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# Native title in the High Court of Australia a decade after Mabo

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*When Parliament enacted the Native Title Act 1993 it left fundamental questions to be resolved by the judiciary. High Court decisions in three test cases in 2002 have substantially defined the potential of native title. Proceeding on a mistaken view of Parliament's intention, the court confirmed a doctrine of extinguishment highly destructive of the original rights enjoyed by Indigenous Australians. The court treated native title as an accumulation of rights, in which the unifying notion of a title plays a weak and uncertain role. It defined tradition, continuity and connection in ways that make native title extremely difficult to establish and which artificially limit the kind of rights that may be recognised. Several intersections with constitutional law require further exploration, including the possible application of s 116 of the Constitution and when the just terms guarantee applies to the extinguishment of native title. Native title holders, already denied basic common law presumptions due to the belated recognition of their rights, now confront further inequality in the way the law protects their property rights.*

The third of June 2002 marked 10 years since the decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1; 66 ALJR 408 (*Mabo [No 2]*), when the High Court of Australia recognised that the pre-existing land rights of Indigenous people across the continent had survived the acquisition of British sovereignty. The Prime Minister at the time, Paul Keating, suggested *Mabo [No 2]* was an opportunity for coming to terms with race relations in Australia: "Mabo is an historic decision – we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians".<sup>1</sup>

A legislative framework to deal with the past and the future implications of the High Court's decision emerged from complex political manoeuvrings throughout 1993. Federal legislation, the *Native Title Act 1993* (Cth), confirmed the validity of past non-Indigenous titles<sup>2</sup> and laid down some basic ground rules for future dealings on native title land and waters. The High Court is now in the habit of emphasising the centrality of that statute to the resolution of native title litigation.<sup>3</sup> Fundamental questions raised by the finding in *Mabo [No 2]*, however, were deliberately left to be resolved by the judiciary as native title litigation under the Act ground its way slowly through the trial and appellate levels of the Federal Court towards the High Court of Australia.

Ten years on, as influential Indigenous lawyer Noel Pearson recently observed, there was a widespread feeling that the complex legal process established for the resolution of native title matters was not working well.<sup>4</sup> The new conservative government led by John Howard expended much of its

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<sup>1</sup> Reproduced as Keating P, "Redfern Park Speech" (2001) 5(11) ILB 9 at 10.

<sup>2</sup> Specifically those titles whose validity was open to doubt due to the existence of native title at the time of grant.

<sup>3</sup> See eg *Western Australia v Ward* (2002) 76 ALJR 1098; [2002] HCA 28 at [2] and [16] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>4</sup> Pearson N, "Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia" (Paper presented at the Native Title Conference 2003, Australian Institute of Aboriginal and Torres Strait Islander Studies, Alice Springs, 3 June 2003), <http://www.aiatsis.gov.au/rsrch/ntru/conf2003/papers/pearson.pdf> viewed 1 August 2003.

first term political capital on amending the *Native Title Act*, ultimately securing passage of an Act which substantially wound back the rights of Indigenous people.<sup>5</sup>

It was, however, the choices made by the High Court in the months following the 10-year Mabo anniversary that have substantially defined the potential of native title to deliver significant land rights to Indigenous people in Australia. This article reviews three native title test cases decided by the High Court in August and December 2002: *Western Australia v Ward* (2002) 76 ALJR 1098; [2002] HCA 28 (*Ward*); *Wilson v Anderson* (2002) 76 ALJR 1306; [2002] HCA 29 (*Anderson*); and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 77 ALJR 356; [2002] HCA 58 (*Yorta Yorta*). In doing so, I will focus selectively on three issues and assess how the cases fit in the overall flow of developments in native title law since the decision in *Mabo [No 2]*.

I will then make some observations about the relevance of Australian constitutional law for native title. Specifically I will refer to three constitutional matters:

1. the operation of the federal *Racial Discrimination Act 1975* (Cth) in tandem with s 109 of the *Constitution* dealing with incompatibility between Commonwealth and State laws;
2. the apparent guarantee of freedom of religion in s 116 of the *Constitution*; and
3. the guarantee of just terms for the acquisition of property under Commonwealth law contained in s 51(xxxi) of the *Constitution*.

I conclude by asking what native title tells us about the operation of the rule of law concept in the Australian legal and constitutional system.

### THREE KEY QUESTIONS

From March 1995 the High Court delivered six significant native title decisions in six and a half years. Despite this, before the trilogy of test cases in 2002, there was significant ambiguity concerning some very basic issues. In particular, interested parties looked to *Ward*, *Anderson* and *Yorta Yorta* for High Court clarification of the answers to three important questions:

1. What is the legal nature of the interest known as “native title”?
2. What are the basic rules of extinguishment?
3. How does an Indigenous group demonstrate the requisite connection to land through traditional law and custom, so as to achieve recognition of native title in Western law?

