Mabo, *The Native Title Act, and the Native Title Tribunal*

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The Mabo *Case*

The decision in *Mabo v State of Queensland (No 2) (1992) 175 CLR 1* has fundamental legal and political implications for all Australians It is becoming more and more apparent that it is a fundamental shift in Australian constitutional and legal history

When Eddie Mabo and others first brought an action against the State of Queensland, they claimed that the original inhabitants of Australia and the Torres Strait Islands exercised rights over the land they occupied which had survived colonisation, and still existed They claimed that the Australian common law should recognise this native title to land In 1992, the High Court decided that native title existed at the time of European occupation, and continued to exist where it had not been extinguished

Land Title Before Mabo

To understand the change that took place with the *Mabo* decision, it is necessary to look briefly at the theory of land ownership that existed before the decision

The High Court in *Mabo* held that it is no longer open to question that the claim of sovereignty made by Britain in 1770 gave the British Government the right to control the New South Wales population, and to make laws with respect to its occupants With this assertion of sovereignty over New South Wales came the right to dispose of the land pursuant to British law

The British theory of land law rests on the basis that all land titles are derived from the State This law requires that the land be owned by someone, whether it be the State, or a person deriving their title from the State It is not legally possible in this theory to have land without an owner, and no land can be properly transferred without registration and a register maintained by the State

The right of the early governments to deal with the land was justified by law on the basis that at the time the occupation of Australia took place, Australia was uninhabited This meant that the law rested on the basis that

the land was not populated by any people with a system of social organisation at all. This is the doctrine of "*terra nullius*"

In *Mabo*, Justice Brennan said that there was no clear basis in legal precedent which compelled the High Court to adopt the principle of *terra nullius*. As its present existence was opposed to modern ideas of what was just and fair in Australian society, it ought no longer be accepted as a valid basis for Australian land tenure. Instead of *terra nullius*, the High Court decided the original inhabitants of Australia had a system of control of the land which may have varied in its nature from place to place, but nevertheless formed a recognisable system.

It followed that when Australia was colonised the British Government acquired sovereignty and with it what the High Court called a "radical" title to land, but that title was subject to the pre-existing entitlements of the Aboriginal people. The native title persisted until it was extinguished by some act of the Crown which was inconsistent with its continued existence. This might have involved the creation of another interest in some other person, or the appropriation by the Crown of the land to itself for its own purposes.

Land Title After Mabo

What elements make up the native title which was found to exist? Native title is not necessarily the same thing as land ownership as understood in European society, although some types of native title may resemble this form of ownership. Native title has several important features:

1. It cannot be the subject of sale or other legal dealings such as a mortgage.
2. It depends upon the continued existence of a *connection* to land, however that might be expressed. It could be expressed by hunting or fishing, or use for other purposes. It could also be related to occupation such as living on the land, either permanently, or temporarily. This means that even nomadic groups can claim native title, provided the relevant connection is established.
3. It can be extinguished by an act of the State which has the effect of appropriating absolute ownership of the land. This appropriation can occur through a grant of the land to someone else, or through the grant of an interest that does not amount to full ownership (e.g. a lease) under which the Crown allocates to itself the right to control the disposition of the land when the interest comes to an end. It can also be extinguished when the Crown itself takes over the land for public purposes (e.g. to dedicate a road to public use).

Native title is different from the concept of land ownership in European law, but that does not mean that Aboriginal people have no rights If they can show that they have a connection with the land in accordance with the law and custom of their group and the title has not been extinguished, the title still exists The Crown now has an obligation to recognise it and may also be under an obligation to pay compensation if native title is extinguished

Compensation

In *Mabo*, some aspects of this entitlement to compensation were considered Most judges considered that an act of a State or Federal Government which extinguished native title after 1975 would give rise to a claim for compensation This is because the *Racial Discrimination Act 1975* prevents discrimination against a person or persons on the ground of race If a Government makes a freehold grant of land (which extinguishes native title) that act affects only those people who hold native title to the area As the only people who can hold native title are Aboriginal, the grant must affect the rights of Aboriginal people on a different basis from other Australian citizens Therefore, at least since 1975, a grant by a State which affects native title is likely to give rise to a right to compensation

