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Property Rights

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Abstract

Four recent decisions concerning native title and land rights confirm that the approach of the High Court to statutory interpretation has become a focal point in defining the relationship between indigenous peoples and the wider Australian community. These recent decisions and the longer-range judicial development of Australian law on Indigenous property rights raises questions about the consistency with which traditional common law principles of interpretation have been applied. After more than three decades of statutory land rights in the Northern Territory, recent developments suggest a perhaps higher than suspected capacity for Australian law and politics to accommodate strong Aboriginal property rights and decision-making power. This raises questions whether the legal containment of native title by judges and politicians in the aftermath of Mabo (No 2) was an over-reaction to uncertainty and somewhat of a missed opportunity.

Statutory interpretation and indigenous property rights

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Four recent decisions concerning native title and land rights confirm that the approach of the High Court to statutory interpretation has become a focal point in defining the relationship between indigenous peoples and the wider Australian community. These recent decisions and the longer-range judicial development of Australian law on indigenous property rights raise questions about the consistency with which traditional common law principles of interpretation have been applied. After more than three decades of statutory land rights in the Northern Territory, recent developments suggest a perhaps higher than suspected capacity for Australian law and politics to accommodate strong Aboriginal property rights and decision-making power. This raises questions whether the legal containment of native title by judges and politicians in the aftermath of Mabo (No 2) was an overreaction to uncertainty and somewhat of a missed opportunity.

INTRODUCTION

After a hiatus in High Court litigation involving indigenous people and land,¹ the High Court delivered four significant decisions between mid-2008 and early 2009. While three decisions confirmed the strong legal position held by Aboriginal groups under statutory land rights regimes, the fourth confirmed the comparative vulnerability of native title.

The introduction of statutory land rights from the late 1960s and, later the recognition of native title, brought about a new era in Australia public law. Fundamental questions were reopened, regarding the relationship between Australia's first peoples and those who came later. Several decades into this process, these larger constitutional issues are being mediated in part by more specific and detailed exercises in statutory interpretation by the High Court. Important questions arise about equivalence of treatment for indigenous property rights. Are traditional common law presumptions protective of property rights being consistently applied when it comes to Aboriginal land rights and native title? Have indigenous groups shared the benefit of other normative principles in the law of statutory interpretation? This article will examine those questions with a particular emphasis on High Court decisions since 1992, commencing with the four important cases from 2008-2009.

THE IMPORTANCE OF STATUTORY INTERPRETATION AND OF PERCEIVED INDETERMINACY

The Diceyan idea that the law of statutory interpretation has constitutional significance remains strong. It speaks to the power of the courts not only to apply the law but also, in interpreting the meaning of statutory language, to scrutinise carefully the exercise of power by the elected branches of government in a rights-protective way.

The "principle of legality", for example, has been a prominent feature in the law of statutory interpretation in recent years, with a readily recognisable constitutional character. It presumes that Parliament does not intend the abrogation of fundamental rights and freedoms. To rebut the presumption, politician-legislators must make their intention unambiguously clear and accept the

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¹ The decade between 1992 and 2002 saw 10 major High Court decisions on native title and then none until *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232.

political costs for explicit rights infringement.² Thus the judiciary nudges the legal system and the elected branches of government in the direction of rights protection.

Indeterminacy is often the precondition to the deployment of particular principles or techniques of statutory interpretation. If language is held to be unambiguous, if Parliament's intention is said to be clear, then "interpretation" is unnecessary and determinate meaning can be ascribed to the statutory text. By the exercise of the threshold judgment as to the existence or absence of ambiguity, appellate courts such as the High Court of Australia determine whether and when they will apply these principles of interpretation. In the way they express their reasons for decision, the courts also exert influence over the extent to which *the need for such interpretive principles to be applied* is readily perceived by others.

An example helps to illustrate the point. It involves a recent High Court case about the compulsory acquisition of non-indigenous property rights and a common law precept said to derive from the principle of legality, the presumption against legislative interference with vested property rights.

In 2009, in *Fazzolari*,³ the High Court unanimously vetoed the compulsory acquisition of private land in Parramatta. Under a public-private partnership agreement, the Council had issued compulsory acquisition notices over two private blocks which the developer Grocon was then to include in a wider redevelopment project. Under the relevant local government statute, an acquisition "for the purpose of re-sale" could only occur with the consent of the owner, a condition which was not satisfied here.

The court had to take two analytical steps to reach a conclusion as to whether these acquisitions were for the purpose of resale:

1. determining the level of generality at which the *purpose* of the acquisitions should be characterised (was it to put the specific properties in the hands of Grocon or was it merely part of a wider purpose, being the redevelopment of the civic centre?);
2. determining whether the Council declaring itself "trustee of the land in return for Grocon's provision of money and money's worth"⁴ was a resale of the land for the purposes of the relevant statute.

While acknowledging the existence of these analytical steps, the judges in the plurality (Gummow, Hayne, Heydon and Kiefel JJ) expressed a conviction that there was a single answer to the question posed. The acquisition was "for only one purpose: the purpose of re-sale".⁵ They saw no ambiguity and their judgment was devoid of reference to the principle of legality or any other normative standards from the law of statutory interpretation.

By contrast, for French CJ (in a single judgment reaching the same result) there was more than one possibility and, in a situation where coercive governmental power was being used to interfere with private property rights, he saw the need to discuss rights-protective principles of statutory interpretation. He noted a common law "presumption, in the interpretation of statutes, against an intention to interfere with vested property rights"⁶ dating back to Blackstone, repeatedly endorsed by

² "[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual": *R v Secretary of State for Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffman).

³ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603.

⁴ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 632.

⁵ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 631.

⁶ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619.

the High Court and consistent with international human rights law. He suggested that the presumption was a specific manifestation of the wider “principle of legality” and (citing his predecessor Gleeson CJ) an aspect of the rule of law.⁷

Resorting to a repertoire of statutory interpretation principles – including reference to “ordinary meaning”, “context”, “purpose” and “the established rules for the construction of statutes affecting property rights”⁸ – French CJ concluded that the acquisition was relevantly for the purpose of resale. In choosing among alternative findings, the interpretive factors just referred to had a decisive effect or, as he put it, “a particular consequence for the way in which the purpose of the relevant acquisition is identified”.⁹

Three points from this brief analysis of *Fazzolari* are relevant. The first is that several members of the contemporary High Court see determinacy in statutory language where others see ambiguity. When that is so, those first-mentioned judges will have a greater tendency to refrain from using the principle of legality and other normative aspects of the law of statutory interpretation.

The second is that the present Chief Justice of the High Court Robert French, like his predecessor and his counterpart on the New South Wales Supreme Court,¹⁰ regards the principle of legality as an appropriate judicial tool for rights protection and an essential element of Australian constitutionalism.

The third is that the Chief Justice, and indeed a majority of the current High Court bench,¹¹ accepts the traditional common law view that property rights belong in the category of fundamental rights and freedoms presumptively protected by the principle of legality.¹²

With these points in mind, this article explores the relevance of statutory interpretation to the strength of indigenous property rights in Australia. It does so initially through the prism of four land rights and native title decisions delivered by the High Court in 2008-2009 and, later, by reference to some wider features of judicial decision-making on native title.

FOUR HIGH COURT CASES FROM 2008-2009

The cases are reasonably diverse. Three were decided following the grant of special leave to appeal from a federal, State and Territory court respectively, each from a different legal regime (Northern Territory land rights, New South Wales land rights and native title) while the fourth was a Northern Territory land rights matter on demurrer in the original jurisdiction of the High Court. The non-chronological order employed below begins with the least complex case and proceeds to the most technically involved one.

Wagga Motor Registry

Decision

In the *Wagga Motor Registry* case¹³ the court found that a decision to sell a derelict government building coupled with preparatory steps to put it on the market did not constitute “use” of the land, meaning it was claimable under New South Wales land rights legislation.

⁷ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619.

⁸ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 620.

⁹ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 620.

¹⁰ See *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 (Gleeson CJ); Spigelman JJ, “Principle of Legality and the Clear Statement Principle” (2005) 79 ALJ 769.

¹¹ *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409 at 421 (French CJ, Gummow, Crennan and Bell JJ).

¹² This point is made recognising that, due to the proliferation of statutes in the 20th century and into the 21st century, the protective coverage of the principle of legality is subject to closer scrutiny and a distinction has been drawn between “common law rights” and “fundamental” ones. See, eg Spigelman, n 10 at 777.

¹³ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285.

The land rights legislation in New South Wales is unique in several respects. Notably, the claims process has an open-ended operation and turns exclusively on a “tenure condition”. If an Aboriginal Land Council lodges a claim to an area that meets the statutory definition of “claimable Crown lands”, the Minister must transfer the land to it.

The relevant part of s 36(1) at the time of this case defined “claimable Crown lands” as:

lands vested in Her Majesty that, when a claim is made for the lands under this Division –

- (a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Consolidation Act, 1913*, or the *Western Lands Act, 1901*;
- (b) are not lawfully used or occupied; and
- (c) are not needed, nor likely to be needed, for an essential public purpose.

Many cases in the Land and Environment Court and the Court of Appeal have explored the meaning and applicability of the words of exclusion in that definition of claimable land. The *Wagga Motor Registry* case was the first to test the boundaries of claimability under the 27-year-old Act in the High Court.

In 2005 the New South Wales Aboriginal Land Council lodged a claim to a corner block in Wagga Wagga. A two-storey brick building, once used by the State government as a motor registry and later for storage, stood “derelict”¹⁴ on the site and “nothing had been done on the land for a considerable time before the claim was made”.¹⁵ The Minister refused the application, stating that “the land was lawfully used and occupied by the Department of Lands in preparing the land for sale”. The Minister was referring to various administrative steps that were set in train after December 2004 to put the land on the market. The Minister’s refusal to grant the land was upheld in the Land and Environment Court,¹⁶ but that decision was overturned in the New South Wales Court of Appeal.¹⁷ The Minister obtained special leave to appeal to the High Court, which delivered its decision on 2 October 2008.

All five members of the High Court upheld the Court of Appeal decision, ordering the Minister to transfer the land to the Wagga Wagga Aboriginal Land Council. Hayne, Heydon, Crennan and Kiefel JJ wrote a joint judgment and Kirby J a separate judgment concurring with some of their reasoning and with the result. The decision to sell and the steps taken preparatory to sale did not constitute “use” of the land, the court said.

The joint judgment adopted a highly fact-specific approach to resolving the case. While acknowledging that the Act is “intended for beneficial and remedial purposes”,¹⁸ the plurality declined to confirm that this parliamentary intention has interpretive significance. This contrasted with Kirby J in the High Court appeal and the general trend in New South Wales courts below. For example, in the New South Wales Court of Appeal in 2001, Spigelman CJ (Powell JA and notably Heydon JA, as he then was, agreeing) said:

The beneficial purpose of the legislative scheme of the *Aboriginal Land Rights Act 1983* suggests that the exceptions to the right to make claims on Crown land should be narrowly construed.¹⁹

It was not necessary, said the plurality in *Wagga Motor Registry*, “to invoke some principle of ‘beneficial construction’ to resolve the issue in this case. No question is presented in this matter which requires a choice to be made between competing constructions of section 36(1)(b), one described as ‘broad’ and the other as ‘narrow’”.²⁰ Instead, the focus was on “the legal characterisation of the facts

¹⁴ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 298.

¹⁵ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 307.

¹⁶ *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 158 (Biscoe J).

¹⁷ *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 (Mason P, Giles and Tobias JJ).

¹⁸ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 300.

¹⁹ *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)* (2001) 50 NSWLR 665 at 674, cited by Mason P in *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 at 24.

²⁰ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 301.

established in the courts below” – that is, “the acts, facts, matters and circumstances which are said to deprive the land of the characteristic of being ‘not lawfully used or occupied’”.²¹

This case, the joint judgment seemed to say, was about the *application* of a statute not its *meaning*. Textual analysis of a provision is a necessary precondition to its judicial application in a given context.²² There was, however, only a brief discussion of statutory interpretation. The plurality endorsed the lower courts’ characterisation of the word “use” as “protean” and disclaimed any present or past judicial attempt at exhaustive definition of the term. The joint judgment did say that recurring physical acts on the ground “by which the land is made to serve some purpose will usually constitute a use of the land”²³ and that outside these common situations there might be other conceivable forms of occupation or use.²⁴ The difficulty for the State in this case was that taking steps in the administrative realm to put the land on the market through actions physically divorced from the land itself was not regarded as “use” of the land.²⁵

Kirby J found himself in a position similar to that which he occupied later in *Wurridjal*.²⁶ That is, although receptive to the Aboriginal party’s ultimate argument, he insisted (contrary to some of his colleagues) that the words of the statute could plausibly deny the Aboriginal group concerned a legal benefit under the Act. In *Wagga Motor Registry* this outcome was avoided, he said, only by opting for a beneficial and remedial interpretation of the statutory term “use”. Viewed in the abstract, he said, acts of dominion over the land, such as readying it for auction, might arguably constitute use. Endorsing the interpretive approach of the Court of Appeal, he said that words of exclusion should be construed narrowly and “use” should be actual not notional, potential or nominal.

Analysis

The plurality judgment upheld the decision of the court below in the first High Court decision on claimability under the New South Wales Act. The plurality described a typical situation where land would be found to be “lawfully used” and left interpretive room for the many possibilities that might arise in future factual scenarios. That could be regarded as an entirely satisfactory outcome to the grant of special leave.

But just as the phrase “for the purpose of re-sale” in *Fazzolari* necessitated at least two analytical choices and yet, for the plurality, was unambiguously clear, so here the word “use” was “protean” and yet its application to the facts was clear-cut.

More significantly, the New South Wales Court of Appeal has stated an important interpretive principle about this “primary mechanism” for giving effect to the Act’s beneficial purposes²⁷ – the definition of claimable land. Because of its beneficial and remedial purpose, exceptions to claimability in s 36 should be construed narrowly. That is not a fact-dependent proposition. Nor is it hostage to the variability of future factual scenarios. It seems oddly reticent to acknowledge that the Act is “intended for beneficial and remedial purposes”, yet decline to confirm that this has interpretive significance.

If such reluctance is attributable purely to judicial parsimony or minimalism, it seems a risky and unpersuasive approach. By reducing the appellate judicial task to the technocratic execution of minute

²¹ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 305.

²² “Of course, it is necessary to measure those acts, facts, matters and circumstances against an understanding of what would constitute use or occupation of the land”: *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 305.

²³ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 306. Occupation, likewise, will usually be established when “a combination of legal possession, conduct amounting to actual possession, and some degree of permanence or continuity” is assembled (also at 306).

²⁴ The joint judgment drew attention to *Newcastle City Council v Royal Newcastle Hospital* (1957) 96 CLR 493 where the use or occupation of land extended to keeping an area in its undeveloped state as a buffer zone of clean air and quiet around a hospital.

²⁵ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 at 307-308.

²⁶ *Wurridjal v Commonwealth* (2009) 237 CLR 309.

²⁷ *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 at 24.

tasks of linguistic or ruthlessly fact-specific analysis, important questions of policy and justice may be obscured and consistent outcomes may be harder to achieve. There is a danger that by focusing the lens too tightly, the surrounding context might be excluded from view.

But instead, or in addition, the plurality's refusal to endorse the Court of Appeal's proposition arguably reflects a preference for a more formalistic approach to the High Court's work. In this context, "formalism" refers to a tendency to see a very high degree of determinacy in legal questions, including those that reach appellate courts, and a corresponding belief that judges can typically or frequently reach decisions without resort to wider normative considerations.²⁸ This can include a disinclination to deploy the techniques of statutory interpretation which imply the judicial task involves value-laden choices and issues of justice.

It is questionable whether such a judicial philosophy is well-suited to the interpretation of legislative language where Parliament has made explicit reference to past loss and remedial purposes.²⁹

Griffiths

Decision

In *Griffiths*³⁰ the High Court said that the Northern Territory executive could compulsorily acquire the land of native title holders solely for the purpose of selling or leasing the land to another person for private use.

The case concerned exclusive possession native title land in the remote township of Timber Creek.³¹ It was to be acquired by the government then immediately leased to a commercial operator for profit-making activities, with a freeholding option. The plaintiffs argued that a private-to-private transfer effected through the coercive powers of the State stands in a category of its own under a legal system that has always offered presumptive protection to vested property rights. They said:

There is, or should be, a presumption that, in the absence of clear words or necessary intentment, a statutory power to acquire property by compulsion should not be construed as a power to interfere with the private title of A for the private benefit of B.³²

Though widely worded to cover acquisitions "for any purpose whatsoever", the plaintiffs argued that s 43 of the *Lands Acquisition Act* (NT) did not thereby authorise purely private-to-private transfers, as opposed to acquisitions for more conspicuously governmental or public purposes.

By a majority of five to two the court rejected the challenge to the acquisition notices.³³ The expression "for any purpose whatsoever", the majority said, must include the purpose of enabling the exercise of powers conferred upon the government by other Territory statutes, such as making land grants to third parties under the *Crown Lands Act* (NT).³⁴

²⁸ See Leiter B, "Legal Formalism and Legal Realism: What is the Issue?" (2010) 16 *Legal Theory* 1 at 1.

²⁹ The preamble to the *Aboriginal Land Rights Act 1983* (NSW) includes the following statement:

WHEREAS:

- (1) Land in the State of New South Wales was traditionally owned and occupied by Aborigines;
- (2) Land is of spiritual, social, cultural and economic importance to Aborigines;
- (3) It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land;
- (4) It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation.

³⁰ *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232.

³¹ For a detailed comment on the case, see Brennan S, "Compulsory Acquisition of Native Title Land for Private Use by Third Parties" (2008) 19 PLR 179.

³² *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at 234 (SJ Gageler SC, in argument).

³³ Gummow, Hayne and Heydon JJ delivered a joint judgment. Gleeson CJ agreed with their orders and reasoning, as did Crennan J. Kirby and Kiefel JJ wrote separate dissenting judgments, concluding that the notices were invalid because they stood outside the category of government acquisitions contemplated by the words "for any purpose whatsoever", properly understood.

³⁴ *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at 243.

Analysis

This is a plausible, literal interpretation of statutory language that was broad not narrow. But should the majority have paid more attention to whether another interpretation, of the kind proffered by the plaintiffs, was (i) also supportable and (ii) to be preferred? The issue confronting the court was not so much breadth as *specificity* – in other words, the principle of legality. The Northern Territory Assembly had not run the gauntlet of public opinion in enacting its law, by making explicit an intention to authorise a private-to-private transfer.

The majority engaged only minimally with the ethically-tinged but still legal question posed by the plaintiffs. Satisfied that, textually, the power to acquire in one Act could be interpreted to mesh neatly with the power to grant in another Act, the court paid only brief attention to the broader question of public law at stake. That public law question was whether the courts should *more carefully scrutinise* the exercise of State power, when the State uses eminent domain to divest one private interest of their property rights in order to enrich another.

The plaintiffs could point to a range of legal support for their argument, in High Court and other Australian authority,³⁵ case law from other Commonwealth countries,³⁶ the position on purely private-to-private transfers in the United States Supreme Court³⁷ and leading contemporary writers on public law and private property.³⁸

The majority indicated that the (relatively) plenary power of the Legislative Assembly of the Northern Territory, when compared with a local government body such as that considered in the earlier High Court case of *Werribee Shire Council*,³⁹ provided a basis for distinguishing Higgins J's comment in that case.⁴⁰ With only briefly-stated supporting arguments reliant on apparently self-evident conclusions to be drawn from statutory language, the majority in *Griffiths* skirted the larger question of public law raised by the case. The argument for a presumption against private-to-private transfers in the absence of express language was rejected, but with little discussion of the merits of adopting or not adopting such an interpretive technique.

