Land, Rights, Laws: Issues of Native Title

Native Title Research Unit
Australian Institute of Aboriginal and Torres Strait Islander Studies

Contributing to the understanding of crucial issues of concern to native title

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Abstract

On 8 August 2002, the High Court handed down its decision on Western Australia v Ward & Ors*, relating to the native title claim by the Miriuwung – Gajerrong peoples. The decision was anticipated as one which would answer critical questions about the nature and content of native title. The majority was constituted by Gleeson CJ, Gaudron, Gummow and Hayne JJ, who prepared a joint judgement, with Kirby J agreeing with the majority subject to some minor qualifications. McHugh and Callinan JJ dissented and provided separate judgements. This paper provides a brief summary of the findings in the decision. As it is an immediate response to the decision, the conclusions may be subject to further qualification. A version of this paper has also been prepared for the ATSIC Native Title and Land Rights Centre.*

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WESTERN AUSTRALIA V WARD ON BEHALF OF MIRIUWUNG GAJERRONG, HIGH COURT OF AUSTRALIA, 8 AUGUST 2002: SUMMARY OF JUDGMENT

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On 8 August 2002 the High Court handed down its long awaited decision in the *Ward* case, the determination of the native title application from the Miriuwung and Gajerrong peoples.[1] The determination area includes some 8,000 square kilometres partially in the East Kimberley and extending into the Northern Territory. The region includes substantial economic projects: the Ord River Irrigation project and the Argyle Diamond Mine. The case, which began in April 1994, was sent back to the Full Federal Court for further hearings.[2]

Central issues

The High Court concentrated on the nature and principles of extinguishment in framing the decision. The two questions posed were:

- whether there can be partial extinguishment; and,
- the principles for determining extinguishment.[3]

Findings

- The Court determined that the operation of the *Native Title Act 1993* (Cth) ('NTA' or 'the Act') mandates partial and permanent extinguishment;
- they affirmed and elaborated the principles for extinguishment established in *Wik*;[4] including confirming that native title rights and interests can coexist with other interests; and,
- returned to the characterisation of native title used in *Mabo*,[5] proof of which is based on traditional laws and customs and not on occupation.

Extinguishment under the NTA

The Court reiterated that the NTA is at the core of native title litigation where applications are brought for determination under the Act.[6] They highlighted that in accordance with s.11, native title is not able to be extinguished contrary to the Act.[7] Emphasis was placed on the impact of Part 2 Division 2 – Validation of Past Acts; and Division 2B – Confirmation of Past Extinguishment of Native Title by Certain Valid or Validated Acts. These provisions form the statutory framework for extinguishment.

Partial extinguishment

The High Court held that within this framework, partial extinguishment is mandated by the NTA.[8] Section 15 provides for (or 'confirms') the complete or partial extinguishment of native title by particular past acts, such as the grant of freehold of exclusive possession leasehold. Sections 23C and 23G provide for complete and partial extinguishment (respectively) in relation to previous exclusive possession acts and previous non-exclusive possession acts.

Also, under the NTA, extinguishment is deemed to be permanent. This was not clearly articulated in the decision but was implicit, for example, in the treatment of the Argyle project.

This is a significant disappointment in the decision. It confirms that the NTA allows the piecemeal erosion of native title. A large part of the effort in arguing against the bundle of rights approach was to protect native title from unnecessary erosion over time.

The Court tried to emphasise that native title can survive the grant of interests to others or the exercise of Executive power.[9] They also limited the concept of extinguishment to inconsistency of rights not of use (see Principles of extinguishment, below). The Court also drew attention to the operation of s.15, which recognised the suspension of native title rights and interests in some circumstances. They drew attention to compensation implications of the extinguishment of native title rights (see Compensation, below). But these provisions have limited operation.

Agitation for legal reform could encourage greater scope for the non-extinguishment principle and the disregarding of prior tenures. As we will see from the treatment of various Crown grants and interests, the complexity of the application of the extinguishment test could be greatly reduced for all parties by further legislative intervention aimed at recognising the continuation of native title wherever feasible.

