
Planning Control and Native Title – A Queensland Perspective*

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Introduction

The consideration of existing use rights is a necessary element of planning control. Carter DCJ sitting in the Local Government Court, the predecessor of the Planning and Environment Court, expressed the need to consider private use rights in the following way:

[W]hilst town planning is essentially designed to achieve the overall good of the community, it cannot but have regard to individual rights such as those inherent in the ownership of land, to the extent that the exercise of such rights does not offend the community good.¹

The decision of the High Court in *Mabo v State of Queensland [No. 2]*² ('*Mabo [No. 2]*') recognised the rights of indigenous people to land that arise from their original occupation of that land. Previously, these rights had not been recognised by the law. As a consequence, many statutory arrangements did not accommodate the existence of native title rights and interests. The relationship between native title rights and planning control legislation is significant. The emergence of native title as a new category of private use rights, previously not considered in planning schemes, may have significant implications for the adequacy of those schemes. In this paper, the relationship between the *Local Government (Planning and Environment) Act 1990* (Qld) and the *Native Title Act 1993* (Cth) will be considered.

* The law is that of 24 January 1997.

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1 *Indooroopilly Golf Club v Brisbane City Council* [1982] QdR 13 at 21-22 per Carter DCJ.

2 (1992) 175 CLR 1.

What is Native Title

Mabo [No. 2] recognised that, in certain circumstances, the indigenous inhabitants of Australia have rights over their traditional land which are capable of recognition and protection under the common law of Australia³. Upon the moment of the acquisition of sovereignty, the Crown acquired radical or ultimate title but not absolute beneficial title. However, the Crown did acquire radical title together with beneficial title (ie. *plenum dominium* — ‘absolute ownership’) to land which was not subject to native title at the time of the acquisition of sovereignty⁴. The majority in *Mabo [No. 2]* defined native title as follows⁵:

The term “native title” conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.

Native title has its source in the customs and traditions of indigenous people and its contents are determined with reference to those traditions and customs⁶. Native title is inalienable other than to members of the community which has the native title and then only in accordance with the traditions and customs of that group although native title may be surrendered to the Crown, thus extinguishing it⁷. A community must maintain a ‘connection’ with the land otherwise native title will be extinguished. The nature of the connection required, whether the connection must be a physical⁸ or spiritual one⁹, is uncertain.

There is some uncertainty as to the nature of native title, whether it represents a proprietary right or a personal right¹⁰. The distinction does not, however, prevent

3 P O'Connor ‘Aboriginal Land Rights at Common Law: *Mabo v Queensland*’ *Monash University Law Review* Vol 18 1992, 251.

4 *Ibid* at 257.

5 *Mabo [No. 2]* at 57 per Brennan J with whom Mason CJ and McHugh J agreed at 15.

6 *Ibid* at 58 per Brennan J.

7 M Manwaring ‘A Small Step or a Giant Leap? The Implications of Australia’s First Judicial Recognition of Indigenous Land Rights’ *Harvard International Law Journal* Vol. 34, 1992, 177 at 184.

8 See *Coe v The Commonwealth* (1993) 68 ALJR 110 at 119 where Mason CJ states:

It seems to me that, if the plaintiff asserts native title to land, then the plaintiff must establish the conditions according to which native title subsists. Those conditions include (a) that the title has not been extinguished by inconsistent Crown grant and (b) that it has not been extinguished by the Aboriginal occupiers ceasing to have a requisite physical connection with the land in question.

9 See R Bartlett ‘The Source, Content and Proof of Native Title at Common Law’ in R Bartlett (ed) *Resource Development and Aboriginal Land Rights in Australia*, Centre for Commercial and Resources Law, Western Australia 1993, 48.

10 G McIntyre ‘*Mabo v The State of Queensland: Retreat from Injustice*’ in Bartlett (ed) *Resource Development and Aboriginal Land Rights in Australia*, Centre for Commercial and Resources Law, Western Australia 1993, 21 at 27. Also, see *Mabo [No. 2]* at 51 per Brennan J (proprietary right) and 89 per Deane and Gaudron JJ (personal right). It is sufficient to describe native title rights as *sui generis*, see *Mabo [No. 2]* at 89 per Deane and Gaudron JJ and 187 per Toohey J.

the protection and enforcement of native title rights by appropriate declaratory and injunctive relief¹¹. Actual possession of the land by a native title holder is sufficient to maintain an action in trespass against an intruder¹². Conflict between the members of a community which holds native title is determined in accordance with the rights and customs of that community¹³. The rights and interests which constitute native title are not frozen in time and may evolve as the customs and traditions of a community evolve¹⁴.

As noted above, native title is extinguished where it is surrendered to the Crown. The majority in *Mabo [No. 2]* also considered that native title is extinguished when the last member of a group or clan dies¹⁵ or where the group or clan ceases to observe traditional laws or customs¹⁶. Native title can also be extinguished by a legislative or executive action where there is a clear and plain intention to do so¹⁷. Clearly, the Crown may extinguish native title by express legislation¹⁸. A law which regulates the enjoyment of native title or creates a regime of control that is consistent with the continued enjoyment of native title will not extinguish native title¹⁹. An executive act consisting of the grant of an interest by the Crown which is inconsistent with the continued existence of native title is also capable of extinguishing native title²⁰. It is apparent that pastoral leases, and possibly other forms of statutory leases, do not entirely extinguish native title²¹.

The Protection of Native Title Under the *Racial Discrimination Act 1975 (Cth)*

The *Racial Discrimination Act 1975 (Cth)*, which commenced on 31 October 1975 and implements in Australia the International Convention for the Elimination of All Forms of Racial Discrimination, crucially altered the operation of the common law about native title and formed the basis of the High Court's decision in *Western Australia v Commonwealth*²². The critical aspect of the *Racial Discrimination Act 1975 (Cth)* is its capacity to render invalid certain dealings in land where native title

11 P O'Connor *supra* n.3 at 260.

12 *Ibid.*

13 *Ibid.*

14 *Mabo [No. 2]* at 70 per Brennan J.

15 *Ibid.*

16 *Ibid* where Brennan J stated this would result in a loss of connection with the land. However, Deane and Gaudron JJ took a contrary view at 110 where it was stated that the abandonment of traditional customs will not result in the loss of native title if the tribe or group continues to occupy or use the land.

17 *Ibid* at 64 per Brennan J.

18 *Ibid* at 67 per Brennan J.

19 *Ibid* at 64 citing *Reg. v Sparrow* (1990) 70 DLR (4th) 385 at 400 and *United States v Santa Fe Pacific Railroad Co.* (1941) 314 US 353.

20 *Ibid* at 68 per Brennan J and 89 per Deane and Gaudron JJ.

21 *Wik Peoples v State of Queensland* (1997) 141 ALR 129.

22 (1995) 128 ALR 1.

survives. This issue is relevant when considering the impact of planning control on native title. If the grant of a lease or of freehold upon which planning control operates is invalid, there are consequences for the validity of planning control over that land. Furthermore, where planning control operates over land where native title survives but does not recognise the 'ownership' of that land by the native title holders, the potential for invalidity exists.

