Native Title, Compensation and the Public Authority Land Manager

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ABSTRACT

Two recent native title cases provide a timely reminder to surveyors and public authority land managers about the impact of native title on public land. On 24 August 2016, Justice Mansfield of the Federal Court of Australia, in the case of Griffiths v. Northern Territory of Australia, ordered the Northern Territory Government to pay compensation to the native title holders of Timber Creek for the impact of land grants and public works on their non-exclusive native title rights and interests. This order, which is the first of its kind in Australia to consider the valuation methodology, calculated total compensation at $3,300,661. In general, it is the Commonwealth, State and Territory Governments which are liable to pay compensation for the extinguishment or impairment of native title, depending on which Government has undertaken the act identified as causing the extinguishment or impairment. However, States and Territories can 'pass on' this liability to third parties in certain circumstances by either legislation or under contracts. This can have consequences for local government authorities and other statutory entities who compulsorily acquire native title as well as project proponent corporations and infrastructure providers. On 22 January 2016, in the Federal Court case of Doyle on behalf of the Iman People #2 v. State of Queensland, Justice Reeves considered the expert evidence of an experienced surveyor describing relevant surveying and mapping practices to assist in determining whether native title had been extinguished by the dedication of certain land as a public road. Surveyors, including those with public land management responsibilities, need to be aware of these decisions and any potential consequences they may have for their practice.

KEYWORDS: *Native title, compensation, public land managers.*

1 INTRODUCTION

It is over 20 years since the *Native Title Act* 1993 (Cth) was introduced. While native title has more recently been determined in parts of far western NSW and the far and mid north coast of NSW, the next wave of developments in native title law, namely native title compensation, is only now being examined by the courts. The recent decision in *Griffiths v. Northern Territory (No. 3)* [2016] FCA 900 (Griffiths #3) provides an insight into the methodologies used by one experienced native title judge, Justice Mansfield, to value native title. While the *Native Title Act* 1993 (Cth) attributes compensation liability to the Commonwealth, State and Territory Governments for the extinguishment or impairment of native title, depending on which Government has undertaken the act identified as causing the extinguishment or impairment, it

is possible for this liability to be 'passed on' to third parties in certain circumstances by either legislation or under contracts. This can have consequences for local government authorities and other statutory entities who compulsorily acquire native title as well as project proponent corporations and infrastructure providers. With an increased focus on native title compensation, governments and other entities will be keen to limit their exposure to pay compensation. For this reason, governments will seek to evidence extinguishing acts that occurred prior to the commencement of the *Racial Discrimination Act* 1975 (Cth) on 31 October 1975, being the date from which native title compensation arises. On 22 January 2016, in the Federal Court case of *Doyle on behalf of the Iman People #2 v. State of Queensland*, Justice Reeves was assisted by the expert evidence of an experienced surveyor regarding survey and mapping practices in deciding that native title had been extinguished by the dedication of land as a public road prior to 1975. Surveyors, including those with public land management responsibilities, need to be aware of these decisions and any potential consequences they may have for their practice.

2 A QUICK HISTORY REFRESHER

2.1 Terra Nullius

According to the international law of Europe in the late 18th century, there were only three ways that Britain could take possession of another country:

- If the country was uninhabited, Britain could claim and settle that country. In this case, it could claim ownership of the land.
- If the country was already inhabited, Britain could ask for permission from the indigenous people to use some of their land. In this case, Britain could purchase land for its own use but it could not steal the land of the indigenous people.
- If the country was inhabited, Britain could take over the country by invasion and conquest – in other words, defeat that country in war. However, even after winning a war, Britain would have to respect the rights of indigenous people (Butler et al., 1995).

However, international law was given scant regard in times of colonial expansion and in that regard Britain was no better than the Spanish or the Portuguese in the Americas. From the time of Cook's arrival, Britain acted as if Australia was uninhabited (Figure 1).

Figure 1: The landing of Captain Cook at Botany Bay in 1770 (E. Phillips Fox, ca. 1960).

Over the next 200 years, settlement of New South Wales continued. The various iterations of the Surveyor General's Department and the Department of Lands created portions of land that were alienated from the Crown (sold or leased), or they were reserved for a public purpose (Figure 2). To date 42% of the State is still Crown Land and, even though the bulk of this land is in the Western Division of the State, around 8% of the Eastern and Central Divisions are Crown land.

Figure 2: Early view of a surveyors' camp (Pickering Brook Heritage Group, 2016).

2.2 Aboriginal Rights

2.2.1 The Racial Discrimination Act 1975

The *Racial Discrimination Act* 1975 (Cth) aimed to ensure that people of all backgrounds are treated equally and have the same opportunities. The Act also makes discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful. This is significant as it effects a date from which compensation may be payable under the *Native Title Act* 1993 (Cth).

The *Racial Discrimination Act* 1975 makes racial discrimination unlawful in Australia and overrides inconsistent State and Territory legislation, making the State or Territory law ineffective to the extent of the inconsistency. The power of the Commonwealth Parliament to pass this overriding law arises under the "external affairs" power contained in the Australian Constitution (Morrison, 2016). The power arose from the International Convention on the Elimination of all Forms of Racial Discrimination.

2.2.2 The Aboriginal Land Rights Act 1983

The *Aboriginal Land Rights Act* 1983, introduced by the Wran Government in New South Wales, commenced on 10 June 1983. In establishing the *Aboriginal Land Rights Act* 1983, the NSW Government acknowledged:

- Land in the State of New South Wales was traditionally owned and occupied by Aborigines.
- Land is of spiritual, social, cultural and economic importance to Aborigines.
- It is fitting to acknowledge the importance that land has for Aborigines and the need of Aborigines for land.
- It is accepted that, as a result of past government decisions, the amount of land set aside for Aborigines has been progressively reduced without compensation (Figure 3).

Figure 3: On 26 August 1975, Prime Minister Gough Whitlam handed a leasehold title to land at Daguragu (Wattle Creek) to Vincent Lingiari, representative of the Gurindji people. It was a turning point for Aboriginal land rights in Australia (photo courtesy of Mervyn Bishop).

The *Aboriginal Land Rights Act* set up the NSW Aboriginal Land Council structure. In NSW, land rights are granted in the form of freehold estate where the Minister administering the *Crown Lands Act* 1989 finds that the land is claimable land for the purposes of the *Aboriginal Land Rights Act.* The *Aboriginal Land Rights Act* establishes a process and conditions for Aboriginal Land Councils to claim land in NSW (Figure 4).

Figure 4: The New South Wales Aboriginal Land Council makes the first land claim pursuant to the new Aboriginal Land Rights Act 1983 at Goanna Headland (NSW North Coast). It is later granted in 1985.

Essentially, claimable Crown lands are lands vested in Her Majesty that:

- Are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Act*.
- Are not lawfully used or occupied.
- Do not comprise lands which, in the opinion of the Minister, are needed or are likely to be needed as residential lands.
- Are not needed, nor likely to be needed, for an essential public purpose.
- Do not comprise lands that are the subject of an application for a determination of native title that has been registered in accordance with the *Native Title Act*.
- Do not comprise lands that are the subject of an approved determination of native title, other than an approved determination that no native title exists in the lands.

The Minister does not have any discretion when determining Aboriginal land claims and land is claimable under conditions that have been modified by the Courts since the commencement of the *Aboriginal Land Rights Act*. If a land claim is lodged over Crown land that meets the conditions above, the Minister is required to grant the claim.

On 1 July 2015 the *Aboriginal Land Rights Act* was amended to allow the Minister and Aboriginal Land Council(s) to enter into Aboriginal Land Agreements with a view to, among other things, allow parcels under claim to be 'determined' by negotiation rather than on a parcel by parcel basis. The mechanisms for these agreements are currently being developed.

2.2.3 Mabo

On 20 May 1982, Eddie Mabo (Figure 5) and two other Meriam people from the Murray Islands in the Torres Strait lodged a statement of claim in the High Court of Australia. They claim 'native title' rights to the Murray Islands.

