FEDERAL

Native Title Recognized By High Court

Mabo v State of Queensland (1992) 66 ALJR 408

The recognition of native title by the full Court of the High Court of Australia in Mabo v Queensland (3 June 1992) is an important development in the relationship between Australia's indigenous people and its European settlers.

In the proceedings, the three plaintiffs - Mabo, Pass and Rice - sought declarations as to their entitlement and that of the Meriam people as a whole to land known as the Murray Islands in the Torres Strait. The plaintiffs alleged that the Meriam people had, since time immemorial, inhabited and exclusively possessed the Islands. They alleged that, upon the annexation by the Crown of the islands on 1 August 1879, the land became part of the colony of Queensland, but that the Crown's sovereignty was subject to the land rights of the Meriam people based on local custom and traditional native title.

Six of the seven members of the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) agreed that the common law of Australia recognizes a form of native title which, where it has not been extinguished, reflects the entitlement of the indigenous inhabitants to their traditional lands in accordance with their laws and customs. The majority accepted that when the Murray Islands were annexed in 1879 the radical or ultimate title vested in the Crown; this ownership of the Murray Islands was, however, qualified and reduced by the communal native title of the Murray Islanders. Dawson J in dissent concluded that on annexation the vesting of the radical title in the Crown was incompatible with the continued existence in precisely the same form of any pre-existing rights; in his Honour's view, native title was thereafter a form of permissive occupancy at the will of the Crown.

The Court declared that the Meriam people were entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands, excluding some land subject to particular Crown leases.

The decision of the Court to recognise the existence of native title has significant implications in other parts of Australia. While the claim of the Meriam people in the Mabo case was strong in the sense that they had shown an effective system of title which saw individual lots of land handed down from one generation to the next, and cultivation of these lots by families and individuals, there is nothing in the decision which would preclude the recognition of native title in mainland Aboriginal tribes where the indigenous inhabitants have traditionally maintained more nomadic lifestyles. Such native title can be extinguished by legislation, or by an appropriation by the Crown which is inconsistent with the continuing right to enjoy native title, such as appropriation for uses such as roads, railways, and other permanent public works. The majority of the Court (Deane, Gaudron and Toohey JJ dissenting) found that in the event that native title had been extinguished, no entitlement to compensation would arise.

Linda Pearson
Macquarie University
Sydney
NEW SOUTH WALES

Elements comprising an offence under sec 5(1) Environmental Offences and Penalties Act 1989 clarified

Environment Protection Authority v N (Court of Criminal Appeal, Hunt CJ, Enderby J and Allen J, unreported decision dated 13 April 1992)

It is an offence under section 5(1) of the Environmental Offences and Penalties Act 1989 if a person, without lawful authority, wilfully or negligently disposes of waste in a manner which harms or is likely to harm the environment. The maximum penalty which may be imposed in relation to this offence is, in the case of a corporation, $1 million, or in any other case, $250,000 or 7 years imprisonment, or both.

In determining the scope of the operation of the section as it applies to wilful acts, the crucial question is whether a defendant must not only wilfully dispose of the waste, but also intend to harm the environment or be aware that his actions are harming or are likely to harm the environment. In SPCC -v- John Hunt (Land and Environment Court, 13 December 1990, Bignold J) and SPCC -v- NSW Sugar Milling Co-Operative Limited (Land and Environment Court, 19 July 1991, Cripps CJ.), it was held that this question must be answered in the affirmative. These decisions conflicted with the decision of Stein J. in SPCC -v- Blue Mountains City Council (No. 2) (Land and Environment Court, 17 May, 1991), where his Honour held that the question should be answered in the negative.

The decision of the Court of Criminal Appeal in EPA -v- N (13 April, 1992) clarifies the uncertainty created by these conflicting Land and Environment Court decisions. In respect of a charge that the defendant had wilfully committed an offence against Section 5, the Court came to the same conclusion reached by both Cripps CJ. and Bignold J. Hunt CJ., who delivered the main judgment of the Court, stated:

"it seems to me that - both in order to give the word "wilfully" some work to do and in order to comply with the common law as stated by Jordan CJ. in Rex -v- Turnbull (by showing that the accused "knew that all the facts constituting the ingredients necessary to make the act criminal were involved in what he was doing") - the prosecution must establish that the person charged with this offence pursuant to s.5(1) of the Act either intended or was aware that the waste which he was disposing of would or was likely to harm the environment."

After noting the substantial penalties which could be imposed upon conviction, his Honour observed:

"it appears to me unlikely that the Legislature could have intended that such a grave penalty should befall a person who was intending only quite lawfully to dispose of waste, who had no intention thereby to cause any harm to the environment and who was unaware that his manner of disposal was likely to cause such harm."

