COMMON LAW NATIVE TITLE IN AUSTRALIA — AN ANALYSIS OF *MABO v QUEENSLAND [NO 2]*

FIONA WHEELER*

INTRODUCTION

Mabo v Queensland [No 2][1] is a landmark decision. The High Court held, by a six to one majority, that the common law of Australia recognises a form of native land title which survived the Crown's acquisition of sovereignty over Australia. The effect of the Crown's acquisition of sovereignty, according to the High Court, was simply to expose common law native title to the possibility of extinguishment by a valid exercise of inconsistent sovereign power.

The judgments in *Mabo [No 2]* range widely across issues of constitutional law and the law of real property. These issues are explored below in a description and analysis of the case. In addition, mention is made of the techniques of legal reasoning adopted by the majority judges. The majority did not shy away from the fact that they were *making* law.[2] The justifications which they gave for assuming this role and the sources which they employed in fashioning a new common law of land titles for Australia provide some idea of the forces which will be brought to bear on the future development of our common law.

THE FACTS AND HISTORY OF THE MABO LITIGATION

The case concerned the Murray Islands in the Torres Strait. Since time immemorial, the Islands had been continuously occupied by the Meriam people. The Meriam people lived in an organised community which recognised individual and family rights of possession and occupation of identified areas of land.[3] The plaintiffs, including Eddie Mabo, were all members of the Meriam people. In 1982, they instituted proceedings in the High Court of Australia against the State of Queensland seeking a declaration of their legal entitlement to their traditional lands.

The Murray Islands were annexed to the Colony of Queensland in 1879, whereupon they became subject to the laws of Queensland, including the common law. By the common law, the Crown acquired a radical (in the sense

---

* Lecturer in Law, Australian National University.

1 (1992) 175 CLR 1.

2 That judges make law is, of course, no revelation. See, for example, M McHugh, "The Law-making Function of the Judicial Process" (1988) 62 *ALJ* 15-31 (Pt I) and 116-127 (Pt II). What was notable about the judicial role in *Mabo [No 2]* was the openness with which this law-making function was assumed, and the fact that the new legal rule formulated by the Court represented a dramatic departure from the previous legal position.

3 *Mabo [No 2]* (1992) 175 CLR 1, 115 *per* Deane and Gaudron JJ, drawing from the findings of fact of Moynihan J of the Supreme Court of Queensland.

of ultimate or final) title to the Islands. This was not in dispute. What was in dispute was the further legal effect of the annexation; in particular, whether the Crown's acquisition of sovereignty over the Islands had the effect of vesting in the Crown, not only a radical title to the Islands, but absolute beneficial ownership of all island lands (as argued by the defendant State of Queensland) or whether the Crown's acquisition of sovereignty (and radical title) was subject to the continuing traditional land rights of the Meriam people (as argued by the plaintiffs).

In 1985, before the principal issue came on for hearing in the High Court, the Queensland Parliament enacted the Queensland Coast Islands Declaratory Act ("the Queensland Act"). The Queensland Act purported to declare with retrospective effect that upon the annexation of the Murray Islands "the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland".[4] The Queensland Act further provided that no compensation was to be payable to any person by reason of the annexation of the Islands, or in respect of any right, interest or claim alleged to have existed prior to the annexation of the Islands to Queensland.[5] The State of Queensland then amended its defence to the proceedings so as to rely on the Queensland Act. However, in 1988, in *Mabo v Queensland [No 1]*[6] a majority of the High Court held that the Queensland Act, to the extent that it purported to extinguish any common law native title of the Meriam people to the Murray Islands, was invalid under s 109 of the Constitution as inconsistent with the Racial Discrimination Act 1975 (Cth). The relationship between common law native title and the Racial Discrimination Act is further considered below.

The principal issue finally came on for hearing in the High Court in May 1991 following the trial of all issues of fact on remitter by the Supreme Court of Queensland. The High Court judgments, recognising a form of common law native title to land in Australia, were handed down in June 1992, over a year later. Justice Brennan (with whom Mason CJ and McHugh J agreed) wrote the leading judgment. Justices Deane and Gaudron (in a joint judgment) and Toohey J substantially agreed with Brennan J subject to one difference of opinion noted below. Justice Dawson dissented.

Before proceeding to an analysis of the majority judgments, it should be noted that the majority regarded the legal issues in this case as governed by general propositions of law not confined in their operation to the Murray Islands or the Meriam people. As Toohey J observed:

> While this case concerns the Meriam people, the legal issues fall to be determined according to fundamental principles of common law and colonial constitutional law applicable throughout Australia.[7]

Thus the judgments in *Mabo [No 2]* are directly relevant to the land rights of all indigenous Australians.

