



WHAT'S NEW IN NATIVE TITLE

January 2016

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1. Case Summaries

[Doyle on behalf of the Inman people #2 v State of Queensland \[2016\] FCA 13](#)

22 January 2016, Extinguishment Hearing, Federal Court of Australia, Brisbane, Queensland, Reeves J

In this matter, Reeves J heard separate questions on extinguishment in relation to the grant and conversion of a number of grazing homestead leases, and the dedication of a road, all of which are located in the vicinity of the town of Taroom in Western Queensland. Reeves J held that the leases and the road were valid, constituting previous exclusive possession acts as defined by [s 23B](#) of the [Native Title Act 1993 \(Cth\)](#) (NTA). Each of those interests had the effect of extinguishing exclusive possession native title over the land and waters concerned. The parties to the native title application agreed in principle to the terms of the proposed consent determination, with the exception of the questions relating to extinguishment of native title dealt with in this separate judgement.

The Road Issue

This issue concerned whether the presumption of regularity could be relied upon by the State of Queensland (the State) to overcome the absence of the evidence necessary to establish that the road was validly dedicated and established. The

State was unable to produce records of a Government Gazette declaring that the lands the subject of the road were open for selection in accordance with the provisions of s 75 of the *Land Act 1897* (Qld) (Land Act); and that the maps relating to that land were exhibited to the public in accordance with s 84 of the Land Act.

The applicant contended that the State could not rely upon the presumption of regularity because it only applies to executive acts required to be performed prior to the exercise of a statutory power, and each of the grants in question were made after, and not before, the proclamation required by s 75 of the Land Act. The applicant relied on the judgment of McHugh JA in *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 at [164] in support of its claim:

Where a public official or authority purports to exercise a power or to do an act in the course of his or its duties, a presumption arises that all conditions necessary to the exercise of that power or the doing of that act have been fulfilled.

Reeves J did not consider that McHugh JA intended to limit the application of the presumption to legislative acts before the performance of the public duty in question.

Reeves J held that it could be inferred that the road would not have been granted to the grantee unless they had quoted in their application the proclamation declaring the land open for selection. On that reasoning, it can also be inferred that the duty to publish the proclamation was fulfilled.

His Honour concluded that the land marked as a road on the plan constituted the dedication of that area of land as a public road, which therefore constitutes a 'public work' within the meaning of s 253 of the NTA. The dedication was valid and therefore operated as a previous exclusive possession act under s 23B(7) of the NTA to extinguish all native title rights and interests that existed in the area of land comprising that road.

The *Metwally* Issue

Reeves J was of the view that the question of whether the grants and conversions of the grazing leases were valid previous exclusive possession acts required consideration of the *University of Wollongong v Metwally* [1984] HCA 74; (1984) 158 CLR 447 (*Metwally*) decision and the operation of s 109 of the *Constitution*. Section 109 states that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

It was not in dispute that the relevant leasehold interests all arose after the enactment of the *Racial Discrimination Act 1975 (Cth)* (RDA); were inconsistent with the provisions of that Act; and were therefore rendered invalid by the operation of s 109 of the *Constitution*. It was also agreed that all of the leasehold interests were surrendered prior to 1 January 1994, when the NTA came into effect.

The applicant relied on the decision in *Metwally* in support of its claim that the Commonwealth cannot retrospectively legislate to overcome the invalidity of a piece of State legislation which was held to be inconsistent with Commonwealth legislation by the operation of s 109 of the *Constitution*. The applicant contended that the provisions of the NTA and the [Native Title \(Queensland\) Act 1993 \(Qld\)](#) (QNTA) could only validate an invalidity from the date they each came into effect. As a result, the applicant argued that since the leases ceased prior to the point at which the NTA and the QNTA came into effect, none of those acts could be retrospectively validated by the 'past acts' provisions of the NTA and the QNTA.

The State argued that the *Metwally* principle correctly formulated, together with the plurality judgement in [Western Australia v Commonwealth \[1995\] HCA 47; 183 CLR 373](#) (the *Native Title Case*) allowed the Commonwealth and State governments to legislate together to correct past s 109 invalidity, if the Commonwealth first removed the source of the inconsistency and then allowed the State to pass validating legislation. The State therefore submitted the combined provisions of the NTA (ss [7](#), [19](#) and [228](#)) and QNTA ([s 8](#)) achieved an effective validation of the past invalid acts associated with the leases.

