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Sean Brennan

Abstract

The High Court decision in Griffiths v Minister for Lands, Planning and Environment (2008) 235 CLR 232 concerned a challenge to compulsory acquisition notices issued over native title land in the Northern Territory. The legal significance of the case is that a High Court majority expressed no particular anxiety over the use of compulsory acquisition powers to deliver the property of one private owner into the hands of another. It suggests an even more permissive attitude to "private-to-private transfers" than Kelo v City of New London 545 US 469 (2005), one of the most controversial decisions of the United States Supreme Court in recent years. The practical significance of Griffiths is that it confirms the special vulnerability of native title land in towns and cities in the Northern Territory and potentially other jurisdictions as well.

Comments

Editor: Dan Meagher

COMPULSORY ACQUISITION OF NATIVE TITLE LAND FOR PRIVATE USE BY THIRD PARTIES

The recent High Court decision in *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 concerned a challenge to compulsory acquisition notices issued over native title land in the Northern Territory. The *legal* significance of the case is that a High Court majority expressed no particular anxiety over the use of compulsory acquisition powers to deliver the property of one private owner into the hands of another. It suggests[1] an even more permissive attitude to "private-to-private transfers" than *Kelo v City of New London* 545 US 469 (2005),[2] one of the most controversial decisions of the United States Supreme Court in recent years. The *practical* significance of *Griffiths* is that it confirms the special vulnerability of native title land in towns and cities in the Northern Territory and potentially other jurisdictions as well.

LEGAL AND FACTUAL CONTEXT

Timber Creek is a small town with a mixed Aboriginal and non-Aboriginal population of about 300, near spectacular gorge country in the north-west of the Northern Territory. It is in the Victoria River district, made famous in 1966 by the Wave Hill walk-off, an event that ushered in the modern land rights era. Much of the land surrounding Timber Creek has been successfully recovered by traditional owners under the Commonwealth's statutory land rights regime.[3]

The *Griffiths* matter was intensively litigated, in two parallel streams, for almost a decade. A native title claim over multiple parcels of unalienated Crown land inside the township of Timber Creek was brought by two senior representatives of the Ngaliwurru and Nungali peoples, Alan Griffiths and William Gulwin, in 1999. Weinberg J of the Federal Court found that the Ngaliwurru and Nungali peoples were an Aboriginal community that had maintained strong traditional connections to country.[4] Their legal position was further strengthened on appeal to the Full Court, when the Bench accepted that rights of exclusive possession, rather than non-exclusive native title rights, had been established over the township land.[5] The High Court declined the Northern Territory's application for special leave to appeal.[6] Essentially, the Federal Court has recognised the Ngaliwurru and Nungali peoples as the owners of 45 parcels of unalienated Crown land in the town.

Simultaneously, the parties have been litigating compulsory acquisition questions. The Northern Territory Government wished to grant interests over land in Timber Creek to Lloyd Fogarty and other commercial operators, for activities such as goat and cattle breeding. For some time, Fogarty had been engaging in like activity on some of the subject land. In 1999 and 2000, the Northern Territory Government issued compulsory acquisition notices over areas of Timber Creek township subsequently shown to be native title land. This was a prelude to granting leases and, later, freehold titles to Fogarty and other business operators.

The Ngaliwurru and Nungali peoples exercised their legal right to lodge an objection to the compulsory acquisition notices in the Northern Territory Lands and Mining Tribunal. The tribunal

[1] The word "suggests" is used out of recognition that the majority declined to state the outer limits of the statutory power to compulsorily acquire property. A second reason for caution is that the leading majority judgment notes a comment from an appeal judge below, that promotion of industry can be a government purpose. However the High Court majority judges say this observation was not "critical" to their decision: *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [31] (Gummow, Hayne and Heydon JJ).

[2] Discussed later in the article.

[3] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

[4] *Griffiths v Northern Territory* (2006) 165 FCR 300.

[5] *Griffiths v Northern Territory* (2007) 165 FCR 391.

[6] *Northern Territory v Griffiths* [2008] HCATrans 123.

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member, Loadman M, recommended that the acquisitions proceed.[7] Griffiths and Gulwin successfully persuaded a judge of the Northern Territory Supreme Court to overturn that recommendation,[8] but then lost at the next level of appeal.[9] The matter ended up in the High Court, with a decision handed down on 15 May 2008.