---

4 Section 3.
5 Section 5.
6 (1988) 166 CLR 186.
7 (1992) 175 CLR 1, 179. See also 25–26 *per* Brennan J and 77 *per* Deane and Gaudron JJ.

THE MAJORITY JUDGMENTS

Common law recognition of native title in Australia

In resisting the plaintiffs' claim, the defendant relied on certain propositions of law said to be applicable to all colonies "settled" from England. As summarised by Brennan J:

> [T]he defendant's argument is that, when the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to colonial conditions became the law of the colony and, by that law, the Crown acquired the absolute beneficial ownership of all land in the territory ... and no right or interest in any land in the territory could thereafter be possessed by any other person unless granted by the Crown.[8]

But these propositions of law, although supported by authority,[9] were not fully accepted by the Court. The Australian colonies received English law upon their establishment. Yet, said the majority, it did not follow that English law, once introduced, operated to extinguish the interests of indigenous Australians in their traditional lands. Such an unjust and discriminatory rule invited critical examination. It was pointed out that the enlarged notion of *terra nullius*, by which the law of England became the law of the Australian colonies as though they were territories "practically unoccupied, without settled inhabitants or settled law",[10] did not fit the facts as understood today. The legal propositions relied on by the defendant were a product of this enlarged notion of *terra nullius* and thus, in the words of Brennan J, depended on a "discriminatory denigration of indigenous inhabitants, their social organisation and customs".[11] Speaking of the theory of *terra nullius* his Honour continued:

> As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities ... or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.[12]

The Court chose the latter option, allowing it to find that the common law of Australia recognises a form of native title to land.

Issues of judicial technique

Before examining the features of common law native title, it is appropriate to examine the issues of judicial technique which governed the "choice of legal principle" in this case. Above all, *Mabo [No 2]* indicates that the Court's perception of its role in the 1990s is a far cry from Sir Owen Dixon's insistence on "strict and complete legalism"[13] in the sense of an inductive form of legal reasoning which eschews explicit reference to social and other policy factors. As previously stated, it was the unjust and discriminatory nature of the

---

8 *Ibid* 26.

9 For example, *Attorney-General v Brown* (1847) 1 Legge 312; *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404; *Randwick Corporation v Rutledge* (1959) 102 CLR 54; *New South Wales v Commonwealth* (the "*Seas and Submerged Lands*" case) (1975) 135 CLR 337.

10 *Cooper v Stuart* (1889) 14 App Cas 286, 291.

11 (1992) 175 CLR 1, 40.

12 *Id.*

13 "Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 CLR xi, xiv.

propositions of law advanced by the defendant which exposed them to scrutiny. Speaking of these propositions — that on European settlement the Australian colonies were *terra nullius* in consequence of which the full legal and beneficial ownership of all lands therein vested in the Crown — Deane and Gaudron JJ said:

> [T]he two propositions in question provided the legal basis for the dispossession of the Aboriginal peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions.[14]

Similarly, according to Brennan J:

> [N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system.[15]

His Honour referred to the "powerful influence" which the "expectations of the international community" and "contemporary values of the Australian people" brought to bear on the development of the common law.[16] Thus, it followed that a common law doctrine "founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration".[17]

In reconsidering the land rights of indigenous Australians, however, the Court did not regard itself as free to adopt legal rules reflecting contemporary Australian values if the adoption of those rules would fracture "the skeleton of principle"[18] which held together the body of Australian law. So, the Court asked, did basic doctrines of land law such as the doctrine of tenure preclude recognition of common law native title to land (in other words, was common law native title inconsistent with the doctrine of tenure)? The Court concluded that there was no inconsistency between the two doctrines. The Court accepted that when the Crown acquired sovereignty over the Australian colonies it acquired, as a concomitant of that sovereignty, a radical or ultimate title to the subject lands. This radical title meant that when the Crown exercised its sovereign power in a colony and granted an interest in land, that interest in land could be said to be "held of the Crown" on a tenure of some kind. But radical title in this sense was not the same as full beneficial title. Thus, except where the Crown had exercised its sovereign power and granted land either to a subject (on tenure) or to itself, the traditional interests in land of indigenous Australians could subsist as a burden on (but consistently with) the Crown's radical title. Thus, common law native title does not owe its existence to a Crown grant and is not in legal theory "held of the Crown" in a conventional tenurial relationship.[19]

---

14 (1992) 175 CLR 1, 109.
15 *Ibid* 30.
16 *Ibid* 42.
17 *Id.*
18 *Ibid* 29, 43 *per* Brennan J.
19 *Ibid* 48–49 *per* Brennan J; 81, 86–87 *per* Deane and Gaudron JJ.

