STATUTORY INTERPRETATION AND NATIVE TITLE EXTINGUISHMENT: EXPANDING CONSTRUCTIONAL CHOICES

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I INTRODUCTION

> [P]urposive construction to ascertain whether a statute extinguishes native title rights or interests is not without difficulty where the statute was enacted prior to this Court's decision in *Mabo [No 2]* that the common law could recognise native title.[1]

Native title jurisprudence is derived from the common law.[2] The concept of native title and its re-institutionalisation into the underlying land law framework emanates from the conclusions of the High Court of Australia in *Mabo [No 2]*.[3] This decision revised the architecture of the ownership framework underpinning Australian land law. The Court allowed native title rights and interests to be recognised in circumstances where they could be shown to have survived the impact of colonisation and the assertion of sovereignty by the United Kingdom.[4] The conceptualisation of native title was given statutory validation in the *Native*

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1 *Akiba v Commonwealth* (2013) 250 CLR 209, 229–30 [31] (French CJ and Crennan J).

2 The origins of native title were outlined in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 51 ('*Mabo [No 2]*)' by Brennan J who stated:

> Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown's radical title when the Crown acquires sovereignty over that territory. The fact that individual members of the community … enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title.

See also Kent McNeil, 'The Relevance of Traditional Laws and Customs to the Existence and Content of Native Title at Common Law' in Kent McNeil (ed), *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, 2001) 416, 420–1.

3 (1992) 175 CLR 1.

4 See *Mabo [No 2]* (1992) 175 CLR 1, 29–30, where Brennan J concluded that Australian common law is an 'organic development' of the law of England and that it might legitimately develop 'independently of English precedent' and in so doing, overrule a 'postulated rule of the common law' if it seriously offends the contemporary values which are the aspirations of the Australian legal system.

Title Act 1993 (Cth) ('*NTA*'), which outlined the mandatory requirements for establishing native title rights and interests.[5] The statutory validation of native title gave it a strong legislative foundation, and prompted the High Court to reify native title as a statutory rather than a common law concept.[6]

One of the most distinct and enduring characteristics of native title rights and interests in Australia is their susceptibility to extinguishment.[7] The scope and range of the doctrine of extinguishment is sweeping. Native title rights and interests may be extinguished by the exercise of an inconsistent grant of sovereign power, whether the inconsistency is express or implied and whether it is manifest through the issuance of a specific grant or through legislative acts.[8] Determining whether an exercise of sovereign power is consistent with the recognition of native title rights and interests is therefore the operational fulcrum underpinning the extinguishment process.[9]

In this article, the scope and application of the statutory construction assessment that underlies the consistency evaluation is examined. The focus is upon legislation enacted prior to the *Racial Discrimination Act 1975* (Cth) ('*RDA*') and the *NTA* because these Acts do not attract the *NTA* validation provisions and therefore must be assessed in accordance with common law processes. The primary contention of this article is that the interpretative strategy for determining the legislative intent of Acts predating the *RDA* and the *NTA*

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5 The definition of native title is encapsulated within the *NTA* s 223(1). See also Lisa Strelein, 'Conceptualising Native Title' (2001) 23 *Sydney Law Review* 95. Strelein notes that the '*Mabo* decision did not exhaustively define the scope and nature of native title, nor would the High Court have intended it to do so': at 96.

6 See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 440 [32], where Gleeson CJ, Gummow and Hayne JJ concluded that native title is now a 'creature of that Act [the *NTA*], not the common law'. See also Noel Pearson, 'Concept of Native Title at Common Law' in *Land Rights – Past, Present and Future: 20 Years of Land Rights: Our Land Is Our Life: Conference Papers* (Northern Land Council, 1996) 118, 119; Strelein, above n 5, 123–4.

7 This is outlined by Toohey J in *Mabo [No 2]* (1992) 175 CLR 1, 195: 'Where the legislation reveals a clear and plain intention to extinguish traditional title, it is effective to do so'.

8 See *Mabo [No 2]* (1992) 175 CLR 1, 69, where Brennan J stated:

> Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of freehold or of leases but not necessarily by the grant of lesser interests (eg authorities to prospect for minerals).

In *Western Australia v Commonwealth* (1995) 183 CLR 373, 422 ('*Native Title Act Case*'), Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ held that the intention of the Crown to extinguish may 'be ascertainable from the instruments relevant to the establishment of the Colony considered in the context of the surrounding circumstances'. Their Honours noted, however, that 'the mere formation of an intention by the officers of the Crown could not have achieved the extinguishment of native title; intention would have had to find expression in order to be effective'.

9 See Kristin Howden, 'Common Law Doctrine of Extinguishment: More than a Pragmatic Compromise' (2001) 8 *Australian Property Law Journal* 206, 211. Howden notes that the test of inconsistency 'forms the basis of the doctrine of extinguishment. As such, the test tells us that the Crown can appropriate land or grant it to third parties without having to deal with the burden of native title'.

needs to be broadly purposive rather than textualist in orientation to ensure that a range of relevant inter-contextual factors and policies are properly considered. A purposive approach to statutory construction provides a more effective foundation for courts in evaluating the underlying objectives connected with the implementation of native title rights and interests. This is despite the fact that their recognition postdates the implementation of the Act under consideration in a particular case.[10]

A number of High Court decisions in this area suggest that a purposive approach to statutory construction is increasingly favoured. In *Yanner v Eaton*,[11] *Akiba v Commonwealth*,[12] and *Karpany v Dietman*,[13] the breadth of focus given to the characterisation of the relevant state and federal fisheries legislation ultimately averted the extinguishment of native title rights and interests to hunt and fish. These decisions suggest that a wide-ranging purposive approach to legislative intent is desirable when assessing whether pre-*RDA* and *NTA* Acts should be deemed to have extinguished usufructuary native title rights. This approach to statutory construction is better equipped to take account of a statute's broad policy context; to address unenumerated historical, social and political concerns; and to balance the normative commitment of judges to faithfully ascertain legislative intention with the broader normative commitments to uphold

10 There are three broad approaches to statutory interpretation: purposivism, textualism and intentionalism. For a discussion of these approaches, see generally William N Eskridge Jr, Philip P Frickey and Elizabeth Garrett, *Legislation and Statutory Interpretation* (Foundation Press, 2nd ed, 2006) 219 ff. See also D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 8th ed, 2014); William N Eskridge Jr, Philip P Frickey and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (Thomson West, 4th ed, 2007). Unlike textualism, which posits that a statute's original and 'plain' meaning, as evidenced in its text, should govern statutory interpretation, or intentionalism, which presupposes that there is a defensible legislative intent underlying the statute, which a court should ascertain, largely by reference to the legislative text, a purposive approach authorises courts to go beyond the defined words or intent articulated within a statute to reach an interpretation that is consistent with the purpose for which the statute was enacted. A purposive approach allows courts to utilise extraneous materials in order to ascertain the purpose of the statute. Purposivism assumes that every statute is a purposive act of the legislators who are seeking a particular outcome. However, it also assumes that the legislature had probably not anticipated the details of a particular case. See also Frank B Cross, *The Theory and Practice of Statutory Interpretation* (Stanford University Press, 2009) 60–1; Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi trans, Princeton University Press, 2005) [trans of: *Parshanut Takhlitit Be-mishpaṭ* (first published 2005)].

11 (1999) 201 CLR 351 ('*Yanner*').

12 (2013) 250 CLR 209 ('*Akiba*').

13 (2013) 303 ALR 216 ('*Karpany*').

the recognition and protection of native title rights and interests within Australia.[14]

This article is divided into three parts. Part II examines the operative dimensions of the common law doctrine of extinguishment, the relevance and scope of the *RDA*, and the validation and extinguishment principles that inform the *NTA* process. It goes on to examine the suitability of textualist and purposive interpretation methodologies for common law extinguishment processes and to consider how the section 211 defence in the *NTA* may provide constructive guidance. This Part argues that in order to achieve greater parity between common law and statutory extinguishment processes, the common law assessment of pre-*RDA* and *NTA* legislation needs to be flexible enough to take account of the provisions of the *NTA*. In particular, provisions such as section 211 are important given the insight they provide regarding *NTA* policy on the scope and extent of permissible regulatory incursion into native title rights and interests. A liberal, purposive approach to statutory interpretation facilitates the integration of core *NTA* policy directives into the extinguishment determination, resulting in a fairer and more effective outcome.

Part III goes on to examine three significant High Court decisions in this area noted above: *Yanner*, *Akiba*, and *Karpany*. Each of these decisions held that native title rights and interests were not extinguished by Acts predating the *RDA* and *NTA* in issue because the statutory interpretation process resulted in the relevant Acts being characterised as regulatory and therefore not inconsistent with the continued recognition of native title rights and interests. The interpretative strategies underlying the assessments are reviewed and the relevance of section 211 of the *NTA* is examined. This Part argues that the preference of the High Court for a broader, purposive interpretative strategy has decreased the extinguishment outcomes, and in so doing, moderated the destructive potential of the common law in such cases.

Part IV then considers the evolving jurisprudence of Canadian reconciliation law and how it has altered the interface between regulation and Aboriginal title. Particular emphasis is given to section 35(1) of the *Canada Act 1982* (UK) clause 11, schedule B ('*Constitution Act 1982*'), which provides protection for Aboriginal rights. The promulgation of a constitutional theory of reconciliation has helped to shield Aboriginal title in Canada from invasive regulatory

14 See Kent McNeil, 'Indigenous Rights Litigation, Legal History and the Role of Experts' (2014) 77 *Saskatchewan Law Review* 173, 201. McNeil notes that '[j]udges have to make decisions based on the force of law as a normative system of principles and rules, not on law as an evidential matter of historical fact'. For a discussion of the importance of purposivism within United States jurisprudence, see John F Manning, 'The New Purposivism' [2011] *Supreme Court Review* 113 and M Herz, 'Purposivism and Institutional Competence in Statutory Interpretation' (2009) *Michigan State Law Review* 89, 98, where the author examines some of the difficulties associated with determining purpose. More generally, see Frank B Cross, 'The Significance of Statutory Interpretative Methodologies' (2007) 82 *Notre Dame Law Review* 1971.

incursions. The recent decision by the Supreme Court of Canada in *Tsilhqot'in Nation v British Columbia* clearly illustrates the progression of this theory.[15] This Part argues that in the absence of constitutional protection, Australian courts should take full advantage of the constructional tools they have before them to improve the protective framework for native title and reduce the prospect of an unfair and arbitrary common law extinguishment process.

II THE COMMON LAW DOCTRINE OF EXTINGUISHMENT AND ITS RELATIONSHIP WITH THE *NTA*

A Extinguishment by Inconsistent Grant and Necessary Implication

The extinguishment principle is an incontrovertible aspect of the British constitutional framework.[16] This elemental concept informs both the recognition and the durability of native title. Recognised native title rights and interests may only be exercised where they have not already been extinguished and interests that have been acknowledged remain susceptible to extinguishment. The end point for the common law doctrine of extinguishment is the legal cessation of native title rights and interests. In the words of French CJ and Crennan J in *Akiba*, extinguishment amounts to the 'obverse of recognition'.[17]

Extinguishment is, of course, a highly juridical concept in that it defines a purely legal state of affairs. Where extinguishment occurs, Aboriginal people are legally precluded from exercising traditional rights such as hunting or fishing within a prescribed area. Extinguishment does not and should not deny the social foundation of Aboriginal laws and customs. Hence, it must be borne in mind that, as noted by the High Court in *Yanner*,

> [r]egulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land … and does not deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing.[18]

Legal extinguishment refers to a termination of native title rights and interests flowing from the implementation of an inconsistent legislative or

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15 [2014] 2 SCR 256 ('*Tsilhqot'in*').

16 For discussion on the common law doctrine of extinguishment, see generally Shaunnagh Dorsett, '"Clear and Plain Intention": Extinguishment of Native Title in Australia and Canada Post-*Wik*' (1997) 6 *Griffith Law Review* 6; Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27 *Melbourne University Law Review* 523. For discussion on the virtues of constitutional protection and recognition, see generally Megan Davis and Zrinka Lemezina, 'Indigenous Australians and the Preamble: Towards a More Inclusive *Constitution* or Entrenching Marginalisation?' (2010) 33 *University of New South Wales Law Journal* 239.

17 (2013) 250 CLR 209, 219 [10].

18 (1999) 201 CLR 351, 373 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

executive act.[19] As outlined by the High Court in *Western Australia v Ward*, extinguishment describes 'the consequences in law of acts attributed to the legislative or executive branches of government'.[20] Such acts may constitute either a grant of a right to a third party, or may refer to powers exercised over the land which are deemed to be inconsistent with the continued existence of native title rights and interests.

Hence, the extinguishment principle has a twofold operation. Native title rights and interests may become defeasible through either (i) a lawful legislative or executive exercise of the power to grant interests in land inconsistent with the continued rights of Indigenous people to enjoy native title; or (ii) a lawful exercise of legislative or executive power in the form of a legislative provision or framework which is interpreted to be inconsistent with native title rights and interests.[21]

Extinguishment by necessary implication has a fundamentally different focus to extinguishment by inconsistent grant. An extinguishment arising from the issuance of an inconsistent grant is grounded in an objective and comparative evaluation of conferred rights.[22] It is not possible for an extinguishment by inconsistent grant to occur 'by degrees of inconsistency of rights' because the process is absolute.[23] Hence, one right will necessarily imply the non-existence of the other when there is 'logical antimony' between each.[24] Traditional native title rights and interests must be able to function consistently with the rights attached to the Crown grant in order to avoid extinguishment in this context.

An extinguishment arising from necessary implication is far more expansive as it is a product of statutory construction.[25] Extinguishment by implication occurs where it is determined that Parliament intended, through a clear and plain exercise of sovereign power, to extinguish native title rights and interests.[26] This type of extinguishment is not based upon an objective conferral of rights, but rather upon a construction of the intended scope and effect of the legislative

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19 For a deconstructed outline of the consequences of the doctrine of extinguishment, see Brian Slattery, 'The Generative Structure of Aboriginal Rights' (2007) 38 *Supreme Court Law Review* (2d) 595. The author discusses the particular amenability of Aboriginal rights to 'cessation'.

20 (2002) 213 CLR 1, 69 [26] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) ('*Ward*').

21 See *Native Title Act Case* (1995) 183 CLR 373, 418 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

22 See *Banjima People v Western Australia [No 2]* (2013) 305 ALR 1, 141–2 [856] (Barker J). His Honour noted that the inquiry is an objective one, which 'requires identification of and comparison between two sets of rights, sometimes called the inconsistency of incidents test'.

23 *Ward* (2002) 213 CLR 1, 91 [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

24 *Western Australia v Brown* (2014) 306 ALR 168, 176 [38] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

25 See *Mabo [No 2]* (1992) 175 CLR 1, 73–6 (Brennan J), on the scope of extinguishment arising from statutory construction. See also Howden, above n 9.

26 See *A-G (Canada) v Hallet & Carey Ltd* [1952] AC 427, 450 (Lord Radcliffe). His Lordship said that 'there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are subject to a "strict" construction'.

framework as a whole. Where legislation is enacted prior to the recognition of native title, courts are required to ascertain whether Parliament intended the Act to operate alongside native title or whether the legislative framework should be interpreted to preclude this.[27]

An implied extinguishment that seeks to make a counterfactual assessment of what Parliament might have intended, if native title interests were recognised at the point when the Act was implemented, is challenging. Courts are required to determine how the Act intended to deal with interests, the scope and nature of which were unknown at the date when the legislation was introduced. The statutory construction process that underlies this type of assessment is amenable to arbitrary and unstructured interpretative suppositions. Assumptions may be made about the legislative focus of an Act that may be unjustified by its intended normative significance.[28] The High Court in *Akiba* held that an extinguishment assessment in this context requires the court to identify and compare the legislative focus of the Act with the rights and interests that underpin native title but acknowledged that this type of diagnostic evaluation is 'not without difficulty'.[29]

The prevailing methodology has been to bifurcate the possible characterisations of the legislative framework as either prohibitive (and therefore inconsistent with native title) or regulatory (and therefore not inconsistent with native title). In each instance, the justifications and interpretative strategies employed to determine which characterisation the legislation in issue should be given varies in scope and form. The High Court has increasingly displayed a strong tendency, in making this determination, to take account of the provisions and objectives of the *NTA*. The aim of the Court in doing so is to develop an improved understanding not only of the nature of usufructuary rights and interests, but more fundamentally, how those interests may function effectively alongside regulatory frameworks.[30]

B The Legitimacy of the Doctrine of Extinguishment

The capacity of the legislature to terminate a property right is not peculiar to native title jurisprudence. It is, however, fundamental to the common law that a subject should not be deprived of property without a legal right to compensation,

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27 *Ward* (2002) 213 CLR 1, 89 [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), citing *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (Gummow J); *Fejo v Northern Territory* (1998) 195 CLR 96, 126 [43] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Fejo*').

28 See especially Sean Brennan, 'Statutory Interpretation and Indigenous Property Rights' (2010) 21 *Public Law Review* 239, 252. Brennan notes that:

> reluctance to find textual ambiguity, or to invoke a statutory purpose conceived in general terms, risks emptying the prefatory words chosen by Parliament of their intended normative significance – let alone missing a more broadly conceived notion of purpose derived from extrinsic material.

29 (2013) 250 CLR 209, 229–31 [31]–[35] (French CJ and Crennan J).

30 See Part III of this article for discussion of the conclusions of the Court in *Yanner*, *Akiba*, and *Karpany*.

in the absence of a clear and unequivocal legislative intention.[31] This was clearly outlined by Griffith CJ and Rich J in *Commonwealth v Hazeldell Ltd*, who stated that '[i]t is a settled rule of construction that such an intention cannot be imputed to the Legislature unless expressed in unequivocal terms incapable of any other meaning'.[32] This rule of statutory interpretation is a component of a more general presumption against legislative interference with vested rights, including rights to property.[33]

Legislative and executive extinguishment flows directly from the fact that the British constitution does not incorporate any protection against an interference with rights.[34] Within an inherited feudal framework, the Crown is the ultimate owner and has the capacity to exercise full sovereign power over land.[35] The specific amenability of native title to legislative or executive extinguishment is a consequence of its expression within the tenure framework in Australia. The decision in *Mabo [No 2]* articulated native title as an encumbrance on the pre-existing radical title of the Crown and this meant that Indigenous holders did not retain independent, allodial ownership.[36] The combination of the Crown's underlying radical title and its enduring sovereignty of power equipped the legislature with the formal capacity to issue grants or enact legislation inconsistent with the continuing recognition of native title rights and interests. In

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31 For a recent restatement of this principle, see *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, 443 [172] (Heydon J). See also *Mabo [No 2]* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ); *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 207 [175] (Heydon J).

