

## NATIVE TITLE AND THE CERTAINTY CREATED BY RACIAL DISCRIMINATION

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### I. INTRODUCTION

In July 1993,<sup>1</sup> writing about Aboriginal title, in the context of possible legislative responses to *Mabo (No 1)* and *Mabo (No 2)*, I said:

The [state and territory] legislatures are obviously wrestling with the requirements of the *Racial Discrimination Act* in trying to accommodate the concerns of ... Crown grantees of title. Whether they succeed in enacting valid legislation will depend on the specific terms of the legislation. One would hope that the federal Government, in any overriding legislation, will maintain a steady eye on its international obligations to avoid racial discrimination and not diminish the human rights of Aboriginal people to their property.

That hope has been dashed by the report in March 1999 of the Committee on the Elimination of All Forms of Racial Discrimination ('CERD Committee').<sup>2</sup>

### II. CERD DECISION

The CERD Committee, in its decision of the 18 March 1999, concluded that "the effects of Australia's racially discriminatory land practices have endured as an acute impairment of the rights of Australia's indigenous communities". It further concluded that the "amended [NTA] appears to create legal certainty for governments and third parties at the expense of indigenous title".

The CERD Committee noted four areas in which the *Native Title Amendment Act* 1998 (Cth) "discriminates against indigenous title-holders":

- the "validation provisions";
- the "confirmation of extinguishment" provisions;

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1 G McIntyre, "Aboriginal Title: Equal Rights and Racial Discrimination" (1993) 16(1)*UNSWLJ* 57.

2 CERD/C/54/Misc.40/Rev.2, 18 March 1999.

- the primary production upgrade provisions; and
- restrictions on the right to negotiate.

### III. VALIDATION AND CONFIRMATION OF EXTINGUISHMENT: THE WESTERN AUSTRALIAN COMPROMISE

The *Native Title Amendment Act 1998* (Cth) permitted state and territory Parliaments in Australia to effect 'bucketloads' of extinguishment of native title. In the state of Western Australia alone,<sup>3</sup> this has been mitigated as a result of the lobbying of non-government parties by the Western Australian Aboriginal Native Title Working Group ('WAANTWG').

The Legislative Council passed amendments to the Government's Titles Validation Amendment Bill 1998 (WA). The Government has reluctantly accepted these, while threatening to reintroduce the legislation at some unspecified time in the future to secure the extinguishment which the Legislative Council has not been prepared to enact.

The Legislative Council has passed the *Titles Validation Amendment Act 1998* (WA) (the "TVAA") which includes the full range of validation of intermediate period acts,<sup>4</sup> which it was authorised to validate by the *Native Title Amendment Act 1998*. This results in native title being extinguished over areas covered by such grants which were inconsistent with the possibility of any co-existent native title. The vast majority of the grants so validated were mining tenements which are capable of co-existing with native title.

The TVAA 'confirms' the extinguishment of native title in relation to current freehold, residential leases, commercial leases, mining town leases and other exclusive possession leases. Importantly, as a result of lobbying by the WAANTWG, it deliberately does not include historical tenures in those categories, which it was permitted to include by the NTA.

The TVAA also does not extinguish native title over community purpose leases, which the NTA would have permitted it to, but allows such leases to be dealt with as part of the residual category of leases, which are declared by the legislation to be valid, but also to be open to the possibility that native title might co-exist with them.

The NTA sets out in Schedules to the Act numerous pages of types of leases enacted under legislation of each of the states and territories which the NTA authorises to be included in the legislation of each State or Territory as "Scheduled interests" which extinguish native title.

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3 In each of the other states and territories (except South Australia, which has not yet passed any legislation on the topic) the full range of extinguishment authorised by the Commonwealth legislation has been passed.

4 A term defined in the NTA to include all acts between the enactment of the NTA and the High Court decision in the *Wik Peoples Case* which were invalid because of the existence of native title.

Native title parties have argued throughout the debate in relation to those provisions that the Schedules included a vast range of leases which would not extinguish native title at common law. The non-government parties in Western Australia listened to that argument, and used their majority in the Upper House of the Western Australian Parliament to pass what has been described as a “mini-Schedule”. The “mini-Schedule” includes only those acts which the *Native Title Amendment Act* 1998 authorises the State Parliament to “confirm” as extinguishing native title. Included in the “mini-Schedule” are current leases only, not historical leases, which would have been included if the full Schedule had been adopted. Other categories of leases included are conditional purchase leases in the South-West granted for agricultural purposes with a residential condition, and perpetual leases.