When considering the regulation and extinguishment of native title, the relevant provision of the *Racial Discrimination Act 1975* (Cth) is s. 10²³. In *Gerhardy v Brown*²⁴, the operation of s. 10 of the *Racial Discrimination Act 1975* (Cth) was usefully described as follows:

If racial discrimination arises under or by virtue of State law because the relevant State law merely omits to make enjoyment of the rights universal ie. by failing to confer it on persons of that particular race, then s. 10 operates to confer that right on persons of that particular race.²⁵

The right referred to is a human right²⁶ including a right referred to in Article 5 of the Convention²⁷. Therefore, it is necessary, for s. 10 to operate, to not only demonstrate the existence of racial discrimination but also that the discrimination has the effect of nullifying or impairing the enjoyment on an equal footing of a human right²⁸. It was noted that there is no universal consensus as to the content of human rights and fundamental freedoms²⁹ and these terms have an imprecise meanings³⁰.

The operation of the *Racial Discrimination Act 1975* (Cth) was further considered

23 *Racial Discrimination Act 1975* (Cth) s. 10 provides:

10 (1) If, by reasons of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by person of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

24 (1984) 159 CLR 70.

25 *Ibid* at 98 per Mason J.

26 *Ibid* at 86 per Gibbs CJ, 97 per Mason J and 125-6 per Brennan J.

27 *Racial Discrimination Act 1975* (Cth) s. 10(2), but the term also includes other statements of universally acknowledged human rights such as the United Nations Declaration of Human Rights (see *Gerhardy v Brown* (1984) 159 CLR 70 at 102 per Mason J and 125-6 per Brennan J) or Convention No. 107 of the International Labor Organization (*ibid.* at 150 per Deane J).

28 *Gerhardy v Brown* (1984) 159 CLR 70 at 97 per Mason J.

29 *Ibid* at 102 per Mason J.

30 *Ibid* at 126 per Brennan J where it was also stated that this did not mean such terms were devoid of meaning or that the provisions of the *Racial Discrimination Act 1975* (Cth) where the terms occurred were devoid of meaning.

in the first *Mabo v Queensland*³¹ decision (*Mabo [No. 1]*) which concerned the effect of that Act upon the *Queensland Coast Islands Declaratory Act 1985* (Qld) which purported to retrospectively extinguish the native title rights of Murray Islanders that were subsequently adjudged to exist in *Mabo [No. 2]*. The majority in *Mabo [No. 1]* found that, on the assumption that the native title asserted by the plaintiff existed, the purported extinguishment was inconsistent with s. 10 of the *Racial Discrimination Act 1975* (Cth) and therefore invalid to the extent of the inconsistency with that provision under s. 109 of the *Constitution*³².

The operation of the *Queensland Coast Islands Declaratory Act 1985* (Qld) was to extinguish all legal titles which take their origin from native law and custom while confirming all legal rights which take their origin from the relevant statutory law of Queensland, namely, 'Crown lands legislation'³³ and therefore discriminated against Meriam people on the basis of ethnic origin³⁴. Among the human rights which are embraced and protected by the *Racial Discrimination Act 1975* (Cth) are³⁵:

- the right to own property alone as well as in association with others³⁶;
- the right to inherit³⁷;
- the right not to be arbitrarily deprived of property³⁸.

The native title rights asserted by the plaintiffs were within the concept of 'property' and therefore the *Queensland Coast Islands Declaratory Act 1985* (Qld) purported to arbitrarily deprive these property rights while maintaining other property rights (those derived from a grant from the Crown). Section 10 of the *Racial Discrimination Act 1975* (Cth) operated to ensure that the plaintiffs enjoyed the right not to be arbitrarily deprived of property to the same extent as those who had not been deprived, thereby rendering the operative provisions of the *Queensland Coast Islands Declaratory Act 1985* (Qld) inoperative or 'invalid'.

Brennan, Toohey and Gaudron JJ concluded that³⁹:

31 (1988) 166 CLR 186.

32 *Mabo [No. 1]* at 219 per Brennan, Toohey and Gaudron JJ and 233 per Deane J. The only distinction of significance between the judgements is that Deane J at 225 was only prepared to construe the retrospective extinguishment as having a narrow operation to provide a declaratory foundation for the operation of s. 4 [which declared the validity of every dealing under Crown lands legislation over the Murray Islands since annexation] while Brennan, Toohey and Gaudron JJ at 212 considered the extinguishment related to the entirety of the Murray Islands. Both judgements determined that the extinguishment was ineffective because of the operation of s. 10 of the *Racial Discrimination Act 1975* (Cth) and s. 109 of the Constitution.

33 *Ibid* at 214 per Brennan, Toohey and Gaudron JJ and, in similar terms, at 230 per Deane J.

34 *Ibid* at 219 per Brennan, Toohey and Gaudron JJ.

35 *Ibid* at 217 per Brennan, Toohey and Gaudron JJ.

36 Article 5 of the International Convention for the Elimination of All Forms of Racial Discrimination.

37 *Ibid*.

38 Article 17 of the Universal Declaration of Human Rights.

39 *Mabo [No. 1]* at 219 per Brennan, Toohey and Gaudron JJ.

[T]his means that if traditional native title was not extinguished before the Racial Discrimination Act came into force, a State law which seeks to extinguish it now will fail. It will fail because s. 10(1) of the Racial Discrimination Act clothes the holders of traditional native title who are of the native ethnic group with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community. A State law which, by purporting to extinguish native title, would limit that immunity in the case of the native group cannot prevail over s. 10(1) of the Racial Discrimination Act which restores the immunity to the extent enjoyed by the general community.

In *Western Australia v Commonwealth*⁴⁰, the High Court described the operation of s. 10(1) of the *Racial Discrimination Act 1975* (Cth) as two-fold. First, it confers upon native title holders 'security of enjoyment' of their native title to the same extent as persons generally have in the enjoyment of their property⁴¹. Secondly, where property held by members of the community can only be expropriated for certain purposes or upon certain conditions, a State law which purports to authorise the expropriation of native title for purposes additional to those generally justifying expropriation or on less stringent conditions (such as lesser compensation) is inconsistent with s. 10(1) of the *Racial Discrimination Act 1975* (Cth) and, by virtue of s. 109 of the *Constitution*, inoperative⁴². The majority in *Western Australia v Commonwealth* referred to the right to object and the right to be given notice, in the context of compulsory acquisition, as examples of the protections given generally to holders of forms of property other than native title⁴³. Importantly, however, the majority also noted that the courts have not yet determined the effect of the *Racial Discrimination Act 1975* (Cth) on the validity of State laws authorising the doing of executive acts which purportedly extinguished or impaired native title after that Act came into operation⁴⁴.

It is apparent from the above that s. 10(1) of the *Racial Discrimination Act 1975* (Cth) operates to confer upon native title holders the same 'security of enjoyment' of their native title as that enjoyed by the holders of other property. While before the commencement of the *Racial Discrimination Act 1975* (Cth) native title could be extinguished by executive actions which were inconsistent with the continued enjoyment of native title, such as a grant of freehold, after the Act's commencement it could only be extinguished in the same way as other property rights are extinguished, such as compulsory acquisition. Consequently, in areas where native

40 (1995) 128 ALR 1.

41 *Ibid* at 24 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ ('Mason CJ *et. al.*') citing *Mabo [No. 1]* at 218-9 per Brennan, Toohey and Gaudron JJ and 230-1 per Deane J.

42 *Ibid*.

43 *Ibid* at 34 per Mason CJ *et. al.*

44 *Ibid* at 35 per Mason CJ *et. al.*

45 *Local Government (Planning and Environment) Act 1990* (Qld) s. 4.1(2)(d).

