# INFORMATION SERVICE

## QUEENSLAND*

### MINING AFTER MABO

All who seek mining rights in remote parts of Australia should contemplate the decision of the High Court (Dawson J. dissenting) in *Mabo v. Queensland.*[1] Doubtless the judgments in that case will be dissected by more celebrated commentators, and particularly by constitutional lawyers, but some comments on possible implications for mineral development are in order. For this purpose we need not consider whether *Mabo* is the result of brilliant new exegesis of old authorities on British colonisation, or an exercise in judicial legislation on the side of the contemporary angels.

As against the defendant, Queensland, the Court declared that land in the Murray Islands in Torres Strait belongs not to the State but to those whom the plaintiffs represented, by virtue of traditional native title. However, it also declared such title to be "subject to the power of . . . Queensland to extinguish [it] by valid exercise of . . . powers . . . not inconsistent with the laws of the Commonwealth".[2]

The leading judgment is that of Brennan J.,[3] with whom Mason C.J. and McHugh J. agreed. His Honour noted[4] that the islands were annexed by Queensland with the approval of the British authorities in 1876 and (a few areas apart) were subsequently reserved for the use of the native population. The question to be decided was whether annexation ipso facto makes the Crown owner of all the lands annexed,[5] or whether some further action is needed for that purpose — native title surviving in the meantime.

In answering that question, Brennan J. observed, the Court could not legislate, or at any rate not too stridently: "In discharging its duty to declare the common law of Australia, this Court is not free to . . . fracture the skeleton of principle which gives the body of our law its shape."[6] Australian law is an "organic development from the law of England" and the "peace and order" of this country depends on preserving its essence.[7] However, when a traditional item of common law offends "contemporary values", judges must carefully consider whether it is indeed "an essential doctrine of our system".[8]

The true position, in his Honour's view,[9] is that the Crown can gain sovereignty over territory without automatically becoming the owner of the lands involved. Until the Crown positively assumes ownership over any particular area,

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1. (1992) 66 A.L.J.R. 408.
2. Ibid., at 499.
3. In recent years a son of Brennan J. has made distinguished contributions to the movement to recognise or to confer Aboriginal land rights.
4. Supra, n. 1, at 412, 413.
5. As assumed in *Attorney-General v. Brown* (1847) 1 Legge 312.
6. Supra, n. 1, at 416.
7. Ibid.
8. Ibid., at 417.
9. Ibid., at 423ff.

there is an Anglo-Australian legal vacuum in which native title may continue to exist. It is then a question of fact whether such title does exist and, if it does, its details can only be revealed by empirical inquiry:

> Native title . . . is given its content by the traditional laws . . . [Its] nature and incidents . . . must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty . . .[10]

Indeed it may, and not the least difficulty is that the available evidence may be vague, recently rationalised or self-serving. However, a court will now be conscious that the normal measure of professional scepticism may be unwelcome on such an occasion — if indeed the "factual" inquiry is not conducted by some special tribunal, possibly chosen for a known empathy with the claimants.

If there is any latter-day John Batman who hopes to acquire native title in exchange for beads, blankets or even large quantities of dollars, let him abandon hope forthwith: "[N]ative title cannot be acquired from an indigenous people by one who, not being a member of [them], does not acknowledge their laws."[11] Only the Crown can supplant such a title, by manifesting a "clear and plain intention"[12] to extinguish the traditional rights — of which there was no proof in the present case. And even then the Crown may find that there are strings attached, namely, fiduciary duties towards the original owners. (More on this point anon.) Another lion in the path is the *Racial Discrimination Act* 1975 (Cth). Indeed, the State fell foul of that legislation, as divined by the High Court, in an earlier bid to short-circuit the *Mabo* affair.[13]

In the light of these warnings it appears that some early expositions of *Mabo* have been overconfident in asserting that where native title exists it is at the mercy of overriding State legislation, and that accordingly the decision makes little or no practical difference. While *Mabo* is by no means so revolutionary as some feared it would be,[14] its obiter dicta concerning fiduciary duties, discrimination laws and liability to pay compensation (not to mention its political utility) should be carefully digested.

Although the Crown has extinguished the title of any pre-1788 owners in many urban and rural areas of Australia, there may remain a question whether the Crown's action (or inaction) in remote areas, apart from the Murray Islands, is consistent with survival of native title. Dedication of land as a National Park is consistent with such survival, and the same may apply to authorities to prospect for minerals.[15]

Brennan J. suggests[16] that a Crown reservation[17] of land for some *future* school, courthouse or other public purpose may also be consistent with

10. Ibid., at 429.
11. Ibid., per Brennan J. at 430.
12. Ibid., per Brennan J. at 432.
13. *Mabo v. Queensland* (1988) 166 C.L.R. 186, in which the *Queensland Coast Islands Declaratory Act* 1985 (Qld) was invalidated.
14. Compare *Courier Mail*, 20 April 1991:
> "The Qld government is racing against time to draft land rights legislation before the High Court decides . . . *Mabo v. Queensland* . . . . Some lawyers expect that the High Court, radicalised by the appointments of judges such as Justice Mary Gaudron and Michael McHugh, will decide that the original inhabitants of Australia 'owned' the country before 1788 . . . the entire system of land tenure . . . could be threatened."
15. Supra, n. 1, per Brennan J. at 434.
16. Ibid.
17. Section 5 of the *Land Act* 1962 (Qld) excludes from the category of "Crown land" any land reserved for public purposes (which term includes Aboriginal reserves).

continuation of native title. He adds, however, that the construction of a building upon such land would be inconsistent with the continuation of native title. But, with respect, if his Honour's major premise is correct, it is difficult to see that the erection of a building would necessarily settle the issue. May not the *size* of the land-parcel be material? Should the inference of "inconsistency"[18] be drawn whether the land occupies one half-acre or a square mile?