32 (1918) 25 CLR 552, 563.

33 See *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744, 752 (Lord Atkinson).

34 See T R S Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' (1985) 44 *Cambridge Law Journal* 111.

35 See Theodore F T Plucknett, *A Concise History of the Common Law* (Butterworth, 5th ed, 1956) 506–20 for an outline of feudalism and sovereignty. Following the conclusions of the High Court in *Mabo [No 2]*, the Crown retains full sovereignty of power but sovereignty of ownership is now qualified and, where a native title encumbrance can be established, the Crown retains a radical title which may be burdened by native title. See also Samantha Hepburn, 'Feudal Tenure and Native Title: Revising an Enduring Fiction' (2005) 27 *Sydney Law Review* 49.

36 (1992) 175 CLR 1, 48 (Brennan J). His Honour stated that:

> By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants.

See also Samantha Hepburn, 'Disinterested Truth: Legitimation of the Doctrine of Tenure Post-*Mabo*' (2005) 29 *Melbourne University Law Review* 1, 26. Hepburn notes that native title is more susceptible to extinguishment because it has been attached to a feudal land system that is incapable of conferring structural equality upon Indigenous and non-Indigenous title.

this respect, the doctrine of extinguishment is intricately connected to the sovereignty assumptions that underlie the tenure system.[37]

C Constitutional Qualifications to the Doctrine of Extinguishment

The doctrine of extinguishment is qualified by two significant constitutional limitations. First, section 51(xxxi) of the *Commonwealth Constitution* provides that the Commonwealth Parliament has the power to make laws with respect to the acquisition of property on just terms from any state or person for any purpose in respect of which the Parliament has power to make laws. The just terms provision imposes a constitutional obligation on the federal government to pay compensation for the taking of property. An extinguishment of native title would constitute an acquisition of property for the purposes of section 51(xxxi).[38] This obligation has no general application to state parliaments because no equivalent provision exists within state constitutions.[39] The power to extinguish property rights is also limited by section 109 of the *Constitution*. Section 109 has the effect that any state legislation which purports to take property is invalid to the extent that it is inconsistent with a law of the Commonwealth. Where state legislation postdates the implementation of the *RDA*, it may potentially extinguish native title rights contrary to the provisions of the *RDA* and therefore be in contravention of section 109 of the *Constitution*. The *RDA*, pursuant to section 10(1), prevents an extinguishment of native title where it can be shown that such extinguishment is discriminatory because it adversely affects the enjoyment of native title in a manner that is different to the enjoyment experienced by holders who have received their title from the Crown.[40]

A fundamental temporal division in the assessment process for native title extinguishment exists as a result of the *RDA*. Legislation enacted prior to 1975 and the implementation of the *RDA* is prima facie valid and any extinguishment of native title in this context will depend upon common law assessment

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37 See especially Brendan Edgeworth, 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*' (1994) 23 *Anglo-American Law Review* 397, 427. Edgeworth argues that retaining the doctrine of tenure allowed colonial governments to retain 'political and ideological' functions.

38 *Mabo [No 2]* (1992) 175 CLR 1, 111 (Deane and Gaudron JJ). Their Honours expressed the view that 'any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purposes of s 51(xxxi)'. See also Sean Brennan, 'Native Title and the "Acquisition of Property" under the *Australian Constitution*' (2004) 28 *Melbourne University Law Review* 28.

39 For a general discussion on the scope of s 51(xxxi), see Tom Allen, 'The Acquisition of Property on Just Terms' (2000) 22 *Sydney Law Review* 351. For a specific discussion of the extension of the just terms requirement to the states in the context of native title, see Sean Brennan, 'Section 51(xxxi) and the Acquisition of Property under Commonwealth-State Arrangements: The Relevance to Native Title Extinguishment on Just Terms' (2011) 15(2) *Australian Indigenous Law Review* 74.

40 In *Mabo v Queensland [No 1]* (1988) 166 CLR 186, it was held that the *Queensland Coast Islands Declaratory Act 1985* (Qld) was invalid because it contravened *RDA* s 10(1).

processes. By contrast, legislation enacted after the *RDA*, which may be invalid as a consequence of section 10(1), is subject to the validating provisions of the *NTA* provided that the exercise of legislative or executive power predates 1 January 1994, which is the date when the *NTA* entered into force.[41]

The curtailment of the extinguishment principle by the provisions of the *RDA* was discussed at length by the High Court in the *Native Title Act Case*.[42] In that case, the Western Australian Government enacted the *Land (Titles and Traditional Usage) Act 1993* (WA) which purported to extinguish native title and replace it with statutory rights of traditional usage within a regime prescribed by that Act. The Commonwealth, on behalf of the Wororra, Yawuru and Martu peoples, argued that the Act was inconsistent with the *RDA*. The High Court concluded that racially discriminatory action, whether legislative or executive, which would otherwise have been effective to extinguish native title, is ineffective if the action is taken after 31 October 1975, by reason of section 10(1) of the *RDA*.

The High Court examined the impact of the *RDA* upon the common law extinguishment principle and concluded that section 10(1) confers equality of enjoyment of the human right to own and inherit property on 'persons of a particular race'. While this section does not alter the characteristics of native title, it does confer

> on protected persons rights or immunities which, being recognised by 'the tribunals and all other organs administering justice', ensure that 'protected persons' enjoy security in their title to property in the same way that the holders of titles granted by the Crown are secure in the enjoyment of their titles. … Security in the right to own property necessarily carries with it immunity from arbitrary deprivation of the property.[43]

Any state law purporting to authorise an expropriation of property that is characteristically held by 'persons of a particular race' for purposes additional to those that generally justify expropriation, will therefore be contrary to section 10(1) of the *RDA*.

D Validation of Past Acts under the *NTA*

The *NTA* scheme contemplates the existence of legislative or executive acts which may affect native title rights and interests by constraint or restriction but which do not necessarily extinguish them.[44] Section 227 of the *NTA* provides that

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41 For an interesting discussion on the intersection between the *RDA* and native title rights and interests, see Kent McNeil, 'Racial Discrimination and Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181. Legislation postdating the implementation of the *RDA* may be validated as a 'past act' or, where it postdates 1 January 1994, but predates 23 December 1996, as an 'intermediate period act'. See generally *NTA* pt 2 divs 2–2B.

42 (1995) 183 CLR 373.

43 Ibid 437 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) (citations omitted).

44 *Akiba* (2013) 250 CLR 209, 226 [25] (French CJ and Crennan J).

an act 'affects' native title 'if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise'.

Acts categorised as 'past acts' under the *NTA* will only have the effect of extinguishing native title completely where they come within the scope of category A past acts defined by the *NTA*.[45] Category A past acts constitute grants of freehold estate or a commercial, agricultural, pastoral or residential lease or the construction of a public work.[46] Past acts coming within category B will only extinguish native title to the extent of any inconsistency. This means that a determination of the level of inconsistency between the rights must be carefully ascertained. Category B past acts constitute all leasehold grants, other than a mining lease, not already within category A.[47] Category C past acts constitute mining leases and category D past acts constitute all other past acts not otherwise coming within categories A to C. Category C and D past acts will not extinguish native title. Rather, native title rights and interests are subject to the statutory concept known as the non-extinguishment principle.[48]

E The Non-Extinguishment Principle

The non-extinguishment principle is defined in section 238 of the *NTA* to mean that native title rights and interests will be suspended for the duration of a category C or D grant, but may be revived once the grant expires or is determined.[49] Section 238 anticipates that an act coming within a category C or D past act may be wholly or partially inconsistent with native title rights and interests. Where such an inconsistency can be established, section 238 allows native title to continue to exist in its entirety even though the rights and interests will have no effect, to the extent of the inconsistency, until the grant expires.

In general terms, the non-extinguishment principle operates to suspend the enforcement of native title rights and interests. As outlined by the High Court in *Ward*, the non-extinguishment principle postpones native title rights and interests so that even though they may continue to exist, to the extent of any inconsistency (which may be entire) with a category C or D act, they will have no effect.[50] Once the past act 'ceases to operate or its effects are wholly removed', native title rights and interests will be revived.[51]

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45 *NTA* ss 15(1)(a)–(b).
46 *NTA* ss 229(2)–(4).
47 *NTA* ss 15(1)(c), 230.
48 *NTA* ss 15(1)(d), 231–2.
49 *NTA* s 238.
50 (2002) 213 CLR 1, 63 [7] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
51 Ibid.

The non-extinguishment principle is a pure statutory construct and has no common law equivalent.[52] Hence, acts that predate the *RDA* and do not require validation under the *NTA* have a greater capacity to extinguish native title rights and interests in absolute terms. The courts rationalised the non-extinguishment principle on the logical proposition that a particular use of a native title right may be restricted or prohibited by legislative mandate, without that right or interest having to be destroyed.[53] The objective is to align the concept of extinguishment with the character of the grant. If the grant only exists for a limited period of time, the *NTA* provides for the statutory 'revival' of native title upon its expiry.