46 This excludes previous legislation which created subdivisional control (under the *Undue Subdivision of Land Prevention Act 1885* (Qld)) or limited control on activities within residential areas (under the *Local Authorities Act 1902* (Qld) as amended in 1923).

title existed at the commencement of the *Racial Discrimination Act 1975* (Cth), the grant of interests in that land which may be invalid where they could not be made over other private land (eg. once a lease has been given for land, the Crown may not grant a further lease of that land without specific, statutory authority such as that for a mining lease). Also, elements of planning control which confer rights upon the owners of land, such as the requirement for land owner consent to planning applications⁴⁵, may not have been observed in the case of native title holders despite the fact that s. 10(1) of the *Racial Discrimination Act 1975* (Cth) operates to confer the same rights upon native title holders and invalidity may result.

The Validity of Planning Schemes and Decisions

Many planning schemes and planning decisions were made in Queensland before the commencement of the *Racial Discrimination Act 1975* (Cth) on 31 October 1975. Planning control was introduced into Queensland in 1934⁴⁶ by the *City of Mackay and Other Town Planning Schemes Act 1934* (Qld). That Act authorised the preparation of planning schemes by local authorities and made provision for objections, for the enforcement of planning schemes by local authorities, and for resumption and compensation. In 1936, the provisions of the 1934 Act were incorporated into the *Local Government Act 1936* (Qld) where they remained, although substantially amended in 1966, until they were replaced by the existing *Local Government (Planning and Environment) Act 1990* (Qld). Initially, the provisions of the *Local Government Act 1936* (Qld) applied to the City of Brisbane. In 1952, however, the *City of Brisbane Act 1924* (Qld) was amended to include equivalent planning control provisions in that Act. On 21 December 1965, the *City of Brisbane Town Planning Act 1964* (Qld) and the first planning scheme for Brisbane came into operation. It appears likely, therefore, that many planning schemes and decisions were validly made even where planning legislation did not confer upon native title holders the same rights as other land owners. The potential for such valid schemes and decisions to affect native title is considered below.

The validity of planning schemes and decisions and all other land dealings effected after 30 October 1975 in respect land where native title survives is determined by the *Native Title Act 1993* (Cth). The *Native Title Act 1993* (Cth) provides for both the validation of land dealings which were invalid, due to the existence of native title, before its enactment⁴⁷ and for the validity of land dealings affecting native title done after its enactment. In determining the validity of dealings, the *Native Title Act 1993* (Cth) distinguishes between 'past acts' and 'future acts'. Both terms rely on the defined term 'act'. The term 'act'⁴⁸ is very broad and includes:

47 The majority of the High Court in *Western Australia v Commonwealth* described the *Racial Discrimination Act 1975* (Cth) as the 'chief, and perhaps the only, way in which the existence of native title might have produced invalidity': see *Western Australia v Commonwealth* (1995) 128 ALR 1 at 37 per Mason CJ *et. al.*

48 Defined *Native Title Act 1993* (Cth) s. 226.

- the making, amendment or repeal of legislation
- the grant, issue, variation, extension, renewal, revocation or suspension of a licence, permit, authority or instrument; and
- the creation, variation, extension, renewal or extinguishment of any legal or equitable right, whether under legislation, a contract, a trust or otherwise.

Past acts

Under s. 14 of the *Native Title Act 1993* (Cth), all past acts which are 'attributable to'⁴⁹ the Commonwealth are deemed to be valid. The *Native Title (Queensland) Act 1993* (Qld) makes similar provision for past acts attributable to the State of Queensland⁵⁰. A past act is essentially any legislative act before 1 July 1993 or any other act before 1 January 1994 which was invalid by reason of the existence of native title⁵¹. However, the term past act includes certain non-legislative acts which occur after 30 December 1993 and are similarly invalid. These are:

- an act which takes place because of the exercise of a legal right created by a legislative act before 1 July 1993 or any other act before 1 January 1994⁵²;
- an act which takes place in giving effect to 'an offer, commitment, arrangement or undertaking' made or given in writing before 1 July 1993⁵³;
- the renewal, extension or re-grant of an interest⁵⁴;
- an action that is done in accordance with the authority conferred by another past act (eg, issuing a permit to take forest products where the past act is dedicating an area of land as timber reserve under the *Forestry Act 1959* (Qld))⁵⁵.

The *Native Title Act 1993* (Cth) prescribes the effect of the validation of a past act upon native title. All past acts are divided into categories A-D. Category A past acts relate to the grant of freehold estates and commercial, agricultural, pastoral or residential leases⁵⁶. Category B past acts relate to the grant of leases that are not Category A past acts or mining leases⁵⁷. Category C past acts relate to the grant of mining leases⁵⁸. Category D past acts relate to the

49 An act is attributable to the Commonwealth, a State or a Territory if it is done by the Crown in the right of the Commonwealth, State or Territory, done by the Parliament or Legislative Assembly of the Commonwealth, State or Territory or done by any person under a law of the Commonwealth, State or Territory: *Native Title Act 1993* (Cth) s. 239.

50 *Native Title (Queensland) Act 1993* (Qld) Part 2 (Validation and its effects).

51 *Native Title Act 1993* (Cth) s. 228(2).

52 *Ibid* s. 228(3).

53 *Ibid*.

54 *Ibid* s. 228(4). *Native Title Act 1993* (Cth) s. 253 defines 'interest' and, in addition to an interest in land, includes a right, charge, power or privilege over land.

55 *Ibid* s. 228(9).

56 *Ibid* s. 229.

57 *Ibid* s. 230.

58 *Ibid* s. 231.

residuary of past acts⁵⁹. The validation of past acts either:

- extinguishes native title (Category A)⁶⁰;
- extinguishes native title to the extent of the inconsistency between the past act and native title (Category B)⁶¹; or
- suppresses native title, to the extent of any inconsistency between the past act and the relevant native title rights and interests, for the duration of the past act (Categories C and D)⁶².

The effect of validation under the *Native Title (Queensland) Act 1993* (Qld) is identical⁶³.

The definition of the term act is wide enough to include planning schemes and decisions. However, where native title has been extinguished, as is the case for Category A past acts, the question of the validity of planning schemes and decisions does not arise. Where native title has not been extinguished, the effect of planning schemes and decisions is relevant.

It is unlikely that the legislative process for promulgating a planning scheme will amount to a past act because the process does not involve any discrimination between native title holders and the owners of other interests in land that may trigger the operation of the *Racial Discrimination Act 1975* (Cth). However, applications made in respect of a planning scheme, such as a scheme amendment (re-zoning) application or a town planning consent application, are likely to be invalid where they relate to land where native title survives and, when made during the appropriate time frame, will qualify as past acts.

Unlike the process for making a planning scheme, a scheme amendment or town planning consent application cannot be made without the consent in writing of the owner⁶⁴. The term owner does not, on its face, include a native title holder⁶⁵. This represents discrimination between the holders of interests in land deriving from the Crown and the holders of interests in land which do not (ie. native title holders) and denies native title holders the same 'security of enjoyment' of their native title as that had by other land owners. Given that the purpose of the consent provision is to ensure that the owners of property are not deprived of the use of land without their consent, and to protect owners against speculative rezoning applications by third parties without the owner's knowledge, the right of an owner to give or refuse consent to an application is an essential part of the 'security of enjoyment' of that owner's property. Consequently, it is most likely that s. 10(1) of the

59 *Ibid* s. 232.

60 *Ibid* s. 15(1)(a)&(b) for Category A past acts.

61 *Ibid* s. 15(1)(c) for Category B past acts.

62 *Ibid* s. 15(1)(d) for Category C and D past acts together with s. 238 which defines the 'non- extinguishment principle'.