### THE CASES

#### Ward

The *Ward* decision dealt with a native title determination over a very large area in the East Kimberley in northern Western Australia and a smaller area of mainly National Park and Aboriginal freehold across the border in the Northern Territory. The claimant group, the Miriuwung Gajerrong people, had enjoyed great success at trial before Lee J.<sup>6</sup> They suffered a substantial reversal on appeal in the Full Federal Court.<sup>7</sup> The High Court majority’s decision on the whole moderated the Full Court’s decision a little, so that both sides to some extent succeeded on that appeal. Notably, despite a 400 page ruling from the High Court and in total over 100 days of litigation, the case was remitted for further hearing and determination in the Federal Court and, at the time of writing, the proceedings remain unresolved. Primarily *Ward* is a case clarifying the law on extinguishment.

#### Anderson

The decision in *Anderson* dealt with a single question of law, abstracted on a preliminary basis from a native title case in western New South Wales. Another extinguishment case, it asked whether a perpetual pastoral lease granted under the *Western Lands Act 1901* (NSW) conferred exclusive possession on the pastoralist plaintiff and thereby extinguished all native title in the land. In stark

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<sup>5</sup> *Native Title Amendment Act 1998* (Cth).

<sup>6</sup> *Ward v Western Australia* (1998) 159 ALR 483.

<sup>7</sup> *Western Australia v Ward* (2000) 99 FCR 316.

contrast to the earlier *Wik* decision decided by the High Court in 1996,<sup>8</sup> the Court in *Anderson* by a six-to-one majority found that the pastoral lease here bore such a strong affinity to a freehold grant, that it did confer exclusive possession and the result was total extinguishment of native title.

### Yorta Yorta

On 12 December 2002 the High Court by majority rejected the appeal of the Yorta Yorta people, who had sought a native title determination over an area straddling the Murray and Goulburn Rivers near the border of New South Wales and Victoria. The critical issue was whether the Yorta Yorta could demonstrate the requisite connection to the area through the continued observance of traditional law and custom. The majority decision upheld the trial judge's dismissal of the Yorta Yorta application for native title recognition. In doing so the High Court in *Yorta Yorta* gave the term "traditional" a sterner interpretation than had been the case to date.

### "TITLE" AND EXTINGUISHMENT: WARD AND ANDERSON

At the centre of both *Ward* and *Anderson* was a recurrent question in Australian native title law: what long-term impact did the grant of a statutory pastoral lease have on the survival of native title at common law? The issue of pastoral leases offers a window into the current state of native title law for two reasons.

First, at one time pastoral leases blanketed much of the land surface of Australia. Whether they extinguish native title is therefore a question of enormous significance to Indigenous and non-Indigenous Australians. Second, they illustrate the High Court's approach to the first two issues identified earlier in the list of three outstanding common law questions on native title.

The first of those outstanding questions was essentially whether native title is genuinely a "title" akin to ownership, the kind of interest Western law would appropriately translate into freehold title, or whether it is a lesser interest or indeed a collection of severable rights easily capable of disaggregation (and hence extinguishment). Until 2002 the common law in Australia had suggested different answers at different times.<sup>9</sup> The *Native Title Act* was also inconclusive.<sup>10</sup>

The second outstanding question concerned the rules of extinguishment. After seven major native title decisions by the High Court, it was still unclear in precisely what circumstances legislative or executive action over land and waters would have an extinguishing effect on native title at common law. A rather disparate collection of concepts and judicial terminology had developed at trial and appellate level. As a result, the High Court had a range of choices in front of it in 2002 to describe the different kinds of friction or interaction between Crown grants and native title. In diminishing order of impact on native title, the court could attribute the following effect to Crown grants of tenure or

<sup>8</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1; 71 ALJR 173. In that case, the High Court was also asked to consider as a preliminary question of law the potentially extinguishing effect of a pastoral lease, in this instance granted under Queensland legislation. By a four-to-three majority, the High Court decided that native title was not necessarily extinguished and, expressing unease at the abstraction of the preliminary question, returned the case to the lower courts for a precise analysis of how the two sets of rights might co-exist in relation to any particular Crown grant of a pastoral lease.