The Court drew a distinction between extinguishment within the framework of the NTA, which is permanent, and partial inconsistency under the common law, introducing the concept of 'relevant

inconsistency' in relation to extinguishment.[10] The Court appears at times to limit the concept of partial extinguishment to previous non-exclusive possession acts. Further exploration of the judgment may reveal a basis for arguing that partial extinguishment is a concept introduced by the NTA amendments in 1998. This would have significant compensation implications, under s.23J.

Bundle of rights debate

The Court only briefly discussed the 'bundle of rights' versus 'interest in land' debate. The Court appeared to prefer the Full Federal Court view of native title as a bundle of rights. However, their acceptance of this characterisation should not be over simplified. It should not be interpreted as unequivocal acceptance of a 'list of activities' approach to native title.

The 'bundle of rights' idea was said to be useful as a metaphor to illustrate that there may be more than one right or interest in a particular piece of land.[11] In addition, the 'bundle of rights' metaphor reflected the view that there may be several kinds of rights and interests, not all of which are fully or accurately expressed as rights to control what others may do on land.[12] In property law the bundle of rights metaphor is used to describe all property interests, including freehold. However, the Court clearly described native title as equal to other property rights, and that native title holders were entitled to the same protection as other title holders.

They rejected the 'interest in land' thesis, in so far as that requires the recognition of native title as analogous to a fee simple, proved by occupation, and which assumes particular rights as a consequence of the existence of the title rather than the rights and interest under traditional law and custom defining the interest.[13]

The Court noted the difficulty of fragmenting the relationship between Indigenous peoples and the land to rights and interests but argued that that is what is required by the NTA. They also noted that the NTA requires the determination of areas where native title confers possession occupation use and enjoyment to the exclusion of all other interests (s.225(e)). The determination of native title therefore requires the expression of this relationship in terms familiar to the common lawyer.[14]

Native title as 'exclusive possession occupation use and enjoyment' is accepted under s.225. This decision did not deal with areas of exclusive possession, being concerned as it was with areas where extinguishment had occurred. Therefore, the decision should not be promulgated as a rejection of native title ever being recognised as equivalent to or approaching freehold.

The Court in *Ward* accepted that the right to speak for country encapsulated the complex relationship between people and country and amounted to exclusive possession occupation use and enjoyment.[15] However, they were concerned that in the context of extinguishment, particularly where the 'exclusive' character of the title may be compromised, a simple equation of the right to speak for country (including the right to control access and use) would not allow a court to assess the limits of extinguishment and the extent to which native title rights and interests remained. They suggested that although the right to be asked permission or control access may be core concepts in traditional law and custom, they do not exhaustively describe the rights and interests conferred by traditional law.[16]

Non-exclusive native title areas

The Court showed a disappointing readiness to find that the 'exclusive' rights were extinguished by a variety of acts. The Court did not say that this destroyed all exclusive rights nor all rights to control access. The Court did say they found it difficult to characterise a non-exclusive right to make decisions about use

and enjoyment, although they did not preclude the existence of such a right. However, defining this right, they said, would require further consideration of the relationship between native title and other interests.

The discussion of 'non-exclusive' in this case should be distinguished from the conclusions in *Croker*.[17] In that case, the competing rights were public rights. In this case, many of the competing rights being discussed were the limited rights of one private party. There may be scope to argue that while neither the native title holders nor the other party have an exclusive right to control access by one another, they have certain rights to control access against the rest of the world. This would introduce the 'reasonable user' concept discussed by the majority of the Federal Court.[18] This relationship was not discussed in the joint judgment, with the exception of Kirby J.

The Court concluded that where there are areas where native title will not amount to exclusive possession occupation use and enjoyment against the whole world, it may be better to describe the rights and interests by reference to activities – 'may' not 'must'. At the same time, the Court recognised that native title is a 'title' and a 'property interest' that enjoys equal protection under the law despite its unique characteristics.

Upon this reasoning, there may be utility in distinguishing exclusive possession areas from other areas. That is, where there are no competing interests or extinguishment issues, broad statements of rights to speak for country may not need to be further particularised. Of course the occurrence of such areas may be limited.

Proof of native title

The conclusions that the Miriuwung and Gajerrong peoples had proved facts under s.223(1)(a) and (b) were not questioned.[19] However, the generality of the findings by the trial judge were said to make determination of questions of extinguishment in the High Court difficult.[20]

The Court construed that native title rights and interests are derived from traditional law and custom. The common law recognises those rights and interests through the concept of native title. The emphasis on law and custom in defining the content of native title will be disappointing to many, not least because of the increased level of proof required and the difficulties of intercultural expression.

