

Queensland v Congo: What now for the law of extinguishment?

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Queensland v Congo [2015] HCA 17

Emergency powers regime:

- ss. 5(1) & 17 National Security Act 1939 (Cth.) ---> reg. 54 ---> five Orders
- Part of the Atherton Tablelands, near Herberton QLD, used as an artillery range/live fire range for training infantry/armoured units: pursuant to reg. 54;
- Qld: the military orders confer upon the Cth. a “right of exclusive possession” ---> NT rights and interests are extinguished in the land affected by the orders;



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The central question:

Did the use of military orders pursuant to reg. 54 of the National Security (General) Regulations between December 1943 & June 1945 extinguish the Bar-Barrum People's native title rights over land which was the subject of those orders?

Answer:

- No: 3 – 3
- Six person judgment due to Crennan J.'s retirement
- s. 23 Judiciary Act 1903 (Cth.)

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Extinguishment: the legal framework

1.) Established parameters

- Legal analysis proceeds from a presumption *against* extinguishment – *Akiba* (2013)
- Primacy of the inconsistency of incidents test: a conceptual, plain meaning test; a comparative evaluation divorced from practical effects;
- Native title *rights* can to some extent be regulated – regulation does not necessarily lead to the extinguishment of the overarching native title *right*;
- As per *Fejo* and *Brown*, a right of exclusive possession re. grants of fee simple and leases = extinguishment;

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Extinguishment: the legal framework

2.) Ambiguous / evolving parameters

- Emerging doctrine of a distinction between the exercise of a native title right and the subsistence of that right from *Akiba*:
- Clear, plain meaning intent towards *abrogation* of those rights and/or the overarching native title right
- “Degrees” of inconsistency; a binary concept; thought to be no “suspension”, as per *WA v Ward* (2002) – temporary grants of exclusive possession to a third party = an inconsistency of rights = extinguishment:

“Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment. Absent particular statutory provision to the contrary, questions of suspension of one set of rights in favour of another do not arise.”

--- Gleeson CJ, Guadron, Gummow & Hayne JJ

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FCA Full Court (2014):

- i. Did the military orders purport to effect an acquisition of the Bar-Barrum people's property contrary to s. 51(xxxi) Cth. constitution?
 - ii. In making the orders, did the Cth. wholly extinguish all native title rights / interests that then subsisted in the land?**
 - iii. Did the Cth.'s physical occupation of at least some of the land under the orders wholly extinguish all the native title rights in the land?
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FCA Full Court (2014):

Held:

- 2-1: the making of the orders/physical occupation *did not* extinguish all native title rights and interests that then subsisted; the military orders ≠ Cth. taking possession of land as per terms of reg. 54;
- North and Jagot JJ:
 - Extinguishment requires objective intent;
 - Inconsistency of rights = an analytical tool in determining such intent;
 - *Contra* Qld.'s submission, objective intention & inconsistency of incidents ≠ two separate tests: inconsistency cannot lead to a result different from ascertainment of objective intention;

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FCA Full Court (2014):

Held:

- North and Jagot JJ:
 - No rights were suspended during the Cth.'s exercise of power;
 - Although NT rights could not be exercised, they continued to exist and were not inconsistent with the Cth.'s rights;
 - The Cth. took exclusive possession:
 - for a limited purpose;
 - for a limited time ;
 - on an objectively ascertainable premise from the statutory scheme that all underlying rights and interests should continue;
 - In taking a right of possession akin to fee simple title, the Cth. compensated the interference with underlying rights/interests ∴ no objective intent to extinguish; also no grant of rights inconsistent in its incidents with continuing NT rights/interests;

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FCA Full Court (2014):

Held:

- Logan J in dissent:
 - The military orders ≠ acquisition: but rather an extinguishment;
 - “Any such extinguishment was, to use the parlance of modern conflict, a form of ‘collateral damage’.”