<sup>9</sup> For example the majority judgments in *Mabo v Queensland [No 2]* (1992) 175 CLR 1; 66 ALJR 408 contain statements which tend to equate native title with ownership (eg at CLR 51 and 88), other statements which say that it may describe lesser group or individual rights (eg at CLR 88), statements which seem to indicate the content of native title will vary according to traditional law and custom (eg at CLR 70) and, in Toohey J's case, serious contemplation of the proposition that the Meriam people acquired an estate in fee simple based on English common law principles of occupation and possession (at CLR 211) – the doctrine of possessory title about which Professor Kent McNeil has written extensively. The truth is that while quite a bit was said about the characterisation of native title in *Mabo [No 2]*, the case was ultimately ambiguous on the issue and subsequent High Court decisions up until 2002 did not resolve the ambiguity.

<sup>10</sup> Several provisions of the Act are consistent with a characterisation of native title as akin to freehold, usually because they are premised on the non-discrimination principles of the *Racial Discrimination Act 1975* (Cth) as first enunciated in relation to native title in *Mabo v Queensland* (1988) 166 CLR 186; 63 ALJR 84 (also known as *Mabo [No 1]*). For example *Native Title Act 1993* (Cth) s 17, s 43A(4)(h), s 51 and s 240 (dealing with compensation principles), subdiv 3M in Pt 2 (the residual category for valid future acts) and arguably also s 227 and the "non-extinguishment principle" as defined in s 238.

other official action in respect to land and water: extinguishment, partial extinguishment, suspension or suppression, impairment, regulation and no effect.<sup>11</sup>

The court also had two ideas available to it to assist in making such choices (eg between regulation and partial extinguishment) when considering the effect of legislative or executive action. Two principles had emerged in the common law over 10 years: the presumption of no extinguishment without a *clear and plain intention* and the doctrine of *inconsistency* between two sets of rights in relation to land. The relationship between the two ideas was quite unclear by 2002.

In *Ward* and *Anderson*, in one sense, it was all reduced to this question: will a pastoral lease partially extinguish native title or will it merely suppress the exercise of some native title rights for the duration of the grant, allowing full-blown native title to revive upon its expiry? In tackling this question the High Court majority made a significant error of statutory interpretation. In doing so it allowed the court to slide by these fundamental questions with minimal analysis – the intellectual challenge posed by the reasoning of North J<sup>12</sup> and Lee J in the Federal Court below in *Ward* (influenced as it was by Canadian jurisprudence on native title) was dismissed in a matter of a few pages (at [74]-[95] Gleeson CJ, Gaudron, Gummow and Hayne JJ).

In the author's view, the court's error was as follows. As part of the political deal done with Independent Senator Brian Harradine to secure passage of the 1998 amendments to the *Native Title Act* through the Senate, the Howard Government backed down from its original position on the issue of partial extinguishment and pastoral leases. Instead of rewriting the Act to say that pastoral leases partially extinguished native title, a revised amendment left the question to the common law.<sup>13</sup> Yet the High Court in *Ward* insisted that the *Native Title Act* "mandated" partial extinguishment (at [9] and [76] Gleeson CJ, Gaudron, Gummow and Hayne JJ).<sup>14</sup>

In making that choice, mistakenly attributed to the Parliament<sup>15</sup> and ostensibly in the interests of cultural sensitivity (at [90] and [95]), the High Court rejected the title view which would have equated connection under traditional law with ownership in Western law (at [82] and [84]). In making that choice the High Court also diluted the requirement in extinguishment doctrine for clear and plain parliamentary intention, and essentially supplanted it with the doctrine of inconsistency (at [78]). In doing so it deprived native title holders of a time-honoured presumption under the common law in favour of existing property rights. The result is extinguishment doctrine more destructive of native title than it might otherwise be.

## RECOGNITION OF A TRADITIONAL CONNECTION: YORTA YORTA

In *Yorta Yorta* the High Court confronted the third outstanding question in native title law: in what circumstances will Indigenous connection to land warrant recognition in Western law as native title?

The decision of the High Court in *Yorta Yorta* has implications for all Indigenous groups in Australia whose native title claims are yet to be determined. While the impacts of colonisation were differentiated across the continent, depending for example on the concentration of non-Indigenous populations and the intensity of land use, the changes wrought upon traditional lifestyles and systems of internal governance have been almost everywhere profound.

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<sup>11</sup> It remains unclear, even after the trilogy of 2002 cases, how these concepts relate to each other and whether there is any overlap, eg between "impairment" and "regulation".

<sup>12</sup> The dissenting judge in the Full Federal Court who devoted a great deal of attention to the "title" view and to arguments in favour of suppression over partial extinguishment.

<sup>13</sup> *Native Title Act 1993* (Cth) s 23G(1)(b).

