

# Military Orders

References:

[Photos](#)

[Regulation54](#)

[Summary of Judgement](#)

# Congoo on behalf of the Bar-Barrum People #4 v State of Queensland [2014] FCAFC 9 (21 February 2014)

During World War II, more than 13,500 Military Orders were made throughout Australia that allowed the military to take possession of land. <sup>1</sup> 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. <sup>2</sup>

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 questions was sufficiently important and difficult to answer <sup>3</sup> to be referred to the Full Federal Court to consider as a “special case”. <sup>4</sup>

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 Jagott JJ with Logan J dissenting.

On 21 March 2014, the State asked the High Court for special leave to appeal the decision of the Full Federal Court.

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<sup>1</sup> The North Queensland Land Council Represent Body refers to affidavit material files in the Federal Court as the source for this figure.

<sup>2</sup> Bar-Barrum People #4 claim, National Native Title Tribunal File No: QC2001/032

<sup>3</sup> *Congoo on behalf of the Bar-Barrum People #4 v State of Queensland* [2014] FCAFC9 (Congoo), at [79] per Logan J.

<sup>4</sup> The matter was referred to North, Jagot and Logan JJ under s 25(6) *Federal Court of Australia Act 1976* (Cth).

# Laws in place for the Duration 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”<sup>5</sup> 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.<sup>6</sup> 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 such as a person exercising a right of way..

The Court paid special attention to the fact that the NSR provided that 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. This period was extended several times by amendments to the Act

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<sup>5</sup> *Congoo* at [5] (quoting the then Prime Minister in the second reading speech for the Act).

<sup>6</sup> *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.”

# Three questions before the Full Federal Court

1. Were the Military Orders an acquisition of the property of the BarBarrum 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 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

Under section 51(xxxi) of the Constitution the Commonwealth can only acquire property if it does so with “just terms” compensation.

- **North and Jagot JJ**<sup>7</sup> 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 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.<sup>8</sup>
- In *Mabo*, the High Court said that legislative extinguishment of native title rights is the same as taking property.<sup>9</sup> 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”.<sup>10</sup>

<sup>7</sup> *Congoo* at [66-76].

<sup>8</sup> *Congoo* at [92-100].

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

<sup>10</sup> *Congoo*, at [105].

Logan J said, if contrary to his collateral damage view, 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, in argument before the Full Court raised the question 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 position 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 defense during 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.

The Majority did not address this issue specifically, simply finding that there was just terms for the acquisition of the Bar Barrum peoples rights

### **Question 2 – Validate Past Acts**

**North and Jagott 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. <sup>11</sup>

### **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 Jagott 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. <sup>12</sup>

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<sup>11</sup> *Congoo* at [126-219].

<sup>12</sup> *Akiba v Commonwealth* [2013] HCA 33, per French CJ and Creenan J, at [24].

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:

- where an act of parliament affects the exercise of native title rights;
  - and
  - it is possible to do so;
  - the objective intent of parliament is not to have extinguished the underlying existence of those native title rights.
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- North and Jagot JJ considered propositions from leading cases, at [35-59]<sup>13</sup>, 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, during the time of possession. 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 but those rights 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.

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<sup>13</sup> 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*.

# Testing the Extinguishment of Native Title

**Radical Title** 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 term "Radical Title" explains the full proprietary rights held by the Commonwealth, except to the extent of native title.<sup>14</sup> 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.

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.<sup>15</sup>

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.

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<sup>14</sup> 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>.

<sup>15</sup> 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].

# Inconsistency of Incidents

The State submitted there are the following two separate tests:

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

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

The “inconsistency of incidents tests” asks whether the continued existence of native title is totally inconsistent with legal rights and interests created by executive or legislative acts. The majority said that this “test” is only a tool for ascertaining the objective intent and did not help where the legislature was in effect creating rights to be held by itself as opposed to creating rights to be held by others.

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 were suspended, but continuing but that native title rights, inherently vulnerable, were extinguished.<sup>16</sup>

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<sup>16</sup> *Congoo*, paras [5], [9], and [7].



## Timing of taking possession/ occupation

Question 3 was split into part (a) and part (b). This reflects different interpretations held by the parties and put forward in discussion in Court before Logan J for the purpose of formulating the suggested questions to be put to the Full Court.

Did the mere signing of the orders by the relevant Minister give possession [ in a legal sense] to the military ? What would be the point of time when Native Title was extinguished [ if it was accepted that extinguishment was the effect]- Time of signing or time of taking physical possession?

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 *something more* than the completion and signing 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 by 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 Parliament did not have any objective intention to extinguish native title when it passed the National Security Act and the National Security Regulations.

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

Disclose any intention let alone a clear and plain intention that rights or interests in land no longer be recognised. I discloses an intention to wholly to the contrary.<sup>17</sup> (emphasis added)

At [21], North and Jagott 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.

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<sup>17</sup> see also *Congoo* at [29]: “the legislative scheme discloses an objective intention that underlying rights should continue.

