Foreword

This excellent and timely book by Dr Isdale provides a careful analysis of a critically important and undeveloped area of the law. Before saying more about the book itself, it is important to make a few observations about the broader context.

Almost 30 years have passed since publication of the High Court's historic judgment in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 on 3 June 1992. The decision established, by majority, that certain Indigenous rights and interests related to land and water and "rooted in traditional law and custom" (*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, Gleeson CJ, Gummow and Hayne JJ at [75]) survived the Crown's acquisition of sovereignty and radical (or ultimate) title in Australia and that it was this pre-sovereignty native title that was recognised by the common law. The term "recognised" is pivotal because the "bundle of rights and interests" comprising native title is not a creature of the common law, "whether the Imperial common law as that existed at the time of sovereignty and first settlement, or the Australian common law as it exists today" (*Yorta Yorta* at [75]), but rather "has its origins in and is given content by the traditional laws acknowledged by and the traditional customs observed by" the relevant Indigenous peoples of a territory: *Mabo (No 2)*, Brennan J at 58. It is *this* native title, recognised by the common law, which is *now* "recognised and protected" by s 10 of the *Native Title Act 1993* (Cth) and which, by s 11 of the Act, cannot be extinguished contrary to the Act. The expression "native title rights and interests" means, by s 223(1) of the Act, the communal, group or individual rights and interests of the relevant peoples in relation to land or waters where those rights and interests are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples; and by those laws and customs, the peoples have a *connection* with the land or waters; and the rights and interests are *recognised* by the common law of Australia.

The *Native Title Act*, which commenced on 1 January 1994, was the Parliament's response to the challenge of enabling by statute a coherent overall framework for addressing native title rights, their recognition, questions of extinguishment and the validation of acts, the relationship between the Act and the *Racial Discrimination Act 1975* (Cth) ("RDA") and, importantly, consequential compensation on just terms for particular acts of extinguishment. The High Court's decision in *Wik Peoples v Queensland* (1996) 187 CLR 1 was yet to come, holding by majority, that pastoral leases (in Queensland) did not necessarily extinguish native title. Thus, uncertainty surrounded the validity of interests granted in and over "land and waters" since the commencement of the *Native Title Act* (aspects of past acts) and the position as to future acts,

especially concerning mining interests to be granted over land subject to pastoral interests. The problem was that many sectoral interests and government agencies had assumed that native title had been wholly extinguished by the grant of pastoral and other leases under statute prior to the commencement of the RDA on 31 October 1975. In the result, issues arising out of the *Wik Peoples* decision (and other issues) were addressed by the 1998 amendments to the Act providing for validation of certain acts done after 1 January 1994; confirmation of complete or partial extinguishment by particular tenures; identification of the "future acts" regime; and provision for applications to determine the subsistence and content of native title to be made to the Federal Court of Australia (among other applications). These amendments also introduced into the Act the s 51A limit on compensation in relation to compensation claims where native title has been extinguished because of the validation of past acts and where future acts may have an extinguishing effect.

Into this framework established by the Act which, as the Hon Robert French AC has observed, "was never an easy statute to read and certainly since the 1998 amendments, has not become any easier", enters Dr Isdale's searching examination of the critically important issues involved in identifying the proper basis upon which compensation on just terms ought to be undertaken. Section 51(1) of the Act provides that compensation concerning the various classes of validated acts (past acts; intermediate period acts; acts attributable to the Commonwealth; confirmation of past extinguishment by previous *exclusive possession* acts and previous *non-exclusive possession* acts; future acts; and other particular matters under Division 4) is an entitlement of the native title holders to compensation on just terms for "any loss, diminution, impairment or other effect of the act on their native title rights and interests". Section 51A provides, subject to s 53, that the total compensation for an act that "extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters".

One of the difficulties in attributing a value to any such loss, diminution or impairment is the unique character of the native title rights and interests. In his *Boyer Lectures* in 1968, the noted anthropologist, Professor WEH Stanner, reflected on the unique conception and connection Aboriginal peoples have of and with land, in these terms:

> No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word "home" … does not match the Aboriginal word that may mean "camp", "hearth", "country", "everlasting home", "totem place", "life source", "spirit centre" and much else all in one. Our word "land" is too spare and meagre. We can now scarcely use it except with economic overtones unless we happen to be poets. The Aboriginal would speak of "earth" and use the word in a richly symbolic way to mean his "shoulder" or his "side". I have seen an Aboriginal embrace the earth he walked on. … A different tradition leaves us tongueless and earless towards this other world of meaning and significance. When we took what we call "land" we took what to them meant hearth, home, the

> source and locus of life, and everlastingness of spirit. At the same time it left each local band bereft of an essential constant that made their plan and code of living intelligible … They had no stable base of life; every personal affiliation was lamed; every group structure was put out of kilter; no social network had a point of fixture left.