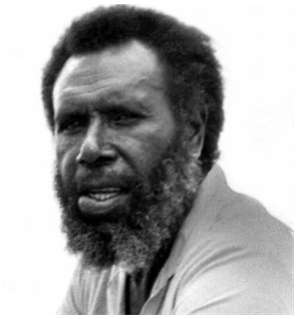

Figure 5: Eddie Mabo.

On 3 June 1992, the High Court recognised that native title is part of Australian land law. The historic decision overturns the doctrine that Australia was terra nullius – a land belonging to no-one. The High Court recognises that the Meriam people were "entitled as against the whole world, to possession, occupation, use and enjoyment of the lands of the Murray Islands."

2.2.4 The Native Title Act 1993

On 19 December 1993, the Federal Parliament enacted the *Native Title Act* 1993. It addresses the consequences of recognising native title for past actions of governments and sets up rules for future dealings in native title land and waters. The legislation followed lengthy debate and negotiations between Indigenous stakeholders, governments, pastoralists and the mining industry. In the second reading speech, former Prime Minister Paul Keating said "the *Native Title Act* does not act to lock land away. It gives certainty to both native title holders and the community about the use of land into the future."

On 23 December 1996, in the *Wik People v. Queensland* case, the High Court decided that native title is not necessarily extinguished by the grant of a pastoral lease and that native title can co-exist with other interests in land.

On 7 April 1997, for the first time, native title is determined on the Australian mainland under the *Native Title Act*, in "The Dunghutti People Consent Determination". In 2010, the Dunghutti Elders Council received $6.1 million as compensation for 12.4 ha of land at Crescent Head that has been used for residential development.

3 NATIVE TITLE

3.1 What is Native Title?

Native title is a communal bundle of rights, and not an individual proprietary right. It depends for its existence on the continuing acknowledgement and observance of the relevant traditions, customs and practices of the community (*Griffiths #3* at [219]). Native title rights may exist over all land and water in Australia unless there has been an act of prior 'exclusive possession'.

Matters relating to native title fall within the Commonwealth jurisdiction of the *Native Title Act 1993* (Cth). All States and Territories, including NSW, have enacted legislation to adopt the Commonwealth scheme. Native title claims are applications filed in and administered by the Federal Court of Australia. The claims are referred to the National Native Title Tribunal to allow public notification of the claim to occur.

Native title deals with the legal recognition of the traditional native title rights and interests that Aboriginal people have in land and water, where Aboriginal people have continued to exercise their rights and interests in accordance with traditional law and custom (NSW Trade & Investment, Crown Lands, 2014).

3.1.1 Native Title Rights

Native title rights will vary depending on an individual group's traditional laws and customs but generally will include the right to:

- Access and occupy the land.
- Camp on the land.
- Live on certain land.
- Hunt, fish, gather and use resources from the land.
- Gather bush medicine.
- Perform traditional ceremonies on the land.
- Possess the land for particular traditional customs.
- Speak for country.

3.1.2 Extinguishment of Native Title

Generally, native title rights will continue to exist unless they have been 'extinguished' prior to 23 December 1996, or cease to exist, as a result of the following:

- The native title claim group has failed to continue to observe their traditional laws and customs, or where they fail to demonstrate continued observance.
- An exclusive possession property interest by the Crown that is wholly or partially inconsistent with the native title rights. This type of interest includes:
  - A grant of freehold estate.
  - A grant of 'Scheduled Interest' as listed in the *Native Title Act*.
  - A commercial lease that is neither an agricultural lease nor a pastoral lease.
  - A residential lease.
  - A community purpose's lease.
  - The construction of a public work.
  - A dedication of a public road.
  - An exclusive agricultural lease or an exclusive pastoral lease.

- Any lease (other than a mining lease) that confers a right of exclusive possession over particular land or waters.

3.2 Land Where Native Title Applies

Thus, native title may continue to exist in Crown land, including vacant and unallocated Crown land, Crown reserves, Crown land under a permissive occupancy or licence, and land under non-exclusive lease. However, it is not limited to Crown land and can continue to be recognised in:

- National Parks, Marine Parks and State Forests.
- Water bodies such as rivers and lakes and areas below Mean High Water Mark, including parts of the territorial sea, the beds and banks of the waterways.

