NATIVE TITLE AS COMPENSABLE PROPERTY

STURT GLACKEN

The paper that has been circulated deals with some aspects of native title as compensable property under two headings.

One involves the question of whether past Commonwealth acts that affect native title can engage the just terms requirement in s 51(xxxi) of the Constitution.

The other concerns possible approaches to the assessment of compensation for the effects of past acts upon native title; the overriding requirement in the *Native Title Act 1993* (Cth) is that compensation be on just terms (ss 51(1), 53).

The first point arose in a recent case in the Federal Court, *Margarula v Northern Territory*, which involved a native title claim by the Mirarr to land and waters within the boundaries of the town of Jabiru.

In 1978 the Commonwealth held back from transfer to the Northern Territory under the *Northern Territory (Self-Government) Act 1978* (Cth) various areas for Commonwealth purposes. It did so by use of acquisition notices issued under that Act said to vest in the Commonwealth a fee simple estate in those lands.

One area was what became known as Stage 1 of the Kakadu National Park which, except for the site of the planned township, later became freehold Aboriginal land under the *Aboriginal Lands Rights (Northern*

Territory) Act 1976 (Cth), and upon grant the area was leased to the Director of National Parks.

Excision of the town site from the grant of Aboriginal land followed the recommendation of the Ranger Inquiry into uranium mining. The apprehension was that if the town site became Aboriginal land a veto over establishment of the town might be used to frustrate the mining project, which was opposed by the traditional Aboriginal owners.

In the native title claim, the government parties contended that the steps taken under the *Self-Government Act* had extinguished native title. If so, in view of the decision in *Newcrest Mining v The Commonwealth* (1997) 190 CLR 513 that mining interests had survived the transition to self-government, there would have been an uncompensated destruction of native title while non-native titles were left unaffected.

That raised questions about the place of s 10 of the *Racial Discrimination Act 1975* (Cth). If the later *Self-Government Act* operated to extinguish native title, it may have diminished the protection given by the earlier *Racial Discrimination Act*. If so, did that statutory abrogation involve an acquisition of property within the scope of s 51(xxxi) of the Constitution?

The question remains on hold as *Margarula* awaits implementation of a settlement package. The terms involve grant of the township area as Aboriginal land with a lease back to government and other elements by which the Mirarr can participate in decisions about the future of the town and have a stake in its economic development.

The outcome provides an illustration of the second point about compensation for the effects of past acts upon native title.

In that example, the contention would be that one of the compensable things the Mirarr lost in 1978 was the right to bargain the terms upon which their land should be used. And what they lost in that respect is evidenced by what they were able to secure some thirty years later following the belated recognition of their native title.

As Hope JA said in *Housing Commission (NSW) v Falconer* [1981] 1 NSWLR 547 at 558, there are many decisions, including decisions of the High Court, in which evidence of future events has been received "not to prove a hindsight, but to confirm a foresight."

The assessment of compensation for the effects of past acts upon native title requires reconstruction of the legal situation existing at the time those acts occurred. As Gummow J pointed out in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 184, the declaratory theory of the common law means that "the existing state of the law was the opposite of that which it since has been held to have been."

The recognition of native title by the common law and its protection by the *Racial Discrimination Act* meant that rights and interests held under traditional law and custom were enforceable by the grant of common law and equitable remedies.

Thus, one aspect of the legal situation existing at the time past acts occurred was the entitlement of native title holders to restrain those acting under colour of an invalid grant of title from interfering with their traditional interests in land. The political compromise made by the *Native Title Act* involved what the High Court termed in the *Native Title Act Case* (1995) 183 CLR 373 at 475 as the "divestiture" of those rights with a corresponding duty to pay compensation on the doing of the effective act of divestiture. A consequence for native title holders was loss of a right to

bargain the terms for access and use, a right which may have regard to gain by others, not just the owner's actual loss.