63 *Native Title (Queensland) Act 1993* (Qld) ss. 10-13.

64 See, for example, *Local Government (Planning and Environment) Act 1990* (Qld) s. 4.1(2)(d).

65 See *Local Government (Planning and Environment) Act 1990* (Qld) s. 1.4 (definition of "owner").

Racial Discrimination Act 1975 (Cth) operates to require rezoning and scheme amendment applications which include land over which native title exists to be authorised in writing by the native title holders of the land. Given that most applications made after the commencement of the *Racial Discrimination Act 1975* (Cth) were probably not so authorised, those applications were invalid⁶⁶.

As a result, applications that were made over land where native title survived and which were not authorised in writing by the native title holders were invalid and, if made during the appropriate time frame, planning decisions made on such applications are past acts. Planning decisions that are past acts amount to Category D past acts. Importantly, the definition of the term past act encompasses the extinction or renewal of planning decisions. The non-extinguishment principle applies to planning decisions which are past acts and therefore native title is suppressed to the extent of any inconsistency for the duration of the planning decision.

Future acts

The *Native Title Act 1993* (Cth) regulates activities which affect native title after 31 December 1993. The central aspect of this regime is the definition of 'future act'⁶⁷ which essentially is:

- a legislative act which occurs after 30 June 1993 or any other act which occurs after 31 December 1993;
- an act that is not a past act⁶⁸; and
- an act which is, apart from the *Native Title Act 1993* (Cth), invalid because of the existence of native title or which validly affects native title⁶⁹.

Future acts are divided into 'permissible future acts' and 'impermissible future acts'. An impermissible future act is simply one which is not a permissible future act⁷⁰. A permissible future act⁷¹ is:

- in the case of a legislative act, an act which applies to native title in the same way as it applies to freehold land or an act which does not place native title holders

66 *Gold Coast Oil Co. Pty Ltd v Gold Coast City Council* [1973] 1 QPLR 35, although it was accepted that the owner had in fact consented to the application. Furthermore, an application made without an owner's consent would not be 'duly made' for the purposes of s. 4.1 of the *Local Government (Planning and Environment) Act 1990* (Qld) which goes to the jurisdiction of a local authority to consider an application.

67 Defined *Native Title Act 1993* (Cth) s. 233.

68 Because of this part of the definition of future acts, past acts which occur after 30 December 1993 are excluded.

69 An act affects native title if it extinguishes native title or is wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title: *Native Title Act 1993* (Cth) s. 227.

70 *Native Title Act 1993* (Cth) s. 236.

71 Defined *Native Title Act 1993* (Cth) s. 235.

- in a more disadvantageous position at law than an owner of freehold land⁷²;
- in the case of a non-legislative act, an act which could be done over land if the native title holders were owners of the freehold of that land or over waters if the native title holders were the owners of adjacent freehold land⁷³;
 - the renewal, re-grant or extension of a commercial, agricultural, pastoral or residential lease⁷⁴;
 - any future act over an offshore place⁷⁵;
 - an act which is a low impact future act⁷⁶;
 - an agreement between native title holders and the State or Commonwealth, surrendering native title or authorising an act affecting native title, or an act authorised by such an agreement⁷⁷.

An impermissible future act is invalid to the extent that it affects native title⁷⁸. A permissible future act is valid⁷⁹. The effect of a permissible future act is to suppress native title for the duration of that permissible future act⁸⁰. Importantly, native title holders are entitled to the same procedural rights as, in the case of land, an owner of freehold or, in the case of waters, the owner of freehold adjacent to the waters⁸¹. An exception to this entitlement to procedural rights applies in respect of low impact future acts and acts to which the 'right to negotiate' applies. It is apparent

72 *Native Title Act 1993* (Cth) s. 235(2) together with s. 253 which defines 'ordinary title', in respect of Queensland, to mean a freehold estate in fee simple.

73 *Ibid* s. 235 (5).

74 *Ibid* s. 235(7).

75 *Ibid* s. 235(8)(a). 'Offshore place' is defined by *Native Title Act 1993* (Cth) s. 253 as 'any land or waters to which this Act extends, other than land or waters in an onshore place'. The term 'onshore place' is defined *ibid* as 'land or waters within the limits of a State or Territory to which this Act extends' and therefore relates to land or waters within the limits of Queensland as at 1 January 1901: see generally *New South Wales v The Commonwealth* (1975) 135 CLR 337. It therefore excludes all waters below the low water mark to the three mile limit over which jurisdiction is conferred upon the State by the *Coastal Waters (State Powers) Act 1980* (Cth) unless those waters were within the limits of Queensland as at 1 January 1901.

76 *Ibid* s. 234 which is an act which takes place before and does not continue after a determination of native title by the National Native Title Tribunal or the Federal Court and does not involve the grant of a freehold estate or a lease, the conferral of a right of exclusive possession, excavation or clearing, mining, the construction of a building or structure or the disposal or storage of garbage or hazardous substances.

77 *Ibid* s. 235(8)(c). These agreements are made under *Native Title Act 1993* (Cth) s. 21.

78 *Ibid* s. 22.

79 *Ibid* s. 23(2), subject to compliance with the 'right to negotiate' under Part 2 Division 3 Subdivision B of the *Native Title Act 1993* (Cth). The right to negotiate applies only to mining and exploration activities and the acquisition of native title land for a non-Government party: *Native Title Act 1993* (Cth) s. 26(2).

80 *Ibid* s. 23(4) and the definition of 'non-extinguishment principle' in s. 238. The effect of a permissible future act which is the compulsory acquisition of native title is somewhat different. Native title is suppressed after the compulsory acquisition until an act is done in giving effect to the purpose of acquisition which is inconsistent with the continued existence of native title which operates to extinguish the native title: *Native Title Act 1993* (Cth) s. 23(3).

81 *Ibid* s. 23(6).

that, although all native title in Australia presently exists and is merely recognised by appropriate decisions of courts or tribunals, the identity and location of native title holders may be very difficult to ascertain before a court or tribunal determines where native title exists and who are the native title holders. Therefore, before a court or tribunal decides these matters, the *Native Title Act 1993* (Cth) offers a means to satisfy the duty to notify native title holders that it has imposed⁸². In these circumstances, a person's duty to notify is satisfied if the person:

- notifies any representative Aboriginal/Torres Strait Islander representative bodies⁸³ for the area in relation to which the duty to notify arises;
- notifies any occupier of the land;
- places notices on the land; and
- notifies the public in the determined way⁸⁴.

The test of validity for making a planning scheme in future is whether the legislative act of making or amending the scheme is a permissible future act. Firstly, scheme making and amending is an act under s. 226 of the *Native Title Act 1993* (Cth) as it is the making of legislation⁸⁵. Scheme making and amending after 31 December 1993⁸⁶ which affects native title, or invalidly purports to affect native title, will be a future act⁸⁷. As a legislative act, the test for whether the scheme making or amending is a permissible future act is whether it applies to native title holders in the same way as if they owned freehold land⁸⁸. This test is satisfied if the *Local Government (Planning and Environment) Act 1990* (Qld) permits all land including freehold land to be subjected to a planning scheme⁸⁹. Scheme making and amending after 1 January 1994 is a permissible future act and as such valid⁹⁰.

The important consequence of the fact that scheme making and amending is a permissible future act is that s. 23(6) of the *Native Title Act 1993* (Cth) operates to entitle native title holders to all the procedural rights of an owner of freehold.

82 *Native Title Act 1993* (Cth) s. 23(7).