Reeves J confirmed that the leases were invalid during the intervening period between the time at which the inconsistency arose and the enactment of the NTA. Furthermore, the leases remained invalid by virtue of the inconsistency after they were surrendered, as was contemplated by the definition of 'past act' contained in [s 228\(2\)](#) of the NTA. His Honour rejected the applicant's contention that the historical invalidity was removed as a result of subsequent dealings with the relevant land, and ruled that as they came within the terms of the NTA and QNTA, they were validated from that time onwards, and extinguished exclusive native title rights and interests.

Reeves J considered the *Metwally* judgements of Murphy, Brennan, Deane and Mason JJ to be persuasive. Those judgements held that neither state nor federal legislatures can render valid what was made invalid by the operation of s 109. Their Honours did indicate that s 109 inconsistencies can be overcome if the Commonwealth Parliament legislates to clarify that the commonwealth legislation is not intended to regulate the subject matter exhaustively, clearing the way for the state governments to legislate on the issue.

His Honour drew on the plurality judgment in the *Native Title Case* for how the NTA and the QNTA overcome the s 109 inconsistency with the RDA. [Section 11](#) of the NTA establishes that native title cannot be extinguished contrary to the NTA. [Section 7\(3\)](#) of the NTA expressly states that while native title is protected against extinguishment from 1975 by the RDA, that protection does not affect the validation of past acts in accordance with the NTA. It was held by the plurality judges that by enacting those provisions, the federal Parliament removed any future inconsistency with the RDA in relation to past acts, allowing future state laws to validate past acts invalidated by the operation of the RDA, in accordance with [s 19](#) of the NTA. Reeves J held that [s 8](#) of the QNTA extinguished native title over the leased areas, as it

complies with and operates as an exception to the protection afforded by s 11 of the NTA.

2. Legislation

There were no current Bills before the Federal, state or territory parliaments, or relevant previous Bills that received Royal Assent or were not passed during the period 1-31 January 2016.

3. Native Title Determinations

In January 2016, the NNTT website listed no native title determinations.

4. Registered Native Title Bodies Corporate & Prescribed Bodies Corporate

[The Native Title Research Unit](#) within AIATSIS maintains a [RNTBC summary document](#) which provides details about RNTBCs and PBCs in each state/territory including the RNTBC name, RNTBC type (agent or trustee) and relevant native title determination information. The statistics for RNTBCs as of 27 January 2016 can be found in the table below.

Information on RNTBCs and PBCs including training and support, news and events, research and publications and external links can be found at nativetitle.org.au. For a detailed summary of individual RNTBCs and PBCs see [PBC Profiles](#).

Additional information about RNTBCs and PBCs can be accessed through hyperlinks to corporation information on the [Office of the Registrar of Indigenous Corporations \(ORIC\) website](#); case law on the [Austlii website](#); and native title determination information on the [NNTT](#) and [ATNS](#) websites.

Table 1: National Registered Native Title Bodies Corporate (RNTBCs) Statistics (27 January 2016)

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Australian Capital Territory	0	0
New South Wales	6	0
Northern Territory	19	40
Queensland	72	2
South Australia	15	0

State/Territory	RNTBCs	No. of successful (& conditional) claimant determinations for which RNTBC to be advised
Tasmania	0	0
Victoria	4	0
Western Australia	35	3
NATIONAL TOTAL	151	45

Note some RNTBCs relate to more than one native title determination and some determinations result in more than one RNTBC. Where a RNTBC operates for more than one determination it is only counted once, as it is one organisation.

Source: <http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx> and Registered Determinations of Native Title and RNTBCs as at 27 January 2016.

5. Indigenous Land Use Agreements

In January 2016, 50 ILUAs were registered with the National Native Title Tribunal.

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
29/01/2015	Wulli Wulli People and Banana Shire Council ILUA	QI2015/044	Area Agreement	QLD	Government, Development
29/01/2015	Ergon Energy and Wulli Wulli People ILUA	QI2015/045	Area Agreement	QLD	Consultation protocol, Access, Community, Energy
29/01/2015	Wulli Wulli People/ Gyranda ILUA	QI2015/070	Area Agreement	QLD	Pastoral, Access
29/01/2015	Wulli Wulli People/ Onkaparinga ILUA	QI2015/071	Area Agreement	QLD	Pastoral, Access
29/01/2015	Wulli Wulli People/ Woodine South ILUA	QI2015/072	Area Agreement	QLD	Pastoral, Access
29/01/2015	Wulli Wulli People/ Wondekai ILUA	QI2015/077	Area Agreement	QLD	Access, Terms of Access
29/01/2015	Wulli Wulli People/ Woolton ILUA	QI2015/079	Area Agreement	QLD	Pastoral, Access
29/01/2015	Wulli Wulli People/ Dawson Vale East ILUA	QI2015/081	Area Agreement	QLD	Access, Pastoral
29/01/2015	Wulli Wulli People Protected Areas ILUA	QI2015/082	Area Agreement	QLD	Government, Access
21/01/2015	Gangalidda People Birkalla, Little Doab, Nierrina, Beamesbrook and other interests ILUA	QI2014/091	Area Agreement	QLD	Access, Terms of Access
21/01/2016	Gangalidda People Kotupna Pastoral ILUA	QI2015/006	Area Agreement	QLD	Access, Pastoral, Terms of Access

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
21/01/2016	Gangalidda People Almora Pastoral ILUA	QI2015/008	Area Agreement	QLD	Access, Terms of Access
21/01/2016	Gangalidda People Armraynald, Part Doab, Yarrum and Iluka Pastoral ILUA	QI2015/009	Area Agreement	QLD	Access, Terms of Access
18/01/2016	Niyaparli People #3 and BHP Billiton Comprehensive Agreement - Further ILUA	WI2015/011	Area Agreement	WA	Mining, Large mining
18/01/2016	Uaroo Pastoralist ILUA	WI2015/012	Area Agreement	WA	Pastoral, Access
18/01/2016	Jurruru and Glenflorrie Pastoral ILUA	WI2015/014	Body Corporate	WA	Pastoral, Access
18/01/2016	Jurruru and Ashburton Downs Pastoral ILUA	WI2015/015	Body Corporate	WA	Pastoral, Access
18/01/2016	Jurruru and Kooline Pastoral ILUA	WI2015/016	Body Corporate	WA	Pastoral, Access
18/01/2016	Jurruru and Cheela Plains Pastoral ILUA	WI2015/017	Body Corporate	WA	Pastoral, Access
18/01/2016	Jurruru and Dooley Downs Pastoral ILUA	WI2015/018	Body Corporate	WA	Pastoral, Access
18/01/2016	Jurruru and Pingandy Pastoral ILUA	WI2015/019	Body Corporate	WA	Pastoral, Access
12/01/2016	Tubba-Gah ILUA	NI2015/001	Area Agreement	NSW	Native Title Settlement, Co-management
11/01/2016	Esso Pipeline Replacement Project ILUA	VI2015/003	Body Corporate	VIC	Pipeline
07/01/2016	Boonthamurra People/ Araluen and Budgerygar ILUA	QI2015/067	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Coomo ILUA	QI2015/068	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Kalabra ILUA	QI2015/074	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Nerrigundah ILUA	QI2015/075	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Nockatunga ILUA	QI2015/047	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Buckeroola and Monler ILUA	QI2015/048	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Clifton ILUA	QI2015/049	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Congie ILUA	QI2015/050	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Harkaway ILUA	QI2015/051	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/Keeroongooloo ILUA	QI2015/052	Area Agreement	QLD	Pastoral, Access
07/01/2016	Boonthamurra People/ Hammond Downs ILUA	QI2015/053	Area Agreement	QLD	Pastoral, Access

Registration date	Name	Tribunal file no.	Type	State or Territory	Subject matter
07/01/2016	<u>Boonthamurra People/ Maroo and Regleigh ILUA</u>	QI2015/054	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Trinidad ILUA</u>	QI2015/055	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Whynot (aka Naretha) ILUA</u>	QI2015/056	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Panjee and Talgeberry ILUA</u>	QI2015/057	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Plevna Downs ILUA</u>	QI2015/058	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Quartpot ILUA</u>	QI2015/059	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Tenham ILUA</u>	QI2015/060	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Moothandella ILUA</u>	QI2015/061	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Raymore and Wheeo ILUA</u>	QI2015/062	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ South Galway ILUA</u>	QI2015/063	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Thylungra ILUA</u>	QI2015/064	Area Agreement	QLD	Pastoral, Access
07/01/2016	<u>Boonthamurra People/ Malagarga and Mt Howitt ILUA</u>	QI2015/065	Area Agreement	QLD	Pastoral, Access
05/01/2016	<u>Boonthamurra People/ Burkobulla ILUA</u>	QI2015/066	Area Agreement	QLD	Pastoral, Access
05/01/2016	<u>Currawinya & Lake Bindegolly National Parks Agreement ILUA</u>	QI2015/076	Area Agreement	QLD	Government, Access
05/01/2016	<u>Boonthamurra People/ Gummomo ILUA</u>	QI2015/069	Area Agreement	QLD	Pastoral, Access
05/01/2016	<u>Boonthamurra People/ Ray ILUA</u>	QI2015/073	Area Agreement	QLD	Pastoral, Access

For more information about ILUAs, see the [NNTT website](#) and the [ATNS Database](#).

