SUPREME COURT
OF QUEENSLAND

WA Lee Equity Lecture
Thursday, 2 November 2023, Banco Court
Chief Justice Helen Bowskill

The interaction of Aboriginal and Torres Strait Islander customary law with some aspects of the law of equity – is the view any different through the lens of the *Human Rights Act?*[1]

[1] Good evening everyone – friends and colleagues, members of the legal and broader community. I acknowledge all of you as distinguished guests and as most welcome visitors to the Banco Court this evening. I also acknowledge the first owners and custodians of this land, the Turrbal people and the Jagera people, and of the land and waters across Australia. I pay my respects to their ancestors and elders, and thank them for their wisdom and leadership.

[2] It is a great honour to have been asked to give the WA Lee Equity Lecture this year. Unlike many of the previous speakers, I was not a student of Professor Lee's; although I have admired his scholarship from afar and have been the great beneficiary of his industry, in the form of his seminal academic works including, of course, *Ford & Lee's Principles of the Law of Trusts* and *Lee's Manual of Queensland Succession Law.* So I cannot begin this lecture, for example as the former Chief Justice de Jersey did, in 2010, with a story about what Tony did at the start of his lecture on the day of the moon landing on 16 July 1969. Nor can I share with you, as my colleague Justice Applegarth did in 2020, a witty anecdote about those halcyon university days, complete with an adaptation of an ABBA song about Tony Lee's equity lectures; although I wish I could.

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[1] I gratefully acknowledge the assistance of my associate, Ms Lucy Cornwell, and research assistant, Ms Paige Mackie, with research for this lecture.

[3] What a remarkable legacy this lecture series is, reflecting contemporary and thought provoking discussions of matters of equitable jurisdiction and principle across the 23 years since the first lecture was given by Professor Lee himself.

[4] I am very sorry that Professor Lee was not able to be here this evening. He was very keen to do so, but has sent a regretful apology, as his health is such that it was just not possible. Although now 93, Tony Lee has not stopped thinking about equity and trust issues, nor lost the ability to express those thoughts with enviable clarity. He has been generous enough to share his latest thoughts with all of us, in the form of a "three minute tutorial". It is entirely apt that we start this evening by reference to W A Lee's "trustee's duties in twelve words":

> "Trustees duties in twelve words, by W A Lee
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> *A trustee's duty is to achieve unequivocally the purpose of the settlor*.
>
> As far as I know trustees duties have never before been expressed in this way. Judges rarely refer to trustees' general duties. Their task is to determine which of the parties before them in court should succeed, the losing party paying costs. To express a personal opinion might indicate bias or even a departure from normally accepted law. A judge who does refer to trustees' duties probably uses words that have been used from the middle of the nineteenth century viz that a trustee must observe strictly the terms of the trust. This is unsatisfactory. Trusts can exist without having terms, such as a bequest in a will and oral trusts. Words used may be vague or ambiguous, leaving the litigants unsure of what they may or must do or must not do and even for go to appeal. As an example suppose a testator leaves 'suitable provision' for 'my handicapped daughter Susan'. Many years later the testator dies but Susan has predeceased the testator leaving a posthumous child, no name. The words of the will can hardly be seen as making suitable provision for the unborn child, although a TFM application may be possible, but if the will defines trustees' duties in the manner suggested the trustees should have no difficulty in making suitable provision for the unborn child."

[5] And now, onto the Lecture – which I hope you will not mind is somewhat more than 12 words.

[6] With some encouragement from John de Groot, I am perhaps adapting the theme slightly in what I have planned to say tonight. But I hope that you will ultimately find that I have not strayed too far from some of the fundamental equitable principles, for example, the

notion of equity as enabling equality of enjoyment of rights,[2] the emphasis on substance rather than form,[3] the role of conscience[4] and the need for the law to adapt, in order to be apt to address the many and varied circumstances in which it is called upon to act.[5] And I like to think that Professor Lee the law reformer would approve of the provocation of thought that is intended by my address to you.

[7] On any view, the history of First Nations Australians' occupation of this continent dates back many tens of thousands of years, with current research suggesting the temporal reach is upwards of 60,000 years. The diverse groups of people who occupied the lands and waters across Australia prior to first European contact – both Aboriginal peoples and Torres Strait Islander peoples – did so according to a subtle and elaborate[6] system of laws, particular to distinct groups, which provided a stable order of society by governing rights, obligations and relationships between people and in relation to land and waters. Spiritual and cultural beliefs were and are central to the existence and regulation of these rights and obligations.[7]

[8] As we know, the truth of that history was obscured for a long time. Ownership of this continent was claimed by the English Crown in the 18th century by fastening onto what had become an enlarged concept of *terra nullius*, meaning "a territory belonging to no one". Although originally the concept meant exactly that, it became "enlarged" in the sense that a territory did not necessarily need to be a complete "desert uninhabited country" to justify acquisition. Acquisition could be justified by reference to the (then) perceived benefits to those inhabitants of Christianity or European civilisation and the concomitant "discriminatory denigration of [I]ndigenous inhabitants, their social organization and customs".[8]

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2 See, for example, *Re Dickens* [1935] Ch 267 at 290 per Lord Hanworth MR, 300-301 per Romer LJ and 309 per Maugham LJ; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 149-150 per Mason CJ, Wilson and Deane JJ.

3 See, for example, *Parkin v Thorold* (1852) 16 Beav 59 at 66-67; 51 ER 698 at 701 per Lord Romilly MR.

4 See, for example, *Norton v Relly* (1764) 2 Eden 286 at 288; 28 ER 908 at 909 per Lord Northington LC; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461 per Mason J; *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 697 per Young J.

5 See, for example, *Dudley v Dudley* (1705) Prec Ch 241 at 244; 24 ER 118 at 119 per Lord Cowper.

6 *Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)* (1971) 17 FLR 141 at 267 per Blackburn J.

7 *Yanner v Eaton* (1999) 201 CLR 351 at 373 [38]; *Western Australia v Ward* (2002) 213 CLR 1 at 64-65 [14] and *Northern Territory v Griffiths* (2019) 269 CLR 1 at 38 [23].

8 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 40 per Brennan J.

[9] The reception, here, of the common law of England, as the law of the land (albeit adapted as necessary), likewise depended upon the fallacy that the First Peoples of this country had no laws and no social organisation, prior to the arrival of English colonists.[9] Nothing could be further from the truth.

[10] In 1992, the truth of our shared history was recognised and acknowledged by the High Court in the *Mabo* decision. The unjust and discriminatory expanded doctrine of *terra nullius* was rejected as a fiction that was both incorrect and no longer acceptable, in terms of the expectations of the international community and the contemporary values of the Australian people.[10] It was acknowledged that, by acquiring sovereignty over the land, the Crown had acquired what might be called the radical title to the land; but that acquisition of sovereignty did not of itself confer absolute beneficial title to previously occupied land. At common law, a mere change in sovereignty over a territory does not extinguish pre-existing rights and interests in land in that territory.[11] The rights and interests in relation to land which were held by the original inhabitants survived the Crown's acquisition of sovereignty and continued, as a burden on the radical title. Although, those rights and interests were susceptible to extinguishment by subsequent valid exercise of the sovereign power in a manner inconsistent with their continued existence. The customary laws acknowledged and observed by those original inhabitants also survived the acquisition of sovereignty – not as a separate legal system that could operate in opposition to or alongside the Australian legal system,[12] but as a basis for the foundation of rights capable of recognition within the Australian legal system – with native title being a clear example of that.[13]

[11] One year later, the *Native Title Act 1993* was enacted by the Commonwealth parliament, in response to the *Mabo* decision. This Act is concerned with rights and interests (which necessarily includes obligations) in relation to land and waters. Native title rights, as defined, are of course inalienable, at least in the sense we understand that concept by

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9 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 31-39 per Brennan J.