Deane and Gaudron JJ. differ from Brennan J. on the technical point of whether native title is sui generis or a common law right.[19] However, they agree that it can be extinguished by surrender to the Crown, by disappearance of the relevant native group, by abandonment and (perhaps) where the traditional owners abandon their old culture. It also disappears in the event of "an unqualified grant of an inconsistent estate in land by the Crown".[20] It follows that surviving native titles are "not entrenched",[21] but those who seek to eliminate them in the future should bear in mind the Commonwealth's constitutional duty to pay "just terms" for property acquired[22] and the subjection of State legislation or executive action[23] to the federal *Racial Discrimination Act* 1975.[24]

Toohey J. takes up a point touched lightly by Brennan J. — namely, that an acquisition which escapes the discrimination laws and which is otherwise valid may be saddled with some form of trust for the benefit of the traditional owners:

> The power to destroy or impair a people's interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused. The fiduciary relationship arises, therefore, out of the *power* of the Crown to extinguish traditional title . . . .[25]

Alternatively, the fiduciary duty might be found in some prior dedication of the land as a native reserve.[26] What the court gives to the Crown with one hand it may remove with the other. Certainly in the case of the Murray Islands ". . . the obligation of the Crown . . . is to ensure that the traditional title is not impaired . . . without the consent of or otherwise contrary to the interests" of the islanders.[27] Besides, if the State were to extinguish the plaintiffs' rights without proper compensation, this would amount to unlawful discrimination.[28]

## *POSSIBLE INTERACTION WITH THE ABORIGINAL LAND ACT 1991 (QLD)*

The Queensland legislation was noted in the April 1992 issue of this journal at 17. *Mabo* appears to touch it at these points:

18. I.e., of extinction of native title.
19. Supra, n. 1, at 447.
20. Ibid., at 452.
21. Ibid.
22. Commonwealth Constitution, s. 51(xxxi); see supra, n. 1, at 452.
23. E.g., under the existing *Land Act* 1962 (Qld).
24. One of several invitations in the *Mabo* judgments to raise an issue under that legislation whenever a question of extinction of native title is litigated. Section 9 of the Discrimination Act bans any "distinction, exclusion, restriction or preference based on race, colour, descent . . .". Section 10 of the same Act nullifies any provision having the effect that persons of a particular race, etc., do not enjoy a right that is enjoyed by persons of another race.
25. Supra, n. 1., per Toohey J. at 493; emphasis in original. This opinion of Toohey J. (and also of Deane and Gaudron JJ.) is not shared by Mason C.J., Brennan and McHugh JJ. at 410.
26. Ibid., at 493.
27. Ibid.; and see the form of the declarations.
28. Ibid., at 498.

(1) It is a silent major premise of the State law that all rights to land flow from the importation of English law to the Australian colonies.[29] But insofar as native title exists in Queensland (apart from the Murray Islands) the foregoing proposition must be qualified.
(2) The State Act provides that rights thereunder cannot be claimed over freehold land or which is subject to a lease or licence under the *Land Act* 1962 or within a town area, a forest reserve, or under a public trust or which is land in which someone has a right "other than under this Act against the Crown".[30] The unavailability of freehold land and land under Crown leases and licences seems compatible with *Mabo*, although there may now be room, in some cases, for an argument that a Crown concession is not inconsistent with the continuance of native title.[31] Claims of this sort, even if they ultimately fail, are likely to be supported by ample public funds and would be expensive to oppose. There is also a question whether Crown reserves amount to "inconsistent title".[32]
(3) The *Mabo* proposition that native title may exist over National Parks is broadly consonant with the State provision that such lands are open to Aboriginal claims[33] but if a "*Mabo* title" exists it will be unnecessary to go through the State claims process as the title will already exist.
(4) The State limitation period of 15 years[34] for claims cannot apply to any rights which already exist according to the *Mabo* principle.
(5) The Land Tribunal constituted under the State Act is not required (or indeed empowered) to create a "*Mabo* title" and presumably any dispute as to the existence of such a title would be a matter for the ordinary courts. However, the Tribunal might still be used in a quest for statutory rights by Aboriginals who can show no "*Mabo* title" to the land in question. Quaere whether a purported grant of title under the *Aboriginal Land Act* would serve to extinguish native title, if any.

## *MABO AND MINING RIGHTS IN QUEENSLAND*

The *Aboriginal Land Act* declares that Crown land subject to a mining interest is open to "land rights" claims unless a special mining Act applies.[35] This appears to be compatible with *Mabo.* Conversely, the State Act allows mining on Aboriginal trust lands, subject to the consent of the trustees, or failing that, with the consent of the Governor in Council.[36] Provided that the native title in question depends upon a grant under the State Act, and *not* upon the *Mabo* principle, this would seem to be unobjectionable. But if the State purported to grant mining rights over land allegedly covered by a traditional "*Mabo* title"

29. As held in numerous cases overruled in *Mabo*, including *Milirrpum v. Nabalco Pty Ltd* (1971) 17 F.L.R. 141; *Coe v. Commonwealth* (1979) 53 A.L.J.R. 403.
30. *Aboriginal Land Act* 1991 (Qld), ss 2.19, 2.13.
31. See nn. 16 and 17, supra, and related text. An analogy may be found in the fact that a mineral exploration permit may co-exist with grazing or agricultural activities, or with another permit relating to a different mineral in the same area: *Mineral Resources Act* 1989, s. 5.6.1.
32. Supra, n. 1, per Deane and Gaudron JJ. at 455.
33. *Aboriginal Land Act* 1991, ss 2.18, 5.20.
34. Ibid., ss 1.02.2, 4.05.
35. