Principles should guide Model approach

By Ernst Willheim*

Public policy values, particularly human rights principles and non-discrimination principles, should guide governments in the conduct of public law litigation. The Commonwealth's *Obligations to Act as a Model Litigant,* part of the Commonwealth's *Legal Services Directions*, should be amended to require compliance with fundamental human rights principles and non-discrimination principles.

This article looks at a major constitutional case in which, so it seems to me, the case put on behalf of the Commonwealth in the High Court of Australia seems to have been at odds with the Commonwealth Government's professed commitment to human rights, non-discrimination and to the rights of Indigenous people.

Wurridjal v The Commonwealth was a constitutional challenge, brought by Reggie Wurridjal and Joy Garlbin, senior members of the Dhukurrdji clan, to provisions of the Commonwealth's Northern Territory Intervention legislation. This controversial legislation was a political response to reports of child sexual abuse of Aboriginal children, graphically described in a report to the Northern Territory Government entitled *Ampe Akelyernemane Meke Mekarle – Little Children are Sacred*. The Commonwealth Government introduced emergency legislation, relying on the "territories power" (Constitution, section 122) and the "race power" (Constitution, section 51 (xxvi)), to amongst other things compulsorily acquire five year leases of Aboriginal land, ostensibly in order to build houses.

Wurridjal and Garlbin, traditional owners of Maningrida land, claimed that provisions of the legislation amounted to an unlawful acquisition, without payment of just terms, of a range of their traditional rights, including their right to participate in ceremony on identified sacred sites.

The Commonwealth demurred to the plaintiffs' claim. Demurrer is a technical legal procedure by which a party contends that, even if the facts alleged are established, the claims are not good in law. There were two major grounds for the Commonwealth's demurrer. Both grounds raised human rights considerations.

- That the "just terms" requirement in section 51(xxxi) of the Constitution did not apply to the Northern Territory.

- That the property relied upon by the Aboriginal plaintiffs, including the right to participate in ceremony on sacred sites, did not constitute property for the purposes of section 51(xxxi) of the Constitution.

Background: Constitution, just terms, the territories power

Section 51 (xxxi) of the Constitution confers on the Commonwealth Parliament power to acquire property "on just terms". Section 122, the territories power, confers on the Parliament power to make laws for the government of any territory. The territories power has often been described as a plenary power.

In Wurridjal, the Aboriginal plaintiffs claimed the Commonwealth's intervention legislation was invalid because it gave rise to an acquisition without just terms. The Commonwealth in response argued that the section 51(xxxi) just terms requirement did not apply in the Northern Territory. The first question raised by the Commonwealth's demurrer was therefore whether the territories power in section 122 was subject to section 51(xxxi), that is, whether a Commonwealth law for an acquisition of property in the Northern Territory must provide just terms.

The Commonwealth's first argument: just terms did not apply

Why would the Commonwealth mount an argument that the just terms compensation provision of the Constitution did not apply in the Northern Territory? It is true that in Teori Tau v Commonwealth, a case relating to the Territory of Papua and New Guinea, the High Court had held that the legislative power conferred by the territories power was plenary and not limited by the just terms requirement. Many other cases had, however, taken the view that the Constitution must be read as a whole and the territories power was not to be segregated from the rest of the Constitution.

Moreover, a more recent case, Newcrest Mining (WA) Ltd v The Commonwealth, had cast doubt on Teori Tau. In light of Newcrest, the legal basis for the Commonwealth's argument was not strong. As it turned out, the Court rejected the Commonwealth's reliance on *Teori Tau* and that case was overruled. This article is, however, concerned not with the technical legal strength of the Commonwealth's argument but with the public policy principles behind the argument.

The internal processes by which the Commonwealth settled on its argument are not known. No doubt there was a financial incentive to argue against any constitutional right to compensation. Protection of its financial interests is undoubtedly a proper consideration for the Commonwealth. Should the Commonwealth be guided solely by its

financial interests? In this case there was clearly a powerful public policy consideration.

All governments need the capacity to acquire property for public purposes. But the Constitution enshrines the right to compensation on just terms when property is acquired. Most people would assume, as a matter of course, that where a government compulsorily acquires property, there would be a right to compensation.

Why would the Commonwealth argue that so basic a right is confined to acquisitions in the states? Why would the Commonwealth argue that this right does not extend to Australians in the Northern Territory and the Australian Capital Territory? What policy considerations motivated the Commonwealth to mount such an argument?

Most people would assume, as a matter of course, that where a government compulsorily acquires property, there would be a right to compensation.

One would not like to think that the Commonwealth's argument was based on deliberate racial discrimination, on a view that Aboriginal Australians should have a lesser entitlement to compensation when their property is acquired than other Australians. Yet it is difficult to think of any other obvious reason for the Commonwealth's argument that Australians in the territories should not have the same right to compensation as other Australians.

One can only speculate whether the Commonwealth considered relevant human rights principles and rejected them or simply failed to have regard to human rights principles. The right to own property was ecognize in Article 17 of the Universal Declaration of Human Rights and one could reasonably expect that a Government with a professed commitment to human rights would not seek to discriminate between Australians in the Northern Territory, particularly Aboriginal Australians, and other Australians on such a basic right as entitlement to fair and just compensation when land is compulsorily acquired.

Yet it is difficult to think of any other obvious reason for the Commonwealth's argument that Australians in the territories should not have the same right to compensation as other Australians.

In this writer's view, the Commonwealth's argument failed to ecognize basic human rights values, was bad public policy and should never have been put to the Court. To put this another way, public policy values, including human rights principles and non-discrimination principles, should have been core considerations in the Commonwealth's argument. They should be core considerations in

public law litigation, including constitutional litigation.

The Commonwealth's second argument: the Aboriginal rights claimed were not property within section 51(xxxi)

The rights asserted by the plaintiffs were somewhat different from conventional property rights commonly ecognize by traditional Australian property law. That is no reason not to ecognize and respect those rights as property rights. A major purpose of the Northern Territory's Land Rights legislation and the recognition of native title under the common law was to give recognition, in the Australian legal system, to a system of traditional ownership not previously ecognize .

There is extensive authority that the guarantee effected by section 51(xxxi) is to be given a wide meaning, extending to protection against acquisition other than on just terms of "every species of valuable right and interest, including … choses in action". Property has been held to extend to intangible property rights and innominate and anomalous interests. Why would the Commonwealth argue that the traditional rights claimed by the Aboriginal plaintiffs in relation to their land, whether rights granted under the Northern Territory's Land Rights legislation or common law native title rights, did not fall within the well established wide meaning given to property?

The plaintiffs made clear in their submissions and in oral argument that they were concerned about their rights of access to their sacred sites. In the view of Wurridjal and Garlbin, the statutory leases created by the Northern Territory Intervention legislation gave the Commonwealth exclusive possession.

The rights claimed by the plaintiffs are in some respects novel, but they are clearly valuable rights. Are they intrinsically different from, say, choses in action or rights of profit or other uses in land ecognize as constituting property rights? Why would the Commonwealth maintain that they were not property rights? Why would the Commonwealth argue that the diminution of those rights by non-consensual statutory leases under the Northern Territory Intervention legislation did not give rise to an acquisition? Again, the considerations that led to the Commonwealth's arguments are not known.

So how should the question of whether the rights claimed by the Aboriginal plaintiffs constituted property for the purposes of the just terms requirement be viewed? What public policy considerations should guide public responses to such claims?

The Maningrida land was Aboriginal land under the *Aboriginal Land Rights (Northern Territory) Act 1976*. Under that Act, the plaintiffs

enjoyed legally protected rights and interests relating to the land itself, to spiritual associations with the land and to their traditional activities on and in relation to the land. The plaintiffs also claimed traditional native title rights which they asserted were ecognize by the common law**.**

In light of the High Court's landmark *Mabo* decision it is now beyond dispute that Indigenous rights in relation to land are valuable legal rights that enjoy the same legal protection as other property rights. These rights include the spiritual, cultural and social connection with the land, including the right to conduct religious or cultural activities. Surely they should not be treated differently from other property interests simply because the characteristics may be different from other more conventional property interests.

International law provides support

International law principles and authorities clearly support the view that the rights of indigenous peoples to pursue their religious, spiritual and cultural practices are important legal rights. Examples include Articles 7, 17 and 18 of the Universal Declaration of Human Rights and Article 27 of the International Covenant on Civil and Political Rights. The Human Rights Committee (the Covenants supervisory and monitoring body), in its comments on Article 27, has explained that the Article ecognize a "right" and that culture protected by the Article includes a particular way of life associated with the use of land.

Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples provides that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned lands. Numerous instruments ecognize the special cultural and religious rights of indigenous peoples and the connection between the exercise of those rights and indigenous land. Yet the Commonwealth argued that where legislation adversely affects those rights, the rights do not constitute property for the purposes of the constitutional protection in the just terms requirement of the Constitution.

It is not surprising that private defendants frequently seek to pursue narrow technical arguments to protect their interests. Should governments in the conduct of litigation be any different? Surely a government should have regard not only to the possible availability of technical defences but also to public policy values, including the values legislation seeks to advance or protect.

The issue arises frequently in human rights litigation, especially discrimination litigation. A common issue is whether an alleged discriminatory act, such as alleged racial abuse, is to be viewed through

the eyes of the general community or from the perspective of the minority group that is the subject of an alleged abuse.

It is widely accepted that legislation designed to protect rights is to be construed beneficially. Where the purpose of legislation is to protect racial or ethnic minorities, surely the legislation should be construed from the perspective of those the legislation seeks to protect. Thus where the question is whether, for example, a remark about an Aboriginal person was racially offensive the preferable approach would be to ask whether the person would find the remark offensive, not whether the majority community would find it offensive. Why? Because the legislation is intended to protect the racial minority.

Similarly, where a constitutional provision protects people against acquisition of property otherwise than on just terms, surely the concept of property is to be understood through the eyes of those whom the provision seeks to protect, that is, those whose property is acquired. Where a government is faced with a question of whether acquisition of rights from Indigenous people constitutes an acquisition of their property, the government's approach should be to seek to understand how Indigenous people perceive the rights that have been acquired.

Public policy principles should guide governments

To argue that Indigenous rights that are acquired do not constitute property because they do not fit a narrow conventional Western concept of property fails to properly address the underlying public policy considerations that should guide governments.

So I argue that public policy values, especially fundamental human rights principles and non-discrimination principles, should guide governments in public law litigation.

It may be noted that these values and principles are not included in the Commonwealth's statement of its *Obligations to Act as a Model Litigant*, part of the Commonwealth's *Legal Services Directions*. Those *Legal Services Directions* are an important legal instrument made under section 55ZF of the *Judiciary Act 1903*.

The *Obligations to Act as a Model Litigant* set out values to which the Commonwealth and its agencies must conform in the conduct of litigation, values such as the obligation to act honestly and fairly and not rely on technical defences. Omission of the importance of respect for fundamental human rights principles and non-discrimination principles in Commonwealth litigation is a serious deficiency in the Commonwealth's statement of its *Obligations to Act as a Model Litigant*. That omission should be rectified.

ENDS

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