10 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J.

11 *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 422-423.

12 *Walker v New South Wales* (1994) 182 CLR 45 at 48-50 per Mason CJ (also, *Coe v Commonwealth* (1993) 68 ALJR 110 at 115), *Wik Peoples v Queensland* (1996) 187 CLR 1 at 214 per Kirby J, *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [44]. See also *Love v Commonwealth* (2020) 270 CLR 152 at [200]-[205] per Keane J.

13 *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244 at 248.

reference to property. But the transmission of obligations, including in relation to property, may be dealt with in other ways.[14]

[12] Almost thirty years later, the *Human Rights Act 2019* was enacted by the Queensland Parliament. Amongst the "human rights" protected and promoted by this Act are the cultural rights of Aboriginal peoples and Torres Strait Islander peoples, a concept that is much broader than the rights and interests that may be held in relation to land or waters.

[13] In that regard, s 28 of the *Human Rights Act* provides:

> "**28 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples**
>
> (1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
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> (2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community –
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> (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
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> (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
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> (c) to enjoy, maintain, control, protect and develop their kinship ties; and
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> (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources

[14] See the discussion in Vines, '*Drafting Wills for Indigenous People: Pitfalls and Considerations*' [2007] UNSWLRS 18 in relation to "obligations vs property as a commodity".

with which they have a connection under Aboriginal tradition or Island custom; and

(e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

(3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture."

[14] As articulated in s 3 of the *Human Rights Act*, the main objects of the Act are:

(a) to protect and promote human rights; and

(b) to help build a culture in the Queensland public sector that respects and promotes human rights; and

(c) to help promote a dialogue about the nature, meaning and scope of human rights.

[15] Section 4 contemplates that those objects will be "primarily achieved" in a number of ways – including:

(f) requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights; and

(g) conferring jurisdiction on the Supreme Court to declare that a statutory provision can not be interpreted in a way compatible with human rights.

[16] Giving effect to that purposive statement is s 48, dealing with "interpretation", which relevantly provides:

"**48 Interpretation**

(1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

> (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights. …"

[17] The question of the interaction of customary laws of Aboriginal people or Torres Strait Islander people, with the received (English) law of the land had already arisen in some cases, prior to the enactment of the *Human Rights Act* – as it happens, and as I will shortly explain, in the context of cases involving the application of equitable principles. That is an interesting enquiry in and of itself. But the further question I pose for the purposes of this lecture is whether the outcome in some of those cases may have been different, if they had been decided after the commencement of the *Human Rights Act*.

Deceased estates

[18] In the Queensland case of *Eatts v Gundy*,[15] the court was concerned with whether a relationship between the deceased and the person recognised as her "child" as a matter of a particular Aboriginal law and custom could fall within the relevant provisions of the *Succession Act 1981* dealing with intestacy or family provision.

[19] Bradley Gundy was the biological son of Roslyn Eatts. But he was raised from the time he was a baby by Roslyn's sister, Doreen. He called Doreen "Mum", and she treated him as her son. The family were members of the Maiawali Karawali people. There was evidence before the court that an arrangement had been made between the sisters, Roslyn and Doreen, that Bradley would be brought up by Doreen as her son; and that the relationship between Doreen and Bradley was a permanent relationship which amounted to a mother and son relationship according to the laws and customs of the Maiawali Karawali people. However, no "legal" adoption – in the sense of an act under the *Adoption Act 2009* (or its predecessors) – had ever taken place.

[20] Doreen Eatts died without leaving a will. Letters of administration were issued to her mother, Joslin Eatts. Bradley commenced proceedings in the Supreme Court, seeking *inter alia* a declaration that, pursuant to s 10(1) of the *Status of Children Act 1978,* he

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[15] At first instance, *Gundy v Eatts* [2013] QSC 297 (Atkinson J); and on appeal *Eatts v Gundy* [2015] 2 Qd R 559.

was a "child" of Doreen Eatts and that she was his "parent" under "Aboriginal tradition" within the meaning of the *Child Protection Act 1999*[16] and also for the purposes of parts 3 (intestacy) and 4 (family provision) of the *Succession Act 1981*. He sought, in effect, either a declaration that he was entitled to the whole of Doreen's estate, as her only surviving issue (child), there being no surviving spouse, or alternatively, that he was entitled to further and better provision from the estate, as the child of Doreen.

[21] The administrator, Doreen's mother, applied to strike out Bradley's claim, on the basis that he had no interest on intestacy (as his biological mother did not predecease Doreen[17]) and also that he did not fall within the ambit of persons entitled to make an application for further provision from the estate. It was that strike out application which led to the reported decisions in this matter.

[22] At first instance, Atkinson J, approaching the matter with the requisite caution,[18] concluded that the application to strike out should be dismissed, because the evidence was such that Bradley may well be able to prove that he was the child of Doreen, according to Aboriginal tradition, and so have a claim under the family provision jurisdiction. Her Honour noted that outcome "is perhaps not surprising" since one of the fundamental legislative principles, set out in s 4 of the *Legislative Standards Act 1992,* required legislation to have sufficient regard to "the rights and liberties of individuals" (s 4(2)(a)), and the same legislation further provided that that might depend on whether, for example, the legislation "has sufficient regard to Aboriginal tradition and Island custom" (s 4(3)(j)). Justice Atkinson also considered it was arguable that Bradley could show he was a child or descendant of Doreen, and therefore the "issue" of Doreen, for the purposes of the intestacy provisions of the *Succession Act*.[19]

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16 The definition of the term "Aboriginal tradition" is now found in schedule 1 to the *Acts Interpretation Act 1954* (Qld) – it means "the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships". See also the term "Island custom", a similar term in relation to "the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community group of Torres Strait Islanders".

17 See s 37(2) of the *Succession Act.*

18 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130; *Agar v Hyde* (2000) 201 CLR 552 at [57]; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at [46].

19 *Gundy v Eatts* [2013] QSC 297.

[23] The administrator successfully appealed that decision, with the result that Bradley's claim was summarily dismissed.[20] The Court of Appeal held that, even if Bradley could establish that he was in a parent/child relationship with Doreen according to Aboriginal tradition, "his claims must fail upon the correct construction of the statutory provisions".[21]

[24] For the purposes of the intestacy provisions, Bradley's claim could only succeed if he was Doreen's surviving "issue" and "child" within the meaning of part 2 of schedule 2 and s 36A of the *Succession Act.* There is no definition of "issue" in the *Succession Act,* but it was held by the Court of Appeal (Fraser JA, Muir JA and Martin J agreeing) that in the context of succession, the ordinary and prima facie legal meaning of "issue" is "descendants or progeny".[22] That is a broader category than "child" or "children", and includes descendants of any degree.[23] In *Matthews v Williams* (1941) 65 CLR 639 at 650, the High Court endorsed the statement[24] that "the essence of the word 'issue', which primarily means all descendants, is totality rather than succession".

[25] There is no generally applicable definition of "child" in the *Succession Act* either.[25] The Court of Appeal in *Eatts v Gundy* referred to and relied upon earlier authority for the proposition that in the context of the intestacy provisions of the *Succession Act*, the meaning of "child" focusses upon a biological connection or blood relationship.[26] This was contrasted with the definition of "child" for the purposes of part 4 of the Act (family provision), which extends to "any child, stepchild or adopted child" of the deceased person. Although even in that context, it was held that Bradley could not bring himself within the provisions, because he was not the (biological) "child" of Doreen and "adopted child" had a narrow definition,[27] referring to adoption "in accordance with the law" (taken to mean the statute law), which did not extend to adoption in accordance with Aboriginal law or custom.