Increasingly, however, the State Government has transferred Crown land subject to native title rights and interests to other entities. In 1994 with the introduction of the *Native Title (New South Wales)* 1994, the *Aboriginal Land Rights Act* 1983 was amended allowing land claims to be granted to Aboriginal Land Councils subject to native title rights and interests. In 2006, the *Government Property NSW Act* allowed the transfer of Crown land with native title intact to that agency. Various single site acts establishing management entities such as the *Parramatta Park Trust Act 2001* were created maintaining existing native title rights and interests.

Most recently, in the *Crown Lands Management Bill 2016* the Government contemplates vesting Crown land subject to native title rights and interests to Local Government. In undertaking this vesting, the Government proposes, with the consent of the Local Government Authority, to transfer the liability for Local Government acts.

3.3 Dealing in Land Where Native Title Applies

The *Native Title Act* allows for 'future acts' to be undertaken on land where native title applies subject to procedural rights. A future act is a proposal to deal with land in a way that affects native title rights. A future act will be invalid where it affects native title unless it complies with the procedures set out in the *Native Title Act*. These procedures vary depending on the nature of the future act. Future acts include:

- Primary production.
- Management of water or airspace.
- Extension or renewal of pre-existing rights.
- Public housing, education and health facilities for the benefit of Aboriginal people.
- Plans of management and construction on public reserves in accordance with purpose or at least to no greater native title impact than the purpose.
- Facilities for services to the public.
- Low impact acts.
- The grant of a mining tenement.
- The compulsory acquisition of land.

The procedural rights vary based on the future act, but include the:

- Right to comment.
- Right to be consulted.
- Rights of ordinary title holder.

- Right to have an objection heard.
- Right to negotiate.

A range of outcomes and agreements can be achieved following the filing of a Native Title Determination Application, including:

- Consent determinations.
- Determinations that native title does or does not exist following litigation.
- Indigenous Land Use Agreements (ILUAs).
- Future Act Agreements.
- Memorandum of Understandings.

The impact of invalid acts is becoming increasingly prevalent. A lease issued invalidly over land subject to the rights and interests of native title may not provide lawful use and occupation for the purposes of a claim under the *Aboriginal Land Rights Act*.

3.4 Native Title Claims

A Native Title Determination Application or a Native Title Claim is an application made to the Federal Court under the *Native Title Act*. The Application seeks a Federal Court determination as to whether native title continues to exist over the land and the nature of the rights and interests held by the native title claim group.

3.4.1 Claimant Applications

A claimant application is made by a group of people, a native title claim group, who declare they hold rights and interests in an area of land and/or water according to their traditional laws and customs. The members of the native title claim group are seeking a decision from the Court that native title exists, so their rights and interests are recognised by the common law of Australia. This is called a native title determination. A determination is a decision by the Federal Court or High Court of Australia, or a recognised body, that native title either does or does not exist in relation to a particular area of land or waters (National Native Title Tribunal, 2017).

3.4.2 Non-Claimant Applications

A non-claimant application is made by a person who holds a non-native title interest in an area of land and/or water. This could be the Commonwealth or a State, or a person or organisation that holds a lease or licence. A non-claimant applicant is generally seeking a decision from the Court as to confirm that native title does not exist in relation to the area of land and/or water covered by the application.

Non-claimant applications cannot be made in areas where there is a current Native Title Determination Application or a court has already determined that native title exists. In most cases it will not be necessary for a person or an organisation making a non-claimant application to obtain a determination of native title. This is because where a non-claimant is unopposed, protection for doing the future act will apply under section 24FA of the *Native Title Act* (National Native Title Tribunal, 2017).

4 COMPENSATION AND THE PUBLIC LAND MANAGER

4.1 The Right to Compensation

Where native title has been determined to exist, the native title holders may lodge a claim for compensation for the extinguishment, impairment or suspension of their native title rights. The entitlement to compensation arises under the *Native Title Act* 1993 (Cth) for any loss and/or impairment which arises from Government acts on land that occur after the commencement of the *Racial Discrimination Act* 1975 (Cth) on 31 October 1975.

