Understanding the Maningrida High Court Challenge

In late 2007, faced with the prospects of seeing their traditional lands compulsorily leased for five years, traditional owners of Maningrida mounted a challenge in the High Court to the constitutional validity of this aspect of the Northern Territory Intervention. They were joined as plaintiffs by the Bawinanga Aboriginal Corporation, a community-based organisation that stood to lose its fixed assets as part of the Intervention, with the defendants being the Commonwealth of Australia joined by the Arnhem Land Aboriginal Land Trust represented by the Northern Land Council. The former was a defendant because it sought to uphold the integrity of its Northern Territory Emergency Response (NTER) legislation; the latter because it held the underlying freehold title to the Maningrida land in trust under the *Aboriginal Land Rights (Northern Territory) Act 1976.*

This is a complex case. To hasten a hearing in the High Court, all parties 'demurred' such that constitutional and other legal issues were resolved prior to any factual disputes (such as to the nature of traditional laws and rights) being addressed. The key issue put by the plaintiffs was whether the NTER laws passed in 2007 would provide traditional owners just terms compensation for loss of their lands. The Howard Government had publicly guaranteed such compensation. However, legally there was some ambiguity as to whether this was required by the 'just terms' protection in s51 (xxxi) of the *Constitution* given a 1969 High Court judgement that it did not apply to laws about Australia's Territories under s122. And the plaintiffs also argued that a question arose as to whether the 'reasonable terms' referred to in the NTER legislation actually meant 'just terms' or not, and whether the Commonwealth could actually proceed without paying anything.

The outcome of the case has been interpreted as a victory for the Intervention. But the case only challenged the constitutional validity of one aspect of the NTER laws. The seven judges of the full bench of the High Court delivered six different judgements with six judges allowing the demurrer with Justice Kirby dissenting; orders that the plaintiffs (that is the traditional owners and Bawinanga Aboriginal Corporation) meet the costs of the Commonwealth; and that further conduct of the action be undertaken in a lower court.

In reality what the High Court did was deal with this issue in a technical and legalistic manner that delivered a convenient outcome. Four judges overruled a 1969 decision of the High Court in *Teori Tau v The Commonwealth* which held that just terms compensation need not be paid regarding compulsory acquisition in a territory. This now means that s122 of the Constitution is subject to the just terms requirements of s51 (xxxi) of the Constitution, so on the back of this case all Territorians (in both the NT and the ACT) now have the same just terms compensation guarantees as other Australians if the Commonwealth compulsorily acquires their land. It is ironic that the earlier

judgment that just terms were not payable was made in relation to a challenge by Indigenous owners of the Bougainville copper mine—at which time native title was recognised under Australian law in colonial Papua New Guinea, but not in Australia; and a case in relation to just terms compensation for Aboriginal Territorians delivers new just terms guarantees for all Territorians (including in the ACT).

So that is the constitutional validity issue dealt with. At the same time other legal issues were clarified. A majority found that traditional rights of occupation and use of the Maningrida land under s71 of the *Land Rights Act* were not extinguished by the five-year compulsory leasehold purportedly to remove barriers to the upgrade of township housing and infrastructure, and nor could they be extinguished by Ministerial action under the NTER laws. Similarly the High Court found that sacred sites remained protected under s69 of the *Land Rights Act*. Chief Justice French said that if the abolition of the permits system constituted an acquisition of property (or loss of property rights) then just terms would be payable, but noted that the quantum would be subsumed within the compensation for the compulsory five-year lease.

What are especially important in this case is the contrasting views of Chief Justice French and Justice Kirby on whether these provisions in the *NTER Act* were racist. French and other judges in the majority resolved the legal issues without reference to the broader matters of policy which have been canvassed in the public domain, whereas Kirby argued that in his view if freehold property owned by non-Aboriginal Australians was compulsorily acquired in this way the legal response would be very different. Kirby explored the policy intent of the compulsory acquisition, to intrude in and improve the lives of Aboriginal people in Maningrida without consultation and irrespective of the wishes of the traditional owners and he gave his judgment international human rights and politico-economic dimensions absent in the reasons of others. He rejected the demurrer because he believed that all the facts—history, policy, human rights, not just legal technicalities—should be presented before the High Court for legal issues of this nature to be resolved.

Where does this judgment leave matters? In a legal sense, the High Court leaves open the possibility that the traditional owners of Maningrida can make their case for just terms compensation before a Justice if they believe that the Commonwealth compensatory offer is inadequate. Deciding what is 'just terms' will prove a challenging task given that Aboriginal freehold land is inalienable and so lacks a real estate market, although there are certainly precedents with leasing arrangements. This is especially the case where compensation is sought for matters such as spiritual affiliation. In reality in Aboriginal custom and tradition, land and resources are inseparable and sacredness is not limited to sites but is everywhere. At the heart of this matter are competing cultural views about the meaning of property that the powerful in Australia have always defined in a particular western legal sense that

overlooks and marginalises far less powerful Aboriginal interests.

In a policy sense, a critical issue will be whether the Commonwealth delivers on its intended aim to improve living conditions in the Maningrida township prescribed area in the next five years. At a time when the dominant policy discourse is about 'Closing the Gap' (even if such closing requires the compulsory alienation of people's property) one wonders where there might be any room for the acceptance of cultural difference and a fundamentally different take on the meaning of property? Clearly Australia's particular manifestation of multicultural liberal democracy and recognition of the inherent rights on its first peoples does not stretch that far, to date.

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