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20 *Eatts v Gundy* [2015] 2 Qd R 559.

21 *Eatts v Gundy* [2015] 2 Qd R 559 at [7].

22 *Eatts v Gundy* [2015] 2 Qd R 559 at [16].

23 See also *Buick v Equity Trustees Executors and Agency Co Ltd* (1957) 97 CLR 599 at 603 per Dixon CJ.

24 Made by Cussen J in *In re Cust; Glasgow v Campbell* (1919) VR 221 at 254-255.

25 Cf s 40, which contains a definition of "child" for the purposes of part 4 – family provision.

26 *Eatts v Gundy* [2015] 2 Qd R 559 at [16]-[20].

27 The term "adopted child" is defined in s 5 of the *Succession Act* to mean "a child that is adopted by such person or by such person and another person jointly, in accordance with the law of the State or Territory, or country, where the adoption takes place, as in force at the date of the adoption".

[26] In support for the meaning of "child" as focussing upon a biological connection, the Court of Appeal cited *Sidle v Queensland Trustees Ltd* (1915) 20 CLR 557. In that case, Isaacs and Powers JJ said, at 560, that the word "child":

> "… is not a term of art. It is a common English word, and, standing by itself usually means a descendant in the first generation. The context may, however, extend or alter that meaning…"

[27] In that regard, Fraser JA referred to some "established extensions" of the terms "child" and "issue" – for example, to include a person who, although not the natural child of the husband, was born during the subsistence of the marriage.[28] The case cited as an example of that "extension" is *Re Clark Trust* [1946] 3 WWR 490 (a Canadian decision, of the Manitoba King's Bench (Dysart J)). The question with which *Clark* was concerned was in fact whether an adopted child was the lawful "issue" of the deceased. But in reasoning towards a positive finding about that, Dysart J made reference to this other example, explaining that:

> "The combined term, 'lawful issue,' does not coincide in meaning with natural born children. It may include a child who is not the natural offspring of a man, and may exclude another child who is his natural offspring. Thus in law, every child born of a couple during their marriage is 'lawful issue' of the couple, even though the husband is not in fact the child's natural father. **This rule of law is based, not upon truth or fact, but upon public policy, which seeks to uphold the purity of the marriage relationship and to protect children born in wedlock**."[29]

[28] So that is an example where the meaning of "child" was extended or altered – on the basis of public policy (or perhaps societal expectations). This principle is now reflected in statute law: see s 24(1) of the *Status of Children Act 1978*, which states the (rebuttable) presumption that a child born to a woman while she is married is presumed to be the child of the woman and her husband. But it did not need to be expressed in a statute to be recognised as a matter of law.

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28 *Eatts v Gundy* [2015] 2 Qd R 559 at [17].

29 Emphasis added.

[29] It was observed by Fraser JA in *Eatts v Gundy* that, although "a more liberal" construction of the word "child" may be adopted in the construction of a will or other instrument, it does not follow that such a construction may be applied to the word "child" in a statute such as the *Succession Act*.[30]

[30] Of course, and as also noted in *Eatts v Gundy*, in the case of a child adopted under statute law, the effect of s 214 of the *Adoption Act 2009* (which contains a statutory declaration that, upon the making of a final adoption order, the adopted child becomes a child of the adoptive parent(s)) and s 216 of the same Act (which provides that s 214 has effect in relation to dispositions of property by will or on intestacy) is that an adopted child is treated as the "issue" of the deceased for the purposes of the intestacy rules.[31]

[31] Similar statutory "extensions" of the meaning of "child" for the purposes of dispositions of property by will or on intestacy have also been made in relation to a child born through a surrogacy arrangement, where a parentage order has been made.[32] In the *Status of Children Act 1978*, parentage presumptions are provided for in relation to a child born as a result of a fertilisation procedure (IVF),[33] which would then operate so that the reference to "child" in the *Succession Act* applied. But even these provisions may warrant consideration, to see if they meet modern societal expectations – and indeed the contemporary legal landscape – given their distinction between "married women", who have male "husbands" or de facto or civil partners; and other women, who have female de facto partners.

[32] Interestingly, the framework from the *Adoption Act* (and the *Surrogacy Act*) has recently been replicated, at least in the case of Torres Strait Islander traditional adoptions, in the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020* (Qld).[34] That Act makes provision for the making of a "cultural recognition order" that has the effect of transferring a person's parentage from their birth parents to their "cultural parents", and of effectively declaring that the person becomes the child of the cultural parents and stops being the child of the birth parents (see s 66).

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30 *Eatts v Gundy* [2015] 2 Qd R 559 at [18], referring *inter alia* to *GE v KM* [1995] 1 VR 471.

31 This was the outcome in *GE v KM* [1995] 1 VR 471, referred to in *Eatts v Gundy* (COA) at [17].

32 *Surrogacy Act 2010* (Qld), ss 17, 39 and 40.

33 *Status of Children Act 1978* (Qld), ss 16 to 23.

34 See also *Akiba (on behalf of the Torres Strait Islanders of the Regional Seas Claim Group) v Queensland (No 2)* (2010) 204 FCR 1 at [196]-[201], in relation to Torres Strait Islander laws and customs on adoption.

As defined in s 10, a cultural parent "is a person who, in accordance with Ailan Kastom child rearing practice, agrees to accept the permanent transfer of the parental rights and responsibility for a child from the child's birth parents to the person". A cultural recognition order has effect in relation to "dispositions of property, whether by will or otherwise" and "devolutions of property in relation to which a person dies intestate" (s 67).

[33] In contrast, s 7(1) of the *Adoption Act 2009* provides that the *Adoption Act* is to be administered under the following principles:

> "(a) because adoption (as provided for in this Act) is not part of Aboriginal tradition or Island custom, adoption of an Aboriginal or Torres Strait Islander child should be considered as a way of meeting the child's need for long-term stable care only if there is no better available option;
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> (b) it is in the best interests of an Aboriginal or Torres Strait Islander child –
>
> (i) to be cared for within an Aboriginal or Torres Strait Islander community; and
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> (ii) to maintain contact with the child's community or language group; and
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> (iii) to develop and maintain a connection with the child's Aboriginal tradition or Island custom; and
>
> (iv) for the child's sense of Aboriginal or Torres Strait Islander identity to be preserved and enhanced."

[34] It is not apparent from my research where the generalised statement that appears in s 7(1)(a) of the *Adoption Act* came from. It is no doubt correct, read literally – that is, adoption, as provided for in the *Adoption Act*, is not part of Aboriginal tradition or Island custom. But, as has now been recognised by the legislature, an equivalent form of permanent change in parentage is part of Torres Strait Islander custom. It is also, as far as I am aware, part of the custom acknowledged and observed by some groups of

Aboriginal people.[35] On the present state of the law, a person "adopted" in accordance with traditional law and custom – other than the Ailan Kastom recognised by the 2020 Queensland Act – is in a difficult, and potentially disadvantaged, position for the purposes of the intestacy rules, or any family provision application.

[35] The Court of Appeal in *Eatts v Gundy* disagreed with the primary judge's reliance upon s 4(3)(j) of the *Legislative Standards Act 1992*, as supporting a broader construction of the meaning of the words "issue" and "child" for the purposes of parts 3 and 4 of the *Succession Act*, to capture cultural (as opposed to only blood) relationships, holding that that Act was intended to operate *prospectively* and so could have no bearing upon the construction of the *Succession Act*, a prior Act. The Court said, at [24], that the *Legislative Standards Act 1992*:

> "… is incapable of bearing a construction that it requires legislation which predated its commencement to be construed in a way which ensures that it has 'sufficient regard to rights and liberties of individuals' in any of the respects referred to in s 4(3), including the requirement that legislation 'has sufficient regard to Aboriginal tradition and Island custom' (s 4(3)(j))."