As with *Wagga Motor Registry*, it is suggested that the majority reasoning in *Griffiths* exhibits a formalist approach to statutory interpretation. In this instance, the apparent reluctance of the majority to see that wider issues of policy and justice warranting judicial attention were embedded in a question of statutory interpretation potentially contributed to an adverse outcome for the Aboriginal plaintiffs. It is noticeable that since *Griffiths*, in 2009 and again in 2010, the court has, outside the native title

³⁵ See the concluding comment by Higgins J in the High Court decision of *Werribee Shire Council v Kerr* (1928) 42 CLR 1 at 33, using propositional language that lent itself to wider normative application. See also *Prentice v Brisbane City Council* [1966] Qd R 394 at 406 (Mansfield CJ).

³⁶ 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* (Oxford University Press, 1998) p 106.

³⁷ In *Kelo v City of New London* 545 US 469 at 477 (2005), Stevens J effectively spoke for both sides of the 5:4 divide in that case when he said "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation".

³⁸ Taggart wrote that across the common law world the constitutional principle that private property should only be taken for public purposes was one of "what Lord Reid once described as the 'fundamental principles' secreted in the law of statutory interpretation": Taggart, n 36, p 112. Likewise Professor Kevin Gray, whose works on property law have been relied on in the High Court, has said that "the assertion of a private form of eminent domain – the 'one-to-one transfer of property' for private rather than public benefit – remains anathema in most legal traditions. This is so even though the taking is coupled with an offer of full monetary compensation": Gray K, "There's No Place Like Home!" (2007) 11 *Journal of South Pacific Law* 73 at 74-75.

³⁹ *Werribee Shire Council v Kerr* (1928) 42 CLR 1.

⁴⁰ *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at 244. Given the propositional language used by Higgins J and wider common law hostility to private-to-private transfers, it is not self-evident that his finding was dependent on the *municipal* status and authority of the government exercising the power of eminent domain. Also, the statutory language in self-government legislation conferring powers on the Legislative Assembly of the Northern Territory is general in nature and thus does not address the point made by the plaintiffs in *Griffiths* made about specificity.

context, strictly construed statutory powers of compulsory acquisition in favour of property-holders, with several judges explicitly referring to the principle of legality.⁴¹

Unquestionably, the wording in s 43 of the *Lands Acquisition Act* (NT) was broad and could conceivably support the Minister's action. Kirby and Kiefel JJ in the minority conceded as much.⁴² It perhaps tested the limits of even a high interpretive threshold.

But the *existence* of such a threshold was surely the first and most enduringly important legal question before the court. Beyond the immediate question of what the text of s 43 means, the court was being asked to recognise a legal principle highly relevant to the fate of a newly-recognised but ancient property right. Given the dimensions of the issue – the legal annihilation of a landed interest that has survived more than 200 years of colonisation and may date back many, many generations – the attention paid to the question, with its unavoidably ethical underpinnings, seems disproportionately brief.

Blue Mud Bay

The vast majority of the Northern Territory coastline is “Aboriginal land”, that is, grants of fee simple to the low water mark made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) to Land Trusts, “for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of the land concerned”. Since 1997, Yolngu traditional owners and the Northern Territory government had been tussling in the courts over the right of traditional owners to exclude fishers from parts of Blue Mud Bay in northeast Arnhem Land and the power of the Territory's Director of Fisheries to grant fishing licences over tidal waters within the boundaries of Aboriginal land.⁴³

Decision

In June 2008 in *Blue Mud Bay*⁴⁴ the High Court confirmed the right of coastal traditional owners under land rights legislation in the Northern Territory to exclude others from the intertidal zone – the area between high and low water mark – including those holding a fishing licence.⁴⁵

The intertidal area in northern Australia can be very wide and also rich in fish and other marine resources. But commercial or recreational fishers who pursue those resources are within the boundaries of Aboriginal land. At Blue Mud Bay this created a dispute which potentially shaped a constitutional case about repugnancy or inconsistency: were the licensing provisions of the *Fisheries Act* (NT) inoperative in the intertidal area of a fee simple land grant made under the Commonwealth's Aboriginal land rights legislation?

Three statutory provisions were central to the case. There was what loosely might be called a “criminal trespass” provision in s 70(1) of the ALRA:

A person shall not enter or remain on Aboriginal land. Penalty: \$1000.

In s 70(2A) there was a statutory defence available to a person charged with such an offence, where they entered or remained on the land:

in accordance with ... a law of the Northern Territory.

Section 73(1) of the ALRA assisted in spelling out what such “a law of the Northern Territory” might be, by contemplating that the Legislative Assembly of the Northern Territory might make concurrent legislation, including among other things:

⁴¹ *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619; *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409 at 421.

⁴² *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232 at 249 (Kirby J), 276 (Kiefel J).

⁴³ *Arnhemland Aboriginal Land Trust v Director of Fisheries (NT)* (2000) 170 ALR 1; *Director of Fisheries (NT) v Arnhem Land Aboriginal Land Trust* (2001) 109 FCR 488; *Gumana v Northern Territory* (2005) 141 FCR 457; *Gumana v Northern Territory* (2007) 158 FCR 349.

⁴⁴ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24.

⁴⁵ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24. The majority consisted of a plurality judgment (Gleeson CJ, Gummow, Hayne and Crennan JJ) and a separate concurring judgment by Kirby J. The appeal was from a unanimous Full Federal Court decision in *Gumana v Northern Territory* (2007) 158 FCR 349.

- (b) laws regulating or authorizing the entry of persons *on Aboriginal land*
 ...
 (d) laws regulating or prohibiting the entry of persons into, or controlling fishing or other activities in, *waters of the sea ... adjoining*, and within 2 kilometres of, *Aboriginal land*. (emphasis added)

Analysis

The High Court majority reached two critical conclusions of statutory interpretation. First, when s 70 of the ALRA prohibited entry “on Aboriginal land”, that included the intertidal zone because land grants were made to the low water mark, even though that last bit of foreshore land was regularly covered by tidal waters. A fisher might be in a boat but could still be trespassing on Aboriginal land, because the boat was inside the Land Trust boundary defined by metes and bounds to the low water mark. Secondly, the majority said that the *Fishing Act* (NT) did not authorise *entry* to anywhere, merely the activity of fishing which was otherwise prohibited.

These findings undermined the defence of licensed fishers, based on s 73 of the ALRA, that they entered “in accordance with ... a law of the Northern Territory”.

Heydon and Kiefel JJ wrote separate dissenting judgments. Put simply, for them “land” meant dry land and “waters of the sea” included tidal waters overlying Aboriginal land, meaning that ultimately the statutory calculus came out in favour of the licensed fishers.

The majority decision in *Blue Mud Bay* said that the inalienable communal fee simple held by an Aboriginal Land Trust is a powerful property right. Despite some restrictions on alienation, reservations of minerals and the exclusion of roads, it was described in the Act as a “fee simple” and therefore “must be understood as granting rights of ownership that ‘for almost all practical purposes, [are] the equivalent of full ownership’”.⁴⁶ In particular, “it is a grant of rights that include the right to exclude others from entering the area”.⁴⁷ The criminal trespass provision in s 70 was dominant, the Territory laws made under s 73 were subsidiary and the fee simple interest was the practical equivalent of ownership. As a further matter of statutory interpretation, the plurality found that the licensing scheme in the *Fisheries Act* (NT) fell short of even setting up a contest between the Territory and Commonwealth laws, because it did not authorise entry to places.

The plurality’s reading of the relationship between s 70(1) and s 73(1) did not need to be exhaustive in order to deal with this litigation. But the analysis of the “balance of power” between the law as expressed by the Legislative Assembly of the Northern Territory and the law as expressed by the Commonwealth Parliament skewed significantly in favour of the property right holders under Commonwealth law. Kiefel J’s dissenting analysis amounted to a very different interpretation of those embedded questions of power and public law.

Kirby J said that the statutory analysis and conclusions in the plurality judgment were “reinforced” by the principles of construction which he said were applicable to the case. He referred to his own judgment in *Griffiths* as well as overseas cases to suggest that when declaring “the ambit of the legal rights to the traditional interests of indigenous peoples living in societies settled during colonial times”, the court should require specificity before finding such rights have been diminished or extinguished.⁴⁸ To this presumption he joined an array of other interpretive principles and considerations which he said also reinforced the majority finding in this case.

Kirby J went as far as suggesting that the plurality had itself applied a presumptive approach.⁴⁹ Certainly the majority and the minority chose to draw opposite conclusions from the coexistence in the ALRA of the prohibition on entry in s 70(1), the grant of “fee simple” interests and the capacity for Territory law-making on matters of entry and fishing in s 73(1). Likewise, the majority’s decision to (a) steer away from a definition of Aboriginal land that would have created a distinction between

⁴⁶ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 63, quoting *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 656.

⁴⁷ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 64.

⁴⁸ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 64.

⁴⁹ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 70-71.

soil and water landward of the low water mark and (b) to confine the authority of the licensing scheme in the *Fisheries Act* (NT) to the activity of fishing alone were noticeable interpretive steps. Kiefel and Heydon JJ (as well as other judges in lower courts) were able to assemble a range of textual and other arguments in favour of an alternative interpretation of Aboriginal rights in the intertidal zone.

The submissions of the Aboriginal parties (which were essentially accepted by the majority) placed no great reliance on any statutory presumption. They did say that “the manifest intent” of the ALRA was “to provide under our legal system real control over the destiny of Aboriginal land ... by the traditional owners”.⁵⁰ They also rejected the implied qualification of the fee simple in favour of fishing licensees advocated by the appellants in the following terms:

the Act has addressed entry on and use of Aboriginal land, directed its attention to those questions, and expressed its intention clearly. Its terms do not permit an implied qualification. Such a construction would not effectuate the beneficial purpose of the Act.⁵¹

In the end, however, the plurality judgment is essentially devoid of the suggestion that either a “clear and plain” requirement for the abridgment of (Aboriginal) property rights applied or that a beneficial interpretation of the ALRA need be taken where questions of statutory interpretation are put in issue.