<sup>14</sup> In part, this appears to be due to the court relying not on the operative provision but on an explanatory "Overview" provision (s 23A). In 1998 the Government evidently failed to make consequential amendments to the Bill after agreeing with Senator Harradine to amend s 23G(1)(b).

<sup>15</sup> The official explanation of the amendment provided to the Parliament by the Commonwealth Government in 1998 stated that s 23G(1)(b) "confirms that the grant of a ... non-exclusive possession pastoral lease will extinguish any native title rights and interests that are inconsistent with the grant *if that is the position at common law*. If however the position at common law is that a ... non-exclusive possession pastoral lease does not extinguish any inconsistent native title rights and interests, but merely suspends them while the lease is in existence, then subparagraph 23G(1)(b)(ii) ensures that the inconsistent native title rights and interests are *suspended* for the duration of the lease", Parliament of the Commonwealth of Australia, *Native Title Amendment Bill 1997 [No 2], Supplementary Explanatory Memorandum to Government Amendments Moved in July 1998* (1998) p 7 [emphasis in original].

The High Court's decision in *Mabo [No 2]* had created a perception that in order to establish native title (assuming no extinguishing acts were proved), Indigenous groups would need to demonstrate a basic continuity of traditional identification with and connection to land, but that legal notions of tradition, connection and continuity would take account of the far-reaching impacts of European colonisation.<sup>16</sup> That perception was also evident in the lower-level court decisions in *Ward*.<sup>17</sup> The *Yorta Yorta* case tested that impression because it concerned land and waters in the south-east corner of the continent where Indigenous people had experienced seven or eight generations of intensive non-Indigenous presence and activity. In December 2002 the High Court majority upheld the trial judge's finding and the surviving members of the Yorta Yorta were refused recognition as native title holders under Australian law.

The trial judge found that a significant number of the claimant group were descended from the Aboriginal inhabitants of the area in 1788 and that, for example, in recent years skeletal remains originally taken for scientific examination had been returned "to the appropriate country" (at [162] Callinan J) for reinterment by the Yorta Yorta. The trial judge and the High Court, however, essentially found that the Yorta Yorta's relationship to the area lacked the necessarily "traditional" character and that the "interruptions" to traditional life of recent history had severed the necessary connection between the original people of the area and the Yorta Yorta society of today.

In doing so, the High Court put severe demands on any group seeking to establish native title under the Act. Acknowledgment and observance of traditional law and custom "must have continued substantially uninterrupted since sovereignty" (at [87] Gleeson CJ, Gummow and Hayne JJ), but only those laws and customs which existed "before the assertion of sovereignty by the British Crown" are to be regarded as authentically traditional for the purposes of native title law (at [46]).

On the one hand, the system of Aboriginal law and custom must demonstrate a "continuous existence and vitality since sovereignty" (at [47] Gleeson CJ, Gummow and Hayne JJ). Yet on the other hand, if that vitality has extended to the generation of new social structures and new law and custom since 1788 to take account of European colonisation, it seems it will surrender its "traditional" character and forfeit the possibility of recognition by the judges of the colonising people (at [54] Gleeson CJ, Gummow and Hayne JJ).

Freezing social structures and the essential state of traditional law and custom as at 1788<sup>18</sup> makes proof of native title extremely difficult for Indigenous groups across Australia. More than that, it suggests that the rights which *are* recognised may not include those arguably *best* adapted to the contemporary needs of the most disadvantaged sector of the Australian population, that is those laws developed by systems of internal Indigenous governance to cope with post-colonisation realities.<sup>19</sup>

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<sup>16</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 70; 66 ALJR 408 (Brennan J): "It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains". See also Deane and Gaudron JJ (CLR at 110). Of course Brennan J did also observe that "when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition" (CLR at 60).

<sup>17</sup> *Ward v Western Australia* (1998) 159 ALR 483 at 501-504; *Western Australia v Ward* (2000) 99 FCR 316 at 381-387.

<sup>18</sup> The joint judgment of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta* does register the need to accommodate some degree of change to traditional law and custom post-1788, but that concession is itself heavily qualified: "Nor is it to say that account could never be taken of any alteration to, or development of, that traditional law and custom that occurred after sovereignty. Account may have to be taken of developments at least of a kind contemplated by that traditional law and custom. Indeed, in this matter, both the claimants and respondents accepted that there could be 'significant adaptations'. But what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible. Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom" (at [44]).

<sup>19</sup> The qualification noted above in n 18 requires that native title rights *find their origin* in pre-sovereignty law and custom. Future litigation will presumably clarify how much leeway for post-1788 modification there is in that formulation within the parameters laid down more broadly in the *Yorta Yorta* decision.