83 A representative Aboriginal/Torres Strait Islander body is one subject to a determination by the Commonwealth Minister under Part 11 of the *Native Title Act 1993* (Cth).

84 See *Native Title (Notices) Determination No. 1 of 1996* (Cth), Commonwealth of Australia Gazette No. 5229, 26 June 1996, where the manner of notifying the public involves advertisements in a state-wide circulating newspaper, a local or regional newspaper and, if one exists, a newspaper catering to the interests of Aboriginal peoples or Torres Strait Islander containing certain information and informing a general broadcasting service within the area.

85 See *Local Government (Planning and Environment) Act 1990* (Qld) s. 2.15(9) which provides that a planning scheme approved by the Governor in Council has the force of law.

86 Given that scheme making is legislative, none of the provisions of s. 228 of the *Native Title Act 1993* (Cth) which relate to 'past acts' which occur after 30 December 1993 will apply. Therefore, any scheme making or amendment after 30 December 1993 will not be a 'past act'.

87 *Native Title Act 1993* (Cth) s. 233.

88 *Ibid* s. 235(2)(a).

89 See *Native Title Act 1993* (Cth) s. 235(3) which gives the example for s. 235(2)(a) of legislation which permits mining on land where there is native title and freehold.

90 *Native Title Act 1993* (Cth) s. 23(2).

Therefore, for land where native title survives, the consent of a native title holder must be obtained before an application for scheme amendment under s. 4.3 of the *Local Government (Planning and Environment) Act 1990* (Qld), or any other application under Part 4 of the Act, is duly made for the purposes of s. 4.1 of the Act. If such consent is not obtained, the application will not be duly made and therefore invalid.

Section 23(6) of the *Native Title Act 1993* (Cth) also means that native title holders of land adjoining the land subject to an application are frequently entitled to the service of a copy of the application⁹¹. Where the identity of the native title holders is unknown, the process of s. 23(7) of the *Native Title Act 1993* (Cth) may be undertaken to satisfy the duty to notify. Rather than risk the consequence of failing to notify under s. 4.3(4)(iii), an applicant may wish to comply with the provisions of s. 23(7) of the *Native Title Act 1993* (Cth) to accommodate the possibility that native title may exist over that land. Where an applicant does not notify an adjoining native title holder in this way and native title is subsequently shown to exist, unless the power of a local authority to cure defects in notice under s. 4.4(2) of the *Local Government (Planning and Environment) Act 1990* (Qld) has been exercised (which, in ignorance of the existence of native title, it may not have been), the application will have failed an essential procedural step depriving the local authority of jurisdiction to hear it⁹².

Is Planning Consent Required by Native Title Holders Exercising Their Native Title Rights?

There appear to be three provisions under which native title holders may not require planning approval or consent when exercising their native title rights and interests. These are s. 211 of the *Native Title Act 1993* (Cth), which provides a limited exemption from the requirement to obtain a licence or approval before undertaking certain native title rights, s. 2.21 of the *Local Government (Planning and Environment) Act 1990* (Qld), which provides for the effect of including 'Crown land' in a planning scheme, and the protection of existing lawful uses under s. 3.1 of the *Local Government (Planning and Environment) Act 1990* (Qld).

Native Title Act 1993 (Cth) s. 211

Section 211 of the *Native Title Act 1993* (Cth) operates where a native title right relates to a hunting, fishing, gathering, cultural or spiritual activity which is prohibited under the law of a State or the Commonwealth unless a person has a licence or

91 See, for example, *Local Government (Planning and Environment) Act 1990* (Qld) ss. 4.3(4)(c), 4.6(3)(c), 4.12(3)(c).

92 *Guse v Brisbane City Council* [1980] QPLR 95 where the service of two of three adjoining owners was not substantial compliance with the requirement to serve adjoining owners and could not be excused. The failure to give adequate notice is fatal to an application and deprives the local authority of jurisdiction to hear it: *Scurr v Brisbane City Council* (1973) 133 CLR 242.

permit⁹³. It does not apply where the law requiring the licence or permit where it is a law that confers rights only on Aboriginal peoples or Torres Strait Islanders⁹⁴. The effect of the provision is to exempt native title holders from the requirement to hold a licence or permit in relation to satisfying personal, domestic or non-commercial communal needs under native title rights⁹⁵.

The potential impact of s. 211 of the *Native Title Act 1993* (Cth) upon the requirement for town planning consent may have some significance. To the extent that an activity covered by s. 211⁹⁶ is a 'permissible use' under the 'Table of Zones', s. 211 will operate, in certain circumstances⁹⁷, to exempt a native title holder from making an application under s. 4.12 of the *Local Government (Planning and Environment) Act 1990* (Qld) for town planning consent. In many cases, the exercise of the native title rights protected by s. 211 of the *Native Title Act 1993* (Cth) will be uses of a temporary and intermittent nature which do not require consent⁹⁸.

Planning control and 'Crown land'

The regulation of native title by planning schemes must be qualified by the introduction of provisions similar to s. 2.21 of the *Local Government (Planning and Environment) Act 1990* (Qld) into the *City of Brisbane Town Planning Act 1964* (Qld) as s. 7A and the *Local Government Act 1936* (Qld) as s. 33(22A). These provisions were inserted by the *Local Government Act and Another Act Amendment Act 1979* (Qld) which commenced on 21 December 1979.

The introduction of these provisions was prompted by the decision in *Brisbane City Council v Group Projects Pty Ltd*⁹⁹. The case concerned the application of planning schemes to the Crown in the right of Queensland. There was land owned by Group Projects which it proposed to subdivide. The land was zoned Future Urban. On 30 October 1975, the Brisbane City Council and Group Projects made a rezoning agreement, by way of a deed, whereby the council agreed to seek the consent of the Governor in Council to rezoning the land Residential A in consideration of the company carrying out works and making certain payments and contributions to the council. The total cost to the company was \$196 160. The company was obliged to carry out its obligations within three years of the approval of the rezoning by the Governor in Council, or prior to the date of endorsement of any plan of survey for subdivision by the council, whichever was sooner. The company arranged for security from AGC (Advances) Ltd by way of a bond for \$196 160 which was executed on 18 December 1975. AGC took a mortgage over the land.

93 *Ibid* s. 211(1)&(3). Compare *Walden v Hensler* (1987) 163 CLR 561.

94 *Ibid* s. 211(1)(c).

95 *Ibid* s. 211(2).

96 ie. hunting, fishing, gathering and cultural or spiritual activities.

97 Only in respect of personal, domestic or non-commercial communal needs of the native title holders: *Native Title Act 1993* (Cth) s. 211(2)(a).

98 *Moore v Kwiksmax Mobile Caterers Pty Ltd* [1990] QPLR 213.

99 (1979) 145 CLR 143.

On 21 July 1976 the company received a notice of intention to resume under the *Acquisition of Land Act 1967* (Qld) and, on 13 November 1976, a proclamation was published in the Gazette, thereby resuming the land owned by the company. By s. 12(5) of the *Acquisition of Land Act 1967* (Qld), the interests of the company and AGC (Advances) Ltd in the land were converted to a right to claim under that Act and the land became vacant Crown land under the *Land Act 1962* (Qld)¹⁰⁰. On 23 December 1976, the Governor in Council purported to rezone the land from Future Urban to Residential A. The majority held that the Crown was not bound by the *City of Brisbane Town Planning Act 1964* (Qld) or the Town Plan¹⁰¹. Consequently, the proclamation of 23 December 1976 which purported to rezone the land was of no effect and the parties were discharged from their obligations under the deed of 30 October 1975.

