

CONGOO ON BEHALF OF THE BAR-BARRUM PEOPLE #4 V STATE OF QUEENSLAND [2014] FCAFC 9 (21 FEBRUARY 2014)

Case summary and analysis by:

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The following is a case summary of a recent decision by the Full Federal Court. On 21 March 2014, the State asked the High Court for special leave to appeal the decision.

During World War II, more than 13,500 Military Orders were made throughout Australia that allowed the military to take possession of land.¹ Between 1943 and 1945, five Military Orders were made over land on the Atherton Tableland in Far North Queensland. In 2001, the Bar Barrum people sought a determination of native title over that land.²

The Full Federal Court was asked to decide whether native title was extinguished by these Military Orders.

Normally, decisions about native title are made by a single judge. However, Logan J thought this question was sufficiently important and difficult to answer³ to be referred to the Full Federal Court to consider as a “special case”.⁴

Both the Commonwealth and the Northern Territory intervened in the proceedings.

The Full Federal Court found that the Orders **did not** extinguish Native Title. This decision was reached by North and Jagot JJ with Logan J dissenting.

Laws in place for the Duration

- 1 The North Queensland Land Council Representative Body refers to affidavit material filed in the Federal Court as the source for this figure.
- 2 Bar-Barrum People #4 claim, National Native Title Tribunal File No: QC2001/032.
- 3 *Congoo on behalf of the Bar-Barrum People #4 v State of Queensland* [2014] FCAFC 9 (Congoo), at [79] per Logan J.
- 4 The matter was referred to North, Jagot and Logan JJ under s 25(6) *Federal Court of Australia Act 1976* (Cth).

of WWII plus 6 Months

The *National Security Act 1939* (Cth) (NSA) and the National Security (General) Regulations (the NSR) gave the Commonwealth Government powers that were “flexible and far reaching”⁵ to provide for the war effort and to defend Australia. This included that the Minister of State for the Army (**the Minister**) could acquire, or take and keep, any property **other than land** in Australia. Section 51 (xxxi) of the Constitution provides for the acquisition of property on ‘just terms’ compensation (meaning that compensation will be paid).

Although the Minister could not acquire the land, the NSA and NSR allowed the Minister to make a Military Order giving an authority to certain members of the military to take possession of land. This could only occur if it might help keep the public safe, defend the Commonwealth or help in other ways with the war.

The NSA and the NSR also allowed the Minister to say what that land could be used for, as if the Minister owned the land.⁶ The Minister could even go beyond the rights that an owner would have because, under the NSA and NSR, the Minister could stop activity on that land that the legal owner would not have been allowed to stop.

The Court paid special attention to the fact that the NSR provided that

- 5 *Congoo* at [5] (quoting the then Prime Minister in the second reading speech for the Act).
- 6 *National Security (General) Regulations* r54(2)(a) provide that the authorised person could:

“...do, in relation to the land, anything which any person having an unencumbered interest, in fee simple in the land would be entitled to do by virtue of that interest.”

The term “unencumbered interest, in fee simple in the land” implies absolute ownership free of any other interests or rights.

compensation was available, where Military Orders interfered with legally recognised rights over land. Also important was that the Commonwealth could only be in possession of the land, under the NSA and NSR, during war time and for six months after the end of World War II.

Three questions before the Full Federal Court

1. Were the Military Orders an acquisition of the property of the Bar-Barrum People other than on just terms?
2. If the answer to question 1 is yes:
 - (a) were the Regulations that allowed for the Orders or the Orders themselves a “past act” under the Native Title Act 1993 (Cth) (the NTA)
 - (b) and if yes, were those past acts validated (made lawful) by the NTA; and
3. (a) did making the Orders extinguish native title
 - (b) and if not, did being in occupation of the Bar Barrum land because of the Orders, extinguish native title.

Question 1 – Acquisition other than on just terms

North and Jagot JJ⁷ considered that, as the NSA scheme provided for compensation for loss suffered, just terms were provided.

North and Jagot JJ also discussed the issue of acquisition and considered that the Bar Barrum people’s “bundle of rights” had been “seized and taken away” for the period of possession, and concluded, at [76]:

... question 1 should be answered “No”. While property was

⁷ *Congoo* at [66-76].

acquired, it was acquired on the basis of just terms.