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Qld.'s appeal to the High Court:

Submission:

FCA/FC erred in holding that the reg. 54 military orders did not –

- i. extinguish all the native title rights and interests re. the Special Case land;**
- ii. or, failing the above, erred in holding that the reg. 54 order did not allow the Cth. to take possession of that land simply by virtue of making orders purporting to take possession of it;

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The statutory majority

French CJ & Keane J:

- Majority *and* minority approach in FCA Full Court = erroneous:
 - Accord with Logan J: “the criterion of extinguishment is and remains one of inconsistency”;
 - However Logan J incorrectly characterised nature of the Cth.’s possession of land pursuant to the reg. 54 orders;
- Exercise of reg. 54 powers may have overridden the enjoyment/exercise of pre-existing rights: but did not involve their extinguishment;
- No necessary legal antinomy between the grant of the rights/powers under reg. 54 and the subsistence of pre-existing NT rights/interests;

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The statutory majority

French CJ & Keane J:

Inconsistency – general principles:

- “...the settled approach to determining extinguishment by operation of legislation or a legislative instrument...was restated by Hayne, Kiefel and Bell JJ in *Akiba*...

‘This Court held in [the *Native Title Act case*] that, at common law, native title rights and interests can be extinguished by a “valid exercise of of sovereign power inconsistent with the continued enjoyment or unimpaired enjoyment of native title”.’

- ...[inconsistency] is not satisfied merely by the identification of restrictions or controls placed on the use of the land by statute or executive act done pursuant to statutory authority.”

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The statutory majority

French CJ & Keane J:

How to test inconsistency:

1. Purposive statutory construction;
2. An objective inquiry involving, as per *Ward*, identification and comparison between the two sets of rights;
3. Resolve whether the statutory provisions were inconsistent w/ continued common law recognition of the NT holders' rights/interests;
4. An inconsistency will *reflect* the "normative force" of a "clear and plain" legislative intention to extinguish as per *Mabo [No 2]* ; *≠ not* a subjective intention

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The statutory majority

French CJ & Keane J:

As applied to facts of this case:

- NSA has a clear limiting / temporal “negative” purpose
- The Cth. imposed a control regime with a limiting purpose of not disturbing subsisting rights and interests: the reg. 54 military orders precluded, *for their duration*, the exercise of NT rights/interests
- No inconsistency and cannot support evidence of “clear and plain” legislative intent
- First ground of appeal fails: second ground ∴ does not arise;

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The statutory majority

Gageler J:

Inconsistency – general principles:

- A settled matter that “the common law ceases to recognise a native title right at the point in time of the creation of an ‘inconsistent’ right by or pursuant to legislation”

How to test inconsistency:

- A logical antinomy of rights: as per *Fejo*, is the existence of the newly-recreated legislative right “inconsistent with the native title holders *continuing to hold* any of the rights or interests which together make up native title”?
- The logical antinomy test is *informed by* a “clear and plain intention” requirement;

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The statutory majority

Gageler J:

As applied to facts of this case:

- The reg. 54 regime is not inconsistent with the continued existence of NT rights; “possession”, as per reg. 54(1), ≠ “exclusive possession”;
- Exclusionary powers under reg. 54 are analogous to mining leases (analogous to *Ward* and *Brown*): no inconsistency merely because a statutory right or power might temporarily prevent NT holders from exercising or enjoying NT rights/interests;
- Appeal dismissed

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The minority

Hayne, Kiefel, Bell JJ*:

Inconsistency – general principles:

- “It is both legally and logically wrong to say that the ‘objective intention’ or ‘statutory purpose’ of the [reg. 54 regime] was to ‘*preserve*’ all previously existing rights.” — Hayne J
- Premise that NT rights/interests are extinguished only if intent to extinguish is discernible = “contrary to the accepted doctrine established and unfailingly applied in this Court in a succession of cases decided over more than 20 years” — Hayne J
- “Anachronistic” to focus on statutory intent: NT rights/interests not recognised in the 1940s — Hayne J