This decision, as can be expected before *Mabo [No. 2]*, proceeds on the assumption that Crown land is in the absolute ownership of the Crown¹⁰². But, by purporting to codify certain aspects of the *Group Projects Case*, s. 2.21 of the *Local Government (Planning and Environment) Act 1990* (Qld) and its predecessors relieve native title holders of land that is Crown land of their obligation to comply with the provisions of planning schemes.

Section 2.21 of the *Local Government (Planning and Environment) Act 1990* (Qld) relevantly provides:

(1) *A planning scheme may include Crown land.*

(2) *Notwithstanding subsection (1)-*

- (a) *a planning scheme made or continued in force under this Act does not bind the Crown;*
 - (b) *where any premises included in a planning scheme is or becomes Crown land –*
 - (i) *the planning scheme;*
 - (ii) *any agreement made between the relevant local government and any person who previously held an interest in the premises and that is in force at the time when the premises is or becomes Crown land;*
 - (iii) ...
- is not to operate or, as the case may be, ceases to operate in respect of those premises for as long as those premises remain Crown land.*

The term premises includes land¹⁰³ and the term Crown land¹⁰⁴ generally means land that is not alienated from the Crown or land in which only the Crown has an

100 *Brisbane City Council v Group Projects Pty Ltd* (1979) 26 ALR 525 at 538 per Wilson J with whom Gibbs and Mason JJ agreed.

101 *Ibid* at 541 per Wilson J.

102 *Ibid* at 538 per Wilson J citing *Attorney-General v Brown* (1847) 1 Legge 312 which was considered extensively in *Mabo [No. 2]*.

103 *Local Government (Planning and Environment) Act 1990* (Qld) s. 1.4 (definition of 'premises').

104 *Ibid* which provides:

"Crown land" means-

- (a) *land that is not alienated by the Crown as to any estate or interest therein;*

interest (such as a road or a reserve). The broad meaning of the term Crown land encompasses many categories of land over which native title may survive. The effect of s. 2.21(2)(b)(i) is to prevent the operation of a planning scheme over Crown land which, as a consequence of the definition of Crown land, includes much of the land over which native title may survive. Effectively, therefore, most land where native title survives in Queensland is not subject to planning control and has not been since 21 December 1979.

The operation of s. 33(2A) of the *Local Government Act 1936* (Qld) was considered by the Full Court in *Byrne Bros Pty Ltd v Maryborough City Council*¹⁰⁵ but that case was not decided on the basis of s. 33(2A). One of the majority suggested that the several limbs of the definition of Crown land were distinct and only one need be satisfied to enliven the operation of s. 33(2A)¹⁰⁶. The matter first came before G. N. Williams J. in *Byrne Bros Pty Ltd v City of Maryborough*¹⁰⁷ where the following description of s. 33(2A) was given¹⁰⁸:

It thus appears that the legislative intent in inserting subs (22A) was to ensure that a town plan could provide for the zoning of Crown land as defined but so that other provisions of the town plan (for example, those regulating the use of land) would not operate in respect of that land whilst it remained Crown land as defined.

Native Title Rights as Existing Lawful Uses

Given that native title rights arose before the introduction of the common law to Australia and are recognised by the common law, it is clear that native title rights were in existence before the introduction of planning control in Queensland. Those native title rights which were in existence before planning control was introduced to an area are eligible for protection as lawful existing uses under s. 3.1 of the *Local*

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- (b) *land for which a permit to occupy has issued under the Land Act 1994 and land for which a lease has issued under the Irrigation Areas (Land Settlement) Act 1962;*
 - (c) *land that is held by any person representing the Crown or by a trustee in trust for the Crown;*
 - (d) *a road or land that is reserved and set apart or held in trust under the Land Act 1994 for a public purpose;*
 - (e) *any other land, or any building or other structure or part thereof, that is occupied by the Crown or by any person representing the Crown;*
 - (f) *harbour lands or industrial lands within the meaning of the Harbours Act 1955, section 62A (other than land that is the subject of a sale or is leased for purposes other than harbour purposes);*
- and that, in the case specified by paragraph (c), (d) or (e), is not the subject of any sale or letting by the Crown or, as the case may be, by the trustee.*

105 (1984) 57 LGRA 419.

106 *Ibid* at 422-3 per Campbell CJ. The other majority judge, Connolly J did not consider this issue and the minority judge, Shepherdson J at 433, did not agree.

107 (1984) 53 LGRA 383.

108 *Ibid* at 389, cited with approval in *A Fogg Land Development Law in Queensland* Law Book Company, Sydney 1987, 12-27.

Government (Planning and Environment) Act 1990 (Qld) and, before the commencement of that Act, equivalent provisions normally present in planning schemes in the past. The effect of s. 3.1 of the *Local Government (Planning and Environment) Act 1990* (Qld) is to render unlawful uses lawful because they were in existence at the time the use was, apart from protection, rendered unlawful¹⁰⁹.

An initial issue arises concerning s. 33(1A) of the *Local Government Act 1936* (Qld) as considered in *Drouyn v Gretini Pty Ltd; Ex parte Gretini Pty Ltd*¹¹⁰. In the version of this provision inserted in 1975, it applied equally to the Brisbane City Council and other local authorities¹¹¹. The Full Court unanimously held that the provision operated, retrospectively, to validate any use that was lawful at the time when a scheme or scheme amendment would, apart from protection, have rendered the use unlawful and since that time the protection of this use as lawful had been lost. Effectively, if the protection of an existing lawful use had been lost (by abandonment or interruption), it was restored to the status of a lawful existing use in 1975. Changes to the legislation in 1977 removed this generous provision but, by that time, the new lawful existing users had acquired a right under s. 20 of the *Acts Interpretation Act 1954* (Qld) which the 1977 legislation did not purport to displace¹¹².

A frequently cited authority for the determination of the existence of a lawful existing use is *Meacham & Leyland Pty Ltd v Brisbane City Council*¹¹³. In that case, Carter DCJ proposed the following three point test:

- determine if the use was in existence prior to the imposition of the restriction upon that use under the planning scheme;
- ask if the use was then a lawful use; and
- ascertain whether the use became an unlawful use once the restriction of the planning scheme was in place.

Where a native title right is a use within the permissible uses or prohibited uses column of the Tables of Zones, the use, in the absence of a permit in the case of a permissible use, will be unlawful apart from the protection given to a lawful existing use. Therefore, where a native title right is enjoyed, and undertaken, before a restriction in a planning scheme which makes it a permissible or prohibited

109 *Local Government (Planning and Environment) Act 1990* (Qld) s. 3.1 relevantly provides:

- (1) *A lawful use made of premises, immediately prior to the day when a planning scheme or an amendment of a planning scheme commences to apply to the premises, is to continue to be a lawful use of the premises for so long as the premises are so being used notwithstanding-*
- (a) *any provision of the planning scheme or amendment of the planning scheme to the contrary (other than a provision to which subsection (1A) applies); and*
 - (b) *that the use is a prohibited use.*

Section 1.4 of the Act defines 'premises' to include land.

110 (1982) 51 LGRA 13.

111 A Fogg *Land Development Law in Queensland*, *supra* n.108, 669.

112 *Ibid* at 670.

113 [1981] QPLR 114.

use, that native title right will be an existing lawful use after that restriction commences. The term 'use', is defined to include such things as excavation work¹¹⁴, but is certainly capable, as part of its natural and ordinary meaning, of extending to the use of land as part of the enjoyment of native title rights.