## ANSWERS TO THE THREE KEY QUESTIONS

Returning to the three basic questions pending at common law when this trio of decisions came down, the answers provided by the High Court are basically as follows:

1. *Legal nature of the interest:* The possibility lurking in earlier High Court decisions that native title might be a genuine “title” akin to ownership has suffered heavily at the hands of recent High Court decision-making. The court has chosen to emphasise the spiritual character of native title and in the process appears to downplay the secular, economic, and pragmatic aspects of Indigenous connection to land.<sup>20</sup> The court has treated native title as an accumulation of rights, but the unifying notion of a title plays a role which is weak and quite unclear.
2. *Extinguishment:* Australia has developed relatively harsh common law rules for extinguishment. Total extinguishment of native title will be frequently found,<sup>21</sup> including under arrangements such as national parks and reserves which would have been considered surprising in 1992.<sup>22</sup> The High Court’s development of a partial extinguishment doctrine apparently devoid of the basic common law presumptions which protect other property rights, will cut a swathe through Indigenous rights to land even in very remote areas, because for a brief window in time most of northern Australia was blanketed by pastoral leases. The role for more benign aspects of extinguishment doctrine such as mere regulation or impairment remains quite uncertain. The opportunity has been passed up by the High Court to develop a more nuanced understanding of the potential for co-existence between titles and for friction without obliteration of one by the other.<sup>23</sup> Native title doctrine already fully protects existing non-Indigenous land and water rights, so the policy necessity for this additional harshness has not been spelt out by the High Court.
3. *Traditional connection:* Since 1992 the “pendulum” (to use a term employed by Prime Minister Howard when advocating amendment of the *Native Title Act* in 1998<sup>24</sup>) appears to have swung back against Indigenous interests most dramatically in relation to the ideas of tradition, connection and recognition. In 2002 the High Court drew much tighter boundaries around these concepts than ever emerged from the statements made in *Mabo [No 2]* and later decisions. In doing so the court cut back the potential for reasoned elaboration from *Mabo [No 2]* away from mainly “use” rights in relation to land and water (such as hunting, fishing and gathering) towards recognition within the native title framework of other rights, eg intellectual property (in *Ward* at [59] Gleeson CJ, Gaudron, Gummow and Hayne JJ) and forms of self government (in *Yorta Yorta* at [43]-[44] Gleeson CJ, Gummow and Hayne JJ). One might observe that tapping a long-term potential for economic and social development was one reason why Aboriginal Australians, the most disadvantaged group in the country, pinned much hope on the decision in *Mabo [No 2]*. More immediately, given the degree of past dislocation, upheaval and suppression of traditional practice in even some very remote parts of Australia, one wonders who will satisfy this rigorous new standard from *Yorta Yorta* for “authentically” traditional law and custom.<sup>25</sup> In other words,

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<sup>20</sup> *Western Australia v Ward* (2002) 76 ALJR 1098; [2002] HCA 28 at [14] and [90]-[95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). The High Court’s approach treats rights of control over land use and access by others as highly fragile after the acquisition of British sovereignty. Assurances that native title rights are not “confined to the common lawyer’s one-dimensional view of property as control over access” (at [95]) seem to offer only a vague promise of future recognition for rights of less material value, with little acknowledgment of the costs of so readily denying recognition to a continuing right of control over land and waters.

<sup>21</sup> For example in *Western Australia v Ward* (2002) 76 ALJR 1098; [2002] HCA 28 the High Court found that the grant of rather limited rights had a totally extinguishing effect, including statutory Special Leases for grazing purposes (at [351]-[357] (Gleeson CJ, Gaudron, Gummow and Hayne JJ)) and even a one-year grazing lease on a reserve which was not being used for its designated purpose (at [361]-[372] Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>22</sup> See eg *Western Australia v Ward* (2002) 76 ALJR 1098; [2002] HCA 28 at [249] and [433] (Gleeson CJ, Gaudron, Gummow and Hayne JJ). Compare *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 69-70; 66 ALJR 408 (Brennan J).

<sup>23</sup> One possible path was to accept that there can be degrees of inconsistency between two sets of rights: cf *Western Australia v Ward* (2002) 76 ALJR 1098; [2002] HCA 28 at [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

<sup>24</sup> “The fact is that the *Wik* decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre.” Prime Minister, *Amended Wik 10 Point Plan*, Media Release (8 May 1997).