In arriving at his conclusion, Hunt CJ. rejected the EPA's arguments, which included:

1. that, due to the practical difficulties involved in proving that a person either intended or was aware that the manner of his disposal of waste would or was likely to cause harm to the environment, it could not have been intended that "wilfully" apply to all elements of the offence; and

2. that the provisions of Section 9 of the Environmental Offences and Penalties Act, which require that a court when fixing a penalty take into account, amongst other things, the extent to which the person who committed the offence "could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence", would be superfluous if the prosecution were required to establish that the defendant intended or was aware that the manner in which he disposed of the waste would have such consequences.

The Court of Criminal Appeal's decision is clearly a landmark in the relatively short history of the Act. Whether sections 5 and 6 will be amended as a result of the Court's decision remains to be seen.

Stephen Garrett
Blake Dawson Waldron, solicitors
Sydney
Bias or apprehended prejudgment in refusing development consent

*Berk v Woollahra Municipal Council & Ors* (Land & Environment Court unreported Cripps J. 1 April 1992)

The case dealt with an allegation of bias or apprehended pre-judgment in respect of the hearing by an Assessor of the Court of an appeal against Woollahra Municipal Council's refusal to grant development consent for a residential development.

Until early 1990, 7 Wolseley Crescent ("Lot 1") and 6 Wolseley Crescent ("Lot 2") at Point Piper had been used as one parcel of land for "Paradis-sur-mer". Lot 1 had been used for the residential building and the swimming pool and Lot 2 for the lawns, gardens and tennis court. The house was demolished in early 1990.

After the house was demolished, development applications were made to the Council to develop Lots 1 and 2. At least three applications were made to the Council and all appeals heard by the Court were heard by Assessor Riding.

The first appeal was heard by Assessor Riding in respect of Lot 1. Assessor Riding later heard an application in respect of Lot 2. On that occasion the legal representatives for the Council requested Assessor Riding to disqualify himself because of comments he had previously made with respect to the proposed residential development on Lot 2. The Assessor declined to do so and the matter was at that time taken no further. The Assessor delivered an extempore judgment refusing consent. The owners of Lot 2 subsequently made a fresh application to the Council which was refused, the appeal then coming before Assessor Riding. Application was made at the beginning of the hearing to Assessor Riding that he disqualify himself. He declined to do so, and the hearing proceeded to finality over eleven days.

An appeal pursuant to section 56A of the Land and Environment Court 1979 from the Assessor's decision followed. Cripps J. stated the basis of the allegation of bias or apprehended pre-judgment at page 5:

"The sole basis of attack is that by reason of findings and observations made in the decision with respect to [Lot 1] and the first decision with respect to [Lot 2], the parties or members of the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question before him (Livesey v New South Wales Bar Association (1983) 151 CLR 288) ... Australian National Industries v Spedley Securities Limited & Ors (unreported Court of Appeal 19 March 1992)."

Cripps J. stressed that there was no allegation that Assessor Riding actually prejudged the matters in issue before him or that the Assessor's statement to the effect that he was able impartially to adjudicate on the matter was untruthful or incorrect. His Honour noted that if the Assessor had erred in law in deciding not to disqualify himself, that error occurred on the first day of the hearing. In respect of the notion of bias, Cripps J. stated as follows:

"The doctrine of apprehended prejudgment has been viewed by many as an aspect of the doctrine of natural justice or procedural fairness. Not only must a decision maker not prejudge an issue but he must not give the appearance of doing so. The dominance of form over substance is justified by the need to maintain public confidence in the integrity of the judicial system. I cannot forbear to observe that if the submission before me is successful, some members of the public may very well entertain serious misgivings about the legal system as a whole."

Cripps J. recounted the words of Mason J. in *Re JRL v B.I. (1986) 161 CLR 342 at 352:

"It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of the judicial officers on issues of fact and law may generate an expectation that is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind ... or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way."
an assessor the Land and Environment Court. An assessor must hear both sides, he must not be biased and he must give the appearance of impartiality ... 

I accept that the reasonably minded observer, a party or a member of the public, is not assumed to have a high level of intellectual sophistication. Nonetheless such an observer would, I think, make enquiries and if the nature of the proceedings were explained to him on the first day of the hearing, I do not think that person might have entertained a reasonable apprehension that the assessor might not bring an impartial and unprejudiced mind to the resolution of the matter. Accordingly, I am of the opinion that it has not been demonstrated that the assessor erred in law in failing to disqualify himself."

Cripps J. also frowned on the parties' failure to request the Assessor to refer the question of law (whether in law he ought to have disqualified himself) to a Judge at the outset of the hearing:

"No applications were made and the hearing continued for 11 days. If the conduct of litigation is to be judged by appearances, members of the public ... might entertain a reasonable apprehension that no request was made to the assessor ... [in order] to keep, as it were, that shot in the locker throughout the proceedings to be brought out and used in the event that the decision was unfavourable. ... A reasonably minded member of the public might think that the parties now claiming to be aggrieved were more concerned about the outcome of the case that (sic) any apprehension of prejudgment."