The parcel of land which is protected must also be identified. In most cases, the real property boundaries of the land will define the extent of the protected parcel¹¹⁵. This is not a strict rule and exceptions have been made in the case of vacant land where there is a protected storage use¹¹⁶ or a quarrying use¹¹⁷. The principle has no real application to determining the boundaries of native title rights, which may vary widely. It may well be the case that native title will exist over small windows of land of the appropriate category around which alienation has extinguished native title. This then may serve as a basis for the determination of boundaries but ultimately it is a factual issue. It should be noted that any ambiguity in the operation of existing lawful use provisions should be construed in favour of the landowner — in this case the native title holder¹¹⁸. The identification of the boundaries applicable to uses undertaken in enjoyment of native title rights should not present insuperable problems.

The extent of protection of native title rights as existing lawful uses under s. 3.1 depends upon the characterisation of the protected use purpose¹¹⁹. The principal authority relating to the identification of use purpose is *Shire of Perth v O'Keefe*¹²⁰. There the test involves characterising, according to ordinary terminology, what is the use purpose¹²¹. It is only the use purpose and uses necessarily associated with that purpose¹²² that are continued as lawful uses under s. 3.1 of the *Local Government (Planning and Environment) Act 1990* (Qld).

It is noted that, whereas a continuous connection with the land is required for the proof of native title, the protection of an existing lawful use under s. 3.1 of the *Local Government (Planning and Environment) Act 1990* (Qld) is lost if the use is discontinued¹²³. It is impossible to determine if there is any common ground between

114 *Local Government (Planning and Environment) Act 1990* (Qld).

115 *Eaton and Sons Pty Ltd v Warringah Shire Council* (1972) 129 CLR 270 at 274 per Barwick CJ adopted in *Pine Rivers Shire Council v DotD Planning and Environment Court* unreported judgment 28 March 1992 per O'Sullivan DCJ.

116 *Ibid.*

117 *Parramatta City Council v Brickworks Ltd* (1972) 128 CLR 1.

118 *Woollahra Municipal Council v Banool Developments Pty Ltd* (1973) 129 CLR 138.

119 For example, the use purpose of some use in enjoyment of native title may be for residential purposes whereas another use may be a religious or spiritual use.

120 (1964) 110 CLR 529.

121 Some difficulty may be encountered here if the characterisation of a use in enjoyment of native title attempted to force native title right uses into the pre-existing concepts of what is a use in planning terms. In effect, this would deny the *sui generis* nature of native title rights. Therefore, some flexibility in characterisation should be given (see *Woollahra Municipal Council v Banool Developments Pty Ltd supra.*).

122 See the definition of 'use' in s. 1.4 of the *Local Government (Planning and Environment) Act 1990* (Qld) and *Southside Action Group v Brisbane City Council* (1992) 76 LGR 402.

123 See generally A Fogg *Land Development Law in Queensland, supra* n.108, 685-691.

the concepts of continuous connection and discontinuation¹²⁴.

The final issue in relation to native title rights as existing lawful uses is the intensification of existing lawful uses¹²⁵. This is particularly important, given the fact that the expression of native title rights can evolve with time and be undertaken in modern ways. An important example of intensification is *Norman v Gosford Shire Council*¹²⁶ where the existing lawful use was the removal of topsoil and fill by hand and loading it onto trucks which commenced in 1952. By 1972, the process involved many trucks and bulldozers on a much greater scale. The High Court decided the change in the process did not amount to a change in use. Rather, there was an intensification within the scope of the existing lawful use protection. Therefore, native title rights which are protected as existing lawful uses may be intensified, even to become a commercial operation, and not lose the protection of s. 3.1 of the *Local Government (Planning and Environment) Act 1990* (Qld).

Does Planning Control Extinguish Native Title?

As noted above, many planning schemes and decisions were made before the commencement of the *Racial Discrimination Act 1975* (Cth) and these schemes and decisions are valid. The capacity for valid schemes and decisions made before 31 October 1975 to extinguish native title must be considered. The practice for zoning in planning schemes in Queensland has been to divide uses of land into three categories in the Table of Zones — a category of permitted uses (or ‘as of right uses’) which can be undertaken without any need for the consent of the local authority¹²⁷, a category of permissible uses for which the consent of the local authority must be obtained before undertaking and prohibited uses which are illegal in that zone. It should be noted that although the layout of more recent planning schemes varies from this model, the basic framework remains the same.

Where a native title right constitutes a use which is a permitted use, there is no inconsistency between the valid legislative action of the planning scheme and any native title. Where a native title right constitutes a permissible use or a prohibited use under the Table of Zones, the question arises — has the Crown indicated, by

124 Furthermore, provisions in planning schemes in operation before the commencement of the *Local Government (Planning and Environment) Act 1990* (Qld) frequently provided that existing lawful use protection was lost after 6 months discontinuance. To the extent such provisions still occur in planning schemes, they are invalid because of conflict with s. 3.1 which covers the field: *Gemcrest Pty Ltd v Gold Coast City Council* [1993] QPLR 334 and *Heilbronn v Pine Rivers Shire Council* (1993) 80 LGERA 434 but note the doubt of the Court of Appeal with respect to these decisions in *Hervey Bay Developments v Hervey Bay City Council* (1993) LGERA 216 at 222. Whether there is any significant difference between ‘6 months discontinuance’ and the test under s. 3.1 remains to be seen.

125 A Fogg *Land Development Law in Queensland*, *supra* n.108, 680-682.

126 (1975) 132 CLR 83.

127 Although an application may be required to the local authority for the imposition of reasonable and relevant conditions. See, for example, s. 4.1 of the *Local Government (Planning and Environment) Act 1990* (Qld). Before that Act, such provisions were frequently found in planning schemes.

valid legislative action, a clear and plain intention to extinguish or impair that native title right or interest? Where there is such a clear and plain intention, any native title will be extinguished to the extent of the inconsistency between the operation of the legislation and the native title¹²⁸. The question therefore becomes whether the requirement for town planning consent in relation to a permissible use before that use can be undertaken, or the prohibition on undertaking a prohibited use, represents a clear and plain intention to extinguish the native title right which is a permissible use or a prohibited use.

The question demonstrates the important distinction between the 'mere regulation' of a native title right and the extinguishment of native title by inconsistent legislative or executive action. In *Mabo [No. 2]*, Brennan J stated that:

A clear and plain intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title or which creates a regime of control which is consistent with the continued enjoyment of native title.¹²⁹

In support of this contention, Brennan J cited the judgement of the Supreme Court of Canada in *R v Sparrow*¹³⁰. The issue before the Court there concerned the operation of s. 35(1) of the *Constitution Act 1982* (Can) which provides that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed'. The case involved a criminal prosecution under s. 61(1) of the *Fisheries Act* (Can)¹³¹ for a breach of condition in a licence relating to the permitted length of a drift-net. The issue arose whether the defendant possessed a native title right to fish and whether this right was protected by s. 35(1) of the *Constitution Act 1982* (Can) which could operate to invalidate the restriction contained in the licence that formed the basis of the charge. The prosecution submitted that the extensive regulation of fishing which had occurred since 1876 operated to extinguish any aboriginal right to fish as the regulations were 'necessarily inconsistent' with the continued enjoyment of that aboriginal right. Dickson CJC and La Forest J considered:

[T]he respondent's argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.¹³²

They further stated:

There is nothing in the Fisheries Act or its detailed regulations that demonstrates a

128 *Mabo [No. 2]* at 64 per Brennan J.