Regardless, the High Court’s decision provides a glimpse of what arguably could have been practised more often in relation to litigation over Aboriginal property rights. The court took a generous, not constrictive view, of Aboriginal rights⁵² in a politically sensitive area. Rather than retreat from the challenges entailed in giving such property rights fair interpretive treatment, the court constructively pointed out (as had the Full Federal Court) the existence of legal mechanisms by which the diverse interests at stake might be reconciled, through the permit and licensing provisions that operate under or “reciprocally” with the ALRA.⁵³

Wurridjal

The Commonwealth “Intervention” in Northern Territory Aboriginal communities, formally known as the Northern Territory Emergency Response, was launched by the Coalition government in June 2007 and maintained by the Labor government after the November 2007 federal election. It involved a range of sweeping legal, policy and administrative measures, several of which have had an involuntary and intrusive impact on the daily lives of Aboriginal people on Aboriginal-owned land in the Northern Territory.

Wurridjal involved a constitutional challenge to one aspect of the Intervention by two Aboriginal landowners and an Aboriginal corporation from Maningrida, inside the Arnhem Land Aboriginal Land Trust area.⁵⁴ The Commonwealth compulsorily acquired control of the Maningrida township, and 63 other Aboriginal communities in the Northern Territory, for a five-year period. It did so by the involuntary and statutory creation of a lease from the traditional owners to the Commonwealth under

⁵⁰ Transcript of Proceedings, *Northern Territory v Arnhem Land Aboriginal Land Trust* (High Court of Australia, BW Walker SC, 5 December 2007).

⁵¹ *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 42 (BW Walker SC, in argument).

⁵² Interestingly, French CJ subsequently interpreted the plurality’s approach in *Blue Mud Bay* in similar terms to Kirby J’s assessment. French CJ said that it was “a purpose of the Act to confer on some of the important benefits of ownership of land upon traditional Aboriginal owners” and observed that the plurality in *Blue Mud Bay* “characterised the fee simple estates granted under the Act consistently with that purpose”: *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 363 (emphasis added) – perhaps more cautiously negotiating the tightrope of attributing a particular character to other judges’ analysis which they themselves do not profess to be employing.

⁵³ The plurality in the High Court drew attention to the capacity for a Land Council to grant permits for lawful entry under s 5 of the *Aboriginal Land Act* (NT): *Northern Territory v Arnhem Land Aboriginal Land Trust* (2008) 236 CLR 24 at 66-67. See also at 51-52. In addition, the Full Federal Court below (including French J as he then was), pointed out the authority of traditional owners to grant interests under s 19(4A) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth): *Gumana v Northern Territory* (2007) 158 FCR 349 at 376. In a practical sense, this is the direction things have taken in negotiations since the High Court’s decision.

⁵⁴ *Wurridjal v Commonwealth* (2009) 237 CLR 309.

s 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNERA).⁵⁵ Although the resident population remained in place, in legal terms the lease conferred exclusive possession and quiet enjoyment on the Commonwealth for five years. The various terms of the lease could be unilaterally changed by the Commonwealth, but not by the traditional owners.⁵⁶ A provision dealing with the payment of rent left it unclear whether the Commonwealth was obliged to pay.⁵⁷

Apart from five-year leases, the litigation in *Wurridjal* also addressed Commonwealth changes to the permit system. As noted earlier, s 73(1)(b) of the ALRA authorises the Legislative Assembly of the Northern Territory to make “laws regulating or authorizing the entry of persons on Aboriginal land”. The Legislative Assembly has enacted such a law – the *Aboriginal Land Act* (NT) – and it enables the traditional owners or the relevant Land Council to issue a permit for entry onto Aboriginal land. Unless covered by a statutory exception, entry without a permit is illegal.⁵⁸

Although the permit scheme under Northern Territory legislation remained intact under the Intervention, amendments to the ALRA had an overriding effect and also diminished the exclusionary effect of s 70(1) of the ALRA. A new s 70F, for example, authorised entry without a permit by any member of the public “on a common area that is within community land”, if his or her purpose was not unlawful.⁵⁹

The Act imposing five-year leases contained a “fail-safe” provision,⁶⁰ in the event that there was a constitutional obligation – arising from s 51(xxxi) of the *Constitution* – to compensate traditional owners for the impact on their property. This provision, commonly known as an “historic shipwrecks” clause,⁶¹ stated that the Commonwealth was “liable to pay a reasonable amount of compensation” only if the operation of the relevant parts of the NTNERA “would result in an acquisition of property to which paragraph 51(xxxi) of the *Constitution* applies from a person otherwise than on just terms”.⁶² A second Act that contained the changes to the permit system also included an historic shipwrecks clause.⁶³

The plaintiffs’ case was that, despite these clauses, the five-year lease at Maningrida and the changes to the permit scheme effected an acquisition of property on other than just terms.

Decision

The Aboriginal plaintiffs in *Wurridjal* persuaded a majority of the High Court that the constitutional guarantee of “just terms” for the acquisition of property applies to the exercise of the Territories power in the *Constitution* (s 122) and that legislation associated with the Commonwealth Intervention in remote communities effected an “acquisition of property” through its impact on Aboriginal freehold.

⁵⁵ Section 31 of the *Northern Territory National Emergency Response Act 2007* (Cth) granted the Commonwealth 64 such leases – over 26 communities on 18 August 2007, and a further 38 communities on 17 February 2008 (including the town of Maningrida, the subject of the challenge in *Wurridjal*). Although commonly called “five-year leases”, all 64 leases end five years after the commencement of the Act, which means that the “second-round” leases like the one at Maningrida are for four-and-a-half years.

⁵⁶ *Northern Territory National Emergency Response Act 2007* (Cth), ss 31, 35, 36, 62.

⁵⁷ See *Northern Territory National Emergency Response Act 2007* (Cth), s 62(1) and 62(5).

⁵⁸ *Aboriginal Land Act* (NT), s 4.

⁵⁹ This was introduced by another part of the Intervention package, the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), Sch 4, item 12.

⁶⁰ The phrase “fail-safe measures to ensure compliance with s 51(xxxi)” appears in Kirby J’s judgment: *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 424. The precaution of catering to the possibility that legislation effects an “acquisition of property” and activates a “just terms” liability is intended to head off the far more drastic legal outcome of legislative invalidity. See also Kiefel J at 470.

⁶¹ A reference commonly used for such “insurance clauses” against s 51(xxxi) invalidity, harking back to the use of one in the *Historic Shipwrecks Act 1976* (Cth), s 21.

⁶² *Northern Territory National Emergency Response Act 2007* (Cth), s 60(2).

⁶³ *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), Sch 4, item 18.

But the plaintiffs failed, in the demurrer proceeding, to persuade the court that due to the distinctive nature of their property rights there was an absence of just terms in the legislation.

The case was complex and the focus of the discussion here is on the influence of statutory interpretation on the outcome.⁶⁴ A key Aboriginal party – the Land Trust itself – disagreed in important respects with the plaintiffs about how harshly the Intervention legislation impacted on the indigenous property rights at stake. A majority of the High Court substantially adopted the statutory construction arguments of the Land Trust in preference to those of the plaintiffs.

These statutory interpretation arguments were critical to the second of the three ultimate issues in the case – that is, whether an “acquisition of property” had occurred. The strength attributed by the High Court to the Aboriginal fee simple interest cut two ways and in both respects favoured the indigenous landholders as against the government.

The *exclusiveness* attributed by the court to the property right in *Blue Mud Bay* and reiterated here meant that a serious incursion on the interest such as the grant of an exclusive possession lease over the top of it would be characterised as an acquisition of property, despite Commonwealth submissions to the contrary.

The *robust character* of the fee simple interest, as interpreted by the court, also meant that lesser features of the Intervention regime bounced off the Land Trust’s title with no impact. To explain this simultaneous outcome, the reasoning on the acquisition of property argument will be briefly discussed.

In the second ground of its demurrer, the Commonwealth denied that a five-year lease on Aboriginal land involved an “acquisition of property”. This was based on a “shared control” interpretation of land ownership under the ALRA,⁶⁵ which depicted the Aboriginal fee simple as inherently defeasible, because of various qualifications to the title contained in the statute. An inherent defeasibility argument asserts that the potential for subsequent alteration by the Parliament or executive is a vulnerability hard-wired into the property right, making an expectation of compensation illogical or unreasonable.

By contrast, the plaintiffs asserted an acquisition of property, relying on several features of the Intervention legislation. They said that the five-year lease diminished the fee simple interest held by the Land Trust in a way that attracted constitutional protection. They also stressed the impact on rights under s 71 of the ALRA (s 71 rights). Section 71 gives statutory force to an entitlement under Aboriginal tradition for Aboriginal people to enter upon Aboriginal land and use or occupy it. The plaintiffs argued that the five-year lease reduced s 71 rights by making them “preserved rights” terminable at will by the Minister or, alternatively, by subordinating them to the Commonwealth’s right of exclusive possession. Finally, by altering the right of exclusion, the plaintiffs said that the changes to the permit system also constituted an acquisition of property.

The court has long recognised that statutory rights can attract the protection of s 51(xxxi) and the Commonwealth’s argument in *Wurridjal* was rejected by a majority of the court, who found that the five-year lease did effect an acquisition of the Land Trust property.⁶⁶ Gummow and Hayne JJ said that rights characterised in the past as inherently defeasible differed from the “continuing and fixed content” of the Aboriginal fee simple under the ALRA. The ongoing role for the Minister under the ALRA was unremarkable when compared to other fee simple titles around Australia.⁶⁷

⁶⁴ For a detailed analysis of the reasoning in the case, including the first and third limb of the demurrer, see Brennan S, “*Wurridjal v Commonwealth: The Northern Territory Intervention and Just Terms for the Acquisition of Property*” (2009) 33 MULR 957.

⁶⁵ The Commonwealth’s submissions, quoted by Gummow and Hayne JJ: *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 381.

⁶⁶ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 364 (French CJ), 383 (Gummow and Hayne JJ), 466 (Kiefel). Kirby J found that the s 31 lease effected an acquisition of the Land Trust’s property (at 420) and said that the claim by the first and second plaintiffs that they too had suffered an acquisition of property was arguable (at 423); cf Heydon J (at 430).

