Ward, Wilson and Yorta Yorta: The High Court, Native Title and the Constitution a Decade after Mabo

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Note: This version was prepared for conference delivery and has not been thoroughly footnoted. A fully referenced version of the paper will be prepared for publication in the near future.

Introduction

I acknowledge the traditional custodians of the land we meet on today, the Gadigal people of the Eora Nation.

I will be reviewing three major native title decisions delivered by the High Court in calendar year 2002. I will focus on a few key issues dealt with in the cases and assess how they fit in the overall flow of developments in native title law since the Mabo decision just over 10 years ago.

I will conclude with some observations about the relevance of constitutional law for native title. Specifically I will refer to 4 constitutional matters

- the operation of the *Racial Discrimination Act* (which I will refer to from now on as the RDA) in tandem with section 109 of the Constitution dealing with the inconsistency between Commonwealth and State laws

- the apparent guarantee of freedom of religion in section 116 of the Constitution

- the guarantee of just terms for the acquisition of property under Commonwealth law contained in section 51(xxxi) of the Constitution and

- the fundamental operation of the rule of law in the Australian legal and constitutional system.

Setting the Scene

By August 2002, on the eve of these three decisions in *Ward*, *Wilson v Anderson* and *Yorta Yorta*, we had seen ten years of development in Australian native title law following *Mabo No 2*. The High Court had delivered since 1995 a series of important decisions at the rate of about one a year. Parliament had conducted two of its longest ever debates in passing the *Native Title Act* in 1993 and the 1998 Howard Government amendments and every State and Territory had enacted its own counterpart legislation.

Despite this, before these 3 cases were decided there was significant ambiguity concerning some very basic issues.

Three Key Questions

In particular people looked to *Ward*, *Wilson* and *Yorta Yorta* for clarification of 3 basic 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: A Quick Overview

I refer you to the map showing the claim areas on the back of the handout.

The ***Ward*** decision (4:1:2) dealt with a native title determination over a very large area in the East Kimberley and a smaller area of National Park across the border in the Northern Territory.

The claimant group, the Miriuwung Gajerrong people, had enjoyed great success at trial before Justice Lee. They suffered a substantial reversal on appeal to the Full Federal Court. The High Court'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[1] of litigation, the matter was remitted for further hearing and determination in the Federal Court.

Primarily Ward is a case clarifying the law on extinguishment.

The decision in ***Wilson v Anderson*** (1+3+2:1) dealt with a single question of law, abstracted on a preliminary basis from a native title case in western NSW. Another extinguishment case, it asked whether a perpetual pastoral lease granted under the *Western Lands Act* conferred exclusive possession on the pastoralist and thereby extinguished all native title in the land.

In stark contrast to the *Wik* decision, the High Court in *Wilson v Anderson* found that the lease bore such a strong affinity to a freehold grant, that it did confer exclusive possession and the result was total extinguishment of native title.

On 12 December 2002 the High Court rejected the appeal of the ***Yorta Yorta*** people (3+1+1:2), who had sought a native title determination over an area straddling the Murray and Goulburn Rivers. The critical issue was whether the Yorta Yorta could demonstrate a connection to the area through the continued observance of traditional law and custom.

The majority finding was self-described in a three-way joint judgment as 'more radical'[2] than the original trial judge's dismissal of the Yorta

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[1] [560]

[2] [96]

Yorta application. And the High Court gave the term ‘traditional’ a sterner interpretation than had been the case to date.

Two Key Legal Issues

I will now go straight to the way *Ward* and *Wilson* dealt with the issue of pastoral leases, for two reasons.

First, at one time pastoral leases blanketed much of the land surface of Australia. Whether they extinguish native title is a question of enormous significance.

Secondly, they illustrate the High Court’s approach to the first two issues I identified in that list of 3 outstanding questions on native title. Let me take each question in turn.

Question one was essentially whether native title is genuinely a ‘title’ akin to ownership. The kind of thing Western law would appropriately translate into freehold title or something like it. The common law suggested conflicting answers at different times. The Native Title Act was similarly ambiguous.