Some judges were prepared to extend the right to compensation even to acts taking place prior to 1975 This was because acts prior to 1975 would deprive the native title holders of the right to enjoy native title to the land This question has not been conclusively decided

The Native Title Act

The Federal Government enacted the *Native Title Act 1993* ("the Act") in December 1993 The Act attempts to establish a system for recognising and protecting native title, validating past acts which were inconsistent with native title, and determining entitlements to compensation where invalid past acts are validated It also recognises that many Aboriginal and Torres Strait Islander people have been deprived of their land, and no longer have a social organisation, or connection with the land, that may have sustained a claim for native title at common law

The legislation was worked out in detail in a heated political climate and in some places bears the marks of some very hasty drafting It is currently the subject of challenge in the High Court by the State of Western Australia While this makes the future scope of the legislation uncertain, the process of implementation will continue

The objects of the Act are:

a) to provide for the recognition and protection of native title;

b) to establish ways in which future acts affecting native title may proceed;

c) to establish a mechanism for determining claims to native title; and

d) to provide for, or permit the validation of past acts which may have been invalid because of the existence of native title.

Some Important Features

The Act adopts a common law concept of native title outlined by the High Court and *Mabo*. This means that:

- The content and origin of native title arises from the traditional laws and traditional customs of the indigenous inhabitants of an area. The nature and incidents of native title must be ascertained as a matter of fact by reference to those traditional customs;
- Where a clan or group has continued to acknowledge the laws and as far as practicable to observe the customs, the traditional community title (native title) of that clan or group remains in existence;
- In time the traditional laws and customs may change, and the relationship of the members of the indigenous group to the land may also change. This recognises that native title is not fixed in one point of time, but may be modified and developed according to the traditional customs of the groups who enjoy native title to the land.

The "past acts" of the Commonwealth ("past acts" are extensively defined in s 253) are validated. This means that acts which may have been invalid because of the existence of native title are now validated and therefore native title has been extinguished in respect of those acts. A right to compensation exists in respect of the validation of invalid past acts. Past acts of a State or Territory government may also be validated by State or Territory legislation, but only insofar as that legislation contains similar provisions to the Commonwealth Act.

The Act preserves existing native title from extinguishment. The "right to negotiate" provisions of the Act provide that if the government proposes to do an act which either extinguishes native title, or may have the effect of impeding the rights of traditional owners to enjoy native title, those traditional owners have a right to negotiate on a *bona fide* basis with the government to seek to achieve an agreed outcome which will enable the act to be done. The question of compensation or the extent of extinguishment or affectation contemplated in the doing of the act is also covered in these provisions.

There is a procedure for working out whether the land is subject to native title or not. This is the process which has been used most frequently to date. It enables the traditional owners of land to lodge an application ("a claimant application") with the Native Title Tribunal. After the application is accepted by the Registrar (or referred by the Registrar to the President if

the Registrar is of the opinion that *prima facie* the claim cannot be made out) a system is set in place which requires notification of persons with an interest in the land, notification to other relevant ministers and authorities, and public notification through newspaper advertisements.

A party whose interests are affected may lodge with the Registrar during a two-month period after notification a notice of intention to become a party. If the period of notification ends, and no person has become a party, the application is unopposed, and the Tribunal holds an enquiry to see whether a determination of native title should be made. If the Tribunal is satisfied that the applicant has made out a *prima facie* case for a determination, and the Tribunal considers the determination to be just and equitable, a determination may be made.

In other cases, where parties agree, the Tribunal may make a determination if it considers that it is within power and appropriate. If other parties do not agree, a conference is held between the applicant and any persons who are parties.

A significant aspect of the Tribunal's work is the way in which mediation conferences and pre-mediation conferences are conducted. These are based on "principled negotiation" in which a mediated outcome that addresses the interests of all parties is sought.