THE HIGH COURT CASE

The *Lands Acquisition Act 1978* (NT), in s 43, allows the Northern Territory Government to compulsorily acquire property, including native title, "for any purpose whatsoever". The main question for the High Court[10] was whether the power of expropriation is as wide as a literal reading of that phrase would suggest or whether the section falls short of authorising acquisitions designed to deliver land into private hands for the pursuit of private profit.

By a majority of five judges to two, the court said that the wording of the statute was wide enough to allow Fogarty and other businesses to acquire title to the native title holders' land via the government's compulsory acquisition powers. Kirby J and the newest member of the bench, Kiefel J, dissented. They said that the *Lands Acquisition Act* could not be interpreted as authorising compulsory acquisition for a private rather than a public or government purpose.[11]

The leading majority judgment of Gummow, Hayne and Heydon JJ[12] surveyed amendments to the *Lands Acquisition Act* since 1982 that began with the removal from s 43 of the requirement that acquisitions be "for public purposes". The present wording of the section came about in 1998, following changes consequent on the amendment of federal native title legislation.[13] The *Griffiths* majority strongly implied that the change in wording over time by the Northern Territory legislature was referable to the High Court's decision in *Clunies-Ross v Commonwealth* (1984) 155 CLR 193,[14] and was thus an attempt to avoid judicial reading down of the power.[15] The court in *Clunies-Ross* had interpreted the phrase "for a public purpose" in federal acquisition legislation as a particular kind of statutory limit on the power of expropriation.[16]

The majority in *Griffiths* was unwilling to state the outer limits of the power in s 43 of the Territory's acquisition statute. But the insertion of the words "for any purpose whatsoever" in 1998, the joint judgment said, must at least extend the power to cover acquisitions for the purpose of granting a lease or fee simple over unalienated Crown land under the *Crown Lands Act 1992* (NT).[17] For the majority, it was "pertinent but not critical" that promoting industry in townships is a recognisable government purpose.[18]

In reaching its conclusion the majority distinguished cases raised by the Aboriginal appellants. In *Werribee Council v Kerr* (1928) 42 CLR 1, the High Court examined the exercise of a power of

[7] *Minister for Lands, Planning and the Environment v Griffiths* (2002) NT LMT 26, 20, 37.

[8] *Griffiths v Lands and Mining Tribunal* (2003) 179 FLR 241.

[9] *Minister for Lands, Planning and the Environment v Griffiths* [2004] NTLR 188.

[10] A second challenge to the acquisitions, based on the wording of s 24MD(2)(b) of the *Native Title Act 1993* (Cth), was rejected by all seven judges of the High Court.

[11] Kirby J called the dealings in *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 "classic 'private to private' acquisitions" and therefore beyond the statutory power (at [123]). Likewise, Kiefel J regarded the acquisitions as devoid of a government purpose: "the exercise of the power stands as no more than a clearing of native title interests in order to effect leases and grants of the land for private purposes" (at [181]).

[12] Gleeson CJ expressed his agreement with the reasoning of the joint judgment (*Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [1]), as did Crennan J (at [155]).

[13] *Native Title Amendment Act 1998* (Cth).

[14] Kiefel J disputed this, pointing out that the public purpose requirement was removed before *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 was decided: *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [166].

[15] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [28]-[29].

[16] *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 198.

[17] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [30].

[18] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [31].

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compulsory acquisition under Victorian local government legislation. Higgins J said:[19]

> The Legislature did not give to municipal councils power to interfere with the private title of A for the private benefit of B.

The majority in *Griffiths* said that that statement was not applicable to the statutory inter-relationship[20] of the *Crown Lands Act* and the *Lands Acquisition Act* in the Northern Territory.[21]

Kirby J accepted the plausibility of the majority's finding, based on a "purely literal" approach to the *Lands Acquisition Act*. However, he said there were "larger considerations at stake" and for that reason he favoured a stricter interpretation of the statutory power of acquisition.[22] One countervailing factor was the common law's vigilant approach to legislation depriving individuals of established legal rights.[23] Another was what he regarded as an atypical use of compulsory acquisition powers in this instance, for the achievement of a private benefit rather than a public or government purpose.[24] A third factor was what he regarded as the special sensitivity of expropriating native title, especially "for the immediate enrichment of private commercial interests".[25] To authorise acquisitions for private use, the language of the statute must be specific and unmistakeable,[26] and Kirby J found that s 43 fell short of that requirement.