# Results Spreadsheet

ISSUE	MAJORITY (North & Jagot JJ)	MINORITY (Logan J)
Did the issuing of orders under Regulation 54 of the National Security (General) Regulations extinguish Native Title?	No	Yes
Did the inconsistency of incidents test apply where the Commonwealth was not the Radical Title Holder granting rights to a third party but simply creating rights in itself?	No, the inconsistency of incidents was only an analytical tool to ascertain the objective intent of the Commonwealth and did not apply where the Crown was not the holder of Radical Title.	Yes
When a Regulation 54 order was issued by the Minister, did that of itself take possession on behalf of the Commonwealth of the land mentioned in the order or is something more required?	Something more than the mere completion of the form by the Minister or his delegate was required. Physical occupation not necessarily required but some (unspecified) manifestation required, which may vary and depend on the facts of each instance.	Possession by the Commonwealth was effected upon the Minister or delegate signing the order. No other act of possession required.
<p>Acquisition of property other than on just terms compensation:</p> <ul style="list-style-type: none"> <li>- were the Native Title rights "property" within the meaning of Section 51 (xxxi) of the Constitution?</li> <li>- was there an acquisition of property?</li> <li>- was there just terms compensation?</li> </ul>	<p>Yes</p> <p>Yes</p> <p>Yes</p>	<p>Yes</p> <p>No - the rights were simply extinguished.</p> <p>If contrary to the opinion expressed, there was in fact an acquisition then it was on just terms.</p>

# Reg 54

Extension  
of application  
of Air  
Navigation  
Regulations.

52. The powers contained in the Air Navigation Regulations made under the *Air Navigation Act 1920-1936* shall be exercisable in relation to the navigation of aircraft registered in Australia, over any area outside Australia, as they are exercisable in relation to the navigation of aircraft over Australia.

## PART V.—ESSENTIAL SUPPLIES AND WORK.

### *General Provisions.*

Power to do  
work on land.

53.—(1.) Any member of the Defence Force acting in the course of his duty as such, and any person thereto authorized by a Minister, may, for any purpose connected with the defence of the Commonwealth, the prosecution of the war, the securing of the public safety or the maintenance of supplies and services essential to the life of the community, do any work on any land, or place anything in, on or over any land.

(2.) If it appears to a Minister to be necessary or expedient so to do in the interests of the public safety, the defence of the Commonwealth, the efficient prosecution of the war or the maintenance of supplies and services essential to the life of the community, he may by order provide for prohibiting or restricting the doing on any particular land of any work specified in the order.

(3.) A person (other than a person in the service of the Crown or constable acting in the course of his duty as such) shall not, except with permission granted by or on behalf of a Minister, remove, alter or tamper with any work done, or thing placed, in, on or over any land in pursuance of this regulation.

(4.) For the purpose of this regulation, the doing of work shall, in relation to any land, be deemed to include the demolition, pulling down, destruction or rendering useless of anything placed in, on or over the land, the maintenance of any work or thing in, on or over the land, and the removal from the land of anything so placed, demolished or pulled down in pursuance of this regulation.

Taking  
possession of  
land.

54.—(1.) If it appears to a Minister to be necessary or expedient so to do in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community, he may take possession of any land, and may give such directions as appear to him to be necessary or expedient in connexion with the taking of possession of the land.

(2.) While any land is in the possession of a Minister in pursuance of a direction given under this regulation, the land may, notwithstanding any restriction imposed on the use thereof (whether by law or otherwise), be used by, or under the authority of, that Minister for such purpose, and in such manner, as he thinks expedient in the interests of the public safety or the defence of the Commonwealth, or for maintaining supplies and services essential to the life of the community; and that Minister, so far as appears to him to be necessary or expedient in connexion with the taking of possession or use of the land in pursuance of this sub-regulation—

(a) may do, or authorize persons so using the land to do, in relation to the land, anything which any person having an interest in the land would be entitled to do by virtue of that interest; and

(b) may by order provide for prohibiting or restricting the exercise of rights of way over the land, and of other rights relating thereto which are enjoyed by any person, whether by virtue of an interest in land or otherwise.

(3.) The owner or occupier of any land shall, if requested by a Minister or a person thereto authorized by him so to do, furnish to that Minister or such person as is specified in the request such information in his possession relating to the land (being information which reasonably may be demanded in connexion with the execution of this regulation) as is so specified.

(4.) Such compensation shall be payable for any damage or loss sustained by the owner or occupier of the land by reason of the taking of possession of the land, or of anything done in relation to the land in pursuance of this regulation, as is determined by agreement, or in the absence of agreement, by action by the claimant against the Minister in any court of competent jurisdiction.

55. Without prejudice to any other of these Regulations, a Minister may by order authorize, subject to any restrictions and conditions imposed by the order, the use of any land specified therein for naval, military or air force purposes, during the period specified in the order; and any such order may, so far as appears to that Minister to be necessary or expedient for the purposes thereof, provide—

- (a) for entitling persons using any land in pursuance of the order to do such acts in relation to that land as are specified in the order; and
- (b) for prohibiting or restricting the exercise of rights of way over that land, and of other rights relating thereto which are enjoyed by any person, whether by virtue of an interest in that land or otherwise.

56. Any member of the Defence Force acting in the course of his duty as such, and any person thereto authorized by a Minister—

- (a) may enter on any land for the purpose of exercising any of the powers conferred in relation to that land by regulations 53, 54 and 55 of these Regulations;
- (b) may enter and inspect any land for the purpose of determining whether, and, if so, in what manner, any of those powers are to be exercised in relation to the land; and
- (c) may, for any purpose connected with the defence of the Commonwealth, the prosecution of the war, the securing of the public safety or the maintenance of supplies and services essential to the life of the community, pass (with or without animals or vehicles) over any land.

57.—(1.) Subject to these Regulations, if it appears to a Minister to be necessary or expedient so to do in the interests of the public safety, the defence of the Commonwealth or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, he may by order provide for the requisitioning of—

- (a) any property (other than land), including any vessel or aircraft and any article on board a vessel or aircraft; and
- (b) any ship or aircraft registered in Australia or any article on board any such ship or aircraft, wherever the ship or aircraft may be.

# 1 Tank Main Street, Herberton



## 2 Cairns Redlynch Camp used for Troops both departing and returning from war zones



### 3 Race Day, Herberton [Bar Barrum Country]





Cairns – Redlynch Camp used for troops both departing and returning from war zone



## 5 Tank – Main Street Herberton