The Court confirmed that native title is defined by the Act in s.223(1). The Court held that the statutory definition requires two inquiries: first, to find the rights and interests possessed under traditional laws and customs; and second, to establish the connection through those laws and customs to the land and waters.[21]

The Court seemed to be of the view that the right to speak for country was equivalent to the right of exclusive possession. But if this right is compromised by a grant to another party, the other rights and interests of the native title holders must be identified (including, for example, rights and interests in the use of the land).[22]

The Court confirmed that s.223(1)(b) 'connection' does not require physical connection. The inquiry is not directed at how Aboriginal peoples use or occupy the land. Absence of evidence of recent use does not lead to the conclusion that there is no relevant connection.[23]

The Court held that s.223 does require consideration of what is meant by connection by traditional law and custom. That is, in identifying what traditional laws and customs say about relationships with the land.

The Court held that protection of cultural knowledge is a native title right/interest only in so far as it relates to land and waters. The Court used the example of denying/restricting access to sites or areas as a right relating to land. The Court pointed to other areas of law that would have to be pursued to provide further protection of cultural knowledge, for example moral rights and intellectual property law.[24]

Principles of extinguishment

The Court confirmed that recognition by the NTA may cease where, as a matter of law, native title has been extinguished, even where apart from that legal conclusion, the facts of Indigenous peoples' continued rights and interest in relation to land under Indigenous law continue.[25]

Inconsistency of incidents

'Inconsistency of Incidents' was held to be the appropriate test for determining extinguishment and co-existence. Taking its lead from Toohey J in *Wik* the Court affirmed that the 'inquiry into extinguishment and the extent of inconsistency requires comparison of particular rights and interests conferred by native title on the one hand and by the statutory grant or interest on the other'. That is, extinguishment can only be determined once the legal content of both sets of rights said to be in conflict has been established.[26]

One positive that may be gleaned from this is that the Court has attempted to treat native title interests and other interests with the same level of scrutiny. That is, non-native title interests are also required to provide details of the rights and interests conferred by title. However, the burden of this test falls clearly on native title parties. With the requirements of proof, the intricacy of the Inconsistency of Incidents test prescribed by the Court appears to make litigation even more problematic as a method of resolving the relationship between native title and other interests.

The acceptance of the idea of 'incidents' as the keystone of the test supports the view that this decision does not reduce native title to a simple bundle of rights that would result in a list of activities able to be permitted on land and waters.

Clear and plain intention

The clear and plain intention test has been de-emphasised by the Court. The Court argued that the requirement that legislation or authorised act have a demonstrated Clear and Plain Intention to extinguish native title should be understood as an objective inquiry with reference to the Inconsistency of Incidents test.

Operational inconsistency

The Court rejected the Federal Court's finding that existence of 'administrative arrangements' for the development of the Ord project engaged a notion of 'operational inconsistency' to extinguish native title.[27] The Court pointed to the piecemeal development of the project, holding that each of the relevant acts must be assessed in their own terms to determine inconsistency of the rights and interests conferred in comparison with the rights and interests conferred by native title.[28]

Operational inconsistency was rejected as a basis for extinguishment – useful only as an analogy.[29] The Court reiterated that uses made of land may only shed light on rights conferred by statute or instrument to determine the legal interests of each of the parties.[30]

To this end, the Ord project could not be classified as a whole as a public work under the NTA due to any operational inconsistency. Whether specific works had been constructed and the reach of incidental areas would require further evidence. The inadequacy of the findings in relation to the Ord Project to allow an assessment of the inconsistency of incidence was a basis for remitting the issue back to the Federal Court.