The Western Australian State Government has recently produced a table of Special Purpose Leases which it is suggested comprise the Scheduled interests for Western Australia included within the *Native Title Amendment Act* 1998 (Cth). The intention of the Special Purpose Leases is to extinguish native title and to expand upon the categories of leases referred to above and in the “mini-Schedule” passed by the Legislative Council.

The leases included in the table comprise 1174 leases, are spread throughout the state and fit into a variety of different categories. This may have a significant impact on whether or not they were intended to extinguish native title, for instance:

- 13 of them comprise leases to Aboriginal corporations;
- 60 comprise lease for cropping and grazing;
- 39 comprise leases in excess of 100 hectares (17 of which are for the purpose of cropping and grazing);
- 255 are for residential purposes (but 22 of those are for combined residential and other purposes, such as agricultural or grazing purposes, and two of them exceed areas of 100 ha).

Justice Lee in the case of *Ward and Others on Behalf of the Miriuwung-Gajerrong Peoples v Western Australia*,<sup>5</sup> the first case in Australia which was obliged to deal with the extinguishing effects on native title of a comprehensive range of competing Government grants of title, held that for extinguishment to be affected at common law by the grant of tenures by the Crown to third parties there must exist:

- (i) a clear and plain expression of intention by the Parliament to bring about extinguishment;
- (ii) an act authorised by legislation which demonstrates the exercise of permanent adverse dominion in relation to native title; or
- (iii) actual use made by the holder of a tenure other than native title which is permanently inconsistent with the continued existence of native title.

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5 (1999) 159 ALR 483.

Justice Lee held, adopting those principles, that several types of leases which were the subject of the Miriuwung-Gajerrong claim did not extinguish native title at common law. Examples that are among the types of leases included in the Scheduled interests for Western Australia in the NTA comprise the following:

- (i) Lease to the Commonwealth for an Agricultural Research Station for 50 years;
- (ii) Special leases for cultivation and grazing;
- (iii) Special leases for market gardening from year to year;
- (iv) Special leases for canning and preserving works, for ten years (with no evidence of works or improvements);
- (v) Special lease for a "Tourist Resort" for 21 years (authorising "works", where no works were carried out);
- (vi) Special lease for a jetty and boat launching facilities (for one year, renewable, where no work was carried out);
- (vii) Leases of reserves under s 41(a) of the *Land Act* 1898 (WA) and s 32 of the *Land Act* 1933 (WA);
- (viii) a lease of part of a reserve for "public utility" or "Tropical Agriculture purposes" for one year;
- (ix) Leases for a "Resting Place for Stock" or "Meat Export Works";

It follows from Justice Lee's reasoning and the High Court judgments in the *Wik Peoples Case* that it will be necessary, before one could determine whether a lease extinguishes native title at common law, to know more about a lease than is contained within the table of leases referred to above.

The table provides information only of the purpose, area and regional location of each lease. In order to decide whether a lease might extinguish native title one would need to have information about a range of other matters, including the terms of the statutory provision under which the lease is created, the status of the land over which the lease is granted, the term of the lease, the conditions of the lease, the use (if any) to which the lease has been put.

In the absence of that information one could not reach a properly informed conclusion as to the effect on native title of any of the leases set out in the table.

The following examples of leases, from those set out in the table, are ones which, on the information supplied, one would not ordinarily assume (at least without further information) would extinguish native title:

- Camping 300 ha<sup>6</sup>
- Cropping & Grazing 1591.573 ha
- Cropping & Grazing 927.6689 ha<sup>7</sup>
- Cultivation & Grazing 547.9444 ha

6 Granted to Strelley Housing Society Inc - a Pilbara based Aboriginal Corporation.

7 These are the largest examples of 60 Cropping & Grazing leases in the table.

- General Industry 14164 ha
- Horticultural & Cattle Breeding 8297.507 ha
- Horticultural 1215.667 ha
- Light Industrial 4998 ha
- Slaughter House & Holding Paddock 562.4418 ha

The above leases have been chosen as examples because of their large size and the purposes for which they have been granted. In some cases the size of the lease appears on its face to be excessive for the purpose for which the lease has been granted, and likely to be capable of co-existing with native title. In the case of the camping lease which is held by the Strelley Housing Society for the benefit of Aboriginal people, the intention was almost certainly to preserve a lifestyle consistent with a co-existing native title.

In order to know whether native title could co-exist on such leases one would need to know whether there had been any use of the land for the purpose for which it was granted; and determine whether such use is inconsistent with any continuing possession, occupation, use or enjoyment of the land for native title purposes. On the information supplied, it may be that many of the leases in question have never been used for any purpose inconsistent with the continuing exercise of native title.