[36] The same cannot be said of the *Human Rights Act 2019*. With only limited exceptions, the *Human Rights Act* applies to all Acts and statutory instruments, whether passed or made before or after the commencement of the Act on 1 January 2020.[36] Consequently, the Act could have a bearing on the construction of the words "issue" and "child" and

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35 See, for some recent examples, *O'Donnell on behalf of the Wilyakali Native Title Claim v State of South Australia* [2023] FCA 1000 (Raper J) (paragraph 10 of the orders (defining native title holders, including by reference to adoption) and paragraph 50 of the reasons); *Alvoen on behalf of the Wakaman People v State of Queensland* [2023] FCA 953 (Collier J) (paragraph 1 of the schedule to the orders (definition of native title holders) and paragraphs 6, 12 and 18 of the reasons); and *Ross on behalf of the Cape York United #1 Claim Group v State of Queensland (No 18) (Atambaya #2 determination)* [2023] FCA 735 (Mortimer CJ) (paragraph 1 of the schedule to the orders (definition of native title holders)). See also *Western Australia v Ward* (2000) 99 FCR 316 (the claim on behalf of the Miriuwung and Gajerrong people in Western Australia) at [233] and *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 at [9] and [114]-[116]. See also de Plevitz and Croft, '*Aboriginality under the Microscope: The Biological Descent Test in Australian Law'* (2003) 3(1) QUTLJJ 104 at 111; *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 at [148] per Basten JA (with whom McCallum JA, as her Honour then was, agreed, at [176]); and *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 at [65] (per Allsop CJ) and at [396] per Mortimer J (as her Honour then was).

36 *Human Rights Act 2019* (Qld) s 108(1). The exception is laws relating to termination of pregnancy (s 106) and the *Human Rights Act* also does not affect native title rights and interests (s 107).

the words could be required "to the extent possible that is consistent with their purpose, [to] be interpreted in a way that is compatible with human rights", including cultural rights of Aboriginal peoples and Torres Strait Islander peoples.[37]

[37] One matter that may be worthy of consideration is whether – even apart from the question of Aboriginal law and custom – the construction of "child" where it appears in the *Succession Act*, as confirmed in *Eatts v Gundy*, reflects a social conservatism, for want of a better term, which lacks contemporary relevance. The notion that the term "child" means, prima facie, a "legitimate" (that is, born in wedlock) biological child seems to stem from observations made by Lord Cairns in 1873.[38] In another case, a broader construction of the word "child" (or "children"), which would include step-children, was rejected on the basis that the word was not used (in a similar statutory context) "as a popular, loose and flexible expression", and should be given its accepted meaning – "sons and daughters, children of the blood, or 'natural children'".[39] But that begs the question – accepted by whom, and in what sociological context?

[38] Is it "popular, loose and flexible" to take account of the many different circumstances in which families are created in contemporary times? Or is it appropriate and adapted? What about surrogacy, or IVF utilising donor eggs or sperm? Legislation has been passed to address those developments in the composition of our society; but does that mean it is necessarily required in order to expand the meaning of "child" more broadly? A similar point was made by Kirby P, then of the Court of Appeal in New South Wales, in *Harris v Ashdown* (1985) 3 NSWLR 193, when he said:

> "I cannot leave this examination of the authorities without saying that, in my view, the observations of Lord Cairns in 1873 must, even as providing a judicial dictionary, be regarded as of doubtful applicability to the task of deriving the testator's intention, at least in the case of a will drawn today. Attitudes to personal relationships and the provisions of the law on matters such as illegitimacy and adoption, have changed so significantly in the past hundred years, that it is no longer safe to adopt, even as a rule of thumb, the principle that by the use of the word 'child' in his will, a

37 *Human Rights Act 2019* (Qld) s 48(1) and s 28.
38 *Hill v Crook* (1873) LR 6 HL 265 at 282-283.
39 See, for example, *Popple v Rowe* [1998] 1 VR 651 at 653 per Brooking JA.

> testator must be taken to mean only a legitimate child. Quite apart from the provisions of legislation on adoption and the status of illegitimacy, social attitudes to such children have so changed since the 19th century, as to make the rule laid down by Lord Cairns inapplicable to modern conditions."[40]

[39] A similar analogy may be drawn from the principle that, where ordinary English words are used, current usage is relevant to the task of interpretation. An example of the application of this principle is *Bruyn v Perpetual Trustee Co Ltd* (1974) 131 CLR 387, in which the Court considered the proper construction of the phrase "to the children of George Rooke and Ernest Bruyn". Previous decisions had construed a similar phrase as a gift to Ernest Bruyn and to the children of George Rooke (essentially on the basis that the omission of a second "of", before Ernest Bruyn, was taken to be intentional). The Court stated the principle that, in the construction of language used in a will, where there is more than one correct grammatical construction, that one is to be preferred which conforms with current usage (at 391). It was observed that "current usage" suggested that the inclusion of a second "of" was not necessary or appropriate – indeed would be regarded as "heavy"; and that it was ordinary practice not to repeat the preposition "of" twice in such a sentence. It was therefore held that, in light of current English usage, it could readily be inferred the testator intended to include the children of both George and Ernest. In the course of their reasons, the Court (Stephens and Jacobs JJ, with Menzies J (albeit the latter had passed away by the time judgment was delivered)) referred to the following words of Viscount Simon LC in *Perrin v Morgan* [1943] AC 399 at 408:

> "… it seems to me a little unfortunate that so many of such cases should find their way into the books, for in most instances, the duty of a judge who is called on to interpret a will containing ordinary English words **is not to regard previous decisions as constituting a sort of legal dictionary to be consulted and remorselessly applied** whatever the testator may have intended, but to construe the particular document so as to arrive at the testator's real meaning according to its actual language and circumstances."[41]

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40 *Harris v Ashdown* (1985) 3 NSWLR 193 at 199-200.

41 Emphasis added.

[40] One might respectfully ask the rhetorical question – is that what was done in *Eatts v Gundy*? Were the previous decisions on the meaning of "child" applied as though they constitute a sort of legal dictionary?

[41] Of course the question of the proper construction of a word or phrase used in a statute is a different task to that which is involved in construing a will or other instrument.[42] The task, when construing a statute, is to ascertain the intended meaning of the words used, a process which must be undertaken having regard to the context for the provision, including its purpose.[43] But in this regard, the intended meaning is not the subjective purpose or (actual) intention of the legislature;[44] but rather the objective purpose or intention, as it may be revealed by the text which has been used, in the context of the whole Act, and the broader context. The native title cases on extinguishment provide a clear example of the operation of this principle. The task, in construing a statutory provision in that context, is to determine whether the provision reveals a clear and plain intention to extinguish native title. At the time such legislation was enacted, native title was not within the contemplation of the legislative drafters, but that does not mean that the intention to extinguish native title could not be demonstrated (for example, by the creation of entirely inconsistent rights). The enquiry is an objective one.[45]

[42] Plainly, the drafters of the *Succession Act 1981* did not contemplate "issue" or "child" potentially including a descendant or child, not related by blood, or legal adoption under the relevant statute law, but rather being recognised as having that relationship by virtue of the operation of traditional laws and customs acknowledged and observed by a particular group of Aboriginal people or Torres Strait Islander people. But that does not *of itself* mean that the words cannot be construed to include such a relationship. Questions of public policy, contemporary societal attitudes and modern usage are all relevant; as is a statutory direction (such as s 48 of the *Human Rights Act*) that requires the statutory provision, to the extent possible consistent with its purpose, to be interpreted

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42 *Harris v Ashdown* (1985) 3 NSWLR 193 at 199; *Popple v Rowe* [1998] 1 VR 651 at 657 per Brooking JA.