<sup>25</sup> An example of the hard line on tradition is discussed in the dissent of Gaudron and Kirby JJ in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 77 ALJR 356; [2002] HCA 58 at [115] where they observed that the trial judge had treated reburial practices of ancestral remains as of recent origin and not part of the law or custom of the original inhabitants. They said that “His Honour did not consider whether the reburial practices had their origins in the past in that, for example,

proving connection now looks a lot harder than it did in 1992 or even November 2002, and even with connection proved, the rights eligible for recognition have been significantly reined in, a matter which also has compensation implications.

## THE INTERSECTION OF NATIVE TITLE WITH CONSTITUTIONAL LAW

With the human rights of Indigenous people at stake and overlapping Commonwealth and State or Territory jurisdiction in native title matters, constitutional issues inevitably intrude. This article canvasses three intersections between native title law and Australian constitutional law, where much remains to be resolved.

First, the High Court has now clarified a major constitutional question which emerged soon after the decision in *Mabo [No 2]*: what impact does the federal *Racial Discrimination Act* actually have on State and Territory laws which affect native title? At one level the answer provided by the High Court in *Ward* (at [108] Gleeson CJ, Gaudron, Gummow and Hayne JJ) is quite straightforward. There are three basic scenarios:

1. A State mining or land law treats existing property holders equally well or equally harshly – in this case, the *Racial Discrimination Act* has no impact.
2. The State law extinguishes all kinds of titles but only provides compensation for non-native titles – in this case, the *Racial Discrimination Act* lifts native title holders up to the same standard by giving them a compensation right too. The Commonwealth law complements the State law, there is no inconsistency and so importantly the State law remains *valid*, as do grants made under it.
3. The State law deprives only native title holders of a property right otherwise enjoyed by all (eg the right to a process of prior acquisition including notice before property is taken away). In this case, Commonwealth and State law conflict and the *Racial Discrimination Act* renders land, mining or other grants invalid. This triggers the validation provisions of the *Native Title Act* or its State counterparts.<sup>26</sup>

In practice these principles play a small but important part in the Kafkaesque nightmare that is contemporary native title law. “Has native title law been extinguished in this area of land?” seems like a simple question. But, partly because of the way the *Racial Discrimination Act* and s 109 of the *Constitution* operate, the answer may depend on an enormous number of variables (one can count at least 15 in the *Ward* judgment, each one of which could change the result from case to case, or tenure to tenure). The way in which the *Racial Discrimination Act* operates becomes almost a lottery and forms part of a larger and strikingly arbitrary body of extinguishment law which has developed in 10 short years. No one can safely predict the answer to that extinguishment question just posed, in vast areas of the continent with a significant history of tenure change and land use.<sup>27</sup>

In this isolated respect, one can only hold the High Court accountable for the confusing situation with the *Racial Discrimination Act* (if at all) to the extent common law choices intrude. It is the result of multiple interactions between Commonwealth and State statutes and is essentially the by-product of Australia failing to deal with Indigenous connection to land far earlier in its history.

Second, Kirby J referred in *Ward* to a section of the *Constitution* which has often caught the attention of Indigenous people looking otherwise largely in vain for constitutional protection of their rights in Australia’s basic law. Section 116 of the *Constitution* forbids the Commonwealth from making any law which prohibits “the free exercise of any religion”. In *Ward* Kirby J (at [586]) suggests that a right based in spirituality, eg a right there asserted to protect cultural knowledge, may be protected by s 116.

As he acknowledged, the extent to which s 116 speaks to Indigenous spirituality is an open question. It does seem an idea well pitched to the heavy emphasis other members of the court wish to

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they had evolved out of earlier practices or constituted an adaptation of earlier laws or customs, with the consequence that they had a sufficient degree of continuity with the past that they could properly be described as traditional for the purposes of s 223(1)(a) of the Act”.

<sup>26</sup> See Div 2 and Div 2A of Pt 2 of the *Native Title Act 1993* (Cth).

<sup>27</sup> For example see the discussion of whether establishing the Keep River National Park extinguished native title in *Western Australia v Ward* (2002) 76 ALJR 1098; [2002] HCA 28 at [426]-[460] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

place on the spiritual character of native title. Historically, however, s 116 has been kept on a very tight judicial leash. The High Court has generally looked for laws which specifically target religious practice.<sup>28</sup> Laws of general application are unlikely to breach s 116 on this fairly narrow view of the freedom. But that limitation may not exclude the *Native Title Act* if the High Court continues on its path of emphasising the spiritual nature of native title. It will be interesting to see whether Kirby J has pointed to a new source of constitutional support for native title rights.

