branch, Department of Planning, Industry and Environment |
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| Solicitor for the Second Respondent: | NTSCORP Limited |

ORDERS

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|  | NSD 1223 of 2019 |
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| BETWEEN: | GRIFFITH LOCAL ABORIGINAL LAND COUNCILApplicant |
| AND: | ATTORNEY GENERAL OF NEW SOUTH WALESFirst RespondentNTSCORP LIMITEDSecond Respondent |

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| order made by: | ABRAHAM J |
| DATE OF ORDER: | 16 OCTOBER 2020 |

THE COURT ORDERS THAT:

1. No native title exists in the land described as Lot 2 in Deposited Plan 1237419, and located in the Local Government Area of Griffith, Parish of Jondaryan, County of Cooper, New South Wales.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ABRAHAM J:

1. On 2 August 2019 the applicant, the Griffith Local Aboriginal Land Council, made a non-claimant application for a determination of native title under s 61(1) of the *Native Title Act 1993* (Cth) (NTA) for a determination that native title does not exist in a parcel of land. The application relates to the parcel of land which is Lot 2 in Deposited Plan 1237419 located in the Local Government Area of Griffith, Parish of Jondaryan, County of Cooper, New South Wales (the Land)
2. On 5 December 2016, the Minister for Primary Industries and Lands and Water determined that the Land could be granted to the applicant under s 36(5A) of the *Aboriginal Land Rights Act 1983* (NSW)(ALR Act). The transfer of the Land to the applicant was effected by dealing AN171033Y dated 22 February 2018. The applicant is the registered proprietor of the Land and holds the fee simple in the Land. As a consequence, the applicant holds a non-native title interest in relation to the whole of the Land for the purposes of subsection (2) relating to native title determination applications in the table at s 61(1) of the NTA.
3. The evidence relied on in support of the application is an affidavit of Sonali Seneviratne (Seneviratne affidavit) dated 6 May 2020. The parties took no issue with the fact the affidavit was not affirmed.
4. The Attorney General of New South Wales (Attorney General) did not oppose the application and submitted that while it is a matter for the Court, such an order would be within the power of the Court to make. NTSCORP Limited (NTSCORP) were joined as a party to the proceedings on 11 March 2020, and neither consents to nor opposes orders in, or consistent with, the terms sought by the applicant pursuant to s 86G of the NTA. NTSCORP also provided written submissions.
5. The applicant and the Attorney General submitted that this proceeding is one which is appropriate for the Court to determine without a hearing in accordance with s 86G(1) of the NTA. Given NTSCORP’s position as described above, for the purpose of s 86G(1)(a), the application is unopposed. It is appropriate that it be determined on the papers.
6. For the reasons below, an order in the terms sought by the applicant is made.

