Partial Extinguishment — The Next Step In The Recognition Of Native Title *State of Western Australia v Ward*[1]

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I. Introduction

The High Court's decision in *Mabo v Queensland (No 2)*[2] (*'Mabo (No 2)'*) constituted the first step in Australia's common law recognition of native title rights. Despite a number of subsequent decisions, native title remains a highly sensitive and controversial area of the law.

State of Western Australia v Ward (*'Ward'*) represents the practical reality of native title, being the first contested determination of native title over the Australian mainland. The appeal before the Full Federal Court lasted 15 days, making it one of the longest appeals in the Courts' history. Due to the enormous amount of material before it, the Full Court confined its reasons to issues that were both significant and consequential, as opposed to those matters that were merely relevant.[3]

Issues relating to both the claimants' connection with the land and to extinguishment were on appeal. As both the majority and the dissenting judge upheld the trial judge's determination in relation to 'connection', this case note will focus primarily on the issue of extinguishment.

II. The Facts and Trial Judgement

In April 1994 representatives of the Miriuwing and Gajerrong peoples lodged a native title claim over the East Kimberly region of Western Australia and adjacent lands in the Northern Territory. The claim was made pursuant to sections 13(1) and 61(1) of the *Native Title Act 1992* (Cth) prior to the amendments by the Howard government, although the amendments are of minimal relevance to this case.

The lands claimed included a National Park, townships, mining and pastoral leases, Crown land and land reserved by either the State or Territory government. The Native Title Tribunal referred the matter to a single judge of the Federal Court after the compulsory mediation process failed.[4]

After hearing the trial Justice Lee gave judgement for the applicants, holding that native title continued to exist over much of the claimed lands.[5] Further, his honour held that native title had been extinguished over very little of the claim area, despite significant settlement and use. Lee J applied a test for extinguishment derived partly from the High Court judgement in *Fejo v Northern Territory*[6] (*'Fejo'*), but largely from Canadian authority, in particular the decision of the Canadian Supreme Court in *Delgamuukw v British Colombia*.[7]

Justice Lee held that native title cannot be partially extinguished. Drawing a distinction between the 'parasitic' rights of native title and the underlying native title itself, his honour

1 *State of Western Australia v Ward* [2000] FCA 191
2 (1992) 175 CLR 1
3 This approach was adopted previously by the Full Federal Court in *Australian Breeders Co-Operative Society v Jones* (1997) 150 ALR 488 at 503.
4 Ketley, H, 'Miriuwung Gajerrong Native Title Decision', *Native Title News*, Vol 4(1), 5, 1999 at 5.
5 Reported at (1998) 159 ALR 483.
6 (1998) 156 ALR 721.
7 (1997) 153 DLR (4th) 193.

recognised that the former rights, such as the right to hunt and fish, can only be regulated or curtailed and not extinguished unless the native title itself is extinguished.

His honour held that native title proper can be extinguished only where,

a. There was a clear and plain legislative intention to do so;
b. There was an act authorised by legislation which demonstrates the exercise of permanent adverse dominion; and
c. Unless legislation provides otherwise, there must be actual use of the land that is permanently inconsistent with the existence of native title.

This is a test congruent to the 'adverse dominion test' as applied by the Canadian courts. Although he did not expressly adopt the adverse dominion test it was pervasive in Justice Lee's reasoning. The most striking application of these principles came when his honour held that native title had not been extinguished in an area of land flooded to create Lake Argyle and Lake Kununurra. His honour believed that a spiritual attachment remained with the land and that no clear and plain intention to extinguish native title had been shown. Further, although certain usufructuary rights had been curtailed, others, such as the right to fish, could still be exercised.

His honour analysed native title not as 'mere a bundle of rights' but as a communal right to land.[8] Inherent in this paradigm is the view that there cannot be partial extinguishment of native title. Indeed, his honour held that once it is recognised that native title exists over an area of land there 'cannot be a determination (under the Act) that native title exists but that some or all native title rights have been extinguished'.[9] The logical extension of such argument is that native title rights are merely suspended while they are inconsistent with other interests, although this point was not pursued by Lee J.

Additionally, in outlining the rights inherent in native title his honour included the right to 'maintain, protect and prevent the misuse of cultural knowledge'.[10] This was a novel development and a right not previously mentioned by the High Court in *Mabo (No. 2)*, *The Wik Peoples v State of Queensland*[11] (*'Wik'*) or the more recent decision of *Yanner v Eaton*.[12]

III. On Appeal — The Judgement of Beaumont and von Doussa JJ

The Full Federal Court delivered its judgement on the 3 March 2000 and as is the practice for certain cases of public interest included a summary accompanying the reasons for judgement.