Kiefel J found it unnecessary to place Aboriginal land in a special category of judicial solicitude. Absent manifest intention, it was inconsistent with authority, and with the basic rules of construction where statutes potentially interfere with vested interests, to suggest that an acquisition law authorises "the use of the power to benefit private interests".[27]

Kiefel J said that the phrase "for any purpose whatsoever" in s 43 requires the demonstration of *a* purpose and moreover, she said, that must be a *government* purpose. That latter proposition is so, she said, because the High Court has made clear in cases dealing with similar wording as to purpose in legislation and in s 51(xxxi) of the Australian *Constitution* that the acquiring authority itself must have a need for the land, meaning some proposal for the land.[28] For Kiefel J, authority demonstrates that a reference to "purpose" in an acquisition statute ordinarily means "government purpose", and therefore the removal of the words "public purpose" from the Territory statute and their eventual replacement in 1998 with "for any purpose whatsoever" was not important for resolving the *Griffiths case*. The word

[19] *Werribee Council v Kerr* (1928) 42 CLR 1 at 33.

[20] The majority said that the expression "for any purpose whatsoever" in s 43 of the *Lands Acquisition Act 1978* (NT) "must at least include for the purpose of enabling the exercise of powers conferred upon the executive by another statute of the Territory": *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [30].

[21] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [32]. Kirby J disagreed, saying that there was no distinction between conferral of such powers on a minister, a statutory authority or a local authority (at [134]). Kiefel J (at [162]) accepted that local government powers may be more narrowly geared to specific purposes, but she maintained that the public use/private benefit distinction apparent in *Werribee Council v Kerr* (1928) 42 CLR 1, as well as *Prentice v Brisbane City Council* [1966] Qd R 394, is not context-specific.

[22] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [76]-[77].

[23] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [108], [115].

[24] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [110].

[25] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [114]. Kirby J recognised that native title is not immune from legislative action, but referred to the spiritual connection of Aboriginal people with their land recognised by the High Court in native title and other cases, the belated legal recognition of traditional rights to land and overseas precedents dealing with expropriation of indigenous lands as special factors. He said that, rather than being "no more than another interest in land", native title is "special, distinctive and legally unique" (at [103]-[104]). The judgment is a little ambiguous as to whether he was discussing a special, stricter rule of statutory interpretation protecting native title rights (eg at [103]) or simply an application of a general rule to a specific context (eg at [108]).

[26] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [107].

[27] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [162].

[28] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [170]-[171]. The judgments referred to are those of Dixon J in *Andrews v Howell* (1941) 65 CLR 255, Dixon CJ in *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 and the court in *Clunies-Ross v Commonwealth* (1984) 155 CLR 193.

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"public" was redundant, or at least, in the absence of a clear statement of intention:[29]

> [t]he omission of the word "public" in the section provides no warrant for a construction that the power of acquisition may be used for private purposes in connection with the land.

In her view, the acquisition notices disclosed no government purpose. The subsequent conferral of interests on Fogarty and others was a non-governmental purpose not authorised by the Act.[30] Kiefel J said that no direct case had been made that the private-to-private acquisition was for a governmental purpose of promoting industry and that the evidence from the proceedings below was of private not public benefit. She conceded that, constitutionally, such an acquisition might be possible and referred to the grey area of takings for the purpose of economic development traversed by the United States Supreme Court in *Kelo*, but said that these difficult questions did not arise in *Griffiths*.[31] The statute, as worded, simply did not extend that far.

PRIVATE-TO-PRIVATE TRANSFERS

The question of expropriating property from one owner so that another private interest can make a profit from it may arise in a *constitutional setting*. In the United States, the Fifth Amendment to the *Constitution* finishes with the words "nor shall private property be taken for public use, without just compensation". For decades the Supreme Court has given a wide definition to "public use", eg allowing government policies of "urban renewal" to proceed on the rationale that private recipients of expropriated land were making a wider contribution to the community.

The Supreme Court decision in *Kelo* involved expropriation of waterfront property, including the residence of Susette Kelo, by an offshoot of the city authority. The drug company Pfizer proposed to locate a new research facility in New London. The City of New London wanted to ride on a mini-boom that it believed would follow from the influx of new workers to the area. The development plan involved expropriation followed by re-granting of the land for a hotel and conference centre, commercial space, residential units and so on.