Logan J said that native title rights, in this case, were proprietary but that the Commonwealth had not acquired them. Rather, those rights were extinguished.⁸

In *Mabo*, the High Court said that legislative extinguishment of native title rights is the same as taking property.⁹ However, Logan J decided that the extinguishment of the Bar Barrum people's rights and interests should not be recognised as an acquisition of property. His reasoning was that Australia was at war and the Bar Barrum people lost their rights and interests in a form of "collateral damage".¹⁰

Logan J said, if a majority of the Court found that the Commonwealth had acquired property (in the form of the Bar Barrum people's native title rights and interests), that acquisition would have been on just terms because of the compensation scheme under the NSR.

The applicant asked whether compensation is for "just terms" if its availability is restricted. In this case, the NSR allowed only two months to apply for compensation.

Logan J rationalised the application of s 51 (xxxii) of the Constitution by saying, at [124]:

there is a balance to be struck when determining whether the scheme for acquisition and compensation is "just" between the imperatives of national defence during a time of pervasive international conflict entailing ... a prospect of invasion and what will amount to an arbitrary acquisition of property without any fair right to compensation.

Question 2 – Validated Past Acts

North and Jagot JJ did not deal with Question 2 because it was not necessary to answer and further, at [77], considered it was "not appropriate to deal with the question on a hypothetical basis."

Logan J made some observations, but considered that it was not necessary to

answer Question 2.¹¹

Question 3 – Extinguishment

An act of parliament will not extinguish native title unless that was parliament's intention. The NSA and NSR were passed a long time before the NTA was enacted. Therefore, the Court had to consider the **objective intent** of parliament. In other words, the Court had to consider what parliament would have intended, if it had known about the NTA when it created the laws in 1939.

Judges interpret laws generally by considering established principles. When dealing with issues of native title, judges also consider what has been said about native title in Australia's High Court, Federal Court and Supreme Courts.

North and Jagot JJ considered the general principle to working out parliament's objective intent was clearly stated by the High Court in *Akiba v Commonwealth (Akiba)* as:

a statute ought not to be construed as extinguishing common law property rights unless no other construction is reasonably open.¹²

Also in *Akiba*, at [29], French CJ and Crennan J discussed the difference between the **existence** of native title rights and the **exercise** of native title rights and stated:

Put shortly, when a statute purporting to affect the exercise of a native title right or interest for a particular purpose or in a particular way can be construed as doing no more than that, and not as extinguishing an underlying right, or an incident thereof, it should be so construed.

Put simply:

1. where an act of parliament affects the exercise of native title rights;
2. and
3. it is possible to do so;
4. the objective intent of parliament is not to have extinguished the underlying existence of those native title rights.

North and Jagot JJ considered propositions from leading cases, at

¹¹ *Congoo*, at [126-129].

¹² *Akiba v Commonwealth* [2013] HCA 33, per French CJ and Crennan J, at [24].

[35-59],¹³ and found, at [52-53], that the Commonwealth had no objective intention to extinguish native title rights and interest.

The majority judgment was that the Commonwealth's exclusive possession did not allow the Bar Barrum people to exercise their native title rights and interests, at that time. However, that did not lead to the conclusion that parliament's objective intention was to extinguish native title.

The majority found that the operation of the scheme in place under the NSA was not to confer a right of exclusive possession that would leave no room for the continued existence of native title rights and interests. Rather, those rights continued to exist while the scheme operated so those rights simply could not be exercised during that period.

Logan J accepted the arguments by the State and the Northern Territory and, at [30], found that native title was extinguished because:

- native title rights and interests are not the same as other rights and interests in land;
- the Military Orders authorised the exercise of interests to the exclusion of all others; and
- unlike a mining or pastoral lease, the Military Orders did not confine the exercise of any right over the land to a particular purpose.

Testing the Extinguishment of Native Title

Radical Title The term "Radical Title" explains the full proprietary rights held by the Commonwealth, except to the extent of native title.¹⁴ In *Mabo (No 2)*, Brennan J discussed that a valid grant of an interest by the Commonwealth, when holding the radical title, is binding on the Commonwealth. That "bindingness" is known as the principle of derogation.

¹³ including *Mabo (No 2)*, *Wik Peoples v Queensland* (1996) 187 CLR 1, *Fejo, Commonwealth v Yarmirr* (2001) 208 CLR 1, *Western Australia v Ward* (2002) 213 CLR 1, *Yanner v Eaton* (1999) 201 CLR 351 and *Akiba*.