Andrew Poulos
Clayton Utz, solicitors
Sydney

Leave to bring proceedings to enforce environmental laws easily obtained

**Brown v Environment Protection Authority & Anor (Land & Environment Court, 2 July 1992)**

The decision of Stein J in *Brown v Environment Protection Authority and Another* (Land & Environment Court, 2 July 1992) will provide significant comfort to those persons who believe that there should be little or no restrictions placed upon citizens seeking to enforce the State's environmental laws.

In the case before Stein J, and as required by section 25 (3), the applicant sought leave of the Court to bring proceedings in which, amongst other things, it is alleged that the EPA failed to deal with an application for a licence under the *Pollution Control Act 1970* in accordance with the provisions of that Act, and that as a result certain licences issued by the EPA are invalid.

Both the EPA and the licensee opposed the granting of leave to bring the proceedings. It was not alleged that the applicant's proceedings were an abuse of the process of the Court and Stein J had little difficulty in finding that it was in the public interest that the subject proceedings should be brought. The major issue for determination was, therefore, whether the second limb of the test was satisfied, namely whether there was a real or significant likelihood that the requirements for the making of an order under the section would be satisfied. On behalf of the EPA, it was submitted that the Court should adopt a test of probability of success. Stein J rejected this submission. His Honour referred to section 13(2A) of the EOP Act which requires that before the Court grants leave to the taking of a prosecution under the Act, it must be satisfied, amongst other things, that the particulars of the offence disclose a prima facie case of the commission of the alleged offence. His Honour noted that this wording could have been used in section 25 but that the legislature had not seen fit to do so. His Honour concluded that the test to be applied by the Court was essentially procedural and that it did not involve any assessment of the likelihood of success in the litigation. His Honour stated:

"It seems to me that an application for leave to proceed under s25 should be approached in a summary fashion, rather than a formal hearing
with detailed evidence and cross-examination. The latter is to be avoided because it will have the natural propensity to expand into a mini final hearing. Leave to proceed could not have been intended to be so dealt with by the Court. The leave required by the section is to obtain access through the door of the Court - a gatekeeper role - rather than the need to establish likely success in the litigation."

His Honour placed emphasis on the fact that section 25(3)(b) referred to "the requirements" for the making of an order and found that those words:

"lead to an inference that the Court has to be satisfied on the probabilities that the case sought to be brought is within the jurisdiction of the Court; seeks a remedy within the power of the Court; alleges an actual, threatened or apprehended breach of the Environmental Offences and Penalties Act or any Act and that the breach is alleged to be causing or likely to cause harm to the environment."

On 27 July 1992, the EPA was denied leave to appeal against his Honour's decision.

Whilst his Honour's decision gives the Land and Environment Court a very limited role to play before granting leave to bring proceedings under section 25, his Honour's interpretation of the section is, in our view, unlikely to lead to an "opening of the floodgates" in respect of actions under section 25 of the EOP Act. The fact that the granting of leave to commence proceedings does not in any way parallel the granting of an interim injunction pending the outcome of the proceedings, and the likelihood that a costs order will be made against an applicant who is unsuccessful at the final hearing of the proceedings, mitigate against such a possibility.

Stephen Garrett
Blake Dawson Waldron
Sydney

TASMANIA

Planning Appeal - standing of applicant; Compulsory Conference - agreement reached between developer and council - whether 3rd party has standing to appeal.

Tasmanian Conservation Trust v Planning Appeal Board and King Cole Properties Pty Ltd (Supreme Court of Tasmania, Wright J., May 29, 1992)

In September 1991, Council granted planning approval to King Cole Properties to construct a 13 storey building in the Hobart C.B.D. Prior to approval being given, and subsequent to the process of public advertisement provided for in S.733B of the Local Government Act 1962, the Tasmanian Conservation Trust submitted written representations to the Council in respect of the proposed development. The Council then granted approval subject to a number of conditions. Because of the nature and extent of these conditions and its agreement with them, the Trust decided not to appeal against Council's approval of the development. Had Council's grant of planning approval been viewed unfavourably by the Trust it would have been entitled under S.733C (2) to appeal the grant of approval within 14 days of Council's publication of its decision.

In October 1991, King Cole Properties appealed to the Planning Appeal Board against the conditions inserted by the Council. In December 1991 the Chairman of the Planning Appeal Board directed the parties to the appeal namely, the Council and the proposed developer, to attend a conference before a member appointed by the Board. At that conference the parties to the appeal reached agreement on all matters of dispute. S. 733D 3(c),(b), (i) provides that upon the completion of a compulsory conference the planning appeal shall in a case in which agreement has been reached, be deemed to have been determined by the Board. King Cole therefore argued that since resolution had been reached at compulsory conference, the appeal process had come to an end and the appeal was deemed to have been determined by the Appeal Board in accordance with that agreement. The Planning Appeal Board argued that a member constituting the Board for the purpose of conducting a compulsory conference has a discretion whether