⁶⁷ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 382.

French CJ said that statutory controls were there mainly to protect, not dilute, the interests of traditional owners, in an Act designed to promote justice and traditional ownership.⁶⁸ Whatever the housing policy objectives of five-year leases might be, the abridgment of ownership rights was undeniable.⁶⁹ In dissent, Crennan J accepted the shared control model and downplayed the conflict with existing property rights.⁷⁰

On changes to the permit scheme, only French CJ analysed their effect on Aboriginal property rights independently of the five-year leases and he found that they did effect an acquisition of property, though again not one above and beyond that already effected by the lease, at least “while the lease remains in force”.⁷¹

A notable feature of the judgment concerned the statutory interpretation of s 71 rights. A majority of the court rejected the plaintiffs’ argument: these rights of entry, use or occupation in accordance with tradition, the majority said, were subordinated neither to the Commonwealth’s right of exclusive possession, nor the will of the Minister. The majority accepted an argument of statutory construction put by the Land Trust, more favourable to the plaintiffs than the plaintiffs’ own interpretation (harnessed as the latter interpretation was to an argument of constitutional invalidity). The s 71 rights held by Aboriginal people under the ALRA trumped the exclusive possession conferred on the Commonwealth by a five-year lease created by the Intervention legislation.⁷² And though treated as “preserved rights”, s 71 rights were not terminable at will, like other preserved rights under s 37 of the NTNERA.⁷³ This is because the notice provision in s 37, designed to announce imminent termination of a preserved right, cannot feasibly be administered for such an amorphous body as the beneficiaries of s 71 rights.

Analysis

As a matter of statutory interpretation, the majority gave the “shared control” argument put by the Commonwealth short shrift. This echoed the Commonwealth’s unsuccessful attempt in *Blue Mud Bay* to deny exclusivity in the intertidal zone, by putting constraints on the trespass provision in s 70 and the fee simple interest held by the Land Trust.

The majority also found, by statutory construction, that s 71 rights were left unimpaired by the grant of the five-year lease to the Commonwealth. Given the extremely resolute nature of the Commonwealth’s approach to the Intervention and the supporting legislation, this was a significant interpretive conclusion.

It is noticeable that in assessing the central questions confronting the High Court in *Wurridjal*, the newly appointed French CJ did not resile from referring to wider normative considerations, such as “justice”, “recognition”, “identity” and opportunity for “economically depressed” people. He did so in “black letter law” fashion, however, by giving voice to expressions of legislative purpose in the statute and the closely related extrinsic material.⁷⁴

It is also interesting to see in *Wurridjal* reference to the requirement for clear and plain language before a statute could be taken to diminish property rights. It is there, not only in the judgments of

⁶⁸ The Chief Justice referred to: (a) the aims of land rights stated by the Woodward Royal Commission, the body which provided the statutory blueprint for the ALRA; and (b) official statements as to the objects of the Act itself: *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 363.

⁶⁹ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 364.

⁷⁰ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 460-461.

⁷¹ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 365.

⁷² *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 379 (Gummow and Hayne JJ), 366-367 (French CJ), 456-457 (Crennan J), 466, 468 (Kiefel J).

⁷³ This is explicit in the judgments of French CJ (*Wurridjal v Commonwealth* (2009) 237 CLR 309 at 366-367), Gummow and Hayne JJ (at 378-379) and Crennan J (at 456) and may be implicit in that of Kiefel J (at 468).

⁷⁴ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 363.

French CJ⁷⁵ and Kirby J,⁷⁶ but also (slightly sotto voce) in the joint judgment of Gummow and Hayne JJ.⁷⁷ The joint judgment also employed a statutory presumption requiring *specificity* in other situations.⁷⁸

BROADER OBSERVATIONS

This section will consider two main issues. The first is the consistency with which statutory presumptions and other interpretive principles have been applied to land rights and native title laws. The second looks at the longer-range judicial development of native title law in the High Court and suggests that choices in statutory interpretation have contributed to the general legal containment of native title's potential, particularly in the past decade.

Statutory presumptions and other interpretive principles

The first issue concerns orthodox principles of statutory interpretation tailored to two situations: laws which have a *beneficial or remedial purpose* and legislation which *threatens vested property rights*.

Beneficial or remedial purpose

Section 3 of the *Aboriginal Land Rights Act 1983* (NSW) refers to five purposes and all speak of the conferral of benefits on Aboriginal people. There is strong textual and judicial support for the notion that the New South Wales law has a beneficial purpose.⁷⁹ Similarly, the long title to the ALRA is “[a]n Act providing for the granting of Traditional Aboriginal Land in the Northern Territory for the benefit of Aboriginals, and for other purposes” and certainly recourse to extrinsic material, such as the Woodward Royal Commission (frequently referred to in the High Court given its very strong influence on the Act), reinforces the impression of remedial legislation intended to benefit Aboriginal people.

The picture is perhaps more complicated with the *Native Title Act 1993* (Cth). As former Chief Justice Murray Gleeson has pointed out, “much legislation is the result of compromise” and “few Acts of Parliament pursue only a single purpose”.⁸⁰ The “recognition and protection of native title” is the first of four objects in s 3 of the Act.

But the Full Federal Court (including French J as he then was) has drawn attention to the strongly normative language of the Preamble, because Parliament expressly said that it “sets out considerations taken into account by the Parliament of Australia in enacting the law”. The Preamble to the *Native Title Act* refers to “dispossession ... without compensation”, “[j]ustice”, “human rights”, the intention of the people of Australia to “rectify the consequences of past injustices” and the intention of Parliament that the Act “be a special law for the descendants of the original inhabitants of Australia” and “intended to further advance the process of reconciliation among all Australians”.

It may be that with a lengthy statute dealing with a range of complex issues in a contested political environment there needs to be a level of specificity in matching an asserted purpose to an identifiable textual ambiguity. But taken too far, reluctance to find textual ambiguity, or to invoke a statutory purpose conceived in general terms, risks emptying the prefatory words chosen by Parliament of their intended normative significance – let alone missing a more broadly conceived notion of purpose derived from extrinsic material.

⁷⁵ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 367. Referring to the statutory entitlement for Aboriginal people to enter upon, use or occupy Aboriginal land in accordance with Aboriginal tradition, French CJ said, “as Gummow and Hayne JJ point out, clear words would be expected if Parliament had intended to authorise the effective repeal or suspension of the operation of s 71 of the *Land Rights Act*”. See also at 355.

⁷⁶ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 406-407. Kirby J referred to a “commonly applied general principle that legislation that *could* be read as diminishing basic civil rights *will* ordinarily be read restrictively and protectively by the courts of this country” and said that the requirement for “specific legislation” had particular application to laws purporting to diminish “any legal interest belonging to indigenous peoples”. See also at 391.

⁷⁷ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 379: “[C]learer words would be expected of the Parliament were it to authorise the Executive Branch to repeal, pro tanto, the operation of s 71 of the *Land Rights Act*.”

⁷⁸ *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 380-381.

⁷⁹ See nn 19, 29.

⁸⁰ Gleeson M, “The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights” (2009) 20 PLR 26 at 32.

Arguably this has happened in the area of native title. There is little sign that the High Court has given weight to any of the above words from the Preamble in test case decisions, despite the court's insistence that "statute lies at the core of this litigation".⁸¹ Likewise (regardless of the result in the case) there was the curious reluctance in *Wagga Motor Registry* – a statutory land rights case – to see potential ambiguity in the "protean" term "use" and to comment on the adoption by New South Wales courts of a "beneficial purpose" approach in construing exclusions from claimability. The risk, in terms of interpretation and thus possibly outcome, is that the court will lose sight of not only purpose but important legislative context as well, in construing, for example, restrictions on claimability.

Threats to vested property rights

What about statutory presumptions, or other protective interpretive techniques designed to deal with legislation that threatens vested property rights, in the context of native title and land rights in Australia? As recently as 2010 a majority of the High Court acknowledged the force of the presumption in respect of non-indigenous property rights, confirming that a compulsory acquisition statute raised "questions of statutory interpretation to be assessed by reference to the statutory presumption against an intention to interfere with vested property rights".⁸²

But the cases from 2008-2009 reviewed here show that the application of these protective principles has been fitful rather than consistent. In native title the benefit of presumptive principles has been conspicuously absent.

From the outset, native title holders were deprived of the benefit of two orthodox principles applicable to property rights. Under the doctrine of extinguishment by inconsistent grant or use by the Crown, native title land could be alienated to another without a prior process of acquisition⁸³ – native title is not "protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant".⁸⁴ Secondly, native title holders have not enjoyed the benefit of the common law presumption that compensation is payable when property rights are extinguished.⁸⁵

The work of Canadian Professor Kent McNeil arguably adds a third presumption to the list. In his carefully argued book on common law Aboriginal title, he said that under the presumptions of English land law indigenous occupiers are prima facie holders of a fee simple title.⁸⁶ The argument was put in *Mabo (No 2)*,⁸⁷ and left open until 2002 when, in the context of arguably contradictory passages,⁸⁸ the court said that the "fact of occupation" is an insufficient basis for legal conclusions about a communal title.⁸⁹

Fourthly, Professors Michael Taggart and Kevin Gray have both argued that the common law presumes that even broadly worded powers of compulsory acquisition cannot be used to effect private-to-private transfers in the absence of very clear indications to the contrary.⁹⁰ In considering such an expropriation on native title land in *Griffiths*, the High Court showed little interest in discussing the statutory presumption pressed by the Aboriginal appellants, or the normative principle which underpinned it.

⁸¹ *Western Australia v Ward* (2002) 213 CLR 1 at 60.

⁸² *Mandurah Enterprises Pty Ltd v Western Australian Planning Commission* (2010) 240 CLR 409 at 421.

⁸³ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 452-453; cf McNeil K, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 *Australian Indigenous Law Reporter* 181 at 190.

⁸⁴ *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84.

⁸⁵ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 15. French CJ recently confirmed the existence of a common law principle "long pre-dating federation that, absent clear language, statutes are not to be construed to effect acquisition of property without compensation": *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 355.

⁸⁶ McNeil K, *Common Law Aboriginal Title* (Clarendon Press, 1989) p 298.

⁸⁷ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

⁸⁸ Brennan S, "Native Title in the High Court of Australia a Decade after Mabo" (2003) 14 *PLR* 209 at 217.

⁸⁹ *Western Australia v Ward* (2002) 213 CLR 1 at 94.

⁹⁰ See nn 36, 38.

A fifth presumption, effectively another manifestation of the principle of legality, is relevant to the doctrine of extinguishment by inconsistent grant. Its disappearance from native title law will be dealt with below.

A patchy enthusiasm for statutory presumptions, and an associated tendency towards minimalism and formalism, may be influenced by judicial perceptions of propriety and likely controversy. Perhaps it indicates discomfort with a normative role for the judiciary and the common law, including the common law of statutory interpretation. These are matters of speculation. In any event, it is difficult to identify a persuasive technical explanation across all the cases reviewed.

Statutory interpretation and the legal containment of native title

The decision in *Blue Mud Bay* and its practical aftermath⁹¹ demonstrates *in the land rights jurisdiction* a developing level of legal and practical comfort with the exercise of Aboriginal jurisdiction and economic empowerment based on exclusive possession rights in areas of shared use and natural wealth. The *Wurridjal* decision, although it went against the plaintiffs on the final demurrer issue, reinforced the robust character of Aboriginal fee simple property rights in the face of concerted legislative action. By contrast, whether one considers (a) the strength and resilience of the property interest in the face of potential diminution or (b) the scope of rights recognised, *native title* has been ascribed a very different legal character.⁹²

The judiciary has emphasised native title's "vulnerability to defeasance at common law".⁹³ Under the Australian common law, it can be extinguished by inconsistent grant without a prior process of acquisition and compensation is not payable. Only the belated intervention of statute (the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act*) offers some qualified protection.

As noted earlier, there is no starting point presumption under the Australian common law that a group of people in occupation of land when the British Crown asserted sovereignty enjoy a *title* akin to ownership, once their pre-existing rights in relation to land are translated into Western legal terms.⁹⁴ Among the rights that really count in the contemporary era, in economic and political terms, is "decisional control over property"⁹⁵ – *Blue Mud Bay* is a good illustration. However, even if original native title rights of exclusive possession can be established, they commonly fall prey across Australia to the doctrine of partial extinguishment. In these circumstances, the key element of decisional control previously enjoyed by native title holders – the right "to be asked permission and to speak for country" – is lost, not only in respect of the coexisting rights holder (such as the pastoral lessee), but as against the world and for all time.⁹⁶

Another notable contrast between land rights and native title is the very limited potential for Aboriginal groups to parlay even exclusive native title rights into something economically empowering in the contemporary sense. Two factors susceptible to judicial control have influenced this outcome. The first is the degree of specificity expected of claimants in enumerating their native title rights.⁹⁷ Eschewing a "title" view in favour of a more atomistic "bundle of rights" conception of native title, the High Court has encouraged claimants to express rights as activities conducted on land

⁹¹ Northern Territory politicians from both sides of politics committed to a negotiated resolution of fishing access issues, despite the High Court decision coming down in the midst of an election campaign. Seafood industry representatives and recreational fishers also committed to negotiating with coastal Aboriginal traditional owners and government about arrangements for access and participation in Northern Territory fishing.

⁹² This is putting aside, of course, the difficulty of proving native title in the first place.

⁹³ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 453, quoted in *Fejo v Northern Territory* (1998) 195 CLR 96 at 118.

⁹⁴ *Western Australia v Ward* (2002) 213 CLR 1 at 91-92, 94.

⁹⁵ Gray K and Gray SF, "Private Property and Public Propriety" in McLean J (ed), *Property and the Constitution* (Hart Publishing, 1999) p 19.

⁹⁶ *Western Australia v Ward* (2002) 213 CLR 1 at 94.

⁹⁷ Simon Young has written of "definitional over-specificity" as one of three doctrinal excesses in Australian native title law: see Young S, *The Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) pp 351-353.

and to describe the content of native title with great specificity.⁹⁸ The level of generality with which a right is expressed of course influences the latitude available to take advantage of new opportunities as they arise into the future.⁹⁹

The second limiting factor is the stern test of continuity contained in the *Yorta Yorta* decision.¹⁰⁰ Native title rights and interests will only be recognised today if they are “traditional”, which the High Court said means that they find their origin in a pre-sovereignty normative system that has had continuous vitality ever since:

Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests.¹⁰¹

Given the economic transformation of the society in which Aboriginal groups find themselves since the British acquired sovereignty, this principle puts severe limits on the potential for native title to assist them in building economic futures.¹⁰²

Building on these examples, which illustrate the contrast with statutory land rights, this final section examines in more detail the judicial approach on three aspects of native title law:

1. the proof of native title, specifically the requirement of continuity;
2. the rules of extinguishment; and
3. the nature of the property interest.

These critical aspects of native title law have been developed in ways that constrain its potential. Several factors have played a role in this, including the High Court’s perspective on the assertion of Crown sovereignty after 1788 and its implications. But clearly, approaches to statutory interpretation have proved crucial. For each of the three issues, the following analysis identifies ways in which native title has been subjected to a form of legal containment, suggesting that less restrictive alternatives existed.

Proof of native title and the requirement of continuity

In Australia we have ended up with a wide gap between, on the one hand, the stubborn tenacity of collective Aboriginal identity based on descent from family and kinship groups connected to particular country and, on the other, the achievability of legal recognition as native title holders. Politics, government and history have played a significant role in that, but so too have the courts.

A major contributing factor is the very literal approach by the judiciary to the question of continuity between Aboriginal societies today and the society of their ancestors at the time the Crown asserted sovereignty. The essential requirement to emerge from the High Court’s decision in *Yorta Yorta* is the demonstration of *continuity*. That is, continuity of a *society* from sovereignty to the present, continuity in the *observance of law and custom* and continuity in the *content* of that law and custom. The degree of legally tolerable interruption to the observance of law and custom and to societal continuity, and the degree of tolerable adaptation and change to the content of law and custom have become key legal issues for indigenous groups, respondents and the Federal Court since 2002.

The Larrakia people’s claim to areas in and around Darwin illustrates the point. The Full Federal Court appeal decision demonstrates the restrictive approach to concessions in *Yorta Yorta* regarding interruption, adaptation and change.¹⁰³ In the Perth metropolitan native title claim by the Noongar of

⁹⁸ *Western Australia v Ward* (2002) 213 CLR 1 at 73, 80.

⁹⁹ See Basten J, *Beyond Yorta Yorta* (Volume 2, Issues Paper No 24, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2003) p 6.

¹⁰⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

¹⁰¹ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 443.

¹⁰² Basten, n 99, pp 6-7.

¹⁰³ *Risk v Northern Territory* (2007) 240 ALR 75. In 2006, the trial judge in *Risk v Northern Territory*, Mansfield J, agreed that the Larrakia were the Aboriginal group in occupation at the time of sovereignty. He also said that the “Larrakia community of today is a vibrant, dynamic society, which embraces its history and traditions” ([2006] FCA 404 at [530]). However, applying the principles of *Yorta Yorta*, he said that he could not recognise them as native title holders. The basic reason was that (due to multiple pressures on their society not of their own making) the observance of traditional law and custom had broken down for

southwest Western Australia, Wilcox J deployed what might be regarded as a “substantive” rather than “literal” continuity standard. In a detailed judgment he couched his factual findings and legal conclusions in terms that appeared consistent with *Yorta Yorta*, finding a correspondence between contemporary traditional norms and pre-sovereignty ones. But, on appeal, in an echo of the Larrakia case, the Full Court found that Wilcox J paid insufficient attention to the observance of law and custom by *each successive generation* between sovereignty and today.¹⁰⁴

The words “continuous” or “continuity” do not appear in the definition of native title in s 223(1) of the *Native Title Act*. In *Yorta Yorta* the High Court attributed its stern requirement for continuity to the statutory use of the word “traditional” in reference to “law and custom”. There is an ordinary or dictionary understanding of this term, as the plurality acknowledged in *Yorta Yorta*, meaning something passed down from generation to generation. But the plurality insisted that there was more to the meaning of the word “traditional” in its statutory context.

At this point there were many sources the court could have gone to in order to inform its analysis of Aboriginal tradition in contemporary Australia. These include the High Court’s decision in *Mabo (No 2)*, the Preamble and objects of the *Native Title Act*, the courts of overseas jurisdictions confronted by similar legal challenges (notably Canada in the modern era), the many reports of Aboriginal Land Commissioners identifying traditional owners under the ALRA in the Northern Territory, indigenous accounts of cultural survival and the voluminous social anthropology literature on Aboriginal groups.

The court referred to none of these sources. Instead it asserted there were two additional layers to the meaning of the word “traditional”:¹⁰⁵

1. the relevant laws and customs are those that existed before the assertion of sovereignty by the British Crown;
2. the system of laws and customs must have “had a continuous existence and vitality since sovereignty”.

The justification for this gloss on the statute drew, instead, on legal positivism, academic jurisprudence from the mid-20th century and, ultimately, a sternly monistic public law conclusion about the significance of the British Crown asserting sovereignty in 1788.¹⁰⁶

The rules of extinguishment law

In 1992 Australia had no law of native title extinguishment. The judges in *Mabo (No 2)* were not required as part of their ruling to determine an actual question of alleged extinguishment. But they did commence the project of developing this body of law. They were particularly focused on the most consequential question hanging over their heads, once they had resolved to confer legal recognition on traditional rights to land which pre-existed sovereignty. What about all the land grants made by the Crown since 1788?