The majority, constituted by Beaumont and von Doussa JJ, delivered a joint judgement allowing the appeal and declaring that native title had in fact been extinguished over much more of the land than the trial judge believed. In doing so they rejected Justice Lee's approach to extinguishment as inconsistent with that developed by the High Court in the earlier native title cases.

1. Rejection of the Adverse Dominion test

In *Ward* the majority affirmed the importance of the 'inconsistency of incidents test' as developed by Brennan J in *Mabo (No. 2)*[13] and applied by the majority in *Fejo*.[14] In doing so they rejected the 'adverse dominion test' as applied in Canada and by Justice Lee.

Justice Lee's reliance on Canadian jurisprudence was rejected in light of the fact that Canada's recognition of native title occurred in circumstances vastly different to those in

8 (1998) 159 ALR 483 at 508.
9 (1998) 159 ALR 483 at 508.
10 (1998) 159 ALR 483 at 645.
11 (1996) 187 CLR 1.
12 (1999) 166 ALR 258.
13 (1992) 175 CLR 1 at 68–69.
14 (1998) 156 ALR 721 at 736-737.

Australia. Of particular note was the fact that the Canadian Constitution[15] recognises aboriginal rights.

The adverse dominion test does not require that if there is an inconsistency between a grant and native title that native title should give way. Conversely, the fact that native title must give way, at least to the extent of the inconsistency, is a proposition inherent in the inconsistency of incidence test.[16]

Further, adverse dominion provides that the grant must 'demonstrate the exercise of permanent adverse dominion'. This element of permanency has not been required by Australian authority. More particularly Australian courts have recognised that leases granting exclusive possession do extinguish native title, despite being for a limited period. The majority held that *obiter* by Justice Lee in relation to the revival of native title was misleading and not consistent with the joint judgement in *Fejo*.[17]

It is interesting to note that their honours left open the possibility that grants for a short, finite period may not extinguish native title even if the grant is permanently inconsistent with native title. This conclusion is in direct contrast with their honours' focus on the rights contained in the grant rather than the length thereof.

The third limb of the adverse dominion test requires 'actual use' by the holder of the tenure. Justice Lee at trial applied this requirement in relation to lands where, upon a proper analysis, the grant itself would have extinguished native title. The majority held that the existence of 'operational inconsistency' is only relevant where the grant itself does not extinguish native title. This is consistent with the approach of the High Court in *Wik* and *Fejo*.

2. Partial Extinguishment

The majority held that native title is constituted by a bundle of rights.[18] Although the High Court has not expressly made this determination, the majority relied upon the obiter dicta of the majority in *Fejo*, where they spoke of 'the rights or interests which together make up native title'.[19]

This approach is consistent with the view of Gummow J in *Wik* where his honour stated that,

> 'the content of native title, its nature and incidents, will vary from one case to another.'[20]

Indeed, it would not be possible for the scope of native title, as recognised by the common law, to vary unless it was viewed as a bundle of rights.

After establishing that native title is deemed by Australian law to constitute a bundle of largely independent rights the court proceeded to investigate the possibility of partial extinguishment.

At the outset the majority stated:[21]

> The question of 'partial extinguishment' of native title rights has not been authoritatively determined by the High Court, nor has it been determined by a decision of a Full Court of this Court.

In the recent decision of the High Court in *Yanner v Eaton*[22] four members of the court (Gleeson CJ, Guadron, Kirby and Hayne JJ) left open the question of partial extinguishment, while the reasoning of two members (Gummow and Callinan JJ) arguably supports such a notion.

15 See s 35 of the Constitution Act 1982 (Can.).
16 (1992) 175 CLR 1 at 69.
17 [2000] FCA 191 at para 82.
18 [2000] FCA 191 at para 90.
19 (1998) 156 ALR 721 at 736.
20 (1996) 187 CLR 1 at 169.
21 [2000] FCA 191 at para 88.
22 (1999) 166 ALR 258.

At trial Justice Lee held at 508 that 'There is no concept at common law of partial extinguishment'. He applied this principle equally to the *Native Title Act 1992* (Cth).

The majority on appeal however concluded that native title could be partially extinguished by acts inconsistent with some of the rights deemed to exist in that native title. They held that rights were not parasitic on the native title, as this approach would elevate native title rights to a status akin to common law 'incidents'. If native title rights are not parasitic on an underlying title then the obvious conclusion is that individual rights combine to make the title. This is in harmony with the well-established principle that native title is extinguished by a valid grant 'to the extent of any inconsistency'.[23]

3. The Right to Maintain, Protect and Prevent the Misuse of Cultural Knowledge

The right to protect cultural knowledge had not been previously recognised by Australian courts, nor was it recognised by the majority in *Ward*. Beaumont and von Doussa JJ narrowly construed existing authority in holding that:

> the native title rights and interests that are recognised and protected by the common law are those which involve physical presence on the land, and activities on the land associated with traditional social and cultural practices.[24]

In doing so their honours denied the right of native title holders to protect their cultural knowledge from exploitation or misuse. Their honours arguably failed to adopt a holistic approach in the interpretation of native title, rendering hollow their latter recognition that native title is 'primarily a spiritual affair'.[25]

4. The Order of the Majority

Ward involved too many pieces of property to summarise the majority's findings in relation to each. A focus on the different types of land holding may however be enlightening.