¹⁴ Secher, Ulla (2005) *The meaning of radical title: the pre-Mabo authorities explained – part 1*. Australian Property Law Journal, Vol 11 (3), 179-208. <http://www.lexisnexis.com.au/en-AU/products/Australian-Property-Law-Journal.page>.

⁸ *Congoo* at [92-100].

⁹ *Congoo* at [105] quoting *Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Deane and Gaudron JJ at [111].

¹⁰ *Congoo*, at [105].

North and Jagot JJ noted, at [29], that the submissions of the State and the Northern Territory, in support of extinguishment:

... did not recognise the essential difference between the exercise of sovereign power by the holder of radical title to land and the exercise of sovereign power which held no right or interest in the land.

Their Honours observed that that difference can be very important for determining parliament's objective intention.

The intention of parliament to extinguish native title will be apparent if a Crown grant:

vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land.¹⁵

In this case, the Commonwealth exercised power in circumstances where it was not the holder of radical title. Determining parliament's objective intention is, therefore, not impacted by the principle of derogation.

Inconsistency of Incidents The "inconsistency of incidents test" asks whether the continued existence of native title is inconsistent with legal rights and interests created by executive or legislative acts. This test can be used to show that native title rights and interests are impacted, but it does not show ...?

The State submitted there are the following two separate tests:

1. the objective intention test; and
2. the inconsistency of incidents test.

North and Jagot JJ corrected this approach, at [50], saying that there is only the objective intention test.

Logan J did not make the distinction, stating at [112]:

so far as extinguishment is concerned, there is no relevant distinction to be drawn between a grant, such as a grant of an estate in fee simple or a leasehold estate giving exclusive possession and

the taking of possession by the Commonwealth of the land pursuant to the military orders. Each was of the character of a sovereign act inconsistent with the continued existence of Native Title rights.

Logan J was satisfied that, when the Commonwealth was in possession, no person was able to exercise their right relating to the land. He considered that the rights of the owner was suspended, but continuing but that that native title rights, inherently vulnerable, were extinguished.¹⁶

Timing of taking possession Question 3 was split into part (a) and part (b). This reflects different interpretations about when possession took place.

North and Jagot JJ considered, at [64], that it was "inherently impractical and unlikely" that the Commonwealth took possession, simply by the Minister "filling in a form and no more." While physical occupation was not necessary, North and Jagot JJ agreed that more than the completion of a form was required, but they did not expand on what that might be.

Logan J, following the submissions of the State and the Northern Territory, found that possession occurred when the Military Order to take possession were made stating, at [86] that:

as the regulations prescribed no special method or means of taking possession and noting that the power to give directions in connection with the taking of possession meant that possession was taken my making the order in writing.

Logan J said, at [87], that the contrary construction would lead to *inconvenient if not, absurd results*.

Conclusion

The majority decision in this case was that the Commonwealth did not have an objective intention to extinguish native title.

North and Jagot JJ said, at [52], that the language of the statute did not

or interests in land no longer be recognised. It discloses an intention wholly to the contrary.¹⁷ (emphasis added)

At [21], North and Jagot JJ said that the native title rights in the land could not be exercised when the Commonwealth was in possession but, once that possession ceased, all rights could once more be exercised.

The Commonwealth's submissions, discussed at [27], seem to have been impliedly accepted by the majority. The Commonwealth submitted that:

- the NSR restricted exercise of a right only during the Commonwealth possession;
- r 54(3) NSR pre-supposed the continuation of underlying rights by requiring any owner or occupier to provide information about the land to the Commonwealth whilst the Commonwealth was in possession;
- r 55AA NSR demonstrated that this was not an acquisition of proprietary interests by providing that, if at a later time the Commonwealth compulsorily acquired the land, the value was to be assessed without taking into account any increase or decrease in value as a result of anything done by the Commonwealth whilst exercising its power;
- the NSR provided for compensation both during and after the time the Commonwealth was in possession, implying that rights and interests in the land continued and could be exercised once the Commonwealth possession ceased; and
- the purposes for which possession could be taken were limited to public safety, defence, efficient prosecution of the war and maintaining supplies and essential services.

¹⁵ Congoo at [36], discussing *Mabo v Queensland (No 2)* (1992) 175 CLR 1, per Brennan J (with whom Mason CJ and McHugh J agreed), at [63]-[68].

disclose any intention *let alone a clear and plain intention* that rights

¹⁶ Congoo, paras [5], [9] and [7].

¹⁷ see also Congoo at [29]: "the legislative scheme discloses an objective intention that underlying rights should continue."