A Law Librarian's Guide Through the Mabo *Maze*

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Introduction

This article is a guide through the material which relates to the *Mabo* case and its ramifications. It outlines the history of the case, in order to give a clear understanding of the relevance of the different sources. It then goes on to discuss these sources, giving a brief description of the aspects of the case which they address.

History of the Case

On 20 May 1982, Eddie Mabo, Dave Passi and James Rice brought an action against the State of Queensland and the Commonwealth of Australia, in the original jurisdiction of the High Court, claiming 'native title' to the Murray Islands. The Commonwealth was later to withdraw from the proceedings.

In 1985 the Queensland Parliament passed the *Queensland Coast Islands Declaratory Act 1985* which applied to the Murray Islands and declared that upon the annexation of the Islands by Queensland in 1879, the Islands vested in the Crown, in right of Queensland, freed from all other rights, interests and claims of any kind, and that any disposal of the land on the Islands by the Crown was valid. This would have effectively extinguished any native title on the Islands with a retrospective effect.

Nevertheless, on 27 February 1986, the Chief Justice, Sir Harry Gibbs, remitted the case to the Supreme Court of Queensland to hear and determine all issues of fact raised by the pleadings and particulars. This matter was heard by Justice Moynihan, but was adjourned when proceedings were brought in the High Court challenging the constitutional validity of the *Queensland Coast Islands Declaratory Act 1985*.

The High Court handed down its judgment on this issue in December 1988 in *Mabo v Queensland [No. 1]*.[1] A majority of the Court consisting of Brennan, Deane, Toohey and Gaudron JJ held that the *Queensland Coast Islands Declaratory Act 1985* was invalid because it was inconsistent with the *Racial Discrimination Act 1975* (Cth). Under s. 109 of the Constitution, if a law of a state is inconsistent with a law of the Commonwealth, the Commonwealth law prevails and the state law is invalid to the extent of the inconsistency. As the state law was invalid, the original *Mabo* proceedings could continue.

1. (1988) 166 CLR 186; 63 ALJR 84; 83 ALR 14.

Justice Moynihan resumed the hearing of the facts in the case, and sittings took place on Murray Island as well as on the mainland. He handed down his determination of facts on 16 November 1990.

The full case was then argued before the High Court in May 1991 over several days. The Court handed down its judgments in *Mabo v Queensland [No 2]*[2] on 3 June 1992. The majority of the Justices held that native title to the Murray Islands had survived the annexation of the Islands by Queensland, and in most parts of the Islands it continued to exist.

Sources

Cases

The primary sources for analysis of *Mabo* are obviously the two cases. The most important one is *Mabo v Queensland [No 2]*, for this is the one which recognises the existence of native title. All seven of the High Court Justices recognised that the common law allows for the continuation of a form of native title to land after sovereignty in the territory is acquired by the Crown. Justice Dawson, however, held that such rights only exist if recognised, or acquiesced in, by the Crown, and that this did not happen in this case. Hence he dissented.

The other six Justices recognised a continuing right to native title after the acquisition of sovereignty by the Crown, but noted that native title may be extinguished by legislation or an act of the Crown which reveals a clear and plain intention to do so. Native title is therefore extinguished where there is an inconsistent Crown grant of the land, such as the grant of freehold title or leases which give a right to exclusive possession. It is also extinguished in relation to Crown land, where that land is used for a purpose inconsistent with the continuing existence of native title, such as the construction of buildings or roads. Native title can also be extinguished by surrender or abandonment by the native title-holders, or through their loss of connection with the land. In the case of the Murray Islands native title over most of the Islands had not been extinguished by any of these ways (although it had been extinguished where the land had been leased to others). The rights of the Murray Islanders to their land were therefore recognised by the High Court.

The majority of six Justices handed down three full judgments, and as they differ on some points, all require close reading. Justice Brennan wrote one judgment, with which the Chief Justice and Justice McHugh agreed. Justices Deane and Gaudron wrote a joint judgment, and Justice Toohey wrote a separate judgment. The Chief Justice and Justice McHugh also wrote a brief statement which summarised the main difference between the members of the majority. It noted that the Chief Justice and Justices Brennan and McHugh did not agree with the implication which may be drawn from the judgments of Justices Deane, Toohey and Gaudron, that compensatory damages should

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2. (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1.

be paid for the extinguishment of native title. They further noted that Justice Dawson supported the position of the Chief Justice and Justices Brennan and McHugh, implying that a majority of the Court does not consider compensation is payable for the extinguishment of native title. This conclusion was expressly made subject to the operation of the *Racial Discrimination Act 1975*.

This is the point at which *Mabo v Queensland [No. 1]* becomes relevant. That case considered the impact of the *Racial Discrimination Act 1975* upon Queensland legislation which purported to extinguish native title. The majority of the High Court held that the legislation was discriminatory as it only extinguished the title of a particular racial or ethnic group, and that it was therefore inconsistent with s. 10 of the *Racial Discrimination Act*. The effect of s. 109 of the Constitution was that the state legislation was therefore invalid.

This case has led to a great deal of concern that Crown grants of land made since 31 October 1975, when the *Racial Discrimination Act* came into force, may be invalid. This is the reason why there are so many calls for the validation of title. It should be noted, however, that *Mabo v Queensland [No. 1]* involved legislation which expressly extinguished all native title and no other title. This can be distinguished from the operation of other legislation which allows for the compulsory acquisition of any type of land, but provides for the payment of compensation. It is likely that in such cases it would be held that it is not the compulsory acquisition of the land which is discriminatory, but rather the failure to pay compensation upon just terms. A claim for compensation from the Crown may therefore exist, but it is unlikely that all title granted by the Crown after 1975 would be held invalid, particularly where the rights of *bona fide* purchasers are involved.