Third, the degree to which native title rights enjoy another constitutional guarantee – that of just terms for the acquisition of property<sup>29</sup> – is a large and important question. Gummow J, an influential member of the current High Court,<sup>30</sup> anticipated an answer to the question in a case about the loss of mining rights by a resource company due to the creation of a national park in the Northern Territory. In *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 613; 71 ALJR 1346 in 1996, Gummow J said that a technical refinement of the law on “acquisition of property” previously applied only to rights created by Parliament – the so-called “inherent vulnerability” doctrine – operated to deny to Indigenous people the benefit of one of the few express guarantees in the *Constitution* (s 51(xxxi)). Meanwhile non-Indigenous people continue to enjoy constitutional protection for their land and property rights. Indeed in the 1990s the just terms guarantee has been expanded, not contracted, to cover a range of other quite novel situations as well.<sup>31</sup> In the writer’s view this proposition about native title and s 51(xxxi), as well as being racially discriminatory in effect, is not well grounded in constitutional authority<sup>32</sup> and should be rejected if the issue comes directly before the High Court again.<sup>33</sup>

Other judges have indicated a different view. For the moment, with the High Court as presently constituted, and despite strong support in terms of principle, policy and precedent, it is not yet clear that executive extinguishment of native title is covered by the just terms guarantee in the *Australian Constitution*.

<sup>28</sup> Williams G, *Human Rights under the Australian Constitution* (2002) pp 112-113, 118.

<sup>29</sup> Section 51 of the *Commonwealth Constitution* provides as follows:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

...  
(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

Although expressed as a legislative power of the Commonwealth Parliament, it has been recognised as having a second function of offering divestees a constitutional guarantee of just terms for acquisitions of property.

<sup>30</sup> Gummow J was recently identified in an empirical analysis of constitutional (and indeed all) decisions given by the Gleeson High Court in its first five years as the judge most likely to be in the majority: Lynch A, “The Gleeson Court on Constitutional Law: An Empirical Analysis of Its First Five Years” (2002) 26 UNSWLJ 32.

<sup>31</sup> For example *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; 68 ALJR 272 (statutory extinguishment of vested cause of action against Commonwealth treated as acquisition of property); *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; 71 ALJR 1346 (“sterilisation” of a mining tenement by declaration of a national park treated as an acquisition of property, and three judges overturning precedent to ensure that the guarantee operated in a federal territory and a fourth arriving at effectively the same result); *Commonwealth of Australia v WMC Resources Ltd* (1998) 194 CLR 1 at 17, 30-31, 36, 70, 93-94; 72 ALJR 280 (five judges confirming that even rights which owe their existence purely to statute may attract the operation of the constitutional guarantee).

<sup>32</sup> The passage of His Honour’s judgment in *Newcrest* is brief, elliptical and collateral to the instant case. No judge except Gummow J has yet suggested that rights other than purely statutory rights may come within the inherent vulnerability doctrine for s 51(xxxi) purposes and some judges appear to have quarantined from the effects of the doctrine those rights “with a basis in the general law”: *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 at 306; 68 ALJR 272 (Mason CJ, Deane and Gaudron JJ). His Honour drew a distinction for constitutional purposes between legislative and executive extinguishment which finds no basis in existing s 51(xxxi) law and is inappropriate to a constitutional guarantee which has always privileged substance over form: see eg *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; 22 ALJ 191.

<sup>33</sup> Some comments in dissent by Callinan J in *Ward* (at [665]) (with whom McHugh J substantially agreed) casting doubt on whether native title rights and interests really amount to rights of ownership “enjoyed by others in the community”, if embraced more widely, could also potentially have negative implications for native title holders seeking “just terms” protection under the *Constitution* for extinguishment of their rights.

## CONCLUSION

Finally the state of native title in Australia invites consideration of the rule of law. In early 2003 the High Court confirmed that the Australian *Constitution* is framed upon the assumption of the rule of law.<sup>34</sup> If one goes to Dicey, he suggests the phrase means three basic things, one of which is “equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts”.<sup>35</sup> A key feature of that ordinary law of the land is the use of presumptions. The British and Australian common law has prided itself on protecting the rights and liberties of individuals by giving a strict interpretation to statutes which might impair them or take them away. It has always been particularly jealous in its protection of property rights.

Regarding basic common law presumptions, native title holders already began well behind the starting line in terms of equality before the law.<sup>36</sup> In *Mabo [No 2]* the High Court settled on a pragmatic and belated accommodation between Crown grants and native title. As part of the compromise 204 years after colonisation, the common law of native title was constructed so as to deny native title holders the benefits of two basic legal principles enjoyed by all other property holders in Australia. First, under the doctrine of extinguishment by inconsistent grant or use by the Crown, their land could be alienated to another without a prior process of acquisition.<sup>37</sup> Second, native title holders do not enjoy the benefit of the common law presumption that compensation is payable if property rights are extinguished.<sup>38</sup> After the native title test cases of 2002 more presumptions and protections can be added to the “missing in action” list.