43 *R v A2* (2019) 269 CLR 507 at [32]-[33] and [36] per Kiefel CJ and Keane J.

44 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68 per Brennan J.

45 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 85 per Brennan CJ; see also *Western Australia v Ward* (2002) 213 CLR 1 at 89 [78].

in a way that is *compatible with* human rights.[46] In that sense, the *Human Rights Act* now forms part of the context in which a statute is to be construed.

[43] So, could a different conclusion have been reached, had *Eatts v Gundy* been decided after the enactment of the *Human Rights Act*?

[44] Historically, the purpose of English intestacy rules was to protect the interests of the family property.[47] Intestacy provisions have been likened to the will the law would expect a member of an average family to make if he or she got around to it.[48] Family provision legislation was enacted in order to "subject freedom of testamentary disposition to discretionary curial intervention in certain classes of case, where moral rights and obligations of support were disregarded".[49] The focus of the provisions was "the family", described as "the social and legal institution within which these … rights and obligations are worked out".[50]

[45] It is perhaps difficult to see how it could be said that a broader approach to the meaning of "child" or "issue", including by reference to Aboriginal or Torres Strait Islander custom, could be inconsistent with those purposes. In addition, if "public policy" supported recognition of a child born "in wedlock" as the husband's "issue", even if the husband was not the child's father, one might think it is not too difficult to imagine public policy considerations supporting recognition of a parent/child relationship established as a matter of Aboriginal or Torres Strait Islander custom, particularly in light of s 28 and s 48 of the *Human Rights Act*.

[46] I do not express a view about the ultimate answer to this question. It is a difficult one, which would benefit from careful consideration and submissions if it were to be argued before a Court. I wish to do no more than provoke the thought – is this an area of the law

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46 See s 8 of the *Human Rights Act* for the meaning of "compatible with human rights"; see also *Momcilovic v The Queen* (2011) 245 CLR 1 at [49]-[51] per French CJ, at [169]-[171] per Gummow J, at [565]-[566] per Crennan and Kiefel JJ and at [684] per Bell J (in relation to s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which is in equivalent terms to s 48 of the Queensland Act), referred to in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250 at [111].

47 Burns, '*The Changing Patterns of Total Intestacy Distribution between Spouses and Children in Australia and England*' [2013] UNSWLawJl 18.

48 Queensland Law Reform Commission, *Intestacy Rules*, Report No 42 (1993) at 1.1.

49 *Barns v Barns* (2003) 214 CLR 169 at 173 per Gleeson CJ, referring to *Schaefer v Schuhmann* [1972] AC 572.

50 Ibid.

where the statutory invocation, to expressly consider human rights in the interpretation of a statute, could result in a change to the law?

[47] These issues could of course be addressed if the person makes a will. But that is not a straightforward "fix". As the authors of an article in relation to legal recognition of Torres Strait Islander traditional adoption[51] have observed:

> "Low will-making rates and the taboo subjects of death and dying among many Aboriginal and Torres Strait Islander people have been referred to by Vines in her research conducted over decades. This leads to high levels of intestacy among Aboriginal and Torres Strait Islander people. This sociocultural context coupled with the decision in *Eatts v Gundy* highlights the ongoing failure of state law to currently provide recognition of traditional adoption and points to the critical need to provide an avenue of legal recognition so that traditional adoptees do not experience discrimination."[52]

[48] That article was published in 2018, and contained a particularly pointed call for government action in relation to Torres Strait Islander traditional adoptions, which I infer is what we now see in the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act 2020.*

[49] Professor Prue Vines (Faculty of Law & Justice, UNSW), the "Vines" referred to in the passage just quoted, has undertaken extensive research and publication in relation to the issue of making wills for Aboriginal people, in order to address this sociocultural disadvantage. Professor Vines has advocated for increased will-making for Aboriginal people, and provides helpful assistance in relation to drafting culturally appropriate and effective wills, to address the fact that the intestacy laws in Australia are, in her words, "grossly inadequate" to deal with the inheritance issues of Aboriginal and Torres Strait Islander people.[53] Professor Vines' work has culminated in the publication of the very

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51 Loban, van Doore and Rathus, '*Parent*age *not parent*hood*: Ending discriminatory laws and policies regarding the legal recognition of Torres Strait Islander traditional adoption*' (2018) 31 Australian Journal of Family Law 135.

52 References omitted.

53 See for example Vines, '*Making Wills for Aboriginal People in NSW*' [2011] UNSWLRS 31; and Vines, '*Drafting Wills for Indigenous People: Pitfalls and Considerations*' [2007] UNSWLRS 18.

useful work, 'Aboriginal Wills: Handbook', now in its third edition.[54] In her articles, Professor Vines raises some interesting, practical suggestions in relation to making culturally appropriate wills, including:

(a) The need for care to be taken when using words to indicate kinship, because whilst the common law's view of kinship is limited by blood and a linear view of time, that may not be reflected in an Aboriginal or Torres Strait Islander person's conception of kinship. The designations of "child", "mother", "cousin" or "aunty", for example, may be much broader. Vines therefore suggests naming each person designated by a kinship term, to ensure the will reflects the real intentions of the testator.

(b) The need to be aware of the mix of property and obligations owned and/or held by an Indigenous person, and for care to be taken as to how these things, which may reflect the traditional and non-traditional combination of elements of a particular person's life, are dealt with.

(c) Using principles of equity to consider how to deal with obligations as opposed to property as a commodity in a will. The example Vines gives is in relation to an artwork based on ritual knowledge, and in her 2007 article, she posed the following question:

> "The artwork itself may be copyright and therefore be an item of property which the common law recognises and which can be passed on to other people. That raises no legal difficulty, except that the fact that it is based on ritual knowledge may mean that it is important to place conditions on the gift in the will. However, the ritual knowledge itself may not amount to property at common law. It certainly will not be copyright because copyright protects the *expression* of an idea rather than the idea itself. If the testator is the person who has done the artwork their major concern may be to ensure that the knowledge itself is protected and passed on. This may happen in life, in which case there is no need for the will to do it. But if it does not happen in life, can we create a vehicle in equity which will

[54] Vines, *Aboriginal Wills Handbook: A Practical Guide to Making Culturally Appropriate Wills For Aboriginal People* (3rd ed, 2019), published by the NSW Trustee & Guardian.

> both protect and keep secret the knowledge itself? For example, can we by the use of secret or half-secret trusts, set up a situation where a person is entitled to keep cultural information such as traditional medicine secrets and pass it on? Can such information be recognised as property in equity? And can it be kept secret?"[55]

(d) The benefits of including a direction about dealing with the body of the deceased person, in the will, in an attempt to prevent arguments arising subsequently.

[50] But until there is a higher rate of will-making, the solution needs to be found elsewhere.

[51] I am not sure that statutory construction is an adequate answer in itself, even having regard to the *Human Rights Act*. As was emphasised in *Momcilovic v The Queen*,[56] by reference to the Victorian equivalent of s 48 of the *Human Rights Act*, the task called for by the provision is one of interpretation, within the rubric of the established principles of statutory construction, not "judicial rewriting" of legislation. The construction question is by no means straightforward and would involve complex, and therefore costly, litigation.

[52] A more straightforward solution would be legislative amendment.