## Statutory framework and relevant legal principles

1. The relevant principles to be applied are not controversial and [8]-[16] below is a summary thereof from the recent decision in *Bahtabah Local Aboriginal Land Council v Attorney General of New South Wales* [2020] FCA 1236 (*Bahtabah*).
2. Section 13(1) of the NTApermits an application to be made to the Court for an “approved determination of native title” in relation to an area for which there is no other approved determination of native title. The Court has jurisdiction to hear and determine applications that relate to native title: s 81 of the NTA.
3. Section 61(1) of the NTA provides who may make such an application for an approved determination: relevantly this includes a person who holds a “non-native title interest in relation to the” relevant land: *Mace v* *State of Queensland* [2019] FCAFC 233; (2019) 375 ALR 717 (*Mace*) at [33]. The applicant is a Local Aboriginal Land Council: s 50 of the ALR Act and is the registered proprietor of land following a transfer pursuant to s 36 of the ALR Act and therefore has standing to make this application: *Deerubbin Aboriginal Land Council v Attorney-General of New South Wales* [2017] FCA 1067 at [44]; *Lightning Ridge Local Aboriginal Land Council v Premier of NSW in his capacity as the State Minister pursuant to the Native Title Act (1993) Cth* [2012] FCA 792 at [9].
4. Section 253 of the NTA provides both for claimant applications and non-claimant applications, and both types of application must be provided to the Native Title Registrar (Registrar) who is required to undertake the notification process in accordance with s 66 of the NTA: *Mace* at [35]-[37]. The Registrar must provide a copy of the application to the relevant State Minister: s 66(2) of the NTA, and to the appropriate representative bodies: s 66(2A) of the NTA. The Registrar is also required to give notice to persons or bodies specified in s 66(3)(a) of the NTA and to “notify the public in the determined way”: s 66(3)(d) of the NTA. By s 66(10)(c) of the NTA, a notice under s 66(3)(a) or (d) must include a statement to the effect that, in relation to a non-claimant application, "a person who wants to be a party in relation to the application must notify the Federal Court, in writing, within the period of 3 months starting on the notification day”: s 66(8) of the NTA, or seek leave from the Court to become a party. Once that period has ended, the notification requirement is satisfied.
5. The *Native Title (Notices) Determination 2011 (No 1)* is also relevant with s 6 providing that a notice under s 66(3) of the NTA must be published: by advertisement in one or more newspapers that circulate generally throughout the area to which the notice relates, or, if the area is an offshore place, the geographical area closest to it that is an onshore place; and in a relevant special-interest publication.
6. A “determination of native title” is, as defined by s 225 of the NTA, a determination of whether or not “native title”, as defined in s 223, exists in relation to a particular area. If native title is found to exist, there must also be a determination of the matters set out in s 225(a)-(e) of the NTA. As a non-claimant application seeks a determination that native title does not exist, those matters in s 225 are not engaged and so the Court is not required to make a determination in relation to them: see *CG (Deceased) on behalf of the Badimia People v State of Western Australia* [2016] FCAFC 67; (2016) 240 FCR 466 at [57] (*Badimia*).
7. The recent judgment of the Full Court in *Mace* affirmed the process to be undertaken in determining claims whether they be under s 86G as in this case or where the matters are contested. In both cases the question for the Court is the same: whether the applicant discharged its burden of proof that no native title exists in the claim area: *Mace* at [44].
8. The Full Court observed, inter alia, that each case must be assessed on its own facts: *Mace* at [47] referring to *Worimi v Worimi Local Aboriginal Land Council* [2010] FCAFC 3; (2010) 181 FCR 320 at [58] (*Worimi*), which will in turn depend upon the nature of the land and tenure; whether there have been previous native title claims; and the evidence adduced: *Mace* at [48]. “[W]hat is required for the applicable level of persuasion will vary from case to case”: *Mace* at [102]. While the nature of the evidence will vary, the Court will weigh and assess the probative strength of the particular evidence to determine whether the applicant has discharged its burden: *Mace* at [50], the standard of proof being proof on the balance of probabilities: *Mace* at [54], [64]. The Court cannot be asked to decide an application by a process of speculation: it will act only on the evidence (whether direct or indirect): *Mace* at [52] and see also [99]. A non-claimant application “does not involve any general inquiry into what native title rights and interests may have existed at the time of sovereignty, or effective sovereignty; nor any general inquiry into how those rights and interests may or may not have continued”: *Mace* at [55] referring to *Worimi* at [56]. Where there is “no direct or even indirect evidence of claims of connection arising from traditional law and custom to the land in question, then there may be little which would ‘cast doubt’” on the applicant’s case that no native title exists: *Mace* at [51] referring to *Worimi* at [64]. Nonetheless, even if an application were found to satisfy all the formal requirements for a non-claimant determination, “it is not inevitable that a determination that native title does not exist will be made”: *Mace* at [65] citing *Worimi* at [83]. The Court needs to determine whether to draw inferences from the absence of responses to notifications in the context of a public notification process that is based on newspapers, rather than, in 2019, social media: *Mace* at [65]. The Court will take account of the gravity of a negative determination and its permanency in terms of the effect on native title rights and interests, referring to s 140(2) of the *Evidence Act 1995* (Cth), and *Badimia* at [48], [66]: *Mace* at [66]-[69].
9. As the Full Court observed in *Mace* at [72]-[73]:

…the particular circumstances of each application are critical to the nature and extent of evidence that a Court may require in order to be satisfied whether it is appropriate to make the determination sought. Given what is at stake, and the fact that any such determination affects property rights, as against the whole world, no prescriptive approaches or glosses on the statute should be imposed. The Court has a wide discretion whether or not to make such an order and the potential combination of considerations which may arise in any particular application cannot be predicted, or turned into any kind of checklist.

We also consider that even though these are not unopposed applications under s 86G, the Court is able to consider as a factor in the exercise of its power whether it is “appropriate” to make a determination that no native title exists, even if a non-claimant applicant has proven on the balance of probabilities that no native title exists. The cases might be rare indeed where, if the burden of proof is discharged, a Court would consider it inappropriate to make a negative determination. However, in principle it may be no different to the Court’s discretion to withhold relief in proceedings brought in other parts of its jurisdiction where an applicant has otherwise made out a case for relief. The circumstances which arise in the consideration of a determination to be made under the NT Act are broad, and new circumstances may yet arise, so that the Court should not foreclose consideration of such a factor. The “appropriateness” consideration governs and is a condition of the exercise of power in s 86G, and we see no reason why it is not at least a permissible factor to consider in a contested application.