The non-extinguishment principle is an innovative statutory modification of the common law process that prevents the undue destruction of native title rights and interests by temporary legislative grants. It has no application to extinguishment by necessary implication, because the legislation predates the *RDA* and the *NTA*. Nevertheless, the non-extinguishment principle provides a powerful illustration of the capacity of the *NTA* to fundamentally alter the nature and impact of common law extinguishment assumptions. Importing this statutory modification into native title extinguishment jurisprudence has instilled a greater level of internal resilience to the common law extinguishment principle.[54]

F Interpretive Strategies and Constructive Choices

Determining the extinguishing effect of a legislative framework that precedes the introduction of native title rights and interests represents an interpretative quandary. If the drafters of the Act had no conception of native title rights and interests at the point of enactment, it is not possible for the textual framework to provide any direct clues regarding the intention of the legislature. In such cases, the statutory construction process is inevitably speculative and likely to involve judicial reflection of a perceived intention rather than a direct assessment of explicit parliamentary will.[55] Assessing how such legislation should deal with native title often devolves into an exploratory pathway, influenced by a range of

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52 See *Akiba* (2013) 250 CLR 209, 227 [26] (French CJ and Crennan J). See also *Rubibi Community v Western Australia* (2004) 138 FCR 536.

53 *Akiba* (2013) 250 CLR 209, 227 [26] (French CJ and Crennan J).

54 G Nettheim, 'The Relationship between Native Title and Statutory Title under Land Rights Legislation' in M A Stephenson (ed), *Mabo: The Native Title Legislation – A Legislative Response to the High Court's Decision* (University of Queensland Press, 1995) 183, 195.

55 It has been argued that '[j]udicial exposition of the meaning of a statutory text is legitimate so long as it is an exercise … in discovering the will of Parliament; it is illegitimate when it is an exercise in imposing the will of the judge': Murray Gleeson, 'The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights' (2009) 20 *Public Law Review* 26, 27. See also *Momcilovic v The Queen* (2011) 245 CLR 1, 133–4 [315] (Hayne J). His Honour described legislative intention as a 'metaphor', which is not concerned with the intention (expressed or unexpressed) of those who propounded or drafted the Act, but with the reach and operation of the law as 'ascertained by the conventional processes of statutory construction'.

exogenous factors, each aimed at assisting courts in determining the appropriate interpretative resolution.[56]

Where a wide range of 'constructional choices' are available for a court to draw upon, the fundamental values encompassed by the native title concept have a better chance of being acknowledged and protected.[57] The importance of having a range of constructive aids when assessing extinguishment was reinforced by the High Court in *Akiba*, where French CJ and Crennan J held that the identification of a statute's purpose may be achieved 'by reference to the apparent legal effect and operation of the statute, express statements of its objectives and extrinsic materials identifying the mischief to which it is directed'.[58] In assessing whether legislation is prohibitive or regulatory in nature, relevant factors should include: the existence or otherwise of a licensing or permitting regime; the purpose or object of the regime; the range of exemptions (if any); and whether the implementation of the licensing or permitting regime predates the recognition of native title rights, and if so, how the intersection between native title and the legislative framework should be managed in light of the *NTA* objectives.[59]

The prospect of courts incorporating broader external factors in assessing the extinguishing effect of pre-*RDA* and *NTA* legislation was raised by Finn J in the Federal Court decision in *Akiba FC*.[60] His Honour held that there was a 'strong presumption' that 'Acts be construed, where constructional choices are open, so as not to encroach upon common law rights and freedoms'.[61] Adopting a broader approach to construction was consistent with what Finn J described as the 'contemporary significance now attributed to "context" in statutory interpretation'.[62] Presumably 'constructional' choices would be 'open'

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56 For discussion on how purposivists seek to achieve interpretative resolutions, see John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 *Columbia Law Review* 70, 78. Manning notes that the problem is to be tackled from the objective perspective of a 'hypothetical' reasonable legislator. See also Jonathan T Molot, 'The Rise and Fall of Textualism' (2006) 106 *Columbia Law Review* 1.

57 See *Akiba v Queensland [No 3]* (2010) 204 FCR 1, 190–1 [768] (Finn J) ('*Akiba FC*').

58 (2013) 250 CLR 209, 229 [31].

59 For a discussion on the distinction between prohibitive and regulatory legislation generally see *Yanner* (1999) 201 CLR 351, 372 [37] where the Court made clear that '*regulating* the way in which rights and interests may be exercised is not inconsistent with their continued existence' (emphasis in original).

60 (2010) 204 FCR 1.

61 Ibid 191 [768], quoting *Evans v New South Wales* (2008) 168 FCR 576 [68] (French, Branson and Stone JJ). See especially L Butterly, 'Clear Choices in Murky Waters: *Leo Akiba on Behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia*' (2013) 35 *Sydney Law Review* 237, 242. Butterly's characterisation of the approach of Finn J distinguishes his Honour's reasoning in this regard from that of Keane CJ and Dowsett J in *Commonwealth v Akiba* (2012) 204 FCR 260, 288 [66] ('*Akiba FFC*').

62 *Akiba FC* (2010) 204 FCR 1, 191 [770], citing *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ). In the latter case, the extinguishment resulted directly from the legislation itself. See also *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85, where McHugh J endorsed a purposive approach to statutory interpretation. His Honour argued that it was upheld by s 15AA of the *Acts Interpretation Act 1901* (Cth), which explicitly sets out that:

in circumstances where, as in *Akiba*, courts must make prognostic and extrapolative assessments about the impact of a pre-native title Act upon native title rights and interests.

Chief Justice Keane and Dowsett J in the Full Federal Court decision in *Akiba FFC* did not agree with the conclusions of Finn J in this regard, arguing that to impose a different approach to legislative construction would 'elevate native title above other rights under common law'.[63] On appeal, the High Court did not specifically comment on this issue, although the comprehensive approach taken in the two joint judgments of French CJ and Crennan J, and of Hayne, Kiefel and Bell JJ, to the characterisation of the legislation as 'non-extinguishing' is indicative of the importance of purposive assessment in this context.[64] Indeed, French CJ and Crennan J specifically noted that 'purposive construction' has the capacity to take account of the distinction between the 'exercise of a native title right … and the subsistence of that right'.[65]

An extinguishment test that incorporates wider 'constructional choices' promotes greater structural coherence.[66] Confirming the validity of this process is particularly crucial for the ongoing protection of traditional rights and customs, given their heightened exposure to destruction by legislation enacted at a time when the existing state of the law was 'perceived to be the opposite of that which it since has been held then to have been'.[67]

Imputative extinguishment of native title should only be justifiable where a wide-ranging, purposive statutory construction process ascertains that such a consequence was undeniably intended. This evaluation must extend beyond the bare detection of 'legislation which governs or affects the exercise of the right'.[68] The assessment must be sufficiently expansive to allow courts to make a proportionate and fair determination on the facts in issue regarding native title

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> In the interpretation of a provision of an Act a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

Further, s 15AB of the *Acts Interpretation Act 1901* (Cth) supports the utilisation of extrinsic material in the interpretation of an Act.

63 (2012) 204 FCR 260, 288 [66].

64 See Part III(B) of this article for further discussion of the High Court's decision in *Akiba*.

65 *Akiba* (2013) 250 CLR 209, 229 [29].

66 See Butterly, above n 61, 246. Butterly notes that 'clear constructional choices' led to the logical determination by Finn J that the availability of licences to the Islanders in the terms of the legislation meant that there was no clear and plain intention to extinguish native title rights.

67 *Wik Peoples v Queensland* (1996) 187 CLR 1, 184 (Gummow J).

68 *Akiba* (2013) 250 CLR 209, 242 [68] (Hayne, Kiefel and Bell JJ).

extinguishment.[69] This is particularly important in a context where the absence of *RDA* protection heightens the vulnerability of native title rights to the vicissitudes of regulatory incursions. Imputative common law assessment must be guided by considerations that enable a court to ascertain 'with irresistible clearness'[70] what Finn J has described as 'evidence … to prove the fact and content of the act'.[71] The *NTA* is an important extra-textual tool in the construction process because it outlines the objectives underlying the recognition and protection of native title and courts need to be cognisant of these objectives when deciding whether legislation should be 'deemed' to be extinguishing.[72] A prognostic assessment of the extinguishing capacity of a legislative framework is profoundly inequitable if it fails to give proportionate consideration to the rationales underlying the recognition of the interest it purportedly seeks to destroy.[73]

An orthodox textualist approach to statutory construction will not generally permit an interpretation of the legislative intention of one Act to be influenced by the policy objectives that underlie another.[74] According to this interpretative strategy, the traditional role of statutory interpretation is one of facilitation; the courts do not creatively make the law, but rather, implement decisions

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69 See also Christopher Walshaw, 'Interpretation Is Understanding and Application: The Case for Concurrent Legal Interpretation' (2013) 34 *Statute Law Review* 101. Walshaw argues that statutory interpretation cannot be based upon preconceived notions of intention and that meaning should arise from the application of legislation to particular facts.

70 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoting *United States v Fisher*, 6 US (2 Cranch) 358, 390 (Marshall CJ) (1805).

71 *Akiba FC* (2010) 204 FCR 1, 190 [766].

72 See especially Glen Staszewski, 'Statutory Interpretation as Contestatory Democracy' (2014) 55 *William and Mary Law Review* 221, 296–7. Staszewski argues that statutory interpretation in the modern regulatory state is a mechanism that allows courts to use their expertise to implement policy objectives in circumstances where the legislation has no discernible intent in relation to specific interpretative problems.

73 See Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard University Press, 1982), 37–44. Calabresi notes that discretion in statutory interpretation is important to ensure statutes are updated to reflect changed circumstances. See also T Alexander Aleinikoff, 'Updating Statutory Interpretation' (1988) 87 *Michigan Law Review* 20, 42. For an Australian perspective, see Gleeson, above n 55.