[53] Part III, division 4A of the *Administration and Probate Act 1969* (NT) might provide a useful guide. Those provisions make express provision for an application for orders for distribution from an intestate estate to be made, in relation to the estate of an Aboriginal person who has died without leaving a will, where the person claims to have an interest in the estate under the customs and traditions of the community or group to which the deceased belonged (s 71B). Equivalent provisions can be found in s 133 and 134 of the *Succession Act 2006* (NSW) and s 34 of the *Intestacy Act 2010* (Tas).

[54] This is a matter worthy of serious consideration by government, because of the real potential for discrimination and legal disadvantage for traditionally adopted people.[57]

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55 Vines, '*Drafting Wills for Indigenous People: Pitfalls and Considerations*' [2007] UNSWLRS 18.

56 See footnote 46 above.

57 See the discussion by Loban, van Doore and Rathus in '*Parent*age *not parent*hood*: Ending discriminatory laws and policies regarding the legal recognition of Torres Strait Islander traditional adoption*' (2018) 31 Australian Journal of Family Law 135.

[55] The opportunity for that is ripe, given that there is a review of the *Succession Act* underway at present. A consultation paper (entitled "public policy paper") released by the Attorney-General in September 2023 observes that Queensland's succession laws are "in need of review and modernisation to ensure they give effect to modern societal expectations" and seeks the community's views.[58] The public policy paper notes that, in the context of the intestacy rules, consideration is being given to allowing the definition of "child" of a deceased person to be expanded by court order to include a person who may be such a child under Aboriginal and/or Torres Strait Islander cultural tradition; and to amending the definition of "spouse" of a deceased person so that it may be expanded, again by court order, to include a spouse under a traditional marriage. Consideration is also being given to, subject to court order, allowing a deceased person's estate to be distributed to the community or group to which the person belonged, in accordance with cultural tradition, rather than under the intestacy rules. The paper acknowledges the cost implications of all of these options, involving as they would an application to the court. Similar changes, in terms of the expansion of the meaning of "child" and "spouse" are also under consideration in relation to eligible applicants for family provision. Responses were sought to be provided by 16 October 2023, so it will be interesting to see what comes next.

[56] Of course, in any event it would be necessary for there to be proof of the law or custom, and its application in the particular case.[59] In some circumstances, that may be relatively straightforward – for example, where there has been a successful native title determination application, the evidence gathered in support of such an application will usually include expert anthropological evidence, and evidence from the claimants themselves, as to the laws and customs observed by the particular group, including in relation to cultural adoption, where that is part of the laws and customs observed. Even if the native title determination application has not been successful – for example, because the requisite continuity of acknowledgement and observance of laws and customs has not been able to be established, due to dislocation and dispossession as a result of white settlement,[60] it may nevertheless be the case that the evidence gathered

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58 Department of Justice and Attorney General (Qld), *Review of the Succession Act 1981*, Public Policy Paper (2023).

59 See, for example, *The Estate of Bunduck* [2021] NTSC 12 at [15].

60 Cf *Widjabul Wia-bal v Attorney-General of New South Wales* [2022] FCA 1187 at [72] per Jagot J (then of the Federal Court of Australia).

adequately establishes the custom in relation to adoption. In other cases, it may be anything but straightforward, as has been seen in some of the cases involving burial disputes, the next topic of discussion. But matters of proof in any particular case ought not stifle the development of the law, in a manner which reflects contemporary societal expectations, including by reference to the *Human Rights Act.*

Burial disputes

[57] In contrast, one area in which customary law, and cultural considerations, have been recognised, respected and applied, even before the *Human Rights Act*, is in the case of burial disputes. It is well established that the Supreme Court has a role in resolving disputes of this kind, as an incident of its inherent power to grant declaratory relief.[61] That power is of course very broad – as described by the majority in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-2, as follows:

> "It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which '[i]t is neither possible nor desirable to fetter…by laying down rules as to the manner of its exercise.' However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions."

[58] Sometimes, s 6(1) of the *Succession Act* has been identified as the source of the Court's jurisdiction to determine burial disputes.[62] That sub-section provides:

> "Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect."

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61 See *Doherty v Doherty* [2007] 2 Qd R 259 at [15], referring to *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582.

62 For example, *Johnson v George* [2019] 1 Qd R 333 at [6].

[59] However, as Henry J pointed out in *Accoom v Pickering* (2020) 6 QR 640, there is nothing in s 6, or any other sections of the *Succession Act*, which provides for decision-making as to burial. His Honour said:

> "Section 6(1)'s relevance in the present context is its conferral of power to grant letters of administration and determine all matters relating to the administration. It does not gain that relevance because of its empowerment in connection with estate property, there being no property in the body of a deceased person (subject to exceptions of no present relevance, see *Doodeward v Spence* (1908) 6 CLR 406). Rather, the relevant connection is with determining who should administer the estate.
>
> It is relevant in that way because at common law the 'usual rule' or 'common starting point' is that the person entitled to administration is usually the person responsible for arranging the funeral and burial of the deceased: see, for example, *Roma v Ketchup* [2009] QSC 442; *Frith v Schubert* [2010] QSC 444; *Johnson v George* [2019] 1 Qd R 333."

[60] In terms of the application of cultural considerations, Henry J recorded that:

> "It was uncontroversial in Queensland before the enactment of the *Human Rights Act* 2019 that Aboriginal custom, including culture and spiritual beliefs, are a relevant consideration in a case like the present: see, for example, *Johnson v George* [2019] 1 Qd R 333. For that reason, this is not a case in which the provisions of the *Human Rights Act* 2019, including s 28 'Cultural Rights – Aboriginal Peoples and Torres Strait Islander Peoples' and s 48 'Interpretation', produce a different approach than that already taken by this Court."

[61] His Honour went on to say that if the outcome of Aboriginal custom in that case were clear cut and yielded a singular result, he would "readily honour it"; but the reality was that there was a difficult mix of custom related considerations in play, and his Honour was acutely conscious that no decision he could make would please all, and that it was inevitable the process and the decision would cause added pain to some. A number of

the cases in this area contain similar sentiments.[63] This reinforces the point emphasised by Professor Vines, as to the desirability of such wishes being expressed in a will of the deceased.

[62] In any event, as already noted, at common law, the "usual rule" or "common starting point" is that the person entitled to administration of the estate of a deceased person is usually the person responsible for arranging the funeral and burial of the deceased.[64] Where there is a will, and an executor has been named, that person has the "primary privilege of burying the deceased's body".[65] Where there is no executor named, and the deceased leaves an estate, the person entitled to administration is usually the person responsible – and in identifying who that is, "one looks to see the person who is most likely to get the grant of administration".[66] But it is emphasised in the cases, notably the decision of Doyle CJ in *Jones v Dodd* (1999) 73 SASR 328, that this "usual rule" is not a "hard and fast rule" or principle of law to be applied rigidly.[67]

[63] Where the person has died intestate, without any significant assets, such that there is unlikely to ever be an application for administration, it has been observed that this approach "takes on an air of unreality" and the generally accepted approach is:

> "…to have regard to the practical circumstances, which will vary considerably between cases, and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question."[68]

[64] In *Britt v Office of State Coroner* [2022] WASCA 75 at [57]-[58], Mitchell JA observed that "practical considerations may also be significant in a case where persons with equally-ranking rights to apply for administration are in dispute about funeral arrangements" and that other "relevant matters [that] have been recognised include, to

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63 Just to take a few examples, see *Johnson v George* [2019] 1 Qd R 333 at [30] (North J), *South Australia v Ken* [2021] SASC 10 at [31] (Stanley J) and *Dodd v Jones* [1999] SASC 458 at [36] (Doyle CJ).

64 *Accoom v Pickering* (2020) 6 QR 640 at 643, [5], and the cases there referred to.

65 *Smith v Tamworth City Council* (1997) 41 NSWLR 680 at 691 per Young J, adopted in *Jones v Dodd* (1999) 73 SASR 328 at [45] (Perry J, Millhouse and Nyland JJ agreeing).

66 Ibid. See r 610 of the *Uniform Civil Procedure Rules 1999* (Qld), for the order of priority of persons to whom the court may grant letters of administration on intestacy.

67 *Jones v Dodd* (1999) 73 SASR 328 at 336; see also *Accoom v Pickering* (2020) 6 QR 640 at 644.

68 *Jones v Dodd* (1999) 73 SASR 328 at 336 [50]-[51]. See also *South Australia v Smith* (2014) 119 SASR 247 at 260-263 and *Johnson v George* [2019] 1 Qd R 333 at 338-339.

the extent they are known to the court, cultural considerations, the deceased's wishes and the wishes and sensitivities of living close relatives of the deceased", as well as "the need for the funeral and burial to be held in a timely way, and the costs and logistical difficulties attendant upon competing proposals".

[65] The need for flexible application of the common law "rules" was recently emphasised, in relation to another category of persons recognised in various cases to have a right to bury a body, where there is no executor or administrator appointed, no will and no estate – namely, the "parents" of the deceased. *Puruntatameri v Baird* (2020) 356 FLR 284 is a decision of the Court of Appeal of the Northern Territory in relation to a tragic case of a dispute about possession of the body of a 15 year old boy for burial. At first instance, there were competing applications, by the boy's biological mother, on the one hand, and by her sister, who had cared for and brought the boy up as his sole caregiver, from the time he was five years old, on the other. The sister assumed the role of mother and treated the boy as her son for the whole of his life. At first instance, the court ordered that the boy's body be delivered into her possession to arrange the funeral and burial of the boy.

[66] On the appeal, there was an argument that the court at first instance had erred by not applying a (supposed) common law rule that it is only "blood" parents who have the duty and right to bury their dead children, a rule said to have been affirmed in the New South Wales decision of *Warner v Levitt* (1994) 7 BPR 15,110. The Court of Appeal rejected the notion that there was any "rigid" rule to this effect, referring to *Jones v Dodd* in this regard. Even taking that common law rule as a starting point, the Court of Appeal also rejected the notion that the rule was confined strictly to biological parents rather than other persons *in loco parentis*, including foster parents. The Court applied *Jones v Dodd* (at [36]) and said it was consistent with that approach to "take into account, and give substantial weight to, who has had the chief responsibility for the care of the deceased child in the time preceding the death" (at [37]).

[67] The Court of Appeal in *Puruntatameri* (at [38]) contrasted the narrow approach taken in *Warner v Levitt,* in which it was acknowledged that the common law rule was "founded originally upon religious beliefs which not very many people would today hold, and upon social conditions which have changed quite dramatically", with the approach taken in *Smith v Tamworth City Council* (1997) 41 NSWLR 680. In that case, Young J observed (at 697):

> "Equity acts as a court of conscience and the conscience is what is right in the eyes of the community for the time being. If one were to ask would the community as a whole consider that a biological mother [the plaintiff in the case] should have the right to have her name endorsed on a tombstone of a child who had been the adopted child of someone else for over twenty years when that other person did not consent to the biological mother's wishes, I could not see that the community would endorse the biological mother's claim. [But] If it is not against the conscience as judged by **modern community standards**, then it is not a situation in which this Court should give relief."[69]

[68] The Court of Appeal in *Puruntatameri* said that was the approach to be applied, by the Supreme Court in exercising jurisdiction in a matter such as a burial dispute, endorsing the flexible approach articulated in *Jones v Dodd*.

[69] Another recent example in which Aboriginal cultural considerations were weighed in the balance in deciding a dispute about burial is *State of South Australia v Ken* [2021] SASC 10. The reasons of Stanley J in that case commence with an acknowledgement that both the dignity of the deceased and the conscience of the community[70] require that the dispute about where the deceased be buried be decided without delay, but with all proper respect and decency.

[70] In that case, there was evidence of academic research and writing on Pitjantjatjara burial practices. Justice Stanley made a finding by reference to that evidence that the primary cultural connection for Anangu men, such as the deceased, was the relationship to their father's and grandfathers' country. Balancing the common law principles and practical considerations, as well as paying attention to cultural, spiritual and religious factors, his Honour found the burial place proposed by the deceased's father and paternal family should be preferred over the wishes expressed by the deceased's mother and sister (at [28]-[39]). That was not a matter of giving greater weight to the wishes and sensitivities of one side of the deceased's family over the other. Instead, Stanley J said he was persuaded that the deceased should be buried in the place pressed for by his father,

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69 References omitted; emphasis added.

70 A phrase borrowed from *Calma v Sesar* (1992) 2 NTLR 37 at 42.

"having weighed the Aboriginal cultural matters and concerns established by the evidence" (at [30]).

[71] In this context, it can be seen that our received legal system has managed to weigh in the balance, and give effect to, cultural considerations without principled difficulty; albeit the problems of proof, and conflict of views about those considerations, remains. Modern community standards, and questions of "the conscience of what is right in the eyes of the community" have been accepted as relevant to the understanding and application of common law and equitable rules and principles. When coupled with the statutory instruction provided by ss 28 and 48 of the *Human Rights Act*, these cases could be said to provide an example of how this might also be replicated in other areas of the law.

Artistic work – relevance of customary law in the protection of cultural knowledge embodied in artistic works

[72] Moving on from deceased estates and burials, another interesting area in which the challenge of the interaction between customary laws observed by First Nations Australians and the Australian legal system has arisen is in the context of protection of cultural knowledge embodied in artistic works. As will be seen, equity has come to the rescue, when other legal principles have been found to be inadequate, or incapable of adaptation.

[73] An early case in which cultural considerations arose is *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, a decision of French J (then of the Federal Court). This case concerned a dispute about the design of a special $10 bank note released in 1988 to commemorate the first European settlement of this country. The note incorporated elements of Aboriginal artworks, including, in part, a reproduction of the design of a "Morning Star Pole" made by Mr Yumbulul. The reproduction was made under a sub-licence of the copyright in the work granted to the Reserve Bank by the Aboriginal Artists Agency Ltd. That company had an exclusive licence from Mr Yumbulul. The case concerned a claim by Mr Yumbulul that he had been induced to sign the licence by misleading or deceptive conduct on the part of the agency. He had also sued the Reserve Bank for breach of his copyright, but that element of his claim was settled and dealt with by consent orders and so was not addressed in the published judgment.

[74] The *Yumbulul* case explains the special circumstances in which an Aboriginal artist may be authorised, in terms of the laws and customs acknowledged and observed by the person, to paint certain designs – including as a result of "various levels of initiation and revelatory ceremonies in which he has gradually learnt the designs and their meanings". That is a unique situation – quite different from (although also captured within) the broader concept of an individual's moral or intellectual rights in a work of art created by them. Having signed the licence agreement, Mr Yumbulul subsequently came under considerable criticism from within his community for permitting the reproduction of the pole by the bank. Although French J found that his causes of action against the agency were not established, because there had been no misleading or deceptive conduct, his Honour did observe (at 490) that:

> "It may well be that when [Mr Yumbulul] executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations. Certainly, it appears to be the case that neither Mr Wallis [the director of the agency], nor anyone else at the agency, felt a need to explore these ramifications with him. Mr Wallis saw that as a matter which was Mr Yumbulul's responsibility. It may be that greater care could have been taken in this case. And it may also be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin."

[75] It remains the case that copyright laws do not address these challenges.[71] However, equitable principles have been called in aid to protect cultural knowledge and communal ownership.