1. Further in *Mace* the Full Court relevantly observed at [97] (emphasis in original):

The principal evidence likely to impede the grant of a negative determination is evidence of an assertion of native title in the land and waters the subject of the non-claimant application which is objectively arguable, not evidence of the *potential* for the assertion of native title. A representative body is best placed to assist Aboriginal and Torres Strait Islander peoples to provide such evidence. To raise an objectively arguable claim of native title sufficient to mean that a non-claimant application needs to go to a full trial, the evidence of native title need not be extensive: it will be the quality of the evidence which is determinative.

1. As noted above, the applicant and the Attorney General accept, and NTSCORP does not oppose, that this case is appropriate to be dealt with pursuant to s 86G of the NTA which is in the following terms:

**86G Unopposed applications**

*Federal Court may make order*

(1) If, at any stage of a proceeding in relation to an application under section 61, but after the end of the period specified in the notice given under section 66:

(a) the application is unopposed; and

(b) the Federal Court is satisfied that an order in, or consistent with, the terms sought by the applicant is within the power of the Court;

the Court may, if it appears appropriate to do so, make such an order without holding a hearing or, if a hearing has started, without completing the hearing.

Note: *If the application involves making a determination of native title, the Court’s order would need to comply with section 94A (which deals with the requirements of native title determination orders).*

Meaning of **unopposed**

(2) For the purpose of this section, an application is **unopposed** if the only party is the applicant or if each other party notifies the Federal Court in writing that he or she does not oppose an order in, or consistent with, the terms sought by the applicant.

1. To make the orders sought the Court must be satisfied on the balance of probabilities that native title does not exist in relation to the Land either: because native title is not claimed by, or cannot be proved by, a native title claimant; or because native title has been extinguished by one or more prior acts of the Crown. The non-claimant applicant has the onus of proving on the balance of probabilities that no native title exists: *Mace* at [54], [64], and [115].
2. In this application, although the orders sought were made in the alternative, the primary basis of the application, and that which is not opposed, is because native title has been extinguished.
3. Extinguishment takes place where rights have been granted to third parties, or where the Executive asserts rights or powers, which are inconsistent with the continuing existence of the native title concerned: *Western Australia v Ward* [2002] HCA 28;(2002) 213 CLR 1 (*Ward*)at [78], [215] and [468] and *State of Western Australia v Brown* [2014] HCA 8; (2014) 253 CLR 507 (*Brown*) at [33]; *Roberts on behalf of the* *Widjabul Wia-Bal People v Attorney-General of New South Wales* [2020] FCAFC 103 at [60].
4. Although native title is not able to be extinguished contrary to the NTA: s 11, it does not constitute a comprehensive code for extinguishment such that an act that does not extinguish native title under the NTA may still have that effect at common law: *Brown v Western Australia* [2012] FCAFC 154; (2012) 208 FCR 505 at [24].
5. Extinguishment of native title is addressed in Divisions 2, 2A and 2B of Part 2 of the NTA. Excluding legislative acts, in considering Divisions 2, 2A and 2B, the “temporal guideposts” are 31 October 1975 (the commencement of the *Racial Discrimination Act 1975* (Cth) (RD Act)), 1 January 1994 (the commencement of the NTA) and 23 December 1996 (*The Wik Peoples v The State of Queensland* [1996] HCA 40; (1996) 187 CLR 1): *Ward* at [4]; see also at [135]-[139].
6. The term “extinguish” is defined in s 237A of the NTA as follows:

The word ***extinguish***, in relation to native title, means permanently extinguish the native title. To avoid any doubt, this means that after the extinguishment the native title rights and interests cannot revive, even if the act that caused the extinguishment ceases to have effect.

1. The applicant submitted, and the other parties did not challenge, that if the Court was satisfied that it is appropriate to make a determination that no native title exists on the ground that native title has been extinguished, it is not necessary for the Court to also make a determination as to whether native title is not claimed: citing, *Darkinjung Local Aboriginal Land Council v Attorney-General of New South Wales* [2018] FCA 1136 (*Darkinjung*), at [48]-[49] per Griffiths J, noting the alternative ground in that case was extinguishment.