The Commonwealth is liable to pay compensation for acts attributable to it (such as the acquisition of land). The States and Territories are liable to pay compensation for acts that they are responsible for, e.g. the grant of freehold or leasehold interests in land across the State. In certain circumstances, the *Native Title Act* provides for this liability to be 'passed on' to Local Government authorities, other statutory entities and companies engaged in the resource sector and infrastructure projects. This 'passing on' occurs either through legislation or under contract.

Native title compensation is assessed by the Federal Court in accordance with section 51 of the *Native Title Act*. Under that statute, compensation is to consist of monetary payments, however, under section 51(3) the compensation claimant may request that the compensation (or part of it) is to include the transfer of property or the provision of goods and services.

While section 51A of the *Native Title Act* suggests that a potential cap is placed on the total native title compensation payable at the market value of the land concerned, the *Native Title Act* also provides that the compensation must be made on 'just terms' (sections 51A and 53). Accordingly, any extinguishment or impairment of native title under the *Native Title Act* must occur consistently with section 51(xxxi) of the Constitution. This section requires the Commonwealth to provide 'just terms' for compulsory acquisition of property. Using 'just terms' as a basis for valuation allows the court to consider a wide range of factors (not merely economic loss) when assessing the value of the native title that has been extinguished or impaired.

4.2 Griffiths v. Northern Territory of Australia (No. 3)

In August 2016, Justice Mansfield of the Federal Court delivered a determination of native title compensation in *Griffiths v. Northern Territory (No. 3)* [2016] FCA 900 (Griffiths #3). While the decision is currently on appeal to the Full Federal Court, it is significant as it is the first decision of the Federal Court to consider the methodologies to be used to value impacts on native title after the matter had been subject to a contested hearing. Prior to Griffiths #3, litigation regarding the quantum payable for native title compensation between States and native title holders was generally concluded by the negotiation of confidential agreements without the benefit of a judgement examining the detail and basis of the compromise.

Here, the case concerned the amount of compensation payable to the Ngaliwurru and Nungali Peoples, the native title holders of non-exclusive native title rights to land and waters in the remote township of Timber Creek in the Northern Territory. It had been determined in previous proceedings that the Northern Territory was liable for the acts for which compensation was sought. These 'determination acts' were attributable to the Territory within the meaning of section 239 of the *Native Title Act*.

In essence, the Federal Court ordered the Northern Territory Government to pay $3.3 million to the native title holders as compensation for the impact of land grants and public works on their non-exclusive native title. The compensation was made up of the following components:

- $512,000 for economic loss (calculated by reference to the freehold value of the land).
- $1,300,000 for non-economic loss (caused by a loss of traditional use of and connection to the land).
- $1,488,261 for interest on the economic loss component of the compensation.

4.2.1 From When is Compensation Calculated?

The *Native Title Act* does not expressly provide for the date on which the entitlement to compensation arises or the date at which the value of any interests being acquired or extinguished is to be determined (*Griffiths #3* at [117]). Justice Mansfield determined that the entitlement to compensation for an 'act' arises, for example, from the date of the grant of the freehold or leasehold interests or the construction or establishment of the public work (*Griffiths #3* at [121]).

4.2.2 Economic Loss

The component of economic loss was calculated at 80% of the freehold value of the land. Put simply, the Commonwealth had argued that 50% of the freehold value more closely represented the value of non-exclusive native title rights, if you considered that exclusive rights equated to the full beneficial entitlement to a freehold estate. However, his Honour considered that the nature of the non-exclusive rights held were closer to exclusive rights and so reached the figure of 80% on an 'intuitive' basis. His Honour's reasoning on this point is summarised in the following paragraphs [232] to [234]:

> *232 The rights the Claim Group in fact enjoyed were in a practical sense exercisable in such a way as to prevent any further activity on the land, subject to the existing tenures. If the appropriate test were as to the price at which the claim group would have been prepared to surrender their non-exclusive native title rights, the answer would be not at all. If the appropriate test was to see what was the value to the Territory of acquiring those rights, as the Territory would not then be restricted by the nature of those rights which were surrendered, the answer is that that would be a figure close to the freehold value. In my view, the appropriate valuation should be 80% of the freehold value.*
> *233 As each of the submissions recognised, that is not a decision as a matter of careful calculation. It is an intuitive decision, focusing on the nature of the rights held by the claim group which had been either extinguished or impaired by reason of the determination acts in the particular circumstances. It reflects a focus on the entitlement to just compensation for the impairment of those particular native title rights and interests which existed immediately prior to the determination acts.*
> *234 I have been careful, in reaching that intuitive figure, not to reflect in that percentage an allowance for the elements which are related to the cultural or ceremonial significance of the land, or of the very real attachment to the land which the Claim Group as an Indigenous community obviously has, and which is acknowledged by both the Territory and the Commonwealth. That is a separate and significant element of the entitlement to compensation. It is separately discussed later in these reasons. However, it is necessary to note it at this point to avoid any suggestion that the percentage arrived at represents a form of double compensation, by putting a particular value on the rights by reason of the cultural and spiritual significance of the land to the*

Claim Group.

4.2.3 Non-Economic Loss

Perhaps the most controversial aspect of the decision is the value which the judge accorded to non-economic value, that is described in paragraph [234] of *Griffiths #3* (as extracted above), as representing "the cultural or ceremonial significance of the land, … the very real attachment to the land". The compensation claimants had claimed $2 million for non-economic loss which was "to give effect to the diminution or disruption in traditional attachment to country and the loss of rights to live on, and gain spiritual and material sustenance from, the land" (*Griffiths #3* at [46]). His Honour decided that $1.3 million more closely reflected the impact on "traditional attachment".

The parties did not dispute that an award in the form of 'solatium' was appropriate in the circumstances. The judge adopted the description 'solatium' to describe the compensation component which represents the loss or diminution of connection or traditional attachment to the land, and was considered to be a suitable focus for ensuring that there is no overlap with the compensation awarded for the economic loss component.

The main issue for the Court was how to quantify "the essentially spiritual relationship which Aboriginal people, and particularly the *Ngaliwurru-Nungali* People, have with country and to translate the spiritual or religious hurt into compensation" (*Griffiths* #3 at [291]). The process of assessing this aspect of compensation was again referred to as "complex" but "intuitive" and not a "matter of science or of mathematical calculation" (*Griffiths #3* at [302] and [383]). Justice Mansfield considered the evidence of the compensation claimants regarding the impact of developments and other acts on their traditional attachment, how they had either tried to prevent the development or characterised the impact and how these acts had had a cumulative and incremental effect on the group's ability to exercise their native title rights (*Griffiths #3* at [290]-[384]).

4.2.4 Interest Calculations

Justice Mansfield considered that in the circumstances interest on the market value of the land forming part of the compensation was to be calculated on the basis of simple interest. However, the judge's comments suggest that compound interest may have been applied if instead the land had been unlawfully occupied for any period of time.

4.2.5 Invalid Acts are Compensable

Compensation was also sought in relation to three grants of freehold by the Northern Territory Government in 1998. These acts were not undertaken in compliance with the future act regime of the *Native Title Act*. Accordingly, the grants were not valid and did not extinguish native title. However, as the *Native Title Act* does not provide for compensation for invalid acts, the compensation claimants made a claim for damages for trespass (see *Griffiths #3* at [449]-[462]). The judge ordered that compensation was payable for the economic value of the non-exclusive native title rights at 80% of the land value for the three parcels, which in total amounted to $19,200 (*Griffiths #3* at [434]).

4.3 The Impact on the Public Land Manager

As mentioned, the Northern Territory Government has appealed the *Griffiths #3* decision on a

number of grounds. Whatever the outcome of this appeal, the issues are of such significance that any decision of the Full Federal Court will be appealed to the High Court. Only then will there be greater certainty about the principles to be applied when valuing native title for the purpose of compensation under the *Native Title Act*.

However, the decision is important to public land managers (whether local government authorities and other statutory entities who compulsorily acquire native title or project proponent corporations and infrastructure providers) for the following key reasons:

- Councils, statutory entities and government owned corporations who compulsorily acquire native title are liable for native title compensation (section 104 of the *Native Title Act* 1994 (NSW)).
- Liability for native title compensation is also 'passed on' by State Government to third parties in the mining context (e.g. section 281B of the *Mining Act* 1992 (NSW)) or to infrastructure providers and major project proponents via contractual arrangements (e.g. by the imposition of conditions of long-term leases).
- Most recently, Division 8.4 of the *Crown Lands Management Bill* 2016 introduced provisions seeking to create compensation responsibilities concerning native title rights and interests for the conduct of Crown land managers and local councils.

5 NATIVE TITLE AND THE SURVEYOR

As discussed in section 3, the *Native Title Act* aims to address the historical dispossession of Aboriginal and Torres Strait Islander peoples from their land by providing recognition of traditional connection to land. Accordingly, the Court, when considering the issue of extinguishment of native title, requires any party asserting extinguishment of native title to provide a high standard of evidence to establish that extinguishment has taken place. This evidence is generally in the form of government gazette notices or other official documents in the form of dealings or plans. These documents establish the legislative authority for the particular act which affects native title, the legal person responsible for the act, the date it was done and the precise extent of land or waters covered.

5.1 Doyle on behalf of the Iman People #2 v. State of Queensland

This judgement by Justice Reeves considers whether an area of land identified as a road on a plan of that parcel of land has extinguished native title as well as questions of whether native title has been extinguished by various types of leasehold grant in respect of a handful of other lots. Under section 23B(7) of the *Native Title Act*, a "public work" that is established on or before 23 December 1996 will be a "previous exclusive possession act" (i.e. it is an act that extinguishes native title). The term "public work" includes a road that is "established by or on behalf of the Crown" as defined in s 253 of the *Native Title Act*. The main aspect in dispute in this case was whether the road in question was established (or dedicated) by the Crown.

The applicant accepted that the Full Court decision in *Fourmile v. Selpam Pty Ltd* (1998) 80 FCR 151 (*Fourmile* case) was binding authority to the effect that, where land is surveyed and declared open for selection in accordance with the statutory process prescribed under a relevant piece of legislation in force at a particular time (in this case the *Land Act* 1897) and the official survey plans prepared in following that process showed an area of land marked as a road, that combination of factors was sufficient to constitute the dedication of that area of land as a public road.

The applicant also accepted that, if there was evidence that a survey was performed and a plan was prepared and charted in accordance with section 77 of the *Land Act* 1897, and if that plan showed an area of land set aside as a road, and if there is evidence that a proclamation was subsequently made under s 75 of that Act that the land so surveyed was declared open for selection, that *series of steps had the effect of dedicating that area of land as a public road*. However, the applicant contended that certain of these steps were not evidenced so could not be said to have occurred and further, they disputed the location of the road boundary.

Interestingly, Justice Reeves devoted paragraphs [8] to [44] of his judgement to examining whether these steps were in fact undertaken and the legal requirements satisfied. Importantly, he considered the legislative regime for creating roads in force at the time the road was created, namely the *Land Act* 1897 (Qld). His Honour also placed great reliance on the affidavit and oral evidence under cross examination of Mr McClelland, a principal surveyor for the State of Queensland, with approximately 40 years' experience as a surveyor, including 33 years employed as an officer of the Department of Natural Resources and Mines and its predecessors (*Doyle* at [6]). In his written and oral evidence, Mr McClelland described, among other things, the surveying and mapping practices followed in Queensland dating back to the late 19th and early 20th centuries.

A number of provisions under the *Land Act* 1897 (Qld) must be read together to understand the precise legal requirements to be satisfied to validly create a road. For example, his Honour considered the requirements for surveyed and unsurveyed land where land is proclaimed open for selection, and the other legislative preconditions to conveyance, or the creation of a road. He also noted that a plan indicating certain details was to be created and placed on public exhibit at the relevant departmental office (*Doyle* at [10]).