The pastoral leases in question were drafted in different terms to those in the *Wik* Case. Justice Lee had relied on this fact to hold that native title had not been extinguished in those areas presently or formerly subject to a pastoral lease. The majority of the Full Court however held that native title rights had been partially extinguished by some leases and fully by others depending upon the terms of the grant.

The declaration of an area as the Keep National Park did not effect native title. While in relation to the Ord Irrigation Project and the creation of Lake Argyle, the majority held that Justice Lee erred in not considering the project as a whole. When viewed as a whole the project did fully extinguish native title as it was a long-term project which conferred rights to exclusive possession. Similar conclusions were drawn in relation to Argyle mining lease.

IV. The Dissenting Judgement of North J

In a well-reasoned and culturally sensitive judgement, Justice North questions the approach of the majority in relation to the extinguishment of native title. His honour develops a different interpretation of the principles of extinguishment as laid down by the High Court.

1. The Partial Extinguishment of Native Title

Justice North argues[26] that the issue of 'partial extinguishment' must be viewed from an aboriginal perspective, as the common law does not create, but merely recognises, native title rights.

23 *Mabo (No 2)* (1992) 175 CLR 1 per Brennan J at 69; see also Rorrison, 'Native Title: "Bundle of Rights" or Interest in Land', *Native Title News*, Vol 4(3), 49, 1999.
24 [2000] FCA 191 at para 104.
25 [2000] FCA 191 at para 104.
26 [2000] FCA 191 at para 211.

After analysing, on a general level, aboriginal heritage and beliefs, his honour concluded that a community title is proprietary in nature and not made up of individual usufructuary rights, although the latter may exist in addition to the community title. As such partial extinguishment is not possible. In many respects this analysis is congruent with that of Justice Lee at trial.

His Honour identifies the proper question in relation to extinguishment as: '(has the Crown) shown a clear and plain intention to abolish the underlying connection with the land'.[27] It is only in these circumstances that native title will be extinguished. Where it is extinguished it is extinguished fully. North J contends[28] that this approach is consistent with the *Mabo (No. 2)* at 51, although his justification on this point is somewhat strained.

2. The Suspension of Native Title Rights

Justice North argues that the suspension of rights and interests is a well-accepted incident of property law. Going further, he notes that the majority of judges in *Wik* did not reject the suspension of native title rights as untenable.[29]

His honour concludes that native title rights can be suspended where there is not a permanent inconsistency with a grant and that native title may continue despite regulation amounting to prohibition.

3. The Recognition of a Native Title Right to Maintain, Protect and Prevent the Misuse of Cultural Knowledge

Justice North draws from the report of an anthropologist, Mr Akerman, in order to conclude that an aboriginal connection with the land is both secular and spiritual.[30] Encompassed within the spiritual aspect is the protection of ritual knowledge. His honour was willing to accept that the common law should acknowledge this native title right since reference was made to the spiritual aspect of native title in *Yanner v Eaton*.[31]

V. Comment

Ward is a significant case in the native title arena. It is the first judgement that awards native title rights over the Australian mainland. Further, it is the first judgement to recognise the partial extinguishment of native title rights and to openly reject a native title right to protect cultural knowledge.

The majority judgement is legally consistent with High Court authority but lacks the sense of empathy and understanding of aboriginal claims that was inherent in the majority decisions in *Mabo (No 2)* and *Wik*. Beaumont and von Doussa JJ seemed too focussed on applying their perception of the law in an overly analytical and methodical way, thereby denying the complexity and flexibility of native title rights.

It is a fundamental notion of justice that rights be recognised to their full extent. More particularly when a territory, such as Australia, is occupied by cession 'the rights of property of the inhabitants are to be "fully respected" '.[32] In failing to recognise the possibility of revival and by rejecting the right to protect cultural knowledge, the majority in *Ward* did not accord full respect to the rights of the Miriuwing and Gajerrong peoples.

27 [2000] FCA 191 at para 784.
28 [2000] FCA 191 at paras 786–788.
29 [2000] FCA 191 at para 745.
30 [2000] FCA 191 at para 866.
31 (1999) 166 ALR 258 at 270.
32 *Mabo (No 2)* (1992) 175 CLR 1 at 56–57 per Brennan CJ; 82–83 per Deane and Gaudron JJ; at 182–184 per Toohey J.