Kelo was decided 5:4 in favour of the taking of property in that case by a "bitterly divided court".[32] In its wake, Harvard Law Professor Laurence Tribe said that the "whole country seems to be down on *Kelo*"[33] and Professor Cass Sunstein wrote that the case produced "the most visible public backlash in recent years"[34] against a Supreme Court decision. Legal debate has ensued over whether *Kelo* was an extension or merely a confirmation of the existing breadth of the term "public use". One point of consensus, though, between the majority and minority in the Supreme Court was that the power of eminent domain (compulsory acquisition) did not extend to authorise pure private-to-private transfers.[35]

In *Griffiths* the challenge was argued as a matter of statutory interpretation, with both dissenting judges noting the constitutional questions that potentially lurked nearby the litigated case.[36] Given the wording of this specific Northern Territory acquisition law, the plaintiffs did face a somewhat uphill battle on the statutory interpretation front. That said, the High Court's majority view suggested no great anxiety about private-to-private transfers effected by government expropriation.

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[29] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [172].

[30] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [174], at least on the commentator's interpretation of the reasoning in that paragraph. Elsewhere, Kiefel J also said that any wider economic spinoffs from the grant of interests to Fogarty were merely an effect or consequence of the acquisition, too remote to constitute its purpose (at [181]-[182]).

[31] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [182]-[184].

[32] Tribe LH, *Keynote Address to the Third National Convention of the American Constitutional Society* (30 July 2005), http://www.acslaw.org/pdf/tribetranscript.pdf viewed 15 June 2008.

[33] Tribe, n 32.

[34] Sunstein CR, "Backlash's Travels" (2007) 42 Harv CR-CL L Rev 435 at 447.

[35] *Kelo v City of New London* 545 US 469 at 477-478 (2005)

[36] One consideration for the plaintiffs may have been the perilous status of the "just terms" guarantee in the Northern Territory on current authority. In *Newcrest Mining v Commonwealth* (1997) 190 CLR 513, three judges of the High Court were prepared to overrule the earlier High Court decision of *Teori Tau v Commonwealth* (1969) 119 CLR 564 and confirm the applicability of

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This, arguably, puts the court at odds with a strong common law tradition of protecting private property rights.[37] For outside the constitutional setting there is, as the dissenters in *Griffiths* pointed out, authority here and overseas for adopting a very strict construction of acquisition statutes of this kind.

The common law achieves protection of property rights by pursuing an interpretive strategy of deterrence, based on political embarrassment. The requirement for an unambiguous expression of intention before a power will be construed as authorising a private-to-private transfer means politician legislators must run the gauntlet of public opinion. It is politically embarrassing to appear to side with developers against individual owners of homes or businesses, and politically difficult to get such changes to acquisition law through parliaments, especially if an upper house is beyond government control.[38]

Recent events in Australia confirm this is an effective judicial strategy for protection of private property rights. When critical media attention was drawn to proposed planning law changes in New South Wales that would have authorised private-to-private transfers using the compulsory acquisition powers of the government, the minister withdrew the amendments.[39] When Noel Pearson and Father Frank Brennan lobbied to ensure that amendments to the *Aboriginal Land Act 1991* (Qld) did not authorise private-to-private transfers, the Queensland Government backed down and inserted an amendment that it said would remove those concerns.[40]

There is no question a grey area exists where the distinction between public benefit and private use blurs. Reasonable minds can differ on where that line is drawn. What is striking about *Griffiths* is the technocratic detachment of the High Court majority's approach to statutory interpretation. Centuries of orthodox common law principles justify a degree of judicial animation when Parliament allows coercive powers of expropriation to be used for private benefit.[41]

The vulnerability of Aboriginal land in townships

Legal claims of Aboriginal ownership in towns and cities have always faced particularly high levels of resistance.

In the area of native title, the Full Federal Court[42] has sent Wilcox J's decision on the claim over the Perth metropolitan area[43] back to trial after an array of parties challenged the finding that Noongar people had maintained their traditional connection to the area. The Larrakia native title claim in the

the just terms guarantee to acquisitions of property in federal territories attributable to Commonwealth law. However, the fourth member of the majority, Toohey J, refrained from overruling *Teori Tau*, indicating that just terms would apply in a territory if a law was referable to a power contained in s 51 of the *Constitution* and not merely to the territories power in s 122.