How then, on just terms, is compensation for such loss, diminution or impairment to be measured?

As Dr Isdale observes, the starting point is to identify the precise content of the native title rights and interests in issue, whether the rights are exclusive or non-exclusive, the character of the compensable act in question and the manner in which each aspect of the rights have been affected by a compensable act. In *Northern Territory v Griffiths* (2019) 269 CLR 1 (the *Timber Creek* decision concerning the Ngaliwurru and Nungali people), the plurality (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) at [44] characterised s 51(1) of the Act as recognising two aspects of native title rights and interests identified in s 223(1) as the "physical or material aspect" (the right to do something in relation to land) and the "cultural or spiritual aspect" (the connection with land). The second aspect of course, is the subject of the observations of Professor Stanner described above. The plurality identified two aspects to compensation (leaving aside interest). First, quantifying the economic loss as a result of being deprived of the right to do something in relation to land. Second, quantifying the non-economic or spiritual loss, diminution or impairment.

The question of the methodology to be adopted in reaching a principled basis for determining compensation on just terms for the loss, diminution or impairment of native title rights is the core analysis of Dr Isdale's excellent book. It should be noted that as at 17 March 2022, native title has been found to exist in over 552 judicial determinations by the Federal Court of Australia; 149 determination applications are pending; and 15 compensation applications have been filed to date. Having regard to the significant number of native title determinations, the Court expects to see many more compensation applications filed. These applications reflect the next phase of native title proceedings before the Court.

Thus, Dr Isdale's book is a critically important contemporary analysis of an undeveloped area of inquiry. Dr Isdale examines the structure of the Act generally and the unique character of native title rights; the relationship between s 223(1), s 51(1) and s 51A and just terms more generally; the approach to construing the proper application of s 51A; whether a *sui generis* approach to determining compensation is necessary or compelling or whether learning derived from an orthodox approach to assessing value in circumstances of compulsory acquisition can usefully inform an approach to compensation under the Act; whether an *adapted* approach which recognises the orthodoxy of other valuation methodologies and seeks to reflect a sense of equality of treatment is warranted and useful; whether a "reinstatement approach" to compensation remains open having regard to the judgments in the *Timber Creek* decision; whether in the approach to compensation, too much emphasis

has been given to the value of the gain made by the acquiring party having freed-up title rather than a focus upon the loss experienced by the dispossessed owner. Apart from these matters which are examined extensively on a principled basis taking into account the authorities, Dr Isdale examines the judgments of the High Court in the *Timber Creek* matter and respectfully expresses some observations on the approach of their Honours and the method reflected in those judgments.

Dr Isdale has also contributed significantly to our understanding of these issues in relation to the general law. This chapter alone is worthy of detailed examination by readers interested in the intersections of the various branches of the law which are affected by the advent of native title.

This is an important and timely book. We were privileged to supervise this work for the degree of Doctor of Philosophy at the University of Queensland. It was awarded the Holt Prize and thus is now published as a monograph by The Federation Press. Compensation for native title loss and diminution may have significant financial and therefore political implications for the Commonwealth of Australia and its constituent States and Territories. Other issues, like COVID-19, natural disasters and climate change have stolen the limelight in recent political and economic debates. Compensation for native title has taken a back seat to these other important issues, but it may of necessity take a more prominent place in the political landscape in the near future. Dr Isdale's suggested approach of *similitude* in addressing any loss, diminution or impairment suffered by the native title holders, affording more weight than hitherto to existing valuation methodologies, is likely to enter that debate as a principled approach to clarifying and simplifying compensation for native title loss. It is therefore a book worthy of the attention of all keen observers of politics and economics interested in understanding the legal and constitutional framework within which these questions will be addressed in Australia.

These issues are important for the nation as a whole but particularly for Aboriginal and Torres Strait Islanders. Almost all of the issues discussed by Dr Isdale will be ventilated in the forthcoming cases. We regard the work as a careful, thoughtful and excellent analysis. Views may well differ about aspects of the analysis and some of the ultimate conclusions but that circumstance is simply a feature of the demands of an inquiring mind in an evolving area of the law.

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