74 See Jarrod Shobe, 'Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting' (2014) 114 *Columbia Law Review* 807, 858–9. Shobe discusses the fact that a textualist approach refines the focus to issues relevant to the Act being evaluated and can be an important tool for clarification. See also Bradley C Karkkainen, '"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction' (1994) 17 *Harvard Journal of Law and Public Policy* 401, 409.

already determined by an elected legislature.[75] From this perspective, statutory interpretation retains an impeccable 'democratic pedigree' because any changes to the law must be made in accordance with constitutionally mandated lawmaking procedures.[76] Textualists argue that reliance upon textual sources of meaning, including the ordinary understanding of statutory provisions and long-standing canons of construction, is crucial.[77] The underlying purpose and policy perspectives of an Act only become relevant where needed to resolve an ambiguity that arises when a number of linguistically permissible meanings exist.[78] Textualism lacks a single canonical meaning, and hence is capable of ranging in focus from a bare preference for rules over standards to a full and 'unwavering adherence to literal meaning'.[79]

On the other hand, legal process theorists, or 'purposivists', argue that courts should adopt a creative approach.[80] This can allow a court to consider a statutory question based upon what the legislature would have intended if it had considered and resolved the problem. Following this strategy, courts should first decide what purpose ought to be attributed to the legislation and then determine which interpretative strategy will best carry out that purpose. In implementing this broad purposivist approach, courts may not give the words a 'meaning they will not bear' nor can they offend established public policies.[81] In determining what purpose to attribute to a statute, purposivists do pay careful attention to text, structure and maxims of construction. However, the purposivist approach tends to identify statutory purpose by filtering interpretative sources through an objective construct that 'does not seek actual legislative intent, but rather invokes an idealized, hypothetical legislator as the benchmark for understanding what the

75 In Australia, the debate has involved a discussion regarding whether legislative intention should be constructed or discovered: see *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), where the High Court suggested that legislative intention is a product of statutory interpretation. See also Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39, 41–2. Ekins and Goldsworthy reject what they describe as the 'new sceptical view' of the High Court, whereby legislative intention is constructed. The dichotomy between a textualist and purposive approach remains particularly apparent in the United States. For an outline of the textualist methodology, see especially John F Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 1, 5.

76 See Staszewski, above n 72, 231.

77 William N Eskridge Jr, 'The New Textualism' (1990) 37 *UCLA Law Review* 621, 623–4.

78 See Manning, 'What Divides Textualists from Purposivists', above n 56, 84.

79 Andrew Tutt, 'Fifty Shades of Textualism' (2014) 29 *Journal of Law and Politics* 309, 310.

80 See Henry M Hart Jr and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) 1380.

81 Ibid 1374. See also Thomas W Merrill, 'Capture Theory and the Courts: 1967–1983' (1997) 72 *Chicago-Kent Law Review* 1039, 1056–9. Merrill argues that legal process theory was prominent during a period when there was significant optimism regarding the capacity of the government to solve problems through the use of 'neutral expertise': at 1059.

legislation means'.[82] The process of identifying statutory purpose was outlined by the joint judgment in *Lacey v Attorney-General (Qld)* as follows:

> The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.[83]

Law is an interpretative enterprise and strategies are always able to be manipulated, given that strategies may be derived from different standpoints that can include historical and political context as well as constitutional perspectives.[84] Determining an appropriate strategic framework is particularly important when legislative intent is illusory and courts are, in truth, exercising policy-making discretion.[85] The common law extinguishment of native title should not occur purely on the basis of a textualist interpretation. The problem does not reside in legislative ambiguity, but rather, chronological adjustment. The text of the Act in issue may be perfectly clear in its intent, however the altered landscape, post-native title, requires the intent to be revised. As argued by Calabresi, judges should be entitled to rework legislative enactments, to keep them in line with the current social and legal landscape. This is no more than the courts are already doing, albeit by subterfuge.[86]

Revisionist strategies are nothing new for native title jurisprudence, which has always been characterised by a spectral presence and a plurality of process.[87] The recognition and enforcement of native title is heavily dependent upon unconventional and irregular adaptations.[88] Incorporating native title into a preconceived Australian land framework is itself the product of a revised feudal imagery.[89] Hence, the capacity of the common law to 'provide the tools for a series of artificial and purely formal reconciliations of law, politics and history'

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82 Manning, 'What Divides Textualists from Purposivists', above n 56, 85–6.

83 (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

84 See Nicholas Bagley, 'The Puzzling Presumption of Reviewability' (2014) 127 *Harvard Law Review* 1285, 1331. See also Suzanne Corcoran, 'Theories of Statutory Interpretation' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 1; Jane S Schacter, 'Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation' (1995) 108 *Harvard Law Review* 593.

85 See Staszewski, above n 72.

86 Calabresi, above n 73, 2.

87 See Peter Rush, 'An Altered Jurisdiction: Corporeal Traces of Law' (1997) 6 *Griffith Law Review* 144, 156.

88 See especially Shaunnagh Dorsett and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking' (2012) 36 *Melbourne University Law Review* 470, 476. Dorsett and McVeigh note that it is the 'forms of jurisdictional arrangement that give us repertoires of lawful engagement': at 479.

89 See Hepburn, 'Feudal Tenure and Native Title', above n 35.

has always been the means by which the success of native title jurisprudence is measured.[90]

The interpretative strategies that inform the extinguishment process must be flexible enough to ensure that native title is not relegated from its status as a 'perception of socially constituted fact' to a 'perception' of fleeting illusion.[91] Statutory interpretation is apposite to the common law doctrine of extinguishment and plays a crucial role in preventing native title from becoming a 'constraining force that works against the interests of Indigenous peoples and against the development of a just and inclusive law'.[92] A purposivist approach is optimum because the exclusivity that textualism attracts prevents words in a statute from being properly supplemented by a full and comprehensive understanding of a fundamentally altered context.[93] A purposive approach also reinforces the ability of native title to function as the normative interface between Indigenous and non-Indigenous law.[94]

It is arguable that one of the core canons of construction, the principle of legality, supports a purposivist approach to common law extinguishment. This principle requires courts to impute an intention to abrogate fundamental common law rights only in circumstances where a clear and unambiguous legislative purpose can be established.[95] Courts must be guided by the paradigmatic assumption that core common law rights are so 'deep-lying in our legal order' that it is 'improbable' that the legislature would overthrow them in the absence of 'irresistible' clarity.[96] Legislative intention is, however, a mercurial notion and the principle of legality is merely a tool of construction.[97] Where the legislation in issue precedes the reception of common law rights, a literal intention to destroy native title cannot be established. A predictive, 'technocratic' interpretation of

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90 Gerry Simpson, '*Mabo,* International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence' (1993) 19 *Melbourne University Law Review* 195, 200.

91 The reference to a 'socially constituted fact' is adapted from Kevin Gray and Susan Francis Gray, 'The Idea of Property in Land' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 15, 27.

92 Strelein, above n 5, 97.

93 See Molot, above n 56, 48. Molot notes that aggressive textualists tend 'to see legislation as words written on a piece of paper'.

94 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 439 [31] (Gleeson CJ, Gummow and Hayne JJ), quoting *Fejo* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). In *Fejo*, the majority held that native title is 'an intersection of traditional laws and customs with the common law. The underlying existence of the traditional laws and customs is a *necessary* pre-requisite for native title but their existence is not a *sufficient* basis for recognising native title' (emphasis in original).

95 For an outline of the principle of legality, see especially Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 452. Meagher notes that there is 'nothing particularly new about judges construing statutes and deploying their interpretive powers more broadly to protect rights'.

96 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J), quoted in ibid 459.

97 See Ekins and Goldsworthy, above n 75, 44. Ekins and Goldsworthy note that the principle of legality has evolved from a 'genuine presumption of legislative intent' to a 'constitutional principle'.

what the drafters may have intended is possible, however, this analysis cannot justify abrogation according to the core tenets of the principle.[98] Within this context, guidance from inter-contextual reference points becomes crucial.[99]

The principle of legality extends beyond the parameters of a defined, textual space where such augmentation is necessary to support an appropriate interpretational solution.[100] This coheres with the 'normative refinement' of the principle of legality, which reconfigures its operative dimensions to something akin to a constitutional right. According to this perspective, courts should be actively seeking to attribute a legislative intention that prevents the abrogation of rights, because such a construction improves the 'mechanisms of political accountability' that form the foundation of our system of representative and responsible government.[101]

G Section 211 and Constructional Choices

Section 211 of the *NTA* prevents personal, non-commercial native title rights and interests from having to comply with licensing and permitting requirements. Section 211(2) stipulates that native title rights and interests which are regulated or prohibited by legislation will not be subject to these restrictions where it can be shown that the native title activity has been carried out for the purpose of satisfying personal, domestic or non-commercial activities.

The preconditions to the application of section 211(2) are specified in section 211(1) of the *NTA*. They include a requirement that the relevant law of the Commonwealth, state or territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued under the law; and that the licence, permit or instrument is not granted purely for research, environmental protection, public health or public safety purposes.