In what has often been described as a “pragmatic compromise” in the spirit of *Johnson v M’Intosh* (the original United States Supreme Court decision recognising Native American property rights),¹⁰⁷ a High Court majority in *Mabo (No 2)* said that native title was validly extinguished by inconsistent grant unattended by a requirement for compensation. Thus, as indicated earlier, native title holders were deprived from the outset of the benefit of two legal principles protective of property rights. Some reasoning was provided in the judgment to justify the vulnerability to inconsistent grants, but none was offered in relation to the question of compensation. There are good reasons to think that the most

a few decades in the middle of the 20th century. According to Mansfield J, this meant that the observance of tradition over recent years was the behaviour of a new society, not the one in existence at the time of sovereignty. His judgment was upheld on appeal by the Full Federal Court.

¹⁰⁴ *Bodney v Bennell* (2008) 167 FCR 84 at 109.

¹⁰⁵ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 444.

¹⁰⁶ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 443-444, 447.

¹⁰⁷ *Johnson v M’Intosh* 21 US (8 Wheat) 543 (1823).

powerful considerations were pragmatic, in light of the very belated stage in Australian history at which legal recognition was being offered to pre-existing rights in land.¹⁰⁸

In 1998, the *Fejo* decision¹⁰⁹ confirmed that fee simple grants totally extinguished native title. In the same year the *Native Title Act*, which originally (in 1993) had said very little about extinguishment, was substantially amended and henceforth prescribed extinguishment outcomes in a wide range of historical situations. The question of whether pastoral leases inflicted partial extinguishment on native title or merely regulated the interest for the duration of the grant, however, had been left unanswered by the outcome in the *Wik* case¹¹⁰ in 1996 and by the *Native Title Act* as amended in 1998. It was finally dealt with in *Ward*¹¹¹ in 2002.

Developing the necessary common law elements of extinguishment doctrine required the court to make choices. Specifically, it had to decide what legal consequences to attribute to the friction (if any) caused when native title interacted with Crown grants or other official action. Those consequences lie on a spectrum between total extinguishment at one end and no effect at the other. The High Court in *Mabo (No 2)* discussed one of those intermediate consequences: native title could be *regulated* by a regime of land management (eg a national park) which had an impact on the native title but not in any permanently destructive way in terms of its legal survival. The *Native Title Act* also introduced the concept of “the non-extinguishment principle”, which essentially provided that a Crown grant, law or other official action would *suppress* any aspect of native title with which it was inconsistent, while allowing compatible aspects of native title to continue. Upon the expiry of the grant, law or official action, the native title would revive to its full capacity.

A question for the court in the *Ward* appeal was whether a suppression or regulation model should apply to the grant of a pastoral lease, as some but not all judges in the litigation below had suggested. The question had massive cultural, geographical and economic implications, given the footprint over Australia created by the present and former pastoral estate. Ultimately, the court identified another place on the spectrum of legal consequences, closer to the total extinguishment end. It said that a pastoral lease would effect *partial extinguishment*, wiping out the inconsistent aspects of native title while allowing the compatible elements of native title to survive and co-exist. Arguments can be found elsewhere as to the relative harshness of Australian extinguishment law and the regrettable absence of a discussion in *Ward* of legal policy issues critical to the choice before the court, such as the *purpose* of extinguishment doctrine and the notion of proportionality.¹¹²

Of interest here is a specific instance of the general principle of legality. In his judgment in *Mabo (No 2)*, Brennan J said that “the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or the Executive”,¹¹³ a sentiment echoed by the joint judgment of six in the *Native Title Act Case* three years later.¹¹⁴

There was some variability in judicial use of this idea in subsequent cases which considered “executive extinguishment” – that is, where extinguishment occurred through the exercise of executive power authorised by a “background” statute (such as a Crown Lands Act).¹¹⁵ This variability made it harder to discern whether, in cases of executive extinguishment, the clear and plain intention test applies *to the legislature* in regard to the background or authorising legislation, as well as to the executive in relation to its particular grant or action. But it is noticeable that all four majority judges

¹⁰⁸ See McNeil K, “The Vulnerability of Indigenous Land Rights in Australia and Canada” (2004) 42 Osgoode Hall LJ 271 at 273.

¹⁰⁹ *Fejo v Northern Territory* (1998) 195 CLR 96.

¹¹⁰ *Wik Peoples v Queensland* (1996) 187 CLR 1.

¹¹¹ *Western Australia v Ward* (2002) 213 CLR 1.

¹¹² See Brennan, n 88.

¹¹³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64.

¹¹⁴ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 423.

¹¹⁵ Compare Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 64 and Brennan CJ in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 85.

in the *Wik* decision employed the principle in arriving at their central conclusion that the grant of a pastoral lease under Land Acts in Queensland did not necessarily extinguish all incidents of native title.¹¹⁶

By the time *Ward* was decided in 2002, however, the interpretive barrier of “clear and plain intention” had been supplanted by the test of inconsistency of incidents.¹¹⁷ It has been argued elsewhere that letting go the idea of clear and plain intention in situations of alleged executive extinguishment allows doctrine to evolve in a harsher form than it otherwise might.¹¹⁸ The “clear and plain” requirement expresses a legal-ethical constraint on extinguishment and its absence changes the atmospherics and permits a more technocratic analysis based on inconsistency alone.

The reasoning in *Griffiths* illustrates why the fading relevance of the statutory presumption of “no extinguishment without clear and plain intention” may be more than a semantic issue in native title. The plaintiffs said that the wording of s 43 of the *Lands Acquisition Act* should not be interpreted to authorise the executive to engage in private-to-private transfers, while the Territory government said that the purpose clause was effectively unlimited.

Would the interests of the Ngaliwurru and Nungali peoples in Timber Creek not stand a better chance of survival in such a contentious situation if the expropriation statute that purportedly authorised their extinguishment was subjected to a legislative requirement of clear and plain intention, than if no such protective principle stood in the way of the executive exercising its statutory powers?

The nature of the title

There has been vigorous debate in Australia since the decision in *Mabo (No 2)* about the proper characterisation of native title as an interest in relation to land and waters. Is it a question of fact or law? Is the precise nature of each group’s native title a fresh question each time, dependent on the facts that can be proven about the particular traditional laws and customs relating to that land and that land-holding group? Or does indigenous occupation of land at the time Britain asserted sovereignty lead to a legal conclusion about the nature of the property right at common law? The debate has been fed by an ambiguity about the issue in Brennan J’s influential judgment in *Mabo (No 2)*.

The ambiguity is deep and complex. Some statements in Brennan J’s judgment appear so emphatic that the issue seems to be foreclosed.¹¹⁹ On the other hand, there are other equally emphatic statements in Brennan J’s judgment that favour a “title” view.¹²⁰

Noel Pearson has sought to reconcile these statements. He suggests that Brennan J adopted a dualist concept of native title. Under this conception, traditional laws and customs are relevant for various purposes, including the *internal* allocation of rights among members of the group. But *externally*, as against the world, it is the common law conclusion drawn from exclusive occupation that is relevant and it gives rise to a communal proprietary title.¹²¹

The ambiguity of *Mabo (No 2)* was sustained in 1999 by what appeared to be an embrace of the “title with pendant rights” view by the High Court majority in *Yanner v Eaton* – this time shaped by an emphasis on the deep and holistic nature of Aboriginal connection to land.¹²²

¹¹⁶ *Wik Peoples v Queensland* (1996) 187 CLR 1 at 130 (Toohey J), 166 (Gaudron J), 185, 186, 202-203 (Gummow J), 247 (Kirby J).

¹¹⁷ *Western Australia v Ward* (2002) 213 CLR 1 at 89; *Wilson v Anderson* (2002) 213 CLR 401 at 434-435.

¹¹⁸ See Brennan, n 88.

¹¹⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 58.

¹²⁰ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51.

¹²¹ See, eg Pearson N, “Land is Susceptible of Ownership” (Paper presented at the High Court Centenary Conference, Canberra, 2003), <http://www.capeyorkpartnerships.com/downloads/noel-pearson-papers/land-is-susceptible-of-ownership-091003.pdf> viewed 4 October 2010.

¹²² *Yanner v Eaton* (1999) 201 CLR 351 at 373.

The *Ward* litigation became the test case for the “title” view. Lee J of the Federal Court put the question in issue because, influenced by the Canadian Supreme Court decision in *Delgamuukw*,¹²³ he concluded in 1998 that native title was a holistic *right to land*.¹²⁴ On appeal, two Federal Court judges disagreed while North J in dissent provided further justification for the trial judge’s decision.¹²⁵

Ultimately, an answer was provided by the High Court in 2002. Native title, the majority indicated, is fact-specific and closer to the “bundle of rights” view, under which native title can be conceptualised as an aggregation of individual rights each potentially severable and extinguishable, than it is to the common law “title” view.¹²⁶

The priority given by the High Court to fact-specific laws and customs has helped defeat legal arguments for a stronger conception of native title in property law terms.

Assessing the judge-made law on characterisation of native title involves a return to the question of statutory interpretation. A central feature of the court’s justification for a more atomistic conception of native title is the wording of the *Native Title Act* and, in particular, the definition of native title in s 223.

In approaching that definition in *Ward*, the plurality said:

The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them.¹²⁷

There is undoubtedly a judicial process of translation entailed here, across a cross-cultural divide, including a translation of spiritual or religious connection into legal language. The reference in s 223 to “rights and interests” may create problems of commensurability and there is a risk that responsibilities or obligations might be separated from corresponding rights. But even accepting all that, the High Court plurality in *Ward* recognised that the notion of “speaking for country” reflects a holistic indigenous relationship to land and quoted Blackburn J who said in *Milirrpum* that there is “an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole”.¹²⁸

Is there really, in the words of s 223, the compulsion apparently felt by the plurality to further fragment what is holistic by translating it into Western legal terms in a diffuse rather than organically cohesive way? At common law, the response of the Canadian Supreme Court, confronted by a similar task of translation in *Delgamuukw*, was to render Aboriginal connection to land *as a holistic interest in Western property terms*. It is suggested that the disaggregating impact of the words in the statute at s 223 has been overstated¹²⁹ and the task of translation, difficult though it is, could be approached in a less atomising way.

The other point about the statutory interpretation approach to s 223 in *Ward* is that it seems again formalistic, implying the near-exhaustiveness of the words themselves. This question of translating connection into legal concepts recognisable by the Western property system was one of the big three tasks facing the High Court in the wake of *Mabo (No 2)*. Large choices confronted the court and it is difficult to accept that they were essentially subsumed by the words of s 223 alone.