6.Future Acts Determinations

In January 2016, 6 Future Acts Determinations were handed down.

Date	Parties	Coverage	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
25/01/2016	<u>Western Desert Lands Aboriginal Corporation (WCD2002/002) (native title party)</u> -and- <u>The State of Western Australia (Government party)</u> -and- <u>Birla Maroochydore Pty Ltd (grantee party)</u>	-	WO2015/0128, WO2015/0129, WO2015/0130, WO2015/0131	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the corporation as to why the objection should not be dismissed, nor was a request for extension of time made in order to comply with directions.
22/01/2016	<u>Wanjina-Wunggurr (Native Title) Aboriginal Corporation (WCD2011/002) (native title party)</u> - and - <u>The State of Western Australia (Government party)</u> - and - <u>Hard Rock Resources Pty Ltd (grantee party)</u>	-	WO2014/0354	WA	Objection - Expedited Procedure Does Not Apply	Member Shurven was satisfied that the grant of the licence would be likely to interfere with one of the sites or areas of particular significance in the licence area.
21/01/2016	<u>Barbara Sturt & Others on behalf of Jaru (WC2012/003) (native title party)</u> - and - <u>The State of Western Australia (Government party)</u> - and - <u>Eastmin Pty Ltd (grantee party)</u>	0.8%	WO2014/0502	WA	Objection - Expedited Procedure Applies	Member Shurven did not receive any contentions from the corporation as to why the objection should not be dismissed, nor was a request for extension of time made in order to comply with directions.

Date	Parties	Coverage	Tribunal file no.	State or Territory	Determination	Reasons for the Determination
21/01/2016	<u>Western Desert Lands Aboriginal Corporation</u> (WCD2002/002; WCD2013/002) (native title party) -and- <u>The State of Western Australia</u> (Government party) -and- <u>Tom Langley Mineral Holdings Pty Ltd</u> (grantee party)	-	WO2015/0545	WA	Objection - Dismissed	Member Shurven held that the evidence did not support a conclusion that the grant of the licence would be likely to interfere with the carrying on of the native title holders' community or social activities, or with areas or sites of particular significance to them in accordance with their traditions. Furthermore, it was not considered that the licence would be likely to involve major disturbance to the land and waters concerned.
20/01/2016	<u>Western Desert Lands Aboriginal Corporation</u> (WCD2002/002) (native title party) -and- <u>The State of Western Australia</u> (Government party) -and- <u>Exterra Resources Limited</u> (grantee party)	-	WO2015/0118	WA	Objection - Dismissed	Member Shurven did not receive any contentions from the corporation as to why the objection should not be dismissed, nor was a request for extension of time made in order to comply with directions
08/01/2016	<u>Gooniyandi Aboriginal Corporation RNTBC</u> (native title party) - and - <u>Kimberley Granite Quarries Pty Ltd</u> (grantee party) - and - <u>The State of Western Australia</u> (Government party)	-	WO2014/0848	WA	Objection - Expedited Procedure Applies	Member Shurven held that the evidence did not support a conclusion that the grant of the licence would be likely to interfere with the carrying on of the native title holders' community or social activities, or with areas or sites of particular significance to them in accordance with their traditions. Furthermore, it was not considered that the licence would be likely to involve major disturbance to the land and waters concerned.

7. Native Title in the News

The [Native Title Research Unit](#) with AIATSIS published the [Native Title in the News](#) which contains summaries of newspaper articles and media releases relevant to the native title sector.

8. Publications

AIATSIS

Native Title Newsletter – December 2015

The December edition of the Native Title Newsletter is now available. The newsletter includes feature articles, traditional owner comments, book reviews, NTLW project reports and other various articles.