In its defensive capacity, section 211 only applies to non-extinguished native title rights and interests. As outlined by Hayne, Kiefel and Bell JJ in *Akiba*, '[s]ection 211 can only be engaged if relevant native title rights and interests continue to exist'.[102] Section 211 provides crucial support in this context because it helps to ease the inevitable collision between usufructuary entitlements that uphold traditional rights and interests and regulatory provisions that qualify or impede the full acknowledgement of those rights. In this sense, section 211 has an exclusionary operation because, in the words of the High Court in the *Native*

98 See Brennan, 'Statutory Interpretation and Indigenous Property Rights', above n 28, 258.

99 See Ekins and Goldsworthy, above n 75, 43. Ekins and Goldsworthy note that 'clarification of a statute's meaning requires taking into account all admissible evidence of legislative intention'.

100 See Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372, 374–5.

101 Ibid 389 ff, where Lim discusses the normative refinement of the principle of legality. See also: at 408.

102 (2013) 250 CLR 209, 243 [71].

Title Act Case, its effect 'is not to control the exercise of State legislative power, but to exclude laws made in exercise of that power (inter alia) from affecting the freedom of native title holders to enjoy the usufructuary rights'.[103] Without such protection, the normative value of native title rights and interests is threatened and practical reconciliation processes are endangered.[104]

Section 211 also provides instructive guidance for courts attempting to determine whether an Act that includes such a licensing or permitting regime should be characterised as extinguishing native title rights or interests. Legislation predating the *RDA* and the *NTA* is less likely to be inconsistent with native title where it contains a licensing or permitting regime because such a framework is characterised by a 'regulatory' rather than 'prohibitive' focus.[105] The operative scope of section 211 of the *NTA* inevitably influences this process. Assessing whether native title has been extinguished by legislation is fundamentally different to determining whether native title rights and interests must comply with licensing or permitting requirements. There is, however, an underlying connection between the two. The core policy of the *NTA* to immunise non-commercial, domestic native title rights against regulatory infringement provides important inter-contextual guidance for determining whether an Act extinguishes native title in the first place.

Only native title rights and interests that have not been extinguished may raise the defence in section 211 of the *NTA*, and native title rights and interests are unlikely to be extinguished if the legislative framework incorporates a licensing regime. In this respect, section 211, like the soft statutory concept of the 'non-extinguishment' principle, helps to moderate the 'seamless violence' of a common law that retains the means to disentitle, exclude and extinguish native title rights and interests.[106] In this way, section 211 may function in a manner akin to the constitutional protections conferred upon Aboriginal title by section 35(1) of the Canadian *Constitution Act 1982*.[107]

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103 (1995) 183 CLR 373, 474 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

104 See especially Victoria Freeman, 'In Defence of Reconciliation' (2014) 27 *Canadian Journal of Law and Jurisprudence* 213, 216. Freeman argues that reconciliation between indigenous and non-indigenous people is a 'multi-faceted' concept that centres around the 'ongoing process of building the relationships, alliances and social understandings that are necessary to support the systemic changes that are true decolonization'.

105 This distinction has been explored in a number of cases: *Melbourne Corporation v Barry* (1922) 31 CLR 174, 188–90 (Isaacs J); *Williams v Melbourne Corporation* (1933) 49 CLR 142, 148–9 (Starke J); *Brunswick Corporation v Stewart* (1941) 65 CLR 88, 93–4 (Rich ACJ), 95 (Starke J); *Toronto Municipal Corporation v Virgo* [1896] AC 88, 93–4 (Lord Davey).

106 See especially Katherine Biber, 'Being/Nothing: Native Title and Fantasy Fulfilment' (2004) 3 *Indigenous Law Journal* 1, 6.

107 The application and scope of s 35(1) of the *Constitution Act 1982* in Canada was outlined in *Sparrow v The Queen* [1990] 1 SCR 1075. For an excellent discussion on the reconciliation functions of s 35(1) of the *Constitution Act 1982* in Canada, see Constance MacIntosh, '*Tsilhqot'in Nation v BC*: Reconfiguring Aboriginal Title in the Name of Reconciliation' (2014) 47 *University of British Columbia Law Review* 167, 204–8.

III RELEVANT CASES

A *Yanner*

Yanner was the first Australian decision to clearly articulate the distinction between regulatory and prohibitive legislation in the context of an imputative extinguishment by legislation predating the *RDA* and the *NTA*.[108] The decision illustrates a preference in such circumstances for a broader thematic evaluation of the legislative framework.

The facts of *Yanner* raised the potential extinguishment of native title rights to hunt and fish through the operation of inconsistent regulation in the *Fauna Conservation Act 1974* (Qld).[109] Section 54(1)(a) of the *Fauna Conservation Act 1974* (Qld) set out that a person should not take or keep fauna of any kind unless a licence or permit is granted in accordance with the Act. The appellant, Yanner, was charged in the Queensland Magistrates Court with taking fauna without a licence contrary to the provisions of the Act. The appellant argued that he was entitled to hunt for fresh water crocodile in the absence of a specific permit as he was exercising native title rights that were upheld by the operation of section 211 of the *NTA*. This argument was supported at first instance.

On appeal, the High Court confirmed this and held that the *Fauna Conservation Act 1974* (Qld) was not inconsistent with the exercise of rights to hunt and fish because it had a regulatory rather than a prohibitive character. Further, section 211 precluded any need for the non-extinguished native title rights of the appellant to comply with licencing or permitting requirements.

In reaching this determination, the High Court adopted a wide-ranging approach to the statutory construction of the vesting provision in the *Fauna Conservation Act 1974* (Qld). The Court argued that the vesting of fauna as 'property' was not inconsistent with the exercise of native title rights and interests. Two core grounds were articulated. First, the Court argued that the reference to 'property' or 'ownership' within the legislation comprehended a wide variety of different meanings and did not necessarily indicate a beneficial ownership that would prohibit any recognition of native title. In reaching this conclusion the Court drew upon a diverse array of textual and non-textual materials. Secondly, the Court argued that a diminished construct of 'property' was not necessarily inconsistent with the continued recognition of native title rights and interests.

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108 (1999) 201 CLR 351, 372 [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ). This distinction was also raised by the Supreme Court of Canada in *Sparrow v The Queen* [1990] 1 SCR 1075, 1097–9 (Dickson CJ and La Forest J), where the discretionary conferral of fishing permits was found to amount to a regulation rather than an extinguishment of Aboriginal title. The distinction between regulatory and prohibitory acts was also referred to by Brennan J in *Mabo [No 2]* (1992) 175 CLR 1, 64, where his Honour noted that a 'clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title'.

109 (1999) 201 CLR 351, 373 [40] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

The breadth and scope of the concept of 'fauna' made it difficult to identify exactly what 'fauna' the Crown actually owned. For example, did 'fauna' include everything located within the boundaries of the territory, or did it include that which merely passed through the boundaries?[110] Further, even if the subject matter could be reasonably identified, it was unclear exactly what ownership of a wild animal meant. Under common law, wild animals were only the subject of limited ownership rights, and the Court concluded that it was unlikely the legislature intended to override this established orthodoxy.[111] There was also a clear historical connection between vesting of fauna as property and the creation of an early royalty system. This provided a strong incentive for the inclusion of a vesting provision in the first iteration of the Act, but was not relevant in a contemporary framework, where a royalty system is not operative.[112]

The High Court concluded that the statutory vesting provision did not confer full beneficial title in fauna upon the Crown. Rather, the vesting provision had little relevance other than to function as 'a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource'.[113]

This conclusion supported the second ground, which was that the *Fauna Conservation Act 1974* (Qld) did not extinguish native title because it was 'regulatory' in character and therefore not inconsistent with the continued recognition of native title. The Court held that the imposition of compliance obligations did not 'deny the continued exercise of the rights and interests that Aboriginal law and custom recognises them as possessing'.[114] According to the Court, this was because a regulatory Act seeks to regulate the exercise of native title rights and interests without extinguishing those rights or interests.[115] A regulatory Act differs fundamentally from a prohibitive Act. Regulating the way in which a right may be exercised 'presupposes that the right exists'.[116]

Section 211 of the *NTA* was also relevant to the characterisation process. Chief Justice Gleeson, Gaudron, Kirby and Hayne JJ noted that section 211 provides guidance because of its underlying assumption that a conditional

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110 Ibid 367 [22] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

111 See William Blackstone, *Commentaries on the Laws of England* (Cavendish Publishing, first published 1765–9, 2001 ed) vol 2, 11–12 [14], 318–21 [391]–[395], where the common law approach is that 'wild animals' prior to being 'seized' remain 'ferae naturae'.

112 '[T]he drafter of the early Queensland fauna legislation may well have seen it as desirable (if not positively essential) to provide for the vesting of some property in fauna in the Crown as a necessary step in creating a royalty system': *Yanner* (1999) 201 CLR 351, 369 [27] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

113 Ibid 369 [28] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), quoting *Toomer v Witsell*, 334 US 385, 402 (Vinson CJ) (1948).

114 *Yanner* (1999) 201 CLR 351, 373 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

115 Ibid.

116 Ibid 372 [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

prohibition does not affect the existence of native title rights and interests.[117] Section 211 indicates that the mere existence of regulatory conditions and prohibitions do not deny the presence of native title and are better regarded as indicative of a broader regulatory intent.

B *Akiba*

The conclusions of *Yanner* were followed by the High Court in *Akiba*, where the connection between the extinguishment process and the application of section 211 was even clearer. The facts of *Akiba* concerned the right of Indigenous inhabitants to take fish for commercial purposes in particular areas of the Torres Strait. The issue before the Court was whether the Commonwealth and Queensland fisheries legislation prohibited the exercise of native title rights to fish for commercial purposes or whether the legislation was purely regulatory. The primary judge, Finn J, held that a native title right to access and take resources for any purpose in the native title area did exist and that this right included taking fish for commercial or trading purposes. Justice Finn characterised the legislation in issue as regulatory rather than prohibitory because the Acts did not seek to deny the fishing rights of Indigenous inhabitants for commercial purposes.[118] His Honour reached this conclusion by adopting a broad 'constructional choices' approach to statutory interpretation.