¹²³ *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

¹²⁴ *Ward v Western Australia* (1998) 159 ALR 483 at 508.

¹²⁵ *Western Australia v Ward* (2000) 99 FCR 316 at 346, 349 (Beaumont and von Doussa JJ), 514-519 (North J).

¹²⁶ *Western Australia v Ward* (2002) 213 CLR 1 at 94, 91-92.

¹²⁷ *Western Australia v Ward* (2002) 213 CLR 1 at 65.

¹²⁸ *Western Australia v Ward* (2002) 213 CLR 1 at 64, quoting *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 167.

¹²⁹ It is noted, even at a technical level of detail, that the definition of native title in s 223 includes reference to “interests”, a term which is defined elsewhere in the legislation to include not only a power or privilege but also “a restriction on the use of the land or waters”.

It is appropriate, therefore, to consider what the court could have drawn on in arriving at its conclusions about the nature and content of native title, consistent with the terms of s 223. There is the “title view” itself, but we have seen that the court did not accept its viability. But even if the court was not attracted to the idea of drawing a wholly legal conclusion from the fact of occupation, it seems that a more middle-ground perspective was possible, mixing fact and law. For example, even the process of legal translation itself involves judicial selection or choice as to expression and specificity. Once the existence of that choice is admitted, it becomes relevant to consider what could have legitimately informed it. Three possibilities are considered, briefly, below.

The first is the Preamble to the *Native Title Act*. As noted earlier, Parliament deliberately inserted strong normative expressions favourable to Aboriginal and Torres Strait Islander people in the prefatory words to the statutory text. Indeed the Full Federal Court (including French J as he then was) has said that the Preamble declares the “moral foundation” on which the Act rests.¹³⁰

The second is a comparative perspective. As implied earlier, the Canadian Supreme Court in 1997 declared that what “aboriginal title confers is the right to the land itself”.¹³¹ Elsewhere Lamer CJ (for the majority) said:

it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title.¹³²

That analysis is of course not conclusive in the Australian context. But is it profitable to ignore it in the landmark case for all time in Australia, testing the issue?

The Canadian Supreme Court also employs interpretive principles in the area of Aboriginal title which seem entirely open to be considered and adopted by Australian courts as well. These principles acknowledge the embedded questions of power, perspective and justice in adjudicating questions of indigenous rights in settler societies:

Canadian jurisprudence on Aboriginal rights has emphasised the twin tasks of recognition and reconciliation. The goal of reconciliation requires us to abandon an all-or-nothing perspective, and to seek principled compromises based on a shared will to live together in a modern, multicultural society.¹³³

There is also an explicit interpretive commitment to a bicultural perspective which seems entirely appropriate to the translation task confronting the courts.¹³⁴

Such an approach does not pre-determine the outcomes of such litigation. A claim for legal recognition of exclusive rights that derive from traditional law would not automatically succeed under a model of legal reasoning based around reconciliation and compromise. But the Canadian approach does suggest a different mindset to that exhibited by the High Court in its recent native title decisions: a greater potential for the law to take a bicultural perspective and a greater willingness to find room for nuance, coexistence and the survival under Australian law of traditional rights.

Thirdly, there is the perspective of non-discrimination. It is true that:

Mabo (No 2) did not apply a broad principle of non-discrimination; on the contrary, the majority accepted that native title could be extinguished by an inconsistent grant by the Crown.¹³⁵

But, as suggested earlier, the doctrine of extinguishment by inconsistent grant is probably best understood in the political paradigm of pragmatic compromise and the extremely belated recognition of native title 204 years after the assertion of Crown sovereignty. That doctrine aside, the theme of

¹³⁰ *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 at 461.

¹³¹ *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1095.

¹³² *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1080-1081.

¹³³ McLachlin B, “Reconciling Sovereignty: Canada and Australia’s Dialogue on Aboriginal Rights” in Cane P (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) p 102. Note the Preamble to the *Native Title Act* itself makes reference to the Act further advancing the process of reconciliation in Australia.

¹³⁴ *R v Marshall; R v Bernard* [2005] 2 SCR 220 at [48].

¹³⁵ Basten, n 99, p 3.

non-discriminatory treatment for indigenous property rights played a prominent and influential role in the court's reasoning in other parts of the judgment in *Mabo (No 2)*. Brennan J said that international law was a "legitimate and important influence on the development of the common law", especially when it declared human rights such as those dealing with discrimination on the basis of race.¹³⁶ The existence of the *Racial Discrimination Act* and later the inclusion of s 7 in the *Native Title Act* have also given the idea of non-discrimination a prominent place in native title law.

The true significance of the non-discrimination principle in native title law was pinpointed, interestingly, by the plurality in *Ward*, as they discussed the operation of the validation provisions in the *Native Title Act*. They said that the analysis in *Mabo (No 1)*¹³⁷ and the *Native Title Act Case*,¹³⁸ whether persuasive or not, should not now be revisited. The effect of the non-discrimination principle in s 10 of the *Racial Discrimination Act* was described as follows:

the Court has rejected the argument that native title can be treated differently from other forms of title because native title has different characteristics from those other forms of title and derives from a different source.

... the RDA must be taken to proceed on the basis that different characteristics attaching to the ownership or inheritance of property by persons of a particular race are irrelevant to the question whether the right of persons of that race to own or inherit property is a right of the same kind as the right to own or inherit property enjoyed by persons of another race.¹³⁹

In short, it seems appropriate to include the principle of non-discrimination among the criteria by which we evaluate contemporary native title law in Australia, including the High Court's own contribution. Further, it is not unreasonable to expect that, the existence of the "extinguishment by inconsistent grant" doctrine aside, the High Court would pay due regard to developing Australian native title law in a way that is compatible with non-discriminatory principles. Indeed, in s 7(2) of the *Native Title Act*, there is a statutory mandate for the court to construe ambiguous terms consistently with the *Racial Discrimination Act* if that construction would remove the ambiguity.

CONCLUSION

After a hiatus in High Court cases about Aboriginal people and land, four recent decisions provided an opportunity to assess the court's contemporary approach to such questions and to take a longer-range view of three decades of legal development in this area. In particular, the recently-confirmed strength of Aboriginal property interests and decision-making power under land rights in the Northern Territory highlights the degree to which a not entirely dissimilar property right – native title – is tightly constrained.

This article has focused on the contribution made by High Court statutory interpretation to the strength or otherwise of indigenous property rights under Australian law, asking some key questions. Does the court apply a beneficial interpretation of land rights and/or native title legislation in cases of statutory ambiguity or indeterminacy? And is other legislation with a potentially harmful effect on Aboriginal property rights interpreted by reference to the common law's traditional concern for the protection of property rights? It is argued that the application of either and sometimes both of those principles is appropriate here but has been fitful in a way that has not been satisfactorily explained. Using four recent decisions and features of the wider case law on native title, the article has identified a tendency to formalism and highly technocratic reasoning largely devoid of reference to these or other normative principles. On some crucial issues this has led the High Court to bypass alternative legal interpretations less destructive of indigenous property rights.

This tendency to formalism will not *always* be injurious to indigenous plaintiffs, as the results in *Wagga Motor Registry* and *Blue Mud Bay* illustrate. We should not put more store in rebuttable

¹³⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42.

¹³⁷ *Mabo v Queensland* (1988) 166 CLR 186.

¹³⁸ *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373.

¹³⁹ *Western Australia v Ward* (2002) 213 CLR 1 at 105-106.

statutory presumptions than they deserve, nor decide that sophisticated technical or black letter interpretation of statutory provisions is unnecessary and forsake it for some heart-on-the-sleeve approach. And we cannot ignore the complexity of the questions that native title poses for an ultimate appellate court, especially when they are presented in such a belated fashion for decision, more than 200 years after inconsistent land grants and other official actions have commenced to occur.

Nevertheless, there is an evident tendency in these cases to formalism and the avoidance of explicit reference to normative considerations in carrying out statutory interpretation and such an approach is ill-suited to these particular legal paradigms of land rights and native title. These are all legal regimes heavily regulated by detailed statutory provisions. There is a considerable degree of indeterminacy in the wording of those statutes, which is not surprising considering the legal and cross-cultural complexity at stake. This creates situations of interpretive choice for the judiciary, not on isolated occasions, but in test cases over land rights or early-era native title decisions, as a matter of course. The existence of choice invites attention to what wider considerations the judiciary looks to or invokes in arriving at its conclusions.

In the High Court case law on native title, for more than a decade there has been an indifference or a reluctance about resorting to protective or beneficial interpretive principles. That has contributed to an interpretive approach which has constrained and contained the potential of native title. Taking account of an alternative set of wider considerations (such as protective and beneficial principles of interpretation, comparative perspectives and the notion of non-discrimination) was a viable and available legal strategy and could have delivered a different legal account of native title and its potential. In the narrowest sense, at least some of those wider considerations are immediately referable to positive law enacted by the Parliament, that is, the statutory text including its Preamble. And in a broader sense, it is suggested that these wider considerations enjoy legitimacy in other parts of our own legal system and traditions and/or in like jurisdictions (with Canada and specifically British Columbia being the most readily comparable one).

Finally, it is suggested that the abovementioned indifference or reluctance is a source of regret in the sense that it might have turned out differently, without disaster. Even taking into account the different legal paradigm in which native title originated and now exists, and the important technical distinctions that exist between native title and statutory land rights, the most recent land rights cases in the Northern Territory (*Blue Mud Bay* and *Wurridjal*) show a perhaps higher than anticipated capacity for Australia to accommodate strong-form Aboriginal property rights and decision-making jurisdiction in a legal and practical sense.

In native title, did we see, in the parliaments of Australia and the judiciary, a rush for certainty and containment which, in the longer run, might be regretted as somewhat of a lost opportunity to help deal with a multi-generational challenge of fundamental significance: the reconciliation of the legal interests of non-indigenous Australians with those of the first Australians?