Question 2 was what are the rules of extinguishment? 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? [HANDOUT: extinguishment / partial extinguishment / suspension / impairment / regulation / no effect]

The Court also had two ideas available to it to assist in making this choice: for example between regulation and partial extinguishment. Two principles which had emerged from the common law over 10 years: the presumption of no extinguishment without a ‘clear and plain intention’ and the doctrine of inconsistency. The relationship between the two ideas was quite unclear by 2002.

In *Ward* and *Wilson* in one sense it 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 its duration?

At this point the High Court made a significant error of statutory interpretation. In doing so it allowed them to slide by these fundamental questions with minimal analysis – the intellectual challenge posed by Justice North and Justice Lee below was dismissed in a matter of a few paragraphs.

Their mistake was this: as part of the deal done with Senator Harradine to allow the 1998 amendments to pass the Senate, the Government backed down on the issue of partial extinguishment on pastoral leases. It introduced a new amendment and the question whether a pastoral lease partially extinguished native title was left to the common law.

Yet the High Court in *Ward* insisted that the Native Title Act 'mandated' partial extinguishment.

In making that choice (mistakenly attributed to the Parliament) the High Court rejected the title view which would have equated connection under traditional law with ownership in Western law. I would argue that on the basis of the existing common law and the NTA, that option was at least as available as the contrary view (perhaps subject to what it had said in the sea claim case of *Yarmirr*).

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. 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.[3]

[3] Wilson [61]

Answers to the Three Important Questions

Returning to the three basic questions pending when this trio of decisions came down, I would suggest the answers provided by the High Court are as follows:

1. *Legal Nature of the Interest:* The idea lurking in *Mabo No 1* and *2* 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 downplayed the material, the economic, the pragmatic aspects of Indigenous connection to land. 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,[4] including under arrangements such as national parks and reserves which would have been considered surprising in 1992.[5]

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, as 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

[4] Permit to occupy, Special leases for grazing, 1 yr grazing lease on reserve not being used for its purpose, reserves

[5]

between titles and for friction without obliteration of one by the other.

3. *Tradition:* Since 1992 the 'pendulum' (to coin a term used by the Prime Minister) has swung back against Indigenous interests most dramatically perhaps in relation to the ideas of **tradition, connection and recognition**. In *Yorta Yorta* the High Court draws much tighter boundaries around these concepts than ever emerged from the statements made in *Mabo No 2* and later decisions.[6]

In doing so the Court cut back the potential for reasoned elaboration from *Mabo No 2* away from mainly physical rights in relation to land and water towards recognition within the native title framework of other rights eg intellectual property[7] and forms of self government.[8] One might observe that this long-term potential for economic and social development was one reason why Aboriginal Australians, the most disadvantaged group in the country, pinned some hope on tapping the potential contained in the *Mabo* decision.

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.[9]

In other words, 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.

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[6] Brennan J formula in Mabo No 2 and similar formulations (YY front rhs).

[7] Ward [59]

[8] [43]-[44]. Compare *Campbell v A-G for British Columbia* (Williamson J)

[9] example of the hardline: reburial practice in [115]

Concluding Observations about the Intersection with Constitutional Law

First the High Court has now clarified a major constitutional question: what impact does the RDA actually have on State and Territory laws which affect native title.

At one level the answer provided by the High Court in *Ward* is quite straightforward: there are 3 basic options[10]

1. The State mining or land act treats existing property holders equally well or equally harshly – in this case, the RDA has *no impact*.

2. The State law extinguishes all kinds of titles but only provides compensation for non-native title – in this case, the RDA 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 RDA renders land, mining or other grants invalid. This triggers the validation provisions of the Native Title Act or its State counterparts.

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 RDA and section 109 of the Constitution operate, the answer may depend on a horrifying number of variables (I can readily list at least 15 each of which can change the result from case to case). The way in which the RDA operates can become a complete lottery and forms part of a

[10] [108]

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 I just posed in vast areas of land with a significant history of tenure change and land use.

I stress that in this respect one can only hold the High Court responsible for this situation to the extent common law principles intrude. The mess is largely the result of multiple interactions between Commonwealth and State statutes and is really the by-product of Australia failing to deal with Indigenous connection to land far earlier in its history.