The Full Federal Court, by majority (Keane CJ and Dowsett J, Mansfield J dissenting), allowed an appeal against the decision of the primary judge. The majority held that successive fisheries legislation in Queensland and legislation enacted by the Commonwealth Parliament did extinguish native title rights to take fish and other aquatic life for commercial purposes because it was prohibitive in character.[119] Chief Justice Keane and Dowsett J distinguished *Yanner* from the facts in *Akiba* on the basis that the decision in *Yanner* turned upon the operation and availability of section 211 rather than any general characterisation process and therefore had no direct relevance to the facts in issue.[120]

The High Court overturned the conclusions of the Full Federal Court and held that the relevant Commonwealth and Queensland fisheries legislation did not extinguish native title because the Acts were regulatory, not prohibitive. Chief Justice French and Crennan J held that extinguishment was not a 'logical necessity' in circumstances where statutory prohibitions against the taking of fish and aquatic life existed.[121] Rejecting this notion was, their Honours felt, 'consistent with the maintenance of a proper distinction between proprietary or

117 Ibid 374 [39] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).
118 *Akiba FC* (2010) 204 FCR 1, 212 [851].
119 See especially *Akiba FFC* (2012) 204 FCR 260, 295–6 [84]–[87] (Keane CJ and Dowsett J).
120 Ibid 293–4 [79]–[80].
121 *Akiba* (2013) 250 CLR 209, 232–3 [39].

usufructuary rights and their exercise in particular ways or for particular purposes'.[122] A law that affects the exercise of a native title right only when undertaken for a particular purpose or by a particular means should not be treated as presumptively inconsistent with native title, particularly where the law may be construed as doing little more than that.[123] Their Honours held that the clear and plain intention of the legislation was to regulate the way in which licences were issued and not to impose a blanket prohibition upon exercising rights to fish.[124]

Justices Hayne, Kiefel and Bell came to the same conclusion, although they relied more extensively upon *NTA* provisions in the statutory construction process. Their Honours made it clear that questions 'about extinguishment of native title rights and interests cannot be answered without beginning in the relevant provisions of the *NTA*'.[125] Their Honours disagreed with the approach of the Full Federal Court, holding that extinguishment by necessary implication depends upon establishing inconsistency and this is achieved by assessing the identity of the Act in issue, not by 'observing only that there is legislation which governs or affects the exercise of the right'.[126]

Further, Hayne, Kiefel and Bell JJ argued that the central point underlying these cases is that a statutory prohibition on taking resources from land or waters without a licence does not conclusively establish that native title rights to access, remain in, use or remove resources have been extinguished. Regulating native title is not, and should not be regarded as, inconsistent with its continued existence. Section 211 reinforces this primary assumption and upholds the fundamental ratio of *Yanner* that '[r]egulating particular aspects of the usufructuary relationship with traditional land does not sever the connection of the Aboriginal peoples concerned with the land'.[127]

C *Karpany*

The scope and application of the *NTA* were further reviewed by the High Court in *Karpany*. In that case, the whole Court (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ) concluded that the *Fisheries Act 1971* (SA), which was introduced prior to the implementation of the *RDA* and therefore unaffected by it, did not extinguish native title rights and interests despite implementing a licensing regime that strictly regulated fishing within the areas covered by the native title rights.

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122 Ibid.

123 See, eg, ibid 224 [21] (French CJ and Crennan J).

124 See also Butterly, above n 61, 247. Butterly notes that '[r]egulation does not evince a clear and plain intention to extinguish; therefore there is no need to go on to consider inconsistency'.

125 *Akiba* (2013) 250 CLR 209, 237 [54].

126 Ibid 242 [68].

127 Ibid 240 [63], quoting *Yanner* (1999) 201 CLR 351, 373 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

The facts of *Karpany* concerned members of the Narrunga people who had successfully defended a summary prosecution under the *Fisheries Management Act 2007* (SA) for having in their possession a quantity of undersized abalone. The Full Court of the Supreme Court of South Australia rejected the assumption that the right to obtain abalone was a product of subsisting native title rights and interests.[128] That Court held, by majority, that the relevant native title rights that would have authorised the taking of undersized abalone were extinguished by the *Fisheries Act 1971* (SA).[129]

On appeal, the High Court concluded that the *Fisheries Act 1971* (SA) did not extinguish any native title right to take abalone. Their Honours adopted a purposive evaluation of the legislation and, consistently with *Yanner* and *Akiba*, concluded that the Act was regulatory rather than prohibitory in nature. The framework of the Act evinced a legislative intention to control the way in which fishing was conducted rather than to prohibit fishing per se. As such, the legislative regime could not 'be said to have been inconsistent with the recognition by the common law of those rights'.[130]

A number of factors influenced this determination. First, the framework of the Act expressly permitted a person who did not hold a licence to take fish by 'certain means' and 'otherwise than for the purpose of sale'. Further, the *Fisheries Act 1971* (SA) conferred upon the Minister power to grant any person a special permit to take fish and this was capable of being 'administered consistently with the continuing exercise of native title rights'.[131]

Finally, section 211(2) of the *NTA* applied to the unextinguished native title rights because the *Fisheries Management Act 2007* (SA) came within the scope of the defence. This meant that when the Narrunga people gathered abalone for their own non-commercial, domestic purposes, they were not to be subject to the permitting requirements in the *Fisheries Act 1971* (SA).

The connectivity between the extinguishment assessment and the application of the section 211 defence was very clear in *Karpany*. Both focused upon the 'regulatory' character of the legislation in issue. The extinguishment assessment determined whether the legislation was consistent with the continued recognition of native title rights and interests. The defence provision protected usufructuary native title rights, in certain circumstances, against regulatory incursion. The extinguishment assessment and defence provision shared the same goal: to determine how regulation should affect the ongoing exercise and recognition of native title rights and interests. This mutuality in focus provided a firm basis for collaborative extrapolation in the extinguishment assessment.

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128 *Dietman v Karpany* (2012) 112 SASR 514.
129 Ibid 524–5 [35]–[36] (Gray J), 525 [38] (Kelly J).
130 *Karpany* (2013) 303 ALR 216, 224 [32] (The Court).
131 Ibid.

D Summary

The conclusions of the High Court in *Yanner*, *Akiba* and *Karpany* suggest a clear pattern that favours an expansive and purposive approach to statutory construction in the context of extinguishment by necessary implication. This process will usually involve referencing the provisions of the *NTA*, particularly section 211. The decisions indicate that the High Court is increasingly conscious of the impossibility of deeming extinguishment purely on the basis of a direct textual analysis of the statutory provisions of an Act that predates the recognition of usufructuary native title rights and interests. The preference for a purposive interpretative strategy in this context coheres with logic and proportionality, and also corresponds with longer-term reconciliation objectives.

IV COMPARISONS WITH CANADIAN JURISPRUDENCE

A broad purposive approach to the construction of extinguishment by necessary implication reinforces longer-term reconciliation objectives by ensuring that native title is more effectively fortified against unfair regulatory incursions.[132] In Canada, the reconciliation responsibilities that flow from the constitutionalisation of Aboriginal rights are wide-ranging and include shielding native title from extinguishment or infringement by regulatory regimes and prioritising the exercise of non-commercial native title rights in resources.[133] In Australia, no such constitutional protection exists. Within such an environment, the relevance of statutory interpretation is heightened. A purposive approach to the construction of legislation with the potential to extinguish native title is crucial because it acknowledges the fact that statutory language is not, in itself, always dispositive. Assessing a range of inter-temporal 'constructional choices' allows broader public policy objectives to be assimilated.[134]

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132 See generally Dwight G Newman and Danielle Schweitzer, 'Between Reconciliation and the Rule(s) of Law: *Tsilhqot'in Nation v British Columbia*' (2008) 41 *University of British Columbia Law Review* 249, 276. Newman and Schweitzer note that reconciliation is fundamentally concerned with the meaningful challenge of determining how 'we are all going to live together'.

133 Ibid 261.

134 This is particularly crucial when dealing with the modern statutory concept of native title. See William L Twining and David Miers, *How To Do Things with Rules* (Cambridge University Press, 5th ed, 2010) 11, quoting Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009) 301–2. Raz notes that statutory interpretation may be innovative in the way in which it approaches meaning.

Australian courts are cognisant of the importance of protecting fundamental civil and human rights when approaching questions of statutory construction.[135] This is particularly true for the doctrine of extinguishment where the impact of characterising a statutory framework as prohibitive and inconsistent has the potential to result in a complete legal termination of traditional rights and interests. A purposivist approach to statutory construction that takes account of 'extra statutory and unenacted contextual clues', and which has access to an extensive array of instructive, multicultural reference points, provides optimum protection in this context given the absence of specific constitutional safeguards.[136]

In Canada, the burgeoning reconciliation jurisprudence is a direct product of the specific constitutional protection afforded to Aboriginal rights pursuant to section 35(1) of the *Constitution Act 1982*.[137] Section 35(1) imposes an obligation to reconcile the federal duty to recognise and affirm Aboriginal rights with the sovereign power of the government to exercise federal legislative power.[138] The reconciliation imperative flows from the 'Crown's assertion of sovereignty over an Aboriginal people and the *de facto* control of land and resources that were formerly in the control of that people'.[139]

In *Sparrow v The Queen*, the Supreme Court of Canada reviewed section 35(1) and concluded that while regulation affecting Aboriginal rights is not precluded by the section, all such regulation must be enacted according to a valid

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135 See Michael Kirby, 'Statutory Interpretation: The Meaning of Meaning' (2011) 35 *Melbourne University Law Review* 113, 115. See also *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 2004* (ACT) s 30. See also Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) 23–4. Ekins outlines the importance of legislation in changing the law, and suggests that positive law provides the foundation for judicial action, even where the text itself is not determinate.

