



Book Review

Compensation for Native Title, Dr William Isdale, Federation Press, 2022, 222 pp (243 pp including Index, plus Contents and Tables etc pp i–xxiii), ISBN 9781760023645.

This is indeed an excellent and timely book by Dr Isdale, for which the author is rightly acknowledged by an award of the Holt Prize — the prize named after the founder of The Federation Press, the late Christopher Holt.

The law of property valuation, freehold and leasehold, is replete with its own complexities and difficult concepts but their context is the long-established structure provided by the doctrine of estates at general law. There do, of course, remain some conceptual and classification issues with respect to some interests, such as leases as chattels real and the distinction between leases and licences, but native title raises issues and concepts outside this comparatively neat structure. It is, unsurprisingly, both easy and tempting to view native title issues through the frame of reference of traditional Anglo-Australian land law concepts. Dr Isdale challenges this thinking and, in so doing, addresses a very significant but undeveloped area of law.

As observed in the detailed Foreword by the Hon Justice Andrew Greenwood of the Federal Court of Australia, and Dr Jonathan Fulcher of the University of Queensland, *Mabo v Queensland [No 2]*¹ established that native title survived the Crown's acquisition of sovereignty and radical (or ultimate) title in Australia. Moreover, it is emphasised that the 'bundle of rights and interests' recognised do not derive from the common law (and see *Yorta Yorta Aboriginal Community v Victoria*).² The Commonwealth Parliament responded by enacting the *Native Title Act 1993* (Cth) in which native title rights issues, including compensation, were addressed.

Dr Isdale examines the unique nature and attributes of native title rights in the context of the legislative provisions of the Act, particularly the compensation provisions of s 51 and related provisions, such as ss 51A, 53 and 240. The starting point in this process is the consideration of the character, content and aspects of native title rights and the extent to which they may be exclusive or non-exclusive. In so doing the two aspects of native title rights, 'the physical or material aspect' and the 'cultural or spiritual aspect', the right to do something in relation to the land and the connection with land, as characterised in *Northern Territory v Griffiths* (the 'Timber Creek' decision)³ as being recognised in s 51(1) of the Act are considered. The *Timber Creek* decision, the critical judicial consideration of the compensation provisions of the Act at this stage, is considered in great detail in all its aspects; in the Federal Court of Australia as first instance and on appeal and, ultimately, in the High Court of Australia.

A particular, and critical, focus of the book is the approach that should be adopted in determining awards of compensation for loss of native title rights.

1 (1992) 175 CLR 1.

2 (2002) 214 CLR 422.

3 (2019) 269 CLR 1.

Having observed that some existing compensation methodologies are strained in their application to rights of such a different nature to other rights and interests, Dr Isdale observes (at 1):

This tension between existing approaches, and a perceived need for a new one, is the underlying theme of this book: *similitude or sui generis*. The question is whether Australian law should favour an approach that folds native title compensation into an existing framework of compensatory principles (treating native title similarly to other interests — ie by *similitude*); or, whether it should adopt or develop a different approach that more readily reflects or accommodates the unique dimensions of native title (ie *sui generis*).

Though arguments on both sides are considered, particularly in the course of discussion of the *Timber Creek* judgments, Dr Isdale argues in favour of an approach of similitude on the basis that a strong *prima facie* presumption in favour of the application of conventional principles and approaches follows from the ‘demands of similitude’, namely ‘coherency, equality and related rule of law considerations’. Moreover, it is argued that guidance on how the law should develop with respect to, as yet undeveloped, native title compensation jurisprudence is provided by applying the similitude approach. The book, in its seven chapters, illuminates these matters in a most lucid and engaging discussion which canvasses a variety of dimensions which flow from the uniqueness of native title.

Chapter 1 contains background material and a general discussion of the unique nature and characteristics of native title together with the consequent challenges in seeking to compensate for its loss. In this respect, the two approaches in terms of compensation methodology are discussed together with compensation provisions of the Act.

Chapter 2 examines the *Timber Creek* decisions and, what is said to be, a vacillation between the two approaches of similitude and *sui generis* culminating in, what is described as the middle ground reached by the High Court — an ‘adapted’ application of a conventional approach. Chapter 3 critiques the *Timber Creek* decisions, arguing that none of the decisions strike an appropriate balance between the two approaches which is consistent with the focus on the loss suffered by the dispossessed owner rather than the gain made by the acquirer in compensation jurisprudence. The appropriate balance advocated is a ‘reinstatement approach’, which poses the question how much it would cost to put the party dispossessed as a result of acquisition, extinguishment or impairment into the position they were in prior to dispossession. Chapter 5 continues the critique of the *Timber Creek* decisions having regard to spiritual and cultural (non-economic) loss. It is also argued that this species of loss includes, with respect to native title, both objective and subjective harms suffered by existing and future generations of native title holders. As Dr Isdale observes, issues arising from the group (rather than individual) holding of native title rights, highlight the difficulties in compensating loss or impairment of these rights.

Chapter 5 examines a most significant unresolved issue with respect to native title compensation, namely the uncertainty in relation to the application of s 51(xxxi) of the *Commonwealth Constitution* and its requirement of ‘just terms’ for certain acquisitions of property to the provisions of the Act, particularly s 51(1). A variety of possibilities are canvassed, including the

argument that the 'just terms' requirement may not be engaged because native title is inherently defeasible or the legislation is to be regarded as a balancing of rights rather than an acquisition of property rights. And there is the underlying question whether native title is properly characterised as 'property' at general law so as to attract the constitutional requirement at all.

Chapter 6 completes the picture in that it contains an examination of possible causes of action at general law that in support of a right of compensation — whether as damages or otherwise — for infringement of native title rights. As with respect to other issues considered, particular issues arise as a result of the commonly non-exclusive nature of native title so that, for example, interference with possession is not an easy concept as would be the position with the tort of trespass. Nevertheless, the point is rightly made, in this chapter and elsewhere, that the common law readily comprehends incorporeal hereditaments, such as easements and *profits à prendre*.

Chapter 7 concludes the work by highlighting the critical issues, concepts and arguments and, in so doing, advances a 'coda' on similitude versus sui generis. The reality of budgetary concerns is raised as is the political dimension with respect to native title compensation and, finally, the future of native title compensation.

Dr Isdale's *Compensation for Native Title* is most certainly an excellent and timely book addressing very significant and important issues. It is very significant work of scholarship and written in a clear and engaging style which makes it also a very important work for a wide readership — academics, practicing lawyers and valuers and students alike. Additionally, many of the issues raised and discussed illuminate the law of valuation more generally such that the work deserves a place with works on native title and also with works on property valuation and property law generally. I strongly recommend the work in all these dimensions.

Justice Clyde Croft AM