The nature, features and limitations of common law native title

The majority, with reference to decisions concerning native title emanating from a number of other former British colonial possessions, discussed at length the nature, features and limitations of common law native title in Australia. The key features of this new form of land title were conveniently set out in summary form by Brennan J.[20] What follows draws in large part from that summary:

(1) Under the common law, the traditional rights and interests in land of indigenous Australians survived the Crown's acquisition of sovereignty and radical title.

(2) However, the Crown's acquisition of sovereignty exposed native title to the possibility of extinguishment by a valid exercise of inconsistent sovereign power. Thus, where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with continued enjoyment of native title, native title is extinguished to the extent of the inconsistency.[21] This means that where the Crown has granted an estate of freehold or a lease conferring the right to exclusive possession, any native title is extinguished. (In the case of a Crown lease, the lessee acquires possession and the Crown the reversion. When the lease expires, the Crown's radical title becomes full beneficial ownership at the expense of any native claims.)[22] However, native title may not necessarily be extinguished by the mere grant of an authority to prospect for minerals.[23]

Similarly, where the Crown has appropriated land to itself and the appropriation is wholly or partially inconsistent with any pre-existing native land rights, native title is extinguished to the extent of the inconsistency.[24] Thus, a parcel of Crown land dedicated to *and used as*[25] a road could not be the subject of any common law native title claim. However, it may be that rights flowing from common law native title can continue to be enjoyed over land set aside as a national park.[26] Also, native title is not extinguished by the creation of reserves, nor by the mere appointment of trustees to control a reserve in the absence of a grant of title.[27]

(3) The question of the validity of any purported exercise by the Crown in right of a State of the power to alienate Crown lands or to appropriate to itself such lands depends upon the general law of that State. That general law, however, is subject to valid federal legislation, and in particular, to the terms of the Racial Discrimination Act 1975 (Cth). Any attempt by a State legislature (as opposed to the Crown) to extinguish common law native title is also subject to the terms of the Racial Discrimination Act as graphically illustrated by the decision in *Mabo [No 1]*. So, for example, if State legislation provides for the payment of compensation in the event of a compulsory acquisition of property,

---

20 *Ibid* 69–71.
21 *Ibid* 69 *per* Brennan J; 89, 110 *per* Deane and Gaudron JJ.
22 *Ibid* 68 *per* Brennan J.
23 *Ibid* 69 *per* Brennan J.
24 *Ibid* 69–70 *per* Brennan J; 89–90, 110 *per* Deane and Gaudron JJ.
25 This seems to be the effect of the majority judgments. See *id.*
26 *Ibid* 70 *per* Brennan J.
27 *Ibid* 66 *per* Brennan J.

such a right could not, consistently with the Racial Discrimination Act, be denied to native title holders.[28]

Furthermore, so far as the Commonwealth is concerned, s 51(31) of the Constitution provides that any law with respect to the acquisition of property must effect that acquisition on "just terms". Thus, native title holders have a constitutional guarantee of fair compensation if the federal Parliament enacts such legislation.[29]

It was the issue of compensation which caused the one key difference of opinion between the majority judges alluded to above. Leaving aside the operation of the Racial Discrimination Act, Deane, Toohey and Gaudron JJ would require the payment of compensation if the Crown extinguished native title by, for example, inconsistent grant unless statute compelled, in the strongest terms, a contrary conclusion. Chief Justice Mason, Brennan, Dawson and McHugh JJ expressly disagreed with this approach.[30]

(4) Native rights and interests in land can be recognised by the common law, even if those rights and interests do not conform to established European notions of property, so long as a traditional connection with the land can be demonstrated.[31] The content of native title to particular land (that is, the rights which attach to native title and the persons entitled to enjoyment of those rights) is determined according to the laws and customs of the relevant indigenous people.[32] That those laws and customs have altered somewhat since the Crown acquired sovereignty does not matter, "provided the general nature of the connexion between the indigenous people and the land remains".[33] However, if the connection between a group of indigenous people and their traditional land is severed, their common law entitlement to that land is also extinguished, in which case the Crown's radical title would expand to absolute ownership. According to Brennan J:

> Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connexion with the land or on the death of the last of the members of the group or clan.[34]

---

28 See, in particular, ss 9 and 10 of the Racial Discrimination Act 1975 (Cth).

29 The same guarantee appears in the two Territory self-government Acts. See Northern Territory (Self-Government) Act 1978 (Cth) s 50(1) and Australian Capital Territory (Self-Government) Act 1988 (Cth) s 23(1)(a).

30 This difference of opinion is summarised (with the endorsement of the other members of the Court) in the judgment of Mason CJ and McHugh J. See *Mabo [No 2]* (1992) 175 CLR 1, 15–16.

31 *Ibid* 59, 70 *per* Brennan J; 85–86 *per* Deane and Gaudron JJ; 187–188 *per* Toohey J.

32 *Ibid* 58, 70 *per* Brennan J; 88, 110 *per* Deane and Gaudron JJ.

33 *Ibid* 70 *per* Brennan J.

34 *Id.* Deane and Gaudron JJ expressed themselves in slightly different terms. They agreed with Brennan J that the rights attaching to common law native title would be lost "by the abandonment of the connexion with the land or by the extinction of the relevant tribe or group". However, they added that such rights would not necessarily be lost by the abandonment of traditional customs and ways "at least where the relevant tribe or group continues to occupy or use the land". See *ibid* 110. Toohey J denied that the modification of traditional society entailed the

One important consequence of the fact that native title takes its content from indigenous law and custom is that it cannot be assigned outside that traditional system. The Crown can accept a surrender of native title (and thus expand its radical title to an absolute title) but native title cannot be assigned to, for example, a "non-traditional" mining company. Again, in the words of Brennan J:

> Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connexion with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.[35]

(5) Native title, although taking its content from indigenous law and custom, is nonetheless recognised by the common law. Thus, native title attracts the protection of "such legal or equitable remedies as are appropriate to the particular rights and interests established by the evidence".[36]

The entitlement of the Meriam People to the Murray Islands

Having found that the common law of Australia recognises a form of native title to land and having identified the nature, features and limitations attending that common law native title, the Court found in favour of the plaintiffs on the facts of the case. The Meriam people remained in occupation of their traditional lands; they had maintained their identity as a people and continued to observe their traditional customs, and, with the exception of certain parcels of land which had been leased by the Crown, nothing had been done to extinguish the Islanders' native title. The order of the Court is instructive. It declares that, subject to the effect of the Crown leases:

> [T]he Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.

However, the order further declares that:

> [T]he title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.

THE FUTURE

Areas of Australia where native title has not been extinguished and where the indigenous inhabitants maintain their identity as a people and their connection with the land may be few. Much of the Australian land mass has been granted by the Crown in freehold or on lease, or appropriated to the Crown's own use in a manner inconsistent with the continuing enjoyment of native title. And

---

extinction of traditional title. In his Honour's opinion: "[T]raditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life". See *ibid* 192.

35 *Ibid* 70. See also 88, 110 *per* Deane and Gaudron JJ.

36 *Ibid* 61 *per* Brennan J; 112–113 *per* Deane and Gaudron JJ.

many groups of Aboriginal people have been dispossessed of their traditional lands and have lost their connection with those lands. Other groups could face insuperable evidential hurdles in seeking to establish their traditional entitlements.

Successful common law native title claims are likely to focus on the waste lands of the Crown, national parks, and Aboriginal reserves. The observation of Brennan J that there is no necessary inconsistency between the grant of a prospecting licence and the continued enjoyment of native title highlights the uncertainty which *Mabo [No 2]* has generated in sectors of the mining industry. It is an open question whether rights under common law native title extend to ownership of mineral reserves. Given that the content of rights attaching to common law native title is determined according to indigenous law, the answer is probably no, at least as regards underground deposits. But it is doubtful whether such deposits could be commercially exploited without affecting enjoyment of traditional surface rights. How such conflicts will be resolved, especially in the context of the Racial Discrimination Act and s 51(31) of the Constitution remains to be seen. Many other issues were left open by the Court in *Mabo [No 2]* on which its guidance will doubtless be sought in the future. For example, what degree of connection with the land is necessary in order to establish a "traditional connection"? To what extent must that traditional connection be shown to exist today in order to found a "*Mabo*-style" claim? And what effect will a significant change in indigenous law and custom, or a significant departure from indigenous law and custom, have upon the continuation of native title?

What is certain, however, is that the current High Court has shown itself willing to act in areas of law reform where others have been reluctant to do so. The decision in *Mabo [No 2]* has served to push land rights to the forefront of this nation's political and social agenda. It has given the Aboriginal people new political power and a new political profile in the on-going struggle for land rights and social justice. In 1988, before he was appointed to the High Court, Justice McHugh wrote that judges have much to contribute to democracy:

> When a legislature fails to recognise and address a problem of law reform, the use of democratic rhetoric to deprive the courts of an opportunity to contribute to the development of the law and the doing of justice is highly questionable. Acts of judicial law-making have been known to set in motion a continuing process of reform. Even where the legislature deems the judicial solution inadequate, the process of reform has been initiated. A creative judiciary, therefore, has a contribution to make to democracy.[37]

It may be, following *Mabo [No 2]*, that many of this Justice's colleagues share his views.

---

37 M McHugh, "The Law-making Function of the Judicial Process — Part II" (1988) 62 *ALJ* 116, 124.