Pastoral leases

The Court's treatment of pastoral leases provides an illustration of the operation of the test of extinguishment. The Court described pastoral leases under Western Australian legislation as a 'precarious' interest, even more so in some respects than the leases considered in *Wik*.[31] The Court said that on no

view could the pastoral leases be said to give the holder exclusive possession. The Court reaffirmed the principle that an interest does not confer exclusive possession merely because it is called a lease.[32]

The granting of this 'precarious interest' did not make unlawful what had previously been the lawful use by native title holders. Therefore, the pastoral lessee had no right, absolutely or contingently, to exclude native title holders.[33]

The reservations in the leases and legislative provisions relating to enclosure and improvement on pastoral leases were held not to affect use and access by native title holders. These provisions were construed as applying only to Aboriginal persons who are not native title holders (as a result there was no need to discuss what constitutes enclosed and improved).[34]

The leases are therefore non-exclusive pastoral leases within s.248B: they were granted before the RDA came into operation and are therefore valid. They are a previous non-exclusive possession act within the definition of s.23F. As a State 'act', s.12M of the State Validation legislation applies. That section parallels s.23G of the NTA. The Court held that the provision has the following effect:

(a) Partial extinguishment: the granting of pastoral leases was an act that involved granting rights and interests inconsistent with so much of the native title rights and interests as stipulate control of access to the land the subject of the grant – they denied the native title holders the exclusive right to say who could or could not come on to the land. To that extent they extinguished native title rights and interests.[35]

(b) Co-existence: to the extent that the grant of a pastoral lease involved the grant of rights not inconsistent with native title rights and interests, the rights and interests granted by the pastoral lease and the doing of any activity in giving effect to them prevail over native title rights and interests but do not extinguish them.[36]

The Northern Territory leases too, it was held, were not necessarily inconsistent with the rights of native title holders, with the exception of the exclusive right to control access and make decisions about the land. The leases specifically reserved the rights of Indigenous peoples. The Court found that in the context of the NTA, that reservation is sufficient to take the pastoral leases outside the definition of exclusive pastoral lease. The pastoral leases did not confer upon the lessee the right to exclude native title holders from the land.[37]

Mining leases

Again, the High Court highlighted that the nomenclature of a 'lease' is that it does not grant exclusive possession.[38] They disagreed with the Full Court's conclusion that the statutory scheme was inconsistent with use or occupation by other than the lessee.[39]

Mining leases under the WA mining legislation, it was held, grant exclusive possession for mining purposes only. That is, they grant a right to exclude others from mining. This does not give the leaseholder the right to exclude native title holders from access to and use of the land. While the exercise of native title rights may be prevented in certain areas of the mining lease (while mining operations are conducted), other native title rights and interests survive the grant of the lease.[40]

Here, the Court again drew a distinction between Inconsistent Incidents, which extinguish native title rights and interests, as opposed to the activities conducted by the leaseholder pursuant to the rights under the lease, which will prevail over but do not extinguish native title rights and interests.

One native title right that the Court said was inconsistent with the granting of a mining lease is the exclusive right to control access to the land. At every juncture the Court drew attention to possible compensation questions.[41]

Ownership and control of resources

Minerals

The Court held that the evidence in the case did not demonstrate a native title right to ownership or the right to use minerals and petroleum.[42] The Court's reasoning in this instance was troubling. It was the only foray the Court took into discussing the proof of particular rights and interests. The justices seemed to suggest that that there would be no native title right because the native title holders had not demonstrated laws and customs related to the use of minerals. This reasoning seems to reflect a 'frozen in time approach' to the laws and customs of Indigenous people.

Consistent with the reasoning elsewhere, the Court was not concerned with the mode of use, except to cast light on the right. However, this reasoning highlights the difference between the Court's approach and the approach argued by the native title holders. The Court has taken a very narrow view of the subject matter to which laws and customs apply. A general native title right to use the resources of the land, whether on or below the surface, was not considered sufficient to establish a right to minerals. It is one thing to resolve a conflict in relation to a specific interest asserted by the Crown by confirming that no native title right to minerals can survive (see below). However, it is another to require that such an assessment legitimises the finding of a particular law in relation to particular sub-surface minerals.

In any event, the Court found that had native title rights to minerals existed, they were extinguished by legislative act. The Crown's vesting and assertion of property in minerals and petroleum under the Western Australian legislation was distinguished from the fauna legislation considered in *Yanner*.[43] The vesting, it was said, was not merely a fiction expressing the importance of the power to preserve and exploit the resources, as was the case in *Yanner*. Rather, it was held to create a right of ownership in the minerals from the Crown's underlying, or radical, title for the purposes of separate disposition.