For further information, [please visit the AIATSIS website](#)

Council of Australian Governments (COAG)

Investigation into Indigenous Land Administration and Use

The report is an investigation into land administration and land use aimed at Indigenous people attracting private sector investment and developing their own enterprises. The report was released by COAG on the 11 December 2015.

For further information, [please visit the COAG website](#)

Cape Magazine – Wet Season 2015/16

One Claim Delivers for Cape York Bama

Christmas 2015 marks the one year anniversary of the lodgement of the 'Native Title One Claim' over Cape York Peninsula, in north Queensland. Details of the claim's progress are featured in this issue.

For further information, [please visit the CYLC website](#)

9. Training and Professional Development Opportunities

AIATSIS

Australian Aboriginal Studies

Australian Aboriginal Studies (AAS) journal is inviting papers for coming issues. AAS is a quality multidisciplinary journal that exemplifies the vision where the world's Indigenous knowledge and cultures are recognised, respected and valued. Send your manuscript to the Editor by emailing aasjournal@aiatsis.gov.au.

For more information, [visit the journal page of the AIATSIS website](#)

The Aurora Project

[See the Aurora Project: 2015/16 Program Calendar](#) for information on training and personal development for staff of native title representative bodies, native title service providers, RNTBCs and PBCs. More information on upcoming training is outlined below.

Strategic Leadership

A program for CEOs and senior managers

The program will cover themes on leadership development and will provide NTRB leaders with access to management strategies that are taking place in other areas such as the private sector. It will also include experiential learning with sessions on 'impact measurement,' which will explore methodologies that are currently being used by national and international not-for-profit organisations. Additionally there will be a session on fundraising systems in the not-for-profit sector.

Date: 23-25 February 2016

Location: Coogee Bay Hotel Conference Centre, in Sydney, NSW.

For further information, [visit the Aurora Project website](#)

Facilitation and Community Engagement Part 2

Increasing skills in and knowledge of facilitation and engagement methods

This workshop builds on material covered in Facilitation Part 1, and includes a range of facilitation techniques and theory, and specifically a session on practical implementation skills.

Date: 1-3 March 2016

Location: Ayers House, in Adelaide, SA.

For further information, [visit the Aurora Project website](#)

ORIC

ORIC provides a range of training for Aboriginal and Torres Strait Islander corporations about the [Corporations \(Aboriginal and Torres Strait Islander\) Act 2006 \(CATSI Act\)](#), the corporation's rule book and other aspects of good corporate governance. More information on upcoming training is outlined below.

Training courses 2016

Course	Location	Dates	Applications Close	Details
Introduction to Corporate Governance workshops	Perth	5-7 April 2016	Applications close: 11 March 2016	Apply online Download the application form
Introduction to Corporate Governance workshops	Mildura	10-12 May 2016	Applications close: 15 April 2016	Apply online Download the application form
Introduction to Corporate Governance workshops	Tamworth	14-16 June 2016	Applications close: 27 May 2016	Apply online Download the application form

For further information on training courses, [visit the ORIC website](#)

10. Events

AIATSIS

National Native Title Conference 2016

The National Native Title Conference 2016 will be co-convened by AIATSIS and the Northern Land Council (NLC), and hosted by the Larrakia people - the traditional owners of Darwin.

The 2016 conference title 'strong culture, strong country, strong future' is reflected in the following themes: Being on Country, Practising and Learning Culture, Holding Title, Being Sovereign, Community and Commerce, and Just Recognition; Just Settlement.

Proposals are being accepted for papers, panels, dialogue forums and Indigenous talking circles for consideration by the conference convenors. If you would like to present at this year's conference, please download our CFP application and return it to AIATSIS by Tuesday 1 March 2016.

Date: 1-3 June 2016

Location: Darwin Convention Centre, NT

For further information, [visit the AIATSIS website](#)

The Cairns Institute

Masterclass in Native Title for Anthropologists

Early career Anthropologists are invited to a unique Masterclass in Native Title. This eight day workshop is facilitated by the Cairns Institute. Generous scholarship grants, including fee waiver, food and accommodation for the eight days will be available to eligible early career Anthropologists.

Date: 10-17 June 2016

Location: James Cook University, QLD

For further information or to register your interest, please contact Jennifer Gabriel, Jennifer.gabriel@jcu.edu.au

The Native Title Research Unit produces monthly publications to keep you informed on the latest developments in native title throughout Australia. You can subscribe to NTRU publications online, follow @NTRU_AIATSIS on Twitter or 'Like' NTRU on Facebook.