## Consideration

1. The applicant provided evidence that the formal requirements set out in s 66 of the NTA have been complied with in this case.
2. On 2 August 2019, under s 63 of the NTA the Registrar received a copy of the application from the Federal Court. Under s 66(2) and (2A) of the NTA the Registrar gave a copy of the application to the NSW Government and to the representative body under the NTA for NSW, NTSCORP.
3. Pursuant to s 66 of the NTA, the notification period for the application was from 9 October 2019 to 8 January 2020. Public notices, specifying the notification period, were duly published. The National Native Title Tribunal (NNTT) publicly notified the application in the Koori Mail and the Area News on 25 September 2019. No native title claimant applications were filed during or subsequent to the notification period, nor were any notices of intention to become a party filed during the notification period, other than by NTSCORP.
4. No approved determination of native title has been made for the Land and there are no other native title determination applications over the Land.
5. Although in *Mace* the Full Court appeared to express some concern about the use of newspaper advertisements to provide notice in an era of widespread use of social media, the Full Court described the notification requirement that referred to newspapers as a “not objectively unreasonable process”: at [92]. The Full Court there observed at [92] that the notifications given by the NNTT were “published in newspapers which, we infer, are reasonably apprehended by the NNTT to reach a greater proportion of Indigenous readers than other newspapers might”. The Court postulated, for the future, that perhaps “consideration should be given more regularly to the use of social media for these notifications”: see discussion at [93]-[94]. Although the use of newspapers was not an unreasonable process in this case, the suggestion by the Full Court as to the consideration of the future use of social media is plainly sensible in the current environment as I have observed elsewhere: *Bahtabah* at [24].
6. The applicant submitted that native title has been extinguished in the Land by a previous act of the Crown pursuant to a vesting in fee simple under the *Public Works Act 1900* (NSW) (*Public Works Act*) on the basis that such a vesting falls within the definition of a previous exclusive possession act (PEPA) in s 23B(2) of the NTA. The evidence establishes that on 6 November 1912, the Land was appropriated pursuant to the *Public Works Act* for the purpose of the *Murrumbidgee Irrigation Area Redemption Act 1910* (NSW). The effect of that vesting, as recorded in the relevant notification published in the NSW Government Gazette dated 6 November 1912, was that the land was vested in fee simple in “His Majesty as Crown Lands within the meaning and for the purposes of the said “Murrumbidgee Irrigation Act, 1910””.
7. PEPA is defined in s 23B of the NTA as follows:

**23B Previous exclusive possession act**

(1) This section defines ***previous exclusive possession act***.

*Grant of freehold estates or certain leases etc. on or before 23.12.199*

(2) An act is a previous exclusive possession act if:

(a) it is valid (including because of Division 2 or 2A of Part 2); and

*Note: As at the commencement of this section, acts such as grants before 1 January 1994 that were invalid because of native title have been validated by or under Division 2.*

(b) it took place on or before 23 December 1996; and

(c) it consists of the grant or vesting of any of the following:

(i) a Scheduled interest (see section 249C);

(ii) a freehold estate;

(iii) a commercial lease that is neither an agricultural lease nor a pastoral lease;

(iv) an exclusive agricultural lease (see section 247A) or an exclusive pastoral lease (see section 248A);

(v) a residential lease;

(vi) a community purposes lease (see section 249A);

(vii) what is taken by subsection 245(3) (which deals with the dissection of mining leases into certain other leases) to be a separate lease in respect of land or waters mentioned in paragraph (a) of that subsection, assuming that the reference in subsection 245(2) to “1 January 1994” were instead a reference to “24 December 1996”;

(viii) any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

*Vesting of certain land or waters to be covered by paragraph (2)(c)*

(3) If:

(a) by or under legislation of a State or a Territory, particular land or waters are vested in any person; and

(b) a right of exclusive possession of the land or waters is expressly or impliedly conferred on the person by or under the legislation;

the vesting is taken for the purposes of paragraph (2)(c) to be the vesting of a freehold estate over the land or waters.

*Construction of public works commencing on or before 23.12.1996*

…

(9C) If an act is the grant or vesting of an interest in relation to land or waters to or in the Crown in any capacity or a statutory authority, the act is not a **previous exclusive possession act**:

(a) unless, apart from this Act, the grant or vesting extinguishes native title in relation to the land or waters; or

(b) if the grant or vesting does not, apart from this Act, extinguish native title in relation to the land or waters—unless and until the land or waters are (whether before or after 23 December 1996) used to any extent in a way that, apart from this Act, extinguishes native title in relation to the land or waters.