Rights in Water and Irrigation Act

The *Rights in Water and Irrigation Act 1914* (WA) provides for rights in use, flow and control of water and that these are vested in the Crown subject only to 'the restrictions hereinafter provided'. The Court held that this provision was sufficient to create an inconsistency with native title rights to possession of the waters to the exclusion of all others. This WA Act also provided for delegated legislation. By-laws were enacted by the Minister to prohibit the taking of flora and fauna. The Court held, unlike the circumstances in *Yanner*, that the prohibition was absolute, hence s.211 of the NTA did not apply in the case.[44]

Fishing rights

Public rights such as the right to fish were held to be properly considered among the 'other interests' that must be considered under s.225(c). The Court held that the public right to fish extinguishes any 'exclusive fishery'.[45] This was a direct application of the reasoning in *Croker*.

Reservations

The Court confirmed the opinion of the Federal Court that a reservation for public purposes of itself does not affect native title. However, the Court held that consideration may need to be given to what was done with the land pursuant to the reservation and also what was done to bring previous interests in land to an end.[46]

They confirmed that the Crown may create an interest for itself that would be inconsistent with native title.[47] The test, a restatement of the 'inconsistency of incidents' test, was described as:

> whether the Crown created in others, or asserted rights in relation to the land that were inconsistent with native title rights and interests over the land.[48]

Public works aside, the question put by the Court is one of inconsistency of rights not of use. Inconsistency of rights would give rise to extinguishment where as other rights and interests may be merely suppressed or constrained in their exercise by the activities pursuant to the prevailing interest of the lease holder.

For general reservations dedicated for a particular purpose, no great weight was attributed to the term 'dedication'. A limit of the Crown's future use of land, without the creation of a trust, was not considered absolute. Reservation without more did not create any rights in the public or any individual which would amount to an inconsistency that would extinguish native title rights and interests.[49]

The Court considered that some further dedication of a reservation may demonstrate an assertion of rights that are inconsistent with a native title holder's continued exercise of power to determine a use of the land that conflicted with the public purpose for which it had been dedicated. However, this was not incompatible with continued use consistent with the rights enjoyed prior to the reservation.

Vesting

Some of the reservations that exist in the determination area resulted in vesting under the WA *Land Act* or the *Rights in Water and Irrigation Act 1914* (WA). The Inconsistency of Incidents test led the Court to reconsider the opinion of both of the lower courts that had considered that mere vesting did not affect native title and was merely a means of management.[50] The Court held that no general conclusion could be drawn from the use of the term 'vesting'. The terms of the vesting and the rights conferred must be considered in relation to their consistency or otherwise in relation to the rights and interests conferred by native title.

The Court found that the vesting under s.33 of the *Land Act* created a public trust that was enforceable against the Crown. It thus created a legal interest in fee simple in the trustee, which is equivalent to freehold, and therefore extinguishes native title.

In contrast, reservations under s.34 were 'vested' because they were placed under the control of a board of management. The Court noted that all reservations might be said to have a public purpose, but not all can be said to create a valid charitable trust or create a valid fee simple in some person or body.[51]

The fact that reservations were for the purposes of conservation in the form of nature reserves does not change the reasoning in terms of the effect on native title.[52]

In contrast to nature reserves in Western Australia, the Keep River National Park in the Northern Territory was effected by a special purposes lease. It was granted to the Conservation Corporation to hold in perpetuity at an annual rent. The Court referred to *Wilson v Anderson*[53] to reinforce that, where a statute creates a lease in perpetuity, the line between a lease and a fee simple is blurred. The Court found that the

lease conferred exclusive possession so that those native title rights and interests that had survived earlier grants of pastoral leases over the area were, subject to the operation of the RDA, extinguished.

Compensation and Racial Discrimination Act

At the outset, the Court indicated that there was still no comprehensive consideration of what is meant by 'recognition' in relation to native title. In particular it did not elaborate on the implications of the appropriate remedies and protection afforded by such recognition.[54] The Court delved into this question in relation to possible extinguishment, looking at the kind of protection that may be afforded to native title as a property right and a right of inheritance under the *Racial Discrimination Act 1975* (Cth) ('RDA' or 'the Racial Discrimination Act').