It is worth remembering that where leases co-exist with native title, uses pursuant to the lease prevail over native title uses. Pursuant to the NTA, such leases are capable of being renewed, re-granted or extended without attracting the right to negotiate. It follows that there is no need to extinguish native title in order for any of the above leases to retain their full value for the leaseholder.

Overall, the examples selected demonstrate the necessity for a detailed consideration of the leases in question by a judicial process, rather than a partially-informed legislature passing legislation to “confirm” that native title is extinguished in respect of them. One could not be satisfied, on the evidence presently before you, that native title would be extinguished in those cases at common law.

#### **A. Right to Negotiate and Freehold Test**

At common law, native title is “as sacred as the fee simple of whites”.<sup>8</sup> Section 235 of the NTA recognised that a future act was only a permissible future act, and thus valid, if it applied to native title holders as it did to “ordinary title” (or freehold title) holders. The NTA also set out specific procedures for negotiation and arbitration (the ‘right to negotiate’), in relation to any permissible future act which related to a right to mine or a compulsory acquisition for the purpose of a grant to a third party.

Those provisions constituted a recognition of the true position of native title at common law as a title due the same respect as fee simple title. As the Canadian

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8 *United States v Santa Fe Pacific Railroad* (1941) 314 US 339.

Supreme Court pointed out in *Delgamuukw*,<sup>9</sup> in order to give substantive recognition to native title as a *sui generis* form of title, it is necessary to preserve the Crown's fiduciary duty of consultation with the Aboriginal peoples whose lands are in issue. The 'right to negotiate' went some way towards doing that.

The *Native Title Amendment Act* 1998 has severely diminished that recognition of native title and procedure for observance of that fiduciary duty. Significantly, it excluded a large range of future acts from the 'right to negotiate' (NTA ss 26(2) and (3)). They include:

- compulsory acquisitions for infrastructure;
- acts within a town or city, offshore or in the intertidal zone;
- renewals, re-grants or extensions of the right to mine;
- approved exploration acts;
- approved gold or tin mining;
- acts within an approved opal or gem mining area;
- acts comprising primary production, management of waters and airspace; and
- and reservations, leases and the creation of facilities for the public.

That diminution of the recognition of native title by the reduction of the procedural rights accorded to it constitutes extinguishment of that title by a process of 'a thousand cuts'.

## B. Pastoral Upgrade

The *Native Title Amendment Act* 1998 (Cth) also allowed pastoral lease holders to upgrade their activities, beyond those permitted by the lease, without regard to the effect on any co-existing native title (Part 2, Division 3, Subdivision G) constitutes another form of arbitrary extinguishment of native title.

## IV. CONCLUSION

Given the CERD Committee's findings, there is now an opportunity for the Commonwealth and State Parliaments to reconsider the approach they have been taking to native title. Attempts to reconcile competing property interests and introduce procedures that foster continued enterprise within the nation has to date tipped the scales too far. It has tipped the bucket loads of extinguishment upon the Indigenous peoples of this nation who have once again been left at the bottom of the pile: the victims of racial discrimination. This is hardly the manifestation of a spirit of reconciliation between Indigenous and non-Indigenous peoples.

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<sup>9</sup> *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

It is not necessary for states such as Western Australia to rush helter-skelter into extinguishing more native title. The *Wik People's* decision has now been with us for two and a half years and the sky has not fallen in. There has been no challenge to the validity of any intermediate period acts. The registration test under the *Native Title Amendment Act 1998* is beginning to take effect, eliminating large quantities of overlapping claims such as residential leases and other leases which cannot co-exist with native title at common law. These recent developments suggest the prospect of a more streamlined approach to reaching agreements between native title parties and others.

Now is the time for governments to do what the CERD Committee suggests and (excluding the positive aspects of the *Native Title Amendment Act 1998* (Cth), such as the provision for entry into enforceable Indigenous land use agreements):

suspend implementation of the 1998 amendments and re-open discussions with the representatives of the Aboriginal and Torres Strait Islander peoples with a view to finding solutions acceptable to the Indigenous peoples and which would comply with Australia's obligations under the Convention [on the Elimination of All Forms of Racial Discrimination].

Only when we have a set of negotiated solutions between Commonwealth and state governments and major industry groups, on the one hand, and Indigenous peoples of this country, on the other, arising out of a just, generous and statesman-like approach, can we say that the appropriate leadership is being given for Indigenous and non-Indigenous Australians to be reconciled.