[76] For example, in *Milpurrurru v Indofurn Pty Ltd* (1994) 54 FCR 240 a number of Aboriginal artists and the Public Trustee, on behalf of the estates of other artists, successfully sued a carpet importer for remedies for copyright infringement in circumstances where the imported carpets had been manufactured by incorporating reproductions of the whole or substantial parts of their artworks, without permission. As

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[71] An argument for standalone legislation protecting Indigenous Cultural Intellectual Property is made by Parkin and Pappalardo in '*Protecting Indigenous art and culture: how the law fails to prevent exploitation*' [2020] Precedent AULA 46.

one of the claimants in that case explained in her evidence, her right to use the image depicted in her artwork arose by virtue of her membership of a particular land owner group and was an incident arising out of land ownership. She gave evidence that:

> "As an artist whilst I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story."

[77] The reproduction of the artworks in circumstances where, for example in one case, the dreaming depicted would be walked on, was totally opposed to the accepted cultural use of the imagery. It was accepted that the infringements caused not only personal distress to the claimants, but also that it exposed the artists to embarrassment and contempt within their communities. The court took into account the effect of the unauthorised reproduction of artistic works under customary laws in quantifying the damage suffered.

[78] A subsequent case, *Bulun Bulun v R & T Textiles* (1998) 86 FCR 244 involved claims, first, by Mr Bulun Bulun, the creator of an artistic work, for remedies for infringement of his copyright in the work under the *Copyright Act 1968* (Cth), as well as a claim by Mr Milpurrurru, on his own behalf and in a representative capacity for the Ganalbingu people, in respect of equitable ownership by that broader community of the copyright in the artistic work. The artistic work the subject of this case was said to incorporate within its subject matter much that is sacred and important to the Ganalbingu people about their heritage. The respondent had imported and sold in Australia printed clothing fabric which infringed Mr Bulun Bulun's copyright in the particular work. The claim by Mr Bulun Bulun was resolved by declarations and orders made by consent, including a declaration that the respondent had infringed Mr Bulun Bulun's legal title to the copyright in the artistic work and comprehensive permanent injunctions against future infringement. The trial proceeded only in relation to the claim by Mr Milpurrurru.

[79] It was observed at the outset of the judgment that statutory remedies under the *Copyright Act* were inadequate as a means of protecting communal ownership in an artistic work, a point that had already been made in both *Yumbulul* (at 490) and *Milpurrurru v Indofurn* (at 272). Nevertheless, the Court (von Doussa J) approached the matter from the

perspective that "**Australian courts cannot treat as irrelevant the rights, interests and obligations of Aboriginal people embodied within customary law**" and said that "[e]vidence of customary law may be used as a basis for the foundation of rights recognised within the Australian legal system" (at 248). Following what was described as a wide ranging search for a way in which the communal interests of the traditional Aboriginal owners in cultural artworks might be recognised under Australian law, the claim by Mr Milpurrurru was ultimately confined to one for recognition of an equitable interest in the legal copyright of Mr Bulun Bulun (at 256-257). Whilst von Doussa J said that, in 1788 there may have been scope for the continued operation of a system of indigenous collective ownership in an artistic work under the common law, the relevant common law had subsequently been subsumed by statute – the *Copyright Act* – the provisions of which (as to who is the author of an artistic work) effectively preclude any notion of group ownership, unless the work is produced by a collaboration of two or more authors (at 257-258).

[80] Although von Doussa J considered the possibility that an express trust had been created, the evidence did not support such a conclusion, because there was no usual or customary practice where artworks were held on trust for the Ganalbingu people and the fact that Mr Bulun Bulun sold and retained the proceeds for his own use was inconsistent with an intention to create an express trust (at 258-259). However, his Honour did find that Mr Bulun Bulun owed a fiduciary obligation to the Ganalbingu people, saying (at 262):

> "The relationship between Mr Bulun Bulun as the author and legal title holder of the artistic work and the Ganalbingu people is unique. The 'transaction' between them out of which fiduciary relationship is said to arise is the use with permission by Mr Bulun Bulun of ritual knowledge of the Ganalbingu people, and the embodiment of that knowledge within the artistic work. That use has been permitted in accordance with the law and customs of the Ganalbingu people.
>
> The grant of permission by the Djungayi and other appropriate representatives of the Ganalbingu people for the creation of the artistic work is predicated on the trust and confidence which those granting permission have in the artist. The evidence indicates that if those who

must give permission do not have trust and confidence in someone seeking permission, permission will not be granted.

The law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. The artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge.

This is not to say that the artist must act entirely in the interests of the Ganalbingu people. The evidence shows that an artist is entitled to consider and pursue his own interests, for example, by selling the artwork, but the artist is not permitted to shed the overriding obligation to act to preserve the integrity of the Ganalbingu culture where action for that purpose is required.

In my opinion, the nature of the relationship between Mr Bulun Bulun and the Ganalbingu people was a fiduciary one which gives rise to fiduciary obligations owed by Mr Bulun Bulun.

The conclusion that in all the circumstances Mr Bulun Bulun owes fiduciary obligations to the Ganalbingu people does not treat the law and custom of the Ganalbingu people as part of the Australian legal system. Rather, it treats the law and custom of the Ganalbingu people **as part of the factual matrix which characterises the relationship as one of mutual trust and confidence**. It is that relationship which the Australian legal system recognises as giving rise to the fiduciary relationship, and to the obligations which arise out of it."[72]

[81] It was further held that equity imposed on Mr Bulun Bulun obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic

[72] Emphasis added.

work. However, those obligations did not, without more, vest an equitable interest in the ownership of the copyright in the Ganalbingu people (at 263). In those circumstances, as Mr Bulun Bulun had taken appropriate action to enforce the copyright, he had fulfilled his obligations as a fiduciary and there was no occasion to grant any additional remedy in favour of the Ganalbingu people. Accordingly, Mr Milpurrurru's claim was dismissed.

[82] Justice von Doussa's analysis in *Bulun Bulun v R & T Textiles* was referred to with apparent approval by Gleeson CJ, Gaudron, Gummow and Hayne JJ in the High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1. In that case, the High Court held that, in so far as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not native title rights and interests protected by the *Native Title Act 1993*. However, it was noted that the law in relation to confidential information,[73] copyright or fiduciary duties may afford some protection to such rights, referring, to *Bulun Bulun v R & T Textiles* as an example.

[83] In the context of protection of cultural knowledge embodied in artistic works, it is hard to see how the lens of the *Human Rights Act* could alter the view. Already, equity has risen to the challenge, where the received common law, and subsequently enacted statute law, may be said to have failed to adequately adapt, to recognise and deal with rights and obligations which arise under customary law. What these cases, in relation to the disparate topics of burial disputes and artistic works, demonstrate, however, is the potential adaptability of the law, which is one of the fundamental equitable principles. Likewise, they demonstrate the law of equity acting as a court of conscience, that which is right in the eyes of the community for the time being, responding to modern societal expectations and so enabling equality of enjoyment of rights. They appropriately recognise as relevant the rights, interests and obligations of Aboriginal people and Torres Strait Islander people embodied within customary law. Those considerations, coupled with the legislative invocation of the *Human Rights Act,* arguably support an approach to construction of a statute such as the *Succession Act,* in a manner which is compatible with, and gives effect to, the distinct cultural rights of Aboriginal people and Torres Strait

[73] The example referred to is *Foster v Mountford and Rigby* (1976) 29 FLR 233, a case in which a group of Aboriginal men were successful in obtaining an injunction prohibiting the publication within the Northern Territory of a book revealing their tribal, cultural and religious secret ceremonies.

Islander people, for example, in relation to kinship ties; and certainly support serious consideration being given to appropriate legislative reform.