Native title after *Ward* and *Wilson*

Anxious native title lawyers, waiting 18 months for the High Court's August decisions on the Miriuwung-Gadjerrong (Kimberley) claim and NSW perpetual leases, sometimes remarked 'the High Court is *over Mabo*'.

They were apprehensive that the Court would resolve conflicts between the title discovered in 1992 and two centuries' worth of property law in a manner seriously disadvantageous to native title. The seeds of this approach were present in *Mabo*, although they are not often remarked on, and were strengthened by discriminatory 1998 amendments to the *Native Title Act*. The lawyers' apprehension in part reflected insistence by the judges during the appeals that they focus on the legislation and not the cases (*Mabo* and *Wik*) which preceded it.

In many respects, the decisions in *WA v Ward* and *Wilson v Anderson* confirm the lawyers' pessimism. However, they also contain some surprises.

It has been widely reported that the Court ruled in *Ward* that native title claims cannot be made to minerals and petroleum in the ground. This is the practical result for most Australian jurisdictions. The Court interpreted a Western Australian statute vesting property in *in situ* minerals in the Crown as not allowing continued existence of native title to the minerals. There are similar statutes elsewhere: for example, Justice Drummond reached the same conclusion about Queensland in an early round of the *Wik* litigation.

However, in New South Wales, where the device of asserting Crown property to minerals has not been used except for some coal, some minerals have been granted to private landowners while others have been 'reserved' to the Crown. The *Ward* ruling cannot apply to these reserved minerals. Native title claims to in-ground resources in New South Wales are unlikely to succeed as a matter of *evidence* - because people have trouble proving traditional rights to use them - rather than as a matter of *law*.

Perhaps surprisingly, unlike the Full Federal Court, the High Court has left open the question of whether native title rights survive to *the surface* of land held under mining leases. Where Aboriginal people prove traditional hunting rights to mining lease land, these might survive because a mining lease amounts to the grant of *exclusive rights to mine*, not exclusive rights to occupy, the land. This conclusion is likely to apply elsewhere in Australia, and the Court has not made an exception to it for large projects like the Argyle diamond mine.

The Court's general approach confirms that native title law is no place for cross-cultural tolerance. This has been evident in other court decisions. Unlike north American jurisdictions, which tended to treat 'Indian' or 'aboriginal' titles as equivalent to full ownership, Australian law (with the significant exception of the trial judge, Justice Lee, in the *Ward* case) insists that the rights conferred by 'native' title can only reflect *proven tradition*. The High Court has hinted that Aboriginal spirituality alone *may* connect people to land even when they can't prove recent presence on it, but spirituality alone is unlikely to generate recognisable rights. Claimants need to prove all aspects of their tradition which they seek to practise as

native title. This burden sits oddly with the history of Australian Aboriginal affairs - a history of the suppression of tradition - but native title law does nothing to overcome this. As is now well known, there are no excuses for people who lost their tradition by being driven off their land or removed from their families as children.

Paradoxically, Australian law may still refuse to 'recognise' some indigenous land traditions as native title. This is because the cultural categories which underlie Australian law are intolerant of different ways of classifying the world. Although native title litigation now occurs under the *Native Title Act*, the 'recognition' principles are still the ones laid down in *Mabo*: principles of 'common', or judge-made, law. (The Act mainly changed the 'extinguishment' principles.) The common law of property is all about possession and use of land, and the 'recognition' principles insist that Aboriginal concepts of land ownership which differ from this 'pragmatic' model are unenforceable. Thus, for example, native title claimants have been unable to convince the courts to recognise as native title their traditional rights to control the painting of land-related motifs. To Australian law, these are issues for the law of intellectual property - which in Aboriginal terms also deals with them unsatisfactorily.

The two cases contain important detail on the relationship between particular land dealings and native title. Sometimes this flows from the statutory 'extinguishment' principles; sometimes Parliament has left the question up to the judges. The Court has abandoned its earlier idea that government dealings with government land are different from Crown grants of title to private citizens: in all cases, extinguishment depends on the extent to which the *rights* created by the Crown clash with those dependent on native title, not on how the land is *used*. Thus statutes which allowed the 'vesting' of land in 'trustees' (eg cricket clubs or local councils) allowed native title to be extinguished, but the mere setting aside of land for 'expansion' or 'buffer' zones around projects like the Ord River scheme did not necessarily extinguish it. *Ward*'s most unjust outcome is that native title has been extinguished completely in WA national parks. This is because former Premier Charles Court used the 'vesting' device to place Crown lands in the hands of that state's national parks authority. It remains to be seen whether the current scheme of parallel Commonwealth and state native title legislation has left space for WA legislation to redress this anomaly.

The Court in *Wilson* treated NSW Western Lands Division perpetual leases as the evolutionary successors of a type of freehold title granted by early NSW governors, for which the holders paid 'rent' and kept convicts. Like these freehold titles, grants of perpetual leases extinguished native title completely. Although *Wilson* concerned a former soldier settler block, the reasoning seems to apply to larger perpetual leases in this region and perhaps in others. Perpetual pastoral leases in the Northern Territory are more recent and less 'precarious' inventions. The *Native Title Act* already treats these as at least partly extinguishing native title.

The judgments emphasise native title holders' contemporary rights to compensation for extinguishment of their titles. This is an under-litigated area, as most claimants to date have pursued land, not money. Some of the judges' reasoning on this issue flows from the application of the Commonwealth *Racial Discrimination Act* to native title between 1975 and 1994. The Court has decided clearly for the first time that this statute *invalidated* general state land laws which singled out native title for extinguishment (eg by allowing the land to be granted to third parties without

consent), but that it merely *supplemented* state laws which forgot to include native title in land acquisition compensation regimes. So this compensation flows from placing native title holders in the same position as other landowners. It will be payable for extinguishment of native title by the establishment of WA national parks, and there is a good argument that this compensation should take the form of grants of title to park land rather than money (something the *Native Title Act* permits). The judges in *Wilson* also warn that even the amended *Native Title Act* requires payment of compensation to the extent that it purports to 'confirm' historical extinguishment but really increases it.

The *Ward* case is ongoing: the High Court has sent several issues back to the court below. The costs of this litigation in three courts over five years remain uncalculated, but the dissenting judges (McHugh and Callinan) point out that these may outstrip benefits to the claimants. The irony is that the largest areas of land on which 'title' has been 'recognised' since *Mabo* are Crown land in Western Australia where 'recognition' has come not from the courts but by agreement with the (present) state government. However, the rights 'recognised' in some of these WA settlements fall well short of ownership of the land, amounting to not much more than rights to use it for traditional purposes. Agreement to give Aboriginal people land rights was legally possible without *Mabo* or the *Native Title Act*, but even *with* them lack of political will often prevents it.

On the other side of the continent, *Wilson* stands as a warning to individuals seeking to claim co-existing native title in 'settled' Australia: lose and you risk having a substantial costs order made against you. Such claims are clearly only for the impecunious.

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