[37] See Gray K, "There's No Place Like Home!" (2007) 11 J South Pac Law 73; Taggart M, "Expropriation, Public Purpose and the Constitution" in Forsyth C and Hare I (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade QC* (Clarendon Press, 1998) pp 91-112.

[38] See Kirby J's discussion in *Griffiths* of political accountability and democratic answerability: *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [106], [113].

[39] Frew W, "Compulsory Purchase Backdown", *The Sydney Morning Herald* (10 May 2008) p 3; ABC Radio National, "Land Appropriation in the NT", *The Law Report* (20 May 2008), http://www.abc.net.au/rn/lawreport/stories/2008/2247140.htm#transcript viewed 18 June 2008.

[40] Queensland, Legislative Assembly, *Parliamentary Debates* (13 May 2008) pp 1556-1562 (CA Wallace, Minister for Natural Resources and Water and Minister assisting the Premier in North Queensland).

[41] Another policy consideration said to underpin the requirement of unmistakeable intention is the discouragement of political corruption and cronyism. If the courts make it too easy for government officials to exercise acquisition powers for the enrichment of third parties the temptation exists for developers to use their wealth and their influence with government to achieve a result they cannot obtain by commercial agreement with the property owner who will not sell. See Gray, n 37 at 82; *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [132] (Kirby J).

[42] *Bodney v Bennell* (2008) 167 FCR 84.

[43] *Bennell v Western Australia* (2006) 153 FCR 120.

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Darwin area has been rejected,[44] despite day-to-day recognition by successive federal and Territory governments of both contemporary Larrakia organisations and Larrakia traditional ownership of the Darwin area.

The statutory land rights regime in the Northern Territory, from its inception in the 1970s, simply prohibited claims to land within towns or cities. In 1978, the Northern Territory Government sought to frustrate land claims by redefining the boundaries of Darwin, Katherine, Tennant Creek and Alice Springs under the *Town Planning Act 1964* (NT). For example, Darwin, which at the time occupied 142 km^2, was declared for the purposes of the Act to have ballooned out to an area of 4,350 km^2. That outlandish strategy was ultimately thwarted after a High Court case over the Kenbi land claim, but it delayed pursuit of the substantive matter for years.[45]

The *Griffiths* decision conforms to this pattern of legal difficulty for Aboriginal people whose traditional country includes areas falling within towns or cities. The result vindicates a legislative strategy of the late 1990s engaged in by the Howard Federal Government and the Northern Territory Government led by Chief Minister Shane Stone, which reduced the position otherwise held at law by native title holders.

When the *Native Title Act 1993* (Cth) was originally enacted, the Keating Federal Government offered specific protection to native title holders, in the face of two categories of development seen as particularly harmful or impactful: mining and compulsory acquisition. That protection took the form of a statutory right to negotiate. It prevented either category of development proceeding on native title land before a time-limited period for negotiations had elapsed. If no agreement was reached, the Act allowed for arbitration of an outcome by a new federal body, the National Native Title Tribunal or a State body set up on an identical basis. Notably the second reading speech at the time only contemplated compulsory acquisitions "for public purposes such as infrastructure".[46]

The Howard Government's amendments to the *Native Title Act* in 1998 diminished the right to negotiate in various ways. In general, it remained the case that a compulsory acquisition that puts the property in the hands of a non-government party[47] is subject to the right to negotiate and, if necessary, an arbitral hearing before a federal body. But, the right to negotiate was replaced with a lesser procedural right when the land involved is inside a town or city.[48]

In that circumstance, the amended Act gave native title parties merely the right to object before what the Act referred to as "an independent person or body".[49] In the Northern Territory that meant a general magistrate, with no specific native title expertise, sitting as the Lands and Mining Tribunal.[50]

[44] *Risk v Northern Territory* [2006] FCA 404 (Mansfield J); *Risk v Northern Territory* (2007) 240 ALR 75 (Full Court). Special leave to appeal to the High Court was refused: *Risk v Northern Territory* [2007] HCATrans 472.

[45] *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 175 (Gibbs CJ). Ultimately, the Aboriginal Land Commissioner, Olney J, found that the Northern Territory Government had changed the town boundaries for the improper purpose of putting the land beyond claim.

[46] Commonwealth, House of Representatives, *Parliamentary Debates* (16 November 1993) p 2877 (Paul Keating, Prime Minister).

[47] This outcome has been possible under the *Native Title Act 1993* (Cth) since its inception. But allowing the vesting of the acquired land in a non-government party does not automatically mean acquisitions for purely private use or purpose are permitted.