Second, Justice Kirby has thrown an idea into the ring which I have heard a lot of Indigenous people ask and talk about in the past. Section 116 of the Constitution forbids the Commonwealth from making any law which prohibits 'the free exercise of any religion'.

In *Ward* Justice Kirby suggests that a right based in spirituality, for example, a right there asserted to protect cultural knowledge, may be protected by section 116.[11]

As he acknowledged, the extent to which section 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 place on the spiritual character of native title.

However historically section 116 has been kept on a very tight judicial leash. The High Court has generally looked for laws which specifically target religious practice. Laws of general application are very unlikely to breach section 116 on this fairly narrow view of the freedom. But that limitation may not apply to 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 Justice Kirby has pointed to a new source of constitutional support for native title rights.

[11] [586]

Third the degree to which native title rights enjoy another constitutional guarantee – that of just terms for the acquisition of property – is a large and complex question. I will simply say this.

Justice Gummow, the judge Andrew Lynch identified this morning as the current High Court's barometer in constitutional cases (at least statistically), has pre-empted the question in a case about the loss of mining rights, when Stage 3 of Kakadu National Park was declared.

In *Newcrest* in 1996 Justice Gummow took a technical refinement of the law on 'acquisition of property' previously applied only to rights created by Parliament - the so-called 'inherent vulnerability' doctrine – and used it to deny to Indigenous people the benefit of one of the few express guarantees in the Constitution (section 51(xxxi)). Meanwhile non-Indigenous people continue to enjoy constitutional protection for their land and property rights and indeed in the 1990s the just terms guarantee has been expanded, not contracted, to cover a range of other quite novel situations as well.

I have argued elsewhere that this proposition about native title and section 51(xxxi), as well as being racially discriminatory, is not well grounded in constitutional authority and should be rejected if the issue comes directly before the High Court again.

I refer you also to some comments by Justice Callinan in *Ward* (with the concurrence of Justice McHugh) casting doubt on whether native title rights and interests really amount to rights of ownership 'enjoyed by others in the community'.[12]

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

[12] [665]

Finally this takes us to the issue of rule of law. Last Tuesday week the High Court confirmed that the Australian Constitution is framed upon the assumption of the rule of law.[13]

If one goes to the classical British text on the rule of law, Dicey 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'.[14]

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.

In terms of basic common law presumptions, native title holders already began well behind the starting line in terms of equality before the law. 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.[15]

Second, native title holders did not enjoy the benefit of the common law presumption that compensation is payable if property rights are extinguished.[16]

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[13] *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 at 31 per Gleeson CJ. See also Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [103].

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[15] *Western Australia v Commonwealth* (1995) 183 CLR 373 at 452-453 per Mason CJ and Brennan, Deane, Toohey, Gaudron and McHugh JJ.

But after the native title test cases last year we can unfortunately add more presumptions and protections 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.[17] I can't go into that here. It was an argument left open in *Mabo No 2* but the current High Court closed the door on it quite emphatically in *Ward*.[18]

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 6 judges in a High Court native title case, only 7 years ago. These days the presumption continues to make its appearance (at least with those judges who have not now discarded it altogether) but we have seen that somewhere along the line it has completely lost its bite as far as native title holders are concerned.[19]

The effects of its dilution are seen everywhere in extinguishment doctrine: take 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. The doctrine of partial extinguishment is therefore not necessary to secure the rights of other people in their land. Nonetheless discussion of impairment or regulation appears to have almost dropped off the horizon in 2002.[20] The readiness to find partial extinguishment suggests a very different High Court to the one which in *Mabo No 1* said that the draconian

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[16] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15 per Mason CJ and McHugh J, Brennan and Dawson JJ agreeing.

[17] Kent McNeil, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989, 298.

[18] [93] see also [82]

[19] *Wilson v Anderson* [61] per Gaudron, Gummow and Hayne JJ.

[20] Example of 'designated area' in [141]-[144].

result of extinguishment will be found in a statute only if its terms do not reasonably admit of another.

Add to this the looming possibility just mentioned that native title holders may not enjoy the same protection for their property interests under the just terms guarantee in the Constitution as other Australians do.

I leave you with a remark made by Justice McHugh in *Ward*. He said: ‘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.’