The Court emphasised that native title is 'property' in the context of the RDA.[55] The Court cited *Mabo [no.1]* as first establishing that native title, though it has different characteristics from other forms of title, in particular that is not derived from Crown grant, cannot be treated differently from other titles.[56] The right to ownership and inheritance of property protected by the RDA is the same right regardless of the characteristics of that property.

The Court noted that compensation for the extinguishment of native title may arise under ss.17, 20, and 23J. For example, under s.23J compensation may be payable where validation and confirmation provisions result in extinguishment that would not have occurred under common law. This may be the case in relation to some non-exclusive leases that are deemed to extinguish native title.

The *Native Title Act case* confirmed that the NTA controls the scope of other laws by determining what state laws/acts are valid and the conditions of validity.[57] It also controls the effect of the RDA on validated acts (s.7). Apart from the operation of s.7 of the NTA, the RDA, under s.10, operates on discriminatory laws or laws that affect the enjoyment of rights by some but not others, or to a different extent. That is, the operation of the RDA is not limited to legislation that can be identified as discriminatory. Consideration must be given to the effect of laws in creating or perpetuating discriminatory treatment. The Court explained the operation of the RDA with reference to Mason J in *Gerhardy v Brown:*[58]

- where a law omits to make enjoyment of a right universal, s.10 operates to extend that right to all on the same terms as the state law. This may occur where an Act provides for compensation only to non-native title holders (directly or in effect);
- where a law deprives persons of a particular race from the enjoyment of a particular right, s.10 confers the right thereby creating an inconsistency and therefore invalidating the discriminatory provision. This may occur where a law only extinguishes native title and leaves other titles intact (directly or in effect); and,
- it is also important to note that a state law expressed in general terms forbids the enjoyment of rights by all racial groups where there is no discrimination upon which the RDA can operate.

The Court clearly stated that the impact of the RDA on State legislation that authorises acts or affects native title must be considered before turning to the impact of the NTA on a particular act. If the RDA does not operate to invalidate the legislation, the past acts or provisions of previous acts are not engaged.

Where the operation of the legislation is racially discriminatory in its treatment of native title, provision for compensation under that legislation will be extended to native title holders by the operation of s.10 of the RDA.

Section 45 of the NTA provides that compensation payments applicable to other interest holders under State legislation (such as the *Mining Act* (WA)) that would have been extended to native title holders under the RDA and are brought within the compensation provisions of the NTA, Part 2 Division 5.[59]

In particular, the Court highlighted the provisions of the *Mining Act* (WA). The Court was of the view that the Act should not differentiate between the holders of native title rights and interests and the holders of any other form of title. If native title holders are not included in the definition of owner or occupier under that legislation, then s.10 of the RDA would take effect to give native title holders the same protections under law as other title-holders.

This aspect of the decision will require detailed analysis. The Court raised possible compensation questions throughout the judgement but did not draw any conclusions. Practical compensation outcomes are therefore difficult to discern.

Applicable law

The Federal Court wrongly took the applicable law to be that in force at the time of the original hearing. The Federal Court had not applied the recent High Court finding, in relation to a Family Court matter, that the applicable law is that in place at the time of the making of the appeal decision.[60] This led the Court into error because it did not consider State and Commonwealth validation and confirmation provisions passed pursuant to the 1998 amendments to the NTA.

In particular, the State Validation legislation and Part 2 Division 2 and 2B of the NTA may have significant implications in relation to:

- possible extinguishment – s.23C (previous exclusive possession acts), s.23G (previous non-exclusive possession acts);
- possible suspension, under the non-extinguishment principle – s.15; and,
- possible compensation – s.23J; s.45.

The orders

- The orders state that both appeals are allowed. However, as Gleeson CJ stated, no party was entirely successful in the proceedings;
- the High Court struck out paragraphs 4 (Ord Project) and 6 (nature and extent of other interests) of the Full Court's findings concerning complete extinguishment; and,
- set aside the determination subject to further hearings in the Federal Court.

The case was sent back to the Federal Court for further submissions on the articulation of native title rights and interests (arguably in relation to areas not properly subject to exclusive possession occupation use and enjoyment), and the remaining questions of extinguishment.

The Federal Court will presumably reissue the determination after consideration of these matters.

Conclusion

Before the High Court delivered its decision last week in the *Ward* case, the case was heralded as one of the most important cases since *Mabo* and *Wik*. It was expected that the decision in the case would go some way towards clarifying the nature and scope of native title.