Opposed applications will be referred to the Federal Court if no agreement is reached.

There is provision for the establishment of a National Aboriginal and Torres Strait Islander Land Fund which is intended to provide a broader measure of compensation where validated past Acts have extinguished native title.

The National Native Title Tribunal

The National Native Title Tribunal (the Tribunal) is established to administer many of the important provisions of the Act. There are several that are carried out by the Tribunal. The main functions are making determinations of native title, carrying out research, and making decisions concerning the "right to negotiate" procedures.

Determining Native Title

Applications may be made to the Tribunal for a determination either:

- that native title exists
- that native title does not exist ("non-claimant application")
- that compensation is payable.

An application is first made to the Native Title Registrar who decides whether or not to accept the application. If the application does not comply with the formal requirements of the Act and the Regulations, the Registrar is required to refer the application to a Presidential member, and if he or she is of the same opinion as the Registrar, must hear submissions from any interested parties, and then decide whether to require the Registrar to accept it, or to reject it.

If the Registrar is of the opinion that the application is frivolous or vexatious, or that *prima facie* a claim cannot be made out, the Registrar must refer the application to a Presidential member, who is then required, if of the same opinion as the Registrar, to provide an opportunity for submissions. If the Presidential member decides that the application should be accepted, the Registrar is directed to accept it. The interested parties will be given a chance to put submissions that the application should be accepted if the Presidential member agrees with the Registrar. An appeal to the Federal Court lies from a decision by a Presidential member to reject an application.

Once the application is accepted, it is placed on the Register of Native Title Claims. The Registrar must notify interested parties, either by letter to registered proprietary interest holders, to relevant State, Territory or Commonwealth bodies, or, by advertisement, the public. There is a period of two months from the date of notification during which any person who wishes to become a party must give notice of their intention to do so to the Registrar. At the conclusion of two months, the parties are ascertained.

If the only party is the applicant, or the interested parties indicate that they do not oppose the application, then the Tribunal will hold an inquiry. Even at this stage, the Tribunal may reject or dismiss the application if it is not satisfied that a *prima facie* case that native title exists can be made out as mentioned above. The determination is then registered in the Federal Court (to make it enforceable as a judgment of that Court) and subsequently registered in the Native Title Register.

All applications which remain opposed will go to the Federal Court for determination.

The Registrar is required to give assistance to applicants in preparing applications. This does not mean that the Registrar provides legal advice, or financial assistance to applicants in bringing applications under the Act. It does mean that the staff of the Tribunal will attempt, so far as is reasonably practicable, to facilitate the progression of the claim through the processes of the Tribunal. This may be done by the provision of information on Tribunal practices, or referral to avenues by which resources may be available to the applicant.

The Tribunal is obliged to carry out its functions in a way which is fair, just, informal, economical and prompt (s 109) There is a heavy emphasis in the Tribunal on the processes of principled negotiation, and on the early identification of each party's real interest in the area where a claim for native title has been made.

Compensation for Future Acts

Because the Act preserves native title, registered holders of native title and registered native title claimants will have a right to negotiate when governments propose to do an act that would affect native title There is no right to veto the Act The Act sets up a series of procedures to ensure that negotiations proceed in a timely and controlled fashion

Where a future act is important to the national interest, the Government can invoke an expedited procedure for negotiations The Tribunal has the power to decide whether the Government has properly invoked the "expedited procedure" The Native Title Tribunal is also an "arbitral body" under these "right to negotiate" provisions This means that the Tribunal must assist the negotiating parties (on their request) by providing a forum for mediating the issues arising between them.

If the parties do not reach agreement, the Tribunal is to make a determination that the proposed act may, or may not be done, or may be done subject to conditions This power is subject to overriding discretion by the relevant minister of the Commonwealth If a determination is made by a State or Territory arbitral body, the relevant minister of a State or Territory may overrule the determination of that body

Who Holds Native Title?