Determination of Facts

As noted above, the case was remitted to Justice Moynihan of the Supreme Court of Queensland to hear the evidence and determine the facts. The hearing took sixty-seven court sitting days. There were 313 exhibits, including a detailed report by a Cambridge anthropological expedition of the 1890s, and many government records. A significant part of the evidence comprised oral accounts by the Murray Islanders, much of which recounted tradition and statements made by people long dead. A great deal of this evidence was challenged as 'hearsay', but was eventually accepted by Justice Moynihan.

Justice Moynihan released his finding of facts on 16 November 1990. As it is not a 'judgment' it has not been published in law reports and hence it is difficult to obtain a copy of it. The determination is also extremely long, and therefore those who hold a copy of it are generally reluctant to photocopy it. It consists of three volumes and amounts to some 500 pages.

The most relevant part to researchers is probably the first volume which contains a very good table of contents. In many cases it may be more useful to request a copy of the table of contents and then ask for a copy of the relevant part, rather than to try and obtain a copy of the whole determination.

Chapters 5 and 6 of Volume 1 deal with the evidentiary problems, including the admissibility of evidence. Chapters 7-9 give Justice Moynihan's findings about the people, culture and society of the Murray Islands, and the relationship of the Murray Islanders with the land. Chapter 10 gives Justice Moynihan's determination in relation to the claims of Eddie Mabo, Dave Passi and James Rice to specific plots of land.

Volume 2 deals with findings of fact in relation to 116 specific matters raised in the case by the plaintiffs. Volume 3 contains a copy of the pleadings, witness and exhibit lists, and submissions concerning the records of the Murray Island court.

Legislation

The most significant legislation which relates to the *Mabo* cases is the *Racial Discrimination Act 1975*. Sections 9 and 10 of that Act may have relevance to land titles granted by the Crown after 1975.

Other relevant legislation includes the limitation of actions acts[3] which may be relevant to any claim for compensation flowing from a grant of land which is inconsistent with the *Racial Discrimination Act*.

The terms of the legislation which regulates the manner in which land can be compulsorily acquired, will be important to future claims,[4] as will the terms of other enactments, such as mining[5] and pastoral[6] legislation.

Texts

One book upon which some of the submissions and parts of the judgments in *Mabo v Queensland [No. 2]* was based, is Kent McNeil's work *Common Law Aboriginal Title*.[7] This book will be important to those who wish to pursue further the concept of 'common law aboriginal title'.

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3 *Limitation Act 1969* (NSW); *Limitation of Actions Act 1958* (Vic); *Limitation of Actions Act 1974* (Qld); *Limitation of Actions Act 1936* (SA); *Limitation Act 1974* (Tas.); *Limitation Act 1935* (WA); *Limitation Act 1985* (ACT); *Limitation Act 1981* (NT).

4 See for example *Lands Acquisition Act 1989* (Cth); *Land Acquisition (Just Terms Compensation) Act 1991* (NSW); *Land Acquisition and Compensation Act 1986* (Vic); *Acquisition of Land Act 1967* (Qld); *Land Acquisition Act 1969* (SA); *Public Works Act 1902* (WA); *Lands Resumption Act 1957* (Tas); *Lands Acquisition Act 1978* (NT).

5 *Mining Act 1992* (NSW); *Mineral Resources Development Act 1990* (Vic); *Mineral Resources Act 1989* (Qld); *Mining Act 1971* (SA); *Mining Act 1929* (Tas); *Mining Act 1978* (WA); *Mining Act 1930* (ACT); *Mining Act 1980* (NT).

6 See, for example: *Pastoral Land Act 1992* (NT); *Pastoral Land Management and Conservation Act 1989* (SA); and *Land Act 1933* (WA): each of which provides for reservations in pastoral leases in favour of the right of Aborigines to have limited access to the land to follow their traditional pursuits.

7 Oxford: Clarendon Press, 1989

Further texts which provide useful information include Henry Reynolds's *The Law of the Land*,[8] which has recently been republished with a postscript discussing the *Mabo* decision, and *Mabo: A Judicial Revolution*,[9] which was published as a special edition of the *University of Queensland Law Journal*, and contains papers by academics and practitioners upon the impact of *Mabo*. The University of Western Australia and Murdoch University have also published a work called *Resource Development and Aboriginal Land Rights in Australia*[10] which addresses *Mabo* from a resource development perspective. It contains a good summary of the case, and several papers on the ramifications of *Mabo* for the pastoral and mining industries in Western Australia.

Other recent publications that are helpful are the Attorney-General's Department's *Legal Practice Briefing* no.5, 30 July 1993, which gives a clear account of the main points of *Mabo*, and the latest issue of *Sydney Law Review*, vol.15 no.2 (June 1993) which contains the papers from a symposium on *Mabo v. The State of Queensland*.

A final relevant work is the Discussion Paper published by the Department of Prime Minister and Cabinet, entitled *Mabo - The High Court Decision on Native Title*.[11] It provides not only a short analysis of the decision, but a discussion of the options that the Government is considering in making its response to the decision.

[The author is a Parliamentary Officer of the Department of Parliamentary Library. The views in this article are the author's and should not be attributed to the organisation for which she works.]

Cartoon by Peter Nicholson of *The Age* newspaper, 25 May 1993

8 (2nd ed.), Ringwood, Victoria: Penguin, 1992

9 Stephenson, M.A., and Ratnapala, S. (eds), *Mabo: A Judicial Revolution*, [Brisbane]: University of Queensland Press, 1993.

10 Bartlett, R. (ed.), *Resource Development and Aboriginal Land Rights in Australia*, [Perth]: Centre for Commercial and Resources Law, University of Western Australia and Murdoch University, 1993

11 Canberra: Commonwealth Government Printer, June 1993