

# **The extinguishment of native title: a revolution in principle**

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# Outline

- interrogating test for extinguishment
- seeds in *Yanner* – statutory vesting and extinguishment
- clear and plain intention to extinguish by creation of rights adverse to existing right
- adverse dominion?

# Akiba

- judgment 7 August 2013
- demonstrated right to take including for commercial purpose arising from traditional law and custom
- disputed extinguishing effect of successive fisheries legislation restricting commercial activity without licence, permit etc.
- French CJ, Hayne, Crennan, Kiefel and Bell JJ

# Akiba

- French CJ and Crennan J at [24]:

[the] extinguishment of rights in whole or in part is not a logical consequence of a legislative constraint upon their exercise for a particular purpose, unless the legislation, properly construed, has that effect. To that proposition may be added the general principle that a statute ought not to be construed as extinguishing common law property rights unless no other construction is reasonably open. Neither logic nor construction in this case required a conclusion that the conditional prohibitions imposed by successive fisheries legislation in the determination area were directed to the existence of a common law native title right to access and take marine resources for commercial purposes.

# Akiba

- French CJ and Crennan J at [31]-[35], emphasis on “inconsistency as the criterion of extinguishment of native title rights by the grant of rights by the Crown”
- [39] inconsistency submission of Qld and Cth which characterises a general right as the exercise of a “lesser right” [commercial only] rejected

# Akiba

- Hayne, Kiefel and Bell JJ at [52]:  
inconsistency of rights lies at the heart of any question of extinguishment
- at [62]:  
relevant question is one of inconsistency, and that is an objective inquiry
- at [67], prohibition on commercial purpose without a licence not inconsistent with right to take the resource for any purpose
- commensurability of right and prohibition

# Karpany

- judgment 6 November 2013
- French CJ, Hayne, Crennan, Kiefel, Bell, Gaegler and Keane JJ
- per curiam judgment, extinguishment and s.211
- concession at trial, native title right but for extinguishment

# Karpany

- [22]:

Read as a whole, the FA 1971 (and s 29 in particular) regulated rather than prohibited fishing in the waters governed by that Act. ... Because neither s 29 nor the FA 1971 more generally prohibited the exercise of a native title right to fish, the FA 1971 was not inconsistent with the continued existence of, and did not extinguish, then existing native title rights to fish. ...reinforced by reference to the statutory mechanisms under ss 42 and 47 by which such activities should be permitted.
- Court at [26], exclusion of statutory Aboriginal subsistence right not basis for concluding extinguishment



# Western Australia v Brown

- judgment 12 March 2014
- French CJ, Hayne, Kiefel, Gaegler and Keane JJ
- per curiam judgment
- [37] – inconsistency determined at time of grant, *De Rose (No 2)* overruled
- [38] – “one right necessarily implies the non-existence of the other when there is logical antinomy between them: that is, when a statement asserting the existence of one right cannot, without logical contradiction, stand at the same time as a statement asserting the existence of the other right”

# Western Australia v Brown

- [39] – no analogy with s.109 inconsistency
- characterising the right is crucial cf. *Akiba*

# Congoo

- judgment 13 May 2015
- French CJ, Kiefel, Bell, Gaegler and Keane JJ
- court divided evenly – French CJ and Keane J, Gaegler J (no extinguishment); Hayne, Kiefel and Bell JJ (extinguishment)
- statutory confirmation of decision under appeal by s.23(2)(a) of the *Judiciary Act 1903* (Cth)
- concerned impact of *National Security (General) Regulations* – military orders taking possession

# Congoo

- conflict between majority and minority:
  - construction of infringement, “possession”
  - analogy with impact on non-native title property
  - regulation versus extinguishment cf *Akiba*
  - crux, requirement for “clear and plain intention” versus mechanical jurisprudence
  - cul-de-sac or mainstream principles of extinguishment

# Emerging principles

- principle of legality – US Indian principle, Griffith
- many instances where NTA prescribes extinguishing effect – PEPAs, PNEPAs, PAs, IPAs, extinguishing FAs
- dynamic relationship between statute and common law – *Esso Australia* (1999) and the coherence principle
- *Cudgen Rutile v Chalk (No 2)* – management of waste lands of the Crown vested in Parliament