IS EQUALITY TOO HARD FOR AUSTRALIA?

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A fundamental aspect of *Mabo* was the legitimation of the dispossession of the Aboriginal people that took place in the colonisation of Australia. That colonisation was founded upon the denial, by legislative fiat, of equality to Aboriginal people. The governmental response to the *Wik* decision suggests that Australia, as it enters the twenty-first century, is prepared to perpetuate that denial of equal treatment before the law to Aboriginal peoples.

In *Wik* the majority of the High Court declared that a rationale of equality governed all aspects of native title, including extinguishment by Crown grant. Equality required, just as in the expropriation of any other interest, that 'extinguishment' of native title occur only if there was a clear and plain intention manifest on the part of the legislature. Such intention would be indicated by a statutory grant that conferred such rights as denied the possibility of coexistence with native title. The declaration of such rationale by the majority would not seem controversial. It merely affirmed the common rationale of equality declared by the six justices in *Mabo* who had recognised native title.

A different rationale had initially been adopted in the early nineteenth century decision of the United States Supreme Court in *Johnson v McIntosh.*[1] In that decision Marshall CJ had deliberately forsaken equality in favour of pragmatism in order to legitimise the early settlement of the United States. To that end, native title was recognised but made subject to extinguishment by inconsistent grant irrespective of legislative authority. Upon that pragmatic foundation the United States Government has, for over two centuries, pursued a policy of treating by regional agreements for a settlement of native title. The policy was opposed at all times by the States, but was made possible by the exclusive jurisdiction over native title vested in the Federal Government. The policy of extinguishing native title only by consent represents a greater respect for rights of native title holders than equality demands.

A judicial pronouncement of the rationale of equality underlying native title was first declared in New Zealand. In *The Queen v Symonds* Chapman J founded the rationale upon the practice of "fair purchase" of the United States and the "sake of humanity".[2] Native title was not subordinate to other interests and could only be "extinguished" in accordance with the same principles under

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1 (1823) 21 US 681

2 [1847] NZ PCC 387 at 390.

which other interests might be "expropriated" (*Te Runanganui o Te Ika Whenua Inc Society v Attorney General*).[3]

Canadian policy was much influenced by the United States. It was accepted that any settlement of native title required agreement with the native title holders. Indeed no native title claim was litigated until, as a last resort, an attempt was made to overcome the recalcitrance of the Provincial Government of British Columbia. In *Calder v Attorney General* the Supreme Court of Canada declared a rationale of equality and the need to give "full respect" to native title.[4] The requirement has been repeatedly affirmed. It received elaboration in *Delgamuukw v Attorney General* where MacFarlane JA sought to dispel any suggestion of a lower status for native title and declared that the "clear and plain test should be applied with as much vigour to Aboriginal title as it is to traditional property rights".[5] Canada moved in 1982 to entrench "existing" Aboriginal rights under s 35 of the *Constitution Act* 1982 (Can). Questions relating to the existence and extinguishment of native title at common law in Canada remain of great significance because of the need to determine whether native title existed in 1982.

Canada and New Zealand have founded native title at common law upon a rationale of equality. The United States has pursued a policy founded upon such a rationale. Australian Governments, however, seem unable to accept the principle. Their response to *Wik* is to put aside a regard for equality. As is notorious to all those who have read *Wik*, the High Court merely decided that some undetermined elements of native title might have survived the grant of a pastoral lease. *But* to the extent that rights were conferred upon a pastoralist those rights prevailed and were to be given preference over native title. The *Wik* decision:

1. extended equality before the law to native title holders in the determination of whether their rights were extinguished; *but also*
2. recognised that such equal treatment did not deny the supremacy of Parliament which might by clear and plain legislation, before the enactment of the RDA, override native title, irrespective of the demands of equality.

Wik affirms the legitimation of the dispossession of Aboriginal people by pastoralists. It affirms the denial of equality mandated by the Parliament of Queensland before 1975. Yet the Premier of that State and the National Farmers Federation wish to go even further. They seek the extinguishment of any shred of native title that might have survived the grant of a pastoral lease. They wish to expunge any regard for equality before the law irrespective of the RDA. To that end Donald McGauchie has asserted "that this is not a debate about race"[6] and has sought to emphasise problems of uncertainty and characterise the debate

3 1994] 2 NZLR 20 at 24.
4 (1973) 34 DLR (3d) 145 at 208-210, per Hall J.
5 (1993) 104 DLR (4th) 470 at 523, see also at 595, per Wallace JA
6 D McGauchie, "An Unworkable Decision", *The Australian*, 1 April 1997, p 15

in terms of land management. It is as though resource security and equality before the law are incompatible. They, of course, are not.

In Canada, the United States and New Zealand the compatibility of resource security and equality before the law has been sought by a process of regional agreement. None of those jurisdictions have enacted any legislation in the form of the NTA. They have preferred to rely on the parties to take responsibility for the exercise of their rights and the courts to adjudicate if a dispute has arisen. No legislation has been passed which would deny equality before the law. Yet in British Columbia the possible invalidity of title goes back to 1871! Investment and development have proceeded in that Province, and in that context the claims of the damage wrought by the native title uncertainty in Australia are absurd. In late April 1997, BHP committed the first $680 million to the development of a diamond mine in the Northwest Territories, Canada.[7] The mine is located on land subject to native title claims by at least two Aboriginal groups. Negotiations for a settlement of native title in the region are ongoing. The 'uncertainty' has not discouraged BHP because it is minimal, if not non-existent. All parties accept that native title will be settled by an agreement which respects existing non-indigenous rights *and* native title.

An assumption in the enactment of the NTA and the proposed amendments was that equality must give way to resource security. It was not considered possible, as it has been elsewhere, to allow the parties themselves to resolve their differences by agreement and thereby to maintain equality before the law. The assumption in the enactment of the NTA was that any possible imperfection in the right of an existing grantee to override native title must be validated. Preference must be given to the non-native title holder.

The Ten Point Plan of the Commonwealth Government will further the subordination of the interests of native title holders. It contemplates the general preferment of *future* grants over *existing* native title and favours the *expectations* of leaseholders over the *rights* of native title holders. The Plan necessarily targets and discriminates against native title holders and subordinates their interests to those of land and resource developers. Resource security is to be assured all those *except* native title holders.

The Ten Point Plan perpetuates the historic policy of subordinating the rights of native title holders. Australia seems even now unable to accept that a prerequisite of any society must be equality before the law. Rather it seems to consider that it is the first principle to be put aside in the supposed interest of economic development. Equality seems much too hard for Australia.

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7 R Sproull, "BHP Commits $640m to Lac de Gras", *The Australian*, 26 April 1997, p 29.