According to Professor Kent McNeil the basic presumptions of English land law suggest Indigenous people in occupation of land in 1788 were entitled to a presumption they held fee simple title.<sup>39</sup> It was an argument left open in *Mabo [No 2]* and indeed in 1995 the High Court said in passing:

those involved in establishing the British Colony of Western Australia knew that *there were Aborigines who, by their law and customs, were entitled to possession of land* within the territory to be acquired by the Crown and settled as a Colony.<sup>40</sup>

Despite quoting the passage containing this observation with approval in *Ward* (at [157] Gleeson CJ, Gaudron, Gummow and Hayne JJ), the current High Court simultaneously maintained elsewhere in the judgment (at [93]) that:

The finding that predecessors of the claimants occupied the claim area at sovereignty does not, without more, identify the nature of the rights and interests which, under traditional law and custom, those predecessors held over that area. The fact of occupation, taken by itself, says nothing of what traditional law or custom provided. Standing alone, the fact of occupation is an insufficient basis for concluding that there was what the primary judge referred to as “communal title in respect of the claim area” or a right of occupation of it.

Instead the High Court has headed in the opposite direction, whittling away the benefits flowing from another common law presumption where native title property rights are concerned. There is a presumption that a statute will not take away the rights of individuals unless Parliament has expressed that intention clearly and plainly. It once enjoyed the shared support of six judges in a High Court native title case, only seven years earlier.<sup>41</sup> These days the presumption continues to make its

<sup>34</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454; [2003] HCA 2 at [31] (Gleeson CJ). See also [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>35</sup> Dicey AV, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) p 202.

<sup>36</sup> See generally McNeil K, “Racial Discrimination and Unilateral Extinguishment of Native Title” (1996) 1 *Australian Indigenous Law Reporter* 181.

<sup>37</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373 at 452-453; 69 ALJR 309 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

<sup>38</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 15; 66 ALJR 408 (Mason CJ, McHugh J, Brennan J and Dawson J agreeing).

<sup>39</sup> McNeil K, *Common Law Aboriginal Title* (1989) p 298.

<sup>40</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373 at 431; 69 ALJR 309 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) [emphasis added].

<sup>41</sup> *Western Australia v Commonwealth* (1995) 183 CLR 373 at 422-423; 69 ALJR 309 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

appearance (at least with those judges who have not now discarded it altogether<sup>42</sup>) but somewhere along the line it has completely lost its bite as far as native title holders are concerned, particularly where the executive acts to extinguish native title pursuant to statutory authority.<sup>43</sup>

The effects of its dilution are seen everywhere in extinguishment doctrine. Take, for example, the now far-reaching doctrine of partial extinguishment. The fundamental rule of native title law is that in cases of conflict, rights given by the Crown will prevail over native title. The doctrine of partial extinguishment is therefore not necessary to secure the rights of other people in their land. In other words, characterising the “friction” caused by a Crown grant as “suppression” of native title, rather than partial extinguishment, would do nothing to diminish the content and supremacy of existing non-Indigenous property rights. Nonetheless discussion of impairment or regulation appears to have almost dropped off the horizon in 2002. The readiness to find widespread total and partial extinguishment suggests a very different High Court to the one which in *Mabo v Queensland* (1988) 166 CLR 186 at 213; 63 ALJR 84 (Brennan, Toohey and Gaudron JJ), said that the draconian result of extinguishment without compensation will be found in a statute only if its terms do not reasonably admit of another. Reinforcing this bleak picture confronting Indigenous people is the difficult-to-fathom possibility just mentioned that native title holders might not enjoy the same protection for their property interests under the just terms guarantee in the *Constitution* as other Australians do.

I conclude with a remark made in *Ward* by McHugh J. He said (at [529]): “you do not have to be a Marxist to recognise that at least on occasions the dominant class in a society will use its power to disregard the rights of a class or classes with less power. On any view, that is what the dominant classes in Australian society did – and in the eyes of many still do – to the Aboriginal people.”

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<sup>42</sup> See its outright rejection as “irrelevant” by Callinan J in dissent in *Western Australia v Ward* (2002) 76 ALJR 1098; [2002] HCA 28 at [619] and [625].

<sup>43</sup> *Wilson v Anderson* (2002) 76 ALJR 1306; [2002] HCA 29 at [61] (Gaudron, Gummow and Hayne JJ).