The plan shown in Figure 6 was extracted and discussed in the judgement with the following note at [11]:

> … *The particular part of area 33 that is at the heart of these road issues is a swamp area which is located in about the middle of the western boundary of Portion 11v on Plan LAB4012 and Portion 26 on Plan LE9. The southern part of Portion 11v was subdivided to become Portion 26. The following is an enlarged view of Plan LE9 showing the particular part of Portion 26 that is in contention in these road issues.*

To assist, the judge reproduced in his decision the detail provided by Mr McClelland regarding the information recorded on the plans and how that information is to be interpreted. The judge also extracted at length the descriptions provided in Mr McClelland's affidavit regarding the practice of the Queensland Government agencies responsible for the performance of land surveys, the preparation of survey plans and the charting and recording of those plans.

The judge accepted the State's argument that although the State could not prove that all steps were taken to create the road, in the circumstances the presumption of regularity applied. The presumption of regularity was described at [28] as follows:

> *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.*

In accepting the application of this presumption, the judge made close reference to the context in which the gaps occurred, noting the detailed information provided by the surveyor and the absence of any evidence provided by the applicant that the steps did not occur. The judge also accepted the evidence of the surveyor as persuasive regarding the State's position on the boundary issue. To date no NSW cases have considered the effect on native title of the dedication or vesting of roads created under the *Roads Act* 1993 (and its predecessors).

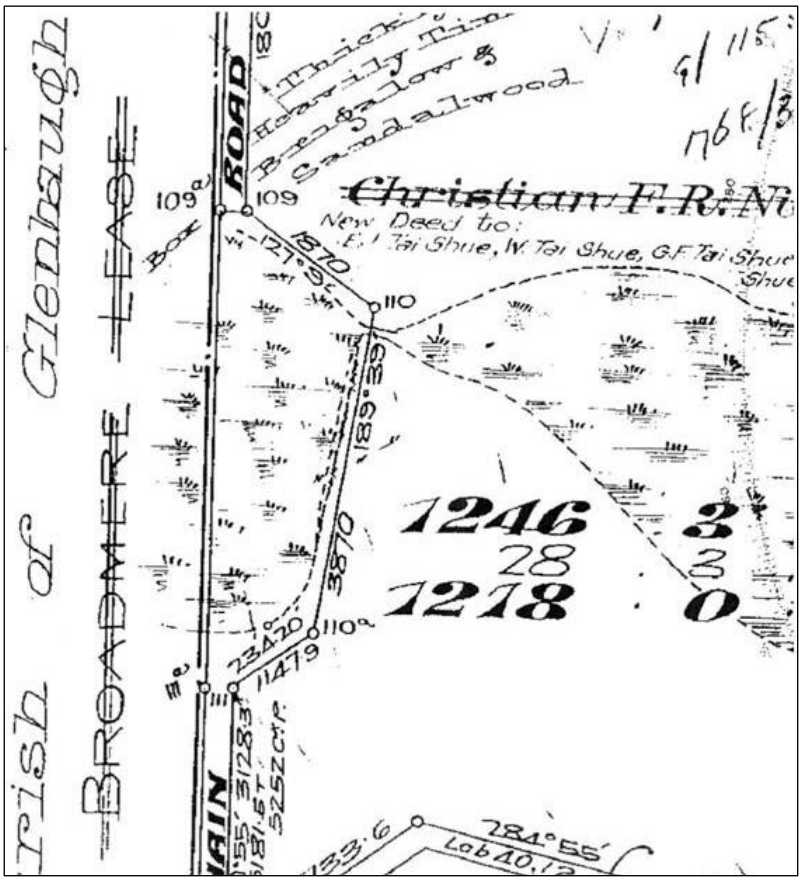

Figure 6: Enlarged view of Plan LE9 showing the particular part of Portion 26 that was in contention in *Doyle*.

6 CONCLUDING REMARKS

This paper has shown that the need to understand and address native title and native title compensation is becoming increasingly important to public land managers. The next wave of legal decisions around compensation for loss of native title rights has been commenced with a recent judgement in the Northern Territory. The financial impact of decisions by public land managers will likely be seen with increasing clarity. Surveyors, in particular, have a potentially important role in providing expert evidence and assistance in native title proceedings that require plans to be interpreted in the context of determining the extinguishing effect of a particular act which is evidenced on the plan.

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