Rather than espouse a coherent theory of native title, the Court instead concentrated on the complex web of statute law that now frames native title and articulated the process for determining the relationship between native title and other interests. The Court concentrated on the intricacies of determining the

extinguishing effects of 200 years of dealing with Indigenous peoples' land without consideration of property rights.

The Court confirmed that prior grants and interests could extinguish native title in part, thereby extracting particular rights and interests from native title permanently. The patchwork of tenures granted over land throughout Australia's history therefore leaves a permanent imprint on native title that cannot be removed without statutory provisions.

Indigenous peoples may be pleased that the Court confirmed that native title could co-exist with other interests, although it would remain subjected to the rights conferred on others. Perhaps more seriously, access agreements and consent determinations negotiated in Western Australia may have been negotiated on the basis of an underestimation of the strength of native title as a co-existing interest.

There are a number of procedural implications from this decision. The Federal Court will need to give serious consideration to the current timelines imposed upon claims. Both Indigenous and non-indigenous parties will need to consider the evidence that has been provided to date.

The judgment of the Court cries out for reform of the system so as to allow greater scope for non-litigious examination of the merits of Indigenous peoples' claims without undue interference from historical tenures.

The anomaly of previous non-exclusive possession acts no longer in force was brought into relief throughout the judgement. Rather than create certainty, this provision unduly complicated the inquiry. There is surely a strong argument, now supported by the demands on both sides of the inquiry, for greater scope for suspension and revival provisions, such as those in s.47B of the NTA.

Interestingly, the minority judges called for more significant reforms. McHugh J expressed concern that the native title system had been stacked against native title holders through the operation of the NTA and the common law. McHugh called for an arbitral system that would determine the merits of the claims of competing interests and determine what the rights should be, unbounded by historical tenures and the common law superiority over non-native title rights.[61]

Callinan J went a step further, calling for a 'true and unqualified' settlement of lands or money rather that the current 'futile' attempt to incorporate native title rights into the common law.[62] The views of McHugh and Callinan JJ reflect the need for a comprehensive land claims/settlement/treaty process. In articulating the immense detail required to compare the rights and interests conferred by successive tenures, the High Court appears to have made a strong argument for negotiated settlements in the political sphere.

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[1] *State of Western Australia v Ward* [2002] HCA 28 (8 August 2002).

[2] For relevant information/articles on this case see the resource page at http://www.aiatsis.gov.au/rsrch/ntru/resources.htm

[3] [2002] HCA 28, per Gleeson CJ, Gaudron, Gummow, and Hayne JJ (joint reasons), at [1].

[4] *Wik Peoples v Queensland* (1996) 187 CLR 1.

[5] *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

[6] [2002] HCA 28, joint reasons, at [2].

[7] Ibid., at [13, 16].

[8] Ibid., at [9].

[9] Ibid., at [26].

[10] Ibid., at [27, 26].

[11] Ibid., at [95].

[12] Ibid., at [82].

[13] Ibid., at [84, 93].

[14] Ibid., at [14].

[15] Ibid., at [88].

[16] Ibid., at [90-91].

[17] *Yarmirr v Commonwealth; NT v Yarmirr* [2001] 56 HCA (11 October 2001).

18 *Western Australia v Ward & ors* (2000) 170 ALR 159.

[19] [2002] HCA 28, joint reasons, at [28].
[20] Ibid., at [49, 51].
[21] Ibid., at [18].
[22] Ibid., at [51].
[23] Ibid., at [64].
[24] Ibid., at [59-61].
[25] Ibid., at [21].
[26] Ibid., at [149].
[27] Ibid., at [148, 151].
[28] Ibid., at [143].
[29] Ibid., at [149].
[30] Ibid., at [78, 215, 234].
[31] Ibid., at [170].
[32] Ibid., at [170].
[33] Ibid., at [184].
[34] Ibid., at [186].
[35] Ibid., at [192].
[36] Ibid., at [193].
[37] Ibid., at [415-7].
[38] Ibid., at [287].
[39] Ibid., at [306].
[40] Ibid., at [308].
[41] Ibid., at [309].
[42] Ibid., at [382].
[43] Ibid., at [384].
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