*Exclusion by regulation*

…

1. Therefore, for an act to be a PEPA pursuant to the NTA there are three main elements that must be satisfied (1) it is valid: s 23B(2)(a); (2) it took place on or before 23 December 1996: s 23B(2)(b); and (3) it consists of the grant of vesting or an interest or an estate set out in s 23B(2)(c). In this case, the act is the granting of a freehold estate as defined in s 23B(c)(ii). This is subject to s 23B(9C), relevantly subparagraph (a).
2. Where an act is a PEPA other than a public work, and is attributable to the State of NSW, the act extinguishes native title in the land concerned, with that extinguishment taken to have happened when the act was done: see s 20(1) of the *Native Title (New South Wales) Act 1994* (NSW) (NSW NT Act) read with ss 23C and 23E of the NTA.
3. In *Tweed Byron Local Aboriginal Land Council v Attorney General of New South Wales* [2019] FCA 936; (2019) 373 ALR 667 (*Tweed Byron*) this Court considered whether an appropriation under the *Public Works Act* extinguished native title. Unlike in this case, her Honour in *Tweed Byron* was considering whether the vesting of land in a statutory authority in 1988 extinguished native title after the commencement of the RD Act.
4. Her Honour relevantly concluded at [33]:

…The short point is that on either view, there was no discrimination on the ground of race against the holders of native title and the vesting of the estate in fee simple in the Tourism Commission under s 43 of the Public Works Act was valid and extinguished any native title in the land in whole at common law, as confirmed by s 20(1) of the *Native Title (New South Wales) Act 1994* (NSW) read in conjunction with s 23B(2) and (9C) of the NTA.

1. It was submitted by the Attorney-General that *Tweed Byron* is “sufficient authority to dispose of these proceedings and for the Court to make the orders sought” by the applicant. After referring to *Tweed Byron* NTSCORP submitted that the provisions concerning appropriations were not relevantly distinguishable and therefore the act effected by the notice published on 6 November 1912 extinguished native title at common law; the act falls within the exception in s 23B(9C)(a) of the NTA for Crown to Crown grants which, apart from the NTA, extinguished native title; and was therefore a previous exclusive possession act pursuant to s 23B(2)(c)(ii).
2. In any event, as the Attorney-General submitted, that conclusion is correct.
3. In *Brown* the High Court said at [38] of the common law test for extinguishment:

There cannot be "degrees of inconsistency of rights". "Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment." As counsel for the native title holders put the point in argument in this Court, inconsistency is that state of affairs where "the existence of one right necessarily implies the non‑existence of the other". And one 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.

1. The grant of an estate in fee simple is a “valid exercise of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title”: *Western Australia v Commonwealth* [1995] HCA 47*;* (1995) 183 CLR 373 at 439. “Native title is extinguished by a grant in fee simple” as it does not permit the enjoyment by anyone else of any right or interest in respect of the land but the owner of the fee simple: *Fejo v Northern Territory* [1998] HCA 58; (1998) 195 CLR 96 at [43], [107].
2. The appropriation and vesting led to the valid vesting of an estate in fee simple which wholly extinguished native title at common law.
3. The vesting was valid as it took place prior to the commencement of the RD Act and is effective to extinguish native title apart from the NTA: *Ward* at [260]; *Lawson v Minister for Land & Water Conservation for the State of New South Wales* [2003] FCA 1127 at [21]. The vesting took place prior to 23 December 1996: s 23B(2)(b) of the NTA. It was the vesting of a freehold interest for the purposes of s 23B(2)(c)(ii) of the NTA, taking into account s 23B(3) of the NTA. The vesting is within the definition of PEPA under s 23B(2) of the NTA.
4. As such, s 23B(9C)(a) of the NTA is satisfied such that the vesting of the estate in fee simple in 1912 was a PEPA which extinguished native title pursuant to s 23E of the NTA (read with ss 23B and 23C) and s 20(1)(a) of the NSW NT Act.

## Conclusion

1. The Court is concerned with an unopposed non-claimant application. I am satisfied that the procedural requirements have been established. Having regard to the evidence, submissions, and relevant principles, I am satisfied that the order sought is within this Court’s power, and that it is appropriate to make the determination in the terms sought by the applicant.
2. Having reached that conclusion it is unnecessary for me to address the second, and alternative limb of the application: *Darkinjung* at [49]; *Awabakal Local Aboriginal Land Council v Attorney-General of New South Wales* [2018] FCA 1249 at [30].

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| I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 16 October 2020