Use of the word "compensation" in the *Native Title Act* can be taken to carry with it the meaning developed in the discourse on the compulsory acquisition of land. In *Horn v Sunderland Corporation* [1941] 2 KB 26 at 42, Scott LJ described compensation as giving to a dispossessed owner "the right to be put, so far as money can do it, in the same position as if his land had not been taken from him." It involves, as Dixon J said in *Nelungaloo v The Commonwealth* (1948) 75 CLR 495 at 569, "full money equivalence."

The description used by Scott LJ recognised the limits to the usefulness of monetary recompense – a point that was floated in *Wurridjal v The Commonwealth* (2009) 237 CLR 309. But as Heydon J noted, so far as s 51(xxxi) of the Constitution is concerned, if monetary payments are not truly compensatory, an acquisition would be invalid for offending just terms: (2009) 237 CLR 309 at 434 [340].

The issues presented by s 51 of the *Native Title Act* are of a slightly different order. The Federal Court is required to craft just terms compensation, but within the statutory framework. That includes considering the possibility of non-monetary forms of compensation, but that aspect is directive not mandatory. Subject to that consideration, the compensation may only consist of the payment of money (s 51(5)).

The statutory framework requires consideration of the criteria for determining compensation set out in compulsory acquisition laws or other laws under which acts affecting native title occur, such as mining legislation (s 51(2), (3), (4)). Resort to compulsory acquisition principles can present difficulties. The usual starting point of market value may be

inapt, but with adjustment those principles can possibly work. *Geita Sebea v Territory of Papua* (1941) 67 CLR 544 provides an example – as the transfer of native held land was restricted and the only purchaser could be the administration that constructed the aerodrome, the existing potentiality meant that the administration would, on a notional sale, be willing to pay a price that included the value of its own expenditure rather than have to start all over again somewhere else: (1941) 67 CLR 544 at 554, 558.

In other situations, however, departure altogether rather than adjustment may be required, or other approached may need to be overlaid. Indeed, that might be mandated by the just terms override (s 53). In this respect, a potential shortcoming is that compulsory acquisition principles require value to the taker to be disregarded.

The entitlement to just terms compensation for the effects of a past act upon native title (s 51(1)) directs attention to the character of the past act provisions. They involve a contraction of the protection of native title otherwise provided by s 11 of the *Native Title Act* and s 10 of the *Racial Discrimination Act*. Because native title is diminished in order to protect non-native title interests, they may be seen as laws with respect to the acquisition of property; the just terms override ensures their validity.

The basic proposition is that if in the past third parties had asked native title owners permission to use their property, the native title holders would have been entitled to ask for reasonable remuneration as the price for permission. As such, no one can be better off for not asking permission: *Strand Electric v Brisford Entertainment* [1952] 2 QB 246 at 254 per Denning MR. Importantly, this approach blends compensatory and resitutionary principles; courts can look at what a taker gains in the use of

someone else's' property as evidence of what the taker would have paid for that use.

Griffiths v Minister for Lands (2008) 235 CLR 232 illustrates the point in play. What was proposed was the use of a compulsory acquisition power for third party private benefit. As Professor Gray has said, such a case skews conventional aspects of the power being concerned with public not private benefit: *Elements of Land Law* 5th Ed at [1.5.36].

It may also skew the attendant duty to pay compensation on takings and the notion that public benefit means value to taker should be ignored. The proposed taking in *Griffiths* was to be transacted on the footing that what the Territory gained from subsequent sale would go to the compensation payable for the extinction of native title on the acquisition.

In the end, however, the Territory decided not to go down that path. And the proponent now uses the land for the intended purpose of the acquisition under agreement with the native title holders, the Ngaliwurru and Nugali peoples. Again, that demonstrates what they would have bargained had they been asked.

Although no universal measure can be advanced, there is much to be said for an approach that serves to vindicate the rights of traditional rights holders by focusing on what third parties were willing to pay to acquire rights to use traditional land in non-traditional ways through looking at what they gained from that use.