*Separate opinions

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The minority

Hayne, Kiefel, Bell JJ*:

Inconsistency – general principles:

- “That the Cth. took exclusive possession for a limited but uncertain time does not deny that the rights which were taken were inconsistent with the NT rights and interests... As cases like *Fejo* demonstrate, cessation of inconsistent rights does not revive NT rights and interests” — Hayne J
- HCA has repeatedly warned (as per *Ward* and *Fejo*) against application of legislative intent as employed by the FCA FC majority – its relegation of inconsistency of rights test to the status of an analytical tool in identification of legislative intent was incorrect — Kiefel J

*Separate opinions

Queensland v Congo [2015] HCA 17

The minority

Hayne, Kiefel, Bell JJ*:

Inconsistency - general principles:

- A sovereign act inconsistent with the continuing existence of NT rights and interests = inconsistency
- Inconsistency of incidents test = *objective*

*Separate opinions

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The minority

Hayne, Kiefel, Bell JJ*:

How to test inconsistency:

- “Common law extinguishment of native title rights and interests depends upon only one test: inconsistency of rights. As the plurality said in *Ward*, ‘[t]wo rights are inconsistent or they are not.’ And ‘[a]bsent *particular* statutory provision to the contrary, questions of *suspension* of one set of rights in favour of another do not arise.’” — Hayne J

*Separate opinions

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The minority

Hayne, Kiefel, Bell JJ*:

How to test inconsistency:

- As confirmed in *Ward, Wik* and *Fejo* reveal that where statutory rights have been granted to a third party the question arises re. inconsistency: an *objective inquiry* requiring identification and comparison between the two sets of rights, and by reference to *the nature and content of the rights as they stood at the time of the grant* -- Kiefel J
- From *Brown*, inconsistency = existence of one right which necessarily implies the non-existence of the other; if the right granted prevents lawful exercise of NT rights, the latter are extinguished -- Kiefel J

*Separate opinions

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The minority

Hayne, Kiefel, Bell JJ*:

How to test inconsistency:

- Identify and compare the incidents of rights granted with the NT rights that are asserted: if continuation of NT rights is *logically inconsistent* with the rights conferred or assumed by sovereign act, NT is extinguished-- Bell J
- “The test for extinguishment under common law does not depend upon identification of an ahistorical legislative intention to extinguish rights which before 1992 were not understood to have survived European settlement.” — Bell J
- “Inconsistency in the incidents of the two sets of rights is to be determined as a matter of law at the date the Cth. took the right.” — Bell J

*Separate opinions

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The minority

Hayne, Kiefel, Bell JJ*:

As applied to facts of this case:

- “By taking exclusive possession of the land, the Cth. asserted rights which were inconsistent with the NT rights and interests in this case. The Cth.’s acts extinguished the NT rights and interests claimed by the Bar-Barrum people.”
— Hayne J (physical occupation aspect “unnecessary to answer”)

*Separate opinions

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The minority

Hayne, Kiefel, Bell JJ*:

As applied to facts of this case:

- “The logical inconsistency between the two sets of rights is demonstrated by considering the position which would have obtained on the day following the making of the first military order. On that day, the Bar-Barrum People could not in law have exercised any of the NT rights and interests that are the subject of their claim.” -- Bell J
- “Settled authority...is against acceptance that the Bar-Barrum People’s NT rights and interests survived the Cth.’s possession of the land taken under temporary war-time powers.” -- Bell J

*Separate opinions

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What now for the law of extinguishment?

- Vulnerability of *Congo*: a statutory majority ≠ binding precedent;
- *Congo* as organic, gradual evolution of a contextualist approach;
- Contextualism as abrogating absurd results;
- The *Akiba* inconsistency doctrine: a logical, faithful evolution of post-*Mabo* judicial interpretation re. extinguishment;
- Nettle & Gordon JJ;
- Political initiative?