[48] *Native Title Act 1993* (Cth), s 26(2)(f). Corresponding changes were made to the *Lands Acquisition Act 1978* (NT) to maximise the potential capacity for the extinguishment of native title permitted by the compulsory acquisition provisions in the federal *Native Title Act*.

[49] *Native Title Act 1993* (Cth), s 24MD(6B)(f). Kiefel J discussed the limitations of the objection procedure in s 24MD in *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [176]-[177].

[50] The decision of the magistrate in the *Griffiths* litigation reinforces concerns about this diversion of matters from the federal body with expertise in native title matters: *Minister for Lands, Planning and the Environment v Griffiths* (2002) NT LMT 26, 20, 37. For example, the decision asserts that as long as the *Lands Acquisition Act 1978* (NT) and the intended acquisitions comply with the *Native Title Act 1993* (Cth), it is futile to inquire into any perceived inconsistency with the *Racial Discrimination Act 1975* (Cth) "because that is of no consequence" (at [379]). This is not consistent with s 7 of the *Native Title*

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According to the Northern Land Council, dozens of compulsory acquisition notices were issued after the 1998 changes to the federal and Territory legislation, over unalienated land in towns across the Northern Territory, some for public purposes and others for private purposes.[51] For Aboriginal people, unalienated land is amongst the precious remaining stock of recoverable country not taken after more than 200 years. Kirby J called it "the classic circumstance in which Australian law gives recognition to an established Aboriginal native title".[52]

But, the Territory experience shows that politically it is precisely this category of land that is vulnerable to being picked off and delivered into the hands of private operators, particularly in towns where not even the right to negotiate applies. As the lawyer for the Aboriginal parties, Stephen Gageler SC, told the High Court, it may be "that the Territory Government goes around acquiring freehold land for the purpose of allowing someone else to run a goat farm on it. It may happen, but we are not aware of it".[53] There is potential for a legal challenge to the skewed pattern of compulsory acquisition notices of the 1998-2001 period on the grounds of racial discrimination. This may be one factor that has stayed the hand of the Labor administration in the Territory that inherited the notices but apparently did not progress them.[54]

Conclusion

In New Zealand, when the mass transfer of State assets to corporatised entities threatened to do away with the remnant Crown land that might otherwise be available to address past dispossession through negotiated settlements with Maori, the Court of Appeal raised its hand. Drawing on principles embedded in the New Zealand legal system, the court interpreted statutory powers in a way that protected threatened elements of the projected indigenous estate.[55]

In Australia, the 1998 amendments increased the vulnerability of native title land that exists as unalienated Crown land, especially in towns and cities. The High Court majority in *Griffiths* rejected the invitation to scrutinise statutory acquisition powers by reference to different, but also deeply embedded, legal principles. This suggests that the source of a remedy for Aboriginal people may lie instead with the Commonwealth Parliament and Government. The rules for extinguishment of native title are set out in the federal *Native Title Act*.[56] The purposes for which native title might be compulsorily acquired can be unambiguously defined in a way that would regulate all exercises of acquisition powers by State and Territory governments affecting native title.

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Act. The magistrate was dismissive of witnesses who later gave evidence that was accepted in the Federal Court trial. He appeared to have difficulty with evidence as to dreaming stories (eg at [174]) and stated that in any case there would be no significant impact from the compulsory acquisitions in that respect (at [493]).

[51] ABC Radio National, n 39.

[52] *Griffiths v Minister for Lands, Planning and Environment* (2008) 82 ALJR 899 at [62].

[53] *Griffiths v Minister for Lands, Planning and Environment* [2005] HCATrans 233.

[54] The Principal Legal Officer of the Northern Land Council, Ron Levy, told ABC Radio National that "it remains the case that the Territory government's inherited these proposed acquisitions, it has a new policy, it should implement the new policy, because if it doesn't, a serious question arises as to whether there is some systemic discrimination in the powers only being used in relation to Native Title owned by Aboriginal people, but not in relation to private property owned by other people": ABC Radio National, n 39.

[55] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. The reference to the *Treaty of Waitangi*, and hence consideration of Maori interests, was explicit in the Act, but the decision was nonetheless ground-breaking and a significant shock to the New Zealand Government.

[56] Section 11(1) of the *Native Title Act 1993* (Cth) states: "Native title is not able to be extinguished contrary to this Act."

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