136 See John F Manning, 'What Divides Textualists from Purposivists?', above n 56, 99. Manning discusses the fact that purposivists focus upon the underlying policy context whereas textualism is concerned with semantic import. See also Lim, above n 100, 392. Lim outlines the underlying values that the 'refined' principle of legality addresses.

137 For a discussion of the reconciliation jurisprudence, see Kent McNeil, 'Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin' (2003) 2 *Indigenous Law Journal* 1; Newman and Schweitzer, above n 132; Kent McNeil, 'Reconciliation and Third-Party Interests: *Tsilhqot'in Nation v British Columbia*' (2010) 8 *Indigenous Law Journal* 7.

138 See *Nikal v The Queen* [1996] 1 SCR 1013, where the Supreme Court of Canada examined a range of 'reconciliation' obligations that flowed from section 35(1). These included the following obligations:

> whether there had been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation was available, and whether the aboriginal group in question had been consulted with respect to the conservation measures being implemented.

at 1064 [109] (Cory J), quoting *Sparrow v The Queen* [1990] 1 SCR 1075, 1119 (Dickson CJ and La Forest J).

139 *Minister of Forests (British Columbia) v Haida Nation* [2004] 3 SCR 511, 528 [32] (McLachlin CJ) (emphasis in original). Her Honour concluded that the Crown's duty of honourable dealing with Aboriginal peoples means that broader approaches to the assessment of Aboriginal title are imperative if reconciliation objectives are to be promoted.

objective which promotes the recognition and affirmation of Aboriginal rights. Chief Justice Dixon and La Forest J in *Sparrow v The Queen* stated:

> By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.[140]

While section 35(1) does not 'promise immunity' from government regulation, it does require the government to at least bear the burden of justifying any legislation which negatively affects any Aboriginal right protected under section 35(1). The focus of the Canadian courts has been to incorporate what has become known as the 'reconciliation theory' into broader Aboriginal jurisprudence to ensure that the exercise of sovereign power and its effect upon Aboriginal rights properly 'accords with Canada's identity as a constitutional democracy'.[141] This does not mean that the Crown has no capacity to regulate Aboriginal rights but rather, as *Delgamuukw v British Columbia* affirmed, that such regulation needs to be of 'sufficient importance to the broader community as a whole'.[142]

The rigor with which the Canadian courts evaluate the legitimacy of regulatory incursions upon Aboriginal title is clearly manifest in the most recent landmark Canadian case on the issue, *Tsilhqot'in*.[143] The facts of *Tsilhqot'in* raised the issue of whether the *Forest Act*, RSBC 1996, c 157 ('*Forest Act*') applied to regulate Aboriginal title and diminish the scope of those rights or whether its application offended section 35(1). At issue was approximately 1700 square kilometres of land in British Columbia. The *Forest Act* made clear that the Crown was only capable of issuing timber licences with respect to 'Crown timber', which is timber located specifically on Crown land.[144] The Crown was not empowered under the Act to issue timber licences over 'private land', which is defined as any land that is not Crown land. The Act was, however, silent on the issue of whether timber licences could be issued over Aboriginal title land. This generated a number of possible interpretations for the Court: (i) Aboriginal title

140 *Sparrow v The Queen* [1990] 1 SCR 1075, 1110 (Dickson CJ and La Forest J).

141 *Tsilhqot'in Nation v British Columbia* [2007] BCJ No 2465, [1350] (Vickers J).

142 [1997] 3 SCR 1010, 1108 [161] (Lamer CJ, Cory and Major JJ), quoting *Gladstone v The Queen* [1996] 2 SCR 723, 774–5 [73] (Lamer CJ, Sopinka, Gonthier, Cory, Iacobucci and Major JJ).

143 [2014] 2 SCR 256.

144 *Forest Act*, RSBC 1996, c 157, s 1 (definition of 'Crown land'), referring to *Land Act*, RSBC 1996, c 245, s 1 (definition of 'Crown land').

land is 'Crown land'; (ii) Aboriginal title land is 'private land'; and (iii) the *Forest Act* does not apply to Aboriginal title land at all.

This raised the further issue as to whether the legislature intended the vast areas of the province, all of which were potentially subject to Aboriginal title, to be immune from forestry regulation. If the Court did hold that the Act had an application to Aboriginal title, the question would be whether the conferral of a regulatory power on the Crown to issue timber licences to third parties, and the failure to consult with the Tsilhqot'in people in the issuance of such licences, infringed the core reconciliation requirements articulated in section 35(1).

The Supreme Court held that the *Forest Act* intended the land to be regulated, as either Crown land or private land, up until the point when a determination regarding Aboriginal title was made, either by agreement or court order. Once land was acknowledged as being subject to Aboriginal title, the *Forest Act* became inapplicable, although it remained open to the legislature to amend the Act to apply to Aboriginal land, provided any such amendment remained in accordance with section 35(1).

The Court further held that the issuance of timber licences by the Crown, without consultation with the Tsilhqot'in people, amounted to an infringement of section 35(1). The Court noted that section 35(1) would be infringed by unreasonable regulation that imposed undue hardship, or denied the holders of the right their preferred means of exercising the right. General forestry legislation would not ordinarily constitute an infringement, however, on the facts, the issuance of timber licences on Aboriginal title land in the absence of any consultation produced a 'direct transfer of Aboriginal property rights to a third party'.[145] The Supreme Court found that this constituted a 'serious infringement' that could not be justified purely on the grounds that the issuance of such licences would generate economic benefits for the tenure holders.[146]

Tsilhqot'in highlights what is achievable in a jurisdiction where constitutional protection has generated strong reconciliation obligations. The absence of equivalent constitutional protection in Australia means that native title has a heightened exposure to the vicissitudes of regulatory incursion. This is particularly manifest through the vulnerability of native title to extinguishment by necessary implication. Australian courts must therefore ensure that the core values underpinning the ongoing recognition and protection of native title rights and interests are facilitated through a more effective usage of available constructional tools. The unique history, demands and opportunities of each extinguishment determination must be unequivocally justified. This is difficult

145 *Tsilhqot'in* [2014] 2 SCR 256, 120 [124] (McLachlin CJ, LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ).

146 Ibid 122 [127] (McLachlin CJ, LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ).

where legislative intention is construed without reference to the underlying principles that informed the reception of native title.[147]

V CONCLUSION

The High Court of Australia has made it clear that considerations of context and purpose may require words contained within legislation to be read 'in a way that does not directly correspond with the literal or grammatical meaning'.[148] A purposive construction is axiomatic for determining the legislative intentions of Acts which predate the recognition of native title and which may be found to extinguish that title. While context is not 'some kind of free-floating resource that can be appropriated for any theoretical purpose', where the information is relevant to the contemporary application of the Act, it is reasonable for courts to rely upon it for the purposes of achieving a balanced statutory construction.[149] The presumption against destroying common law rights in the absence of clear and unequivocal legislative intention means that any indicative evaluation of the extinguishing impact of a pre-*RDA* and *NTA* Act needs to be carefully balanced and informed. The process should take account of the policy objectives underlying the implementation of native title rights and interests, and reconcile these objectives, where possible, with the purpose and intent of the legislation in issue.

Native title in Australia has always been a tentative concept. Its existence is subject to the relatively unconstrained application of the sovereignty assumptions that underlie an inherited British constitutional framework. To protect the traditional usufructuary rights that are incorporated within the concept of native title against the disentitling effects of this background, extinguishment by necessary implication requires a broad but structured interpretative strategy. Native title rights and interests should not be extinguished unless a clear and plain statutory intention can be established. A clear and plain intention will not be shown unless, in accordance with a purposive construction, it is apparent that the explicit framework of the Act, the objectives of the *NTA*, the instructional insights of section 211 and any further relevant interpretative aids, indisputably indicate that native title cannot coexist with the regulatory framework. A positive extinguishment should not occur in the absence of rigorous purposive construction, given the profound consequences of such a legal cessation.

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147 See, eg, Tsilhqot'in Nation, 'Appellant's Factum', Submission in *Tsilhqot'in Nation v British Columbia*, File No 34986, 30 May 2013, 78 [293] ff.

148 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

149 Ekins and Goldsworthy, above n 75, 58.

This process may not be formally consistent with stricter, textualist approaches to statutory interpretation. However, the underlying importance of protecting native title against undue and unfair regulatory destruction and of reinforcing core values that transcend the boundaries of constitutional protection in Australia justifies such deviation. Textualism is simply incapable of providing an effective response to the inherent limitations on legislative foresight. The most effective and utilised interpretative strategy in this context is a broad purposivist approach which introduces an expansive range of 'constructional choices' for courts, as this strategy remains faithful to the normative progression of robust reconciliation goals for Indigenous communities.