129 *Ibid.*

130 (1990) 70 DLR (4th) 385.

131 Chapter F-14, *Revised Statutes of Canada 1970*.

132 *R. v Sparrow* (1990) 70 DLR (4th) 385 at 400 per Dickson CJC and La Forest J.

clear and plain intention to extinguish the Indian aboriginal right to fish. The fact that express provision permitting the Indians to fish for food may have applied to all Indians and that for an extended period permits were discretionary and issued on an individual rather than a communal basis in no way shows a clear intention to extinguish. These permits were simply a manner of controlling the fisheries, not defining the underlying rights.¹³³

These statements are useful in assessing the impact of the Table of Zones where a native title right constitutes a permissible use or a prohibited use, particularly because they have been endorsed by the majority in *Mabo [No. 2]*. The regulation of use rights by requiring an application to a local government for consideration of a proposed use on an individual basis, or the limited prohibition of certain uses of land, parallels the regulatory scheme in *R v Sparrow*. In the same way, the fact that a native title right, or an aspect of a native title right, is a permissible use or prohibited use does not demonstrate a clear and plain intention to extinguish that native title right. In similar terms to those used by Dickson CJC and La Forest J, the permissible use and prohibited use entries in the Table of Zones is simply a manner of controlling use rights, not defining underlying rights.

Subdivision

Subdivisional control has not always been associated with planning control. The introduction of subdivisional control in Queensland predated planning control by many years. It is convenient to note here that in the majority of cases, subdivided land was alienated by the Crown in a form of tenure (whether leasehold or freehold) which would have extinguished any pre-existing native title (either as a valid act before the commencement of the *Racial Discrimination Act 1975* (Cth) or as a Category A past act). In the event that subdivision took place over some form of tenure which did not extinguish native title¹³⁴, it becomes necessary to examine the effect, if any, of subdivision on native title. This issue is easily disposed of as subdivision has no implications or effect upon the lawful use of land. The relationship between subdivision and the use of land was considered in *Smith v Randwick Municipal Council*¹³⁵ where, in considering the operation of the approval of an application for subdivision upon a subsequent application for the consent of the local authority to a use of the land, Sugerman J stated:

The Local Government Act does not attribute any particular effect to approval of a subdivision as regards the user to which the subdivided land may be put, or the buildings

133 *Ibid* at 401 per Dickson CJC and La Forest J.

134 For example, an occupation licence under s. 77 of the repealed *Land Act 1962* (Qld) was able to be subdivided under *Land Act 1962* (Qld) s. 271. The *Land Act 1994* (Qld) provides for the subdivision of leases but not for permits (which are similar to licences under the *Land Act 1962* (Qld)).

135 (1950) 17 LGR(NSW) 246, approved by the Court of Appeal in *Stubberfield v Redland Shire Council* (1993) 81 LGERA 13.

which may be erected upon it. The effects of the Local Government Act, on approval of a subdivision, are effects as to the way the owner may dispose of or deal with land.¹³⁶

Therefore, the subdivision of land over which native title survives has no impact upon native title rights or interests and is 'neutral as to the use to which the land may be put or the buildings which may be erected on it; the ultimate benefits of such approval relate to the ways the landowner may dispose of or deal in the land in its component titles'¹³⁷. This is because it cannot be said that subdivision is in any way inconsistent with the continued existence of native title — it conveys no rights over or in relation to land that could impair or extinguish native title.

Conclusions

It is apparent that the operation of planning control legislation has had more than a limited effect on the enjoyment of native title rights and interests. It has been suggested that planning control legislation has operated, both before and after the commencement of the *Racial Discrimination Act 1975* (Cth), to regulate the enjoyment of native title rights and interests.

There are significant procedural requirements which must be observed in respect of applications made for land where native title survives. In the future, local authorities and applicants must comply with the provisions of the *Native Title Act 1993* (Cth) concerning future acts. Consequently, native title holders are entitled to be notified as if they were owners of freehold. Before a determination of native title in the National Native Title Tribunal or the Federal Court, there may be uncertainty concerning the existence of native title or the identity of native title holders and the substituted notice procedures under the *Native Title Act 1993* (Cth) can be employed in these circumstances. The form of these notice procedures may involve considerable expense on the part of a person who has a duty to notify a native title holder. Risk assessment decisions may be required when considering whether to undertake the substituted notification process for notifying native title holders. Also, the consent of native title holders to planning applications over native title land must be obtained for s. 4.1 of the *Local Government (Planning and Environment) Act 1990* (Qld). These procedural issues probably represent the most significant implications of the *Native Title Act 1993* (Cth) for the day to day practices of local governments. Where the awareness of native title matters is not extensive, there is the risk of invalidity in dealing with planning applications where the procedural rights of native title holders have not been considered.

Presently, the scope for planning control over native title where native title

¹³⁶ *Ibid* at 250.

¹³⁷ A Fogg *Land Development Law in Queensland*, *supra* n.108, 1, citing *Smith v Randwick Municipal Council* (1950) 17 LGR(NSW) 246; *Foxwood Ltd v Johnstone Shire Council* [1973] 3 QPLR 29; *Nancy Shetland Pty Ltd v Melbourne and Metropolitan Board of Works* (1974) 34 LGRA 151; *Cassey v Hervey Bay Town Council* (1979) 39 LGRA 68.

exists is severely constrained by s. 2.21 of the *Local Government (Planning and Environment) Act 1990* (Qld). The context in which that provision was enacted makes it clear that the exclusion of certain land from planning schemes was intended to facilitate the use of land by the Crown. For much of the land over which native title rights and interests survive to be subjected to planning control, s. 2.21 of the *Local Government (Planning and Environment) Act 1990* (Qld) must be amended. Any such an amendment would be a permissible future act under s. 235(2)(b) of the *Native Title Act 1993* (Cth) which relates to bringing native title into line with freehold title.

Native title rights and interests are legal concepts which are not easily accommodated by the traditional planning concepts of use rights. However, to the extent that native title rights and interests do represent a use of land, they are capable of protection under s. 3.1 of the *Local Government (Planning and Environment) Act 1990* (Qld) (and its predecessors) as existing lawful uses. This represents an important caveat upon the effect of planning schemes upon native title rights and interests. The nature and scope of protection of native title rights and interests as existing lawful uses is difficult to determine without knowledge of the content of particular native title rights and interests. Even where native title rights and interests do not qualify for protection as existing lawful uses, it is likely that planning control will not operate to extinguish native title but, rather, native title will be 'merely regulated'.

It is readily apparent that *Mabo [No. 2]* and the *Native Title Act 1993* (Cth) represent a significant change to pre-existing notions of property law in this country. Although it may initially be assumed that native title rights and interests are subject to planning law as a law of general application, this is not necessarily the case. The historical assumptions made about the absolute ownership of land by the Crown are no longer applicable and there are important implications of this for planning control on native title land. Also, the procedural rights of native title holders, which initially arose under the *Racial Discrimination Act 1975* (Cth) and are now enunciated in s. 23(6) of the *Native Title Act 1993* (Cth), must be considered during all phases of the development process. Even when adequate consideration is given to these matters, the considerable uncertainty associated with the existence of native title and its location only adds uncertainty to the planning process. The risk of invalidity associated with failing to observe the notification and consent rights of native title holders is balanced against the considerable expense involved in undertaking the substituted notification process of the *Native Title Act 1993* (Cth). The only viable means for dispelling the uncertainty within the planning system that arises from the existence of native title is the rapid and comprehensive resolution of native title claims.