One of the elements of native title is that it is not usually capable of being "owned" in the same sense that a suburban block of land might be owned by a person under statute and common law If a determination is made that native title exists, the persons who hold native title must also be determined The title may be held in trust for the persons claiming by a body corporate such as an Aboriginal Land Council, or other registered native title body corporate If it is held in trust, the powers of the body corporate must be spelled out in the determination

Inquiries by Tribunal

There are two types of inquiries that can be conducted by the Tribunal. The first arises in relation to an application for a determination The purpose of this inquiry is to determine, in the case of unopposed applications, that

there is a *prima facie* case for a determination and the Tribunal considers the determination to be just and equitable. Where the parties have reached agreement, the Tribunal will make a determination if it is within power and appropriate.

The Tribunal is also to hold an inquiry where a right to negotiate procedure is invoked and a mediated settlement cannot be reached. Any questions of law arising in the course of the inquiry must be answered by the Tribunal, or referred to the Federal Court for decision. There are wide powers to gather evidence, and to use evidence given before other bodies or persons (such as the tribunals of a State or Territory, the Aboriginal Land Commissioner, or an assessor in the Federal Court).

The other type of inquiry is a special inquiry initiated by the Minister. The Minister may ask the Tribunal to conduct an inquiry related to such things as:

- the effect on Aboriginal and Torres Strait Islander people of the validation of acts extinguishing native title
- alternative forms of compensation
- action that may be taken to assist people whose title has been extinguished

Registers

The Tribunal maintains a Register of Land Claims and the Native Title Register.

The Claims Register is a register of all claims contained in applications given to the Register and accepted. The Register will provide identification of parties who may be interested in applications, and presence on the Register is an important aspect in attracting the "right to negotiate" procedures.

The Native Title Register includes all determinations in respect of native title by all bodies authorised to make them. It is to include information such as the body making the determination, and the people who are the common law holders, as well as the bodies who hold any native title on trust. This Register establishes the proper parties to negotiations affecting future acts, as well as providing a central record of all native title determined throughout Australia.

The Federal Court of Australia

The role of the Federal Court is to decide applications for compensation or native title which are opposed, or in which the Tribunal cannot reach a

mediated settlement It also has a general role in supervising the lawfulness of Tribunal decisions Determinations made by the Tribunal, once registered with the Federal Court, may be enforced as an order of the Court

The Tribunal is obliged to refer applications for determinations which are opposed to the Federal Court The Court is then to provide assistance to the parties and provide a fair, just, economical, informal and expeditious means of determining the parties' rights The Court is also required to take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders It is not bound by technicalities, legal forms or rules of evidence

Where there is an appeal from a Tribunal determination, all relevant documentation is sent to the Federal Court by the Tribunal

Assessors

The Federal Court is to be assisted by assessors who are to be, so far as practicable, Aboriginal people, or Torres Strait Islanders The assessor is to have either special knowledge in relation to Aboriginal or Torres Strait Islander societies, dispute resolution, land management or any other class of matters considered by the Governor-General (who appoints them) to have special relevance to the duties of an assessor

Assessors may take evidence, and apply for summons to witnesses The assessor may be appointed to assist the Court, and the assessor must preside over any conference held in the Federal Court to assist the parties resolve their differences

Conferences

The Court may direct conferences of the parties or their representatives be held to resolve any matter relevant to the proceedings These conferences will be held in public unless the assessor decides that they should be held in private

Other Matters

The Court may receive into evidence the transcript of any other evidence given to the Court, another court, or any Native Title Tribunal or arbitral body

The Court may make consent orders disposing of all or part of the proceedings or a matter in issue of the proceedings if the parties agree

Once the Court makes a determination, the Registrar of the Federal Court is to send the determination to the Native Title Tribunal for registration in the Native Title Register.

Conclusion

Although the *Native Title Act* is complex, systems which the Native Title Tribunal have developed are intended to be readily accessible and provide a timely means for resolving questions of native title. The staff of the Tribunal are committed to processes of facilitation and communication in order to make the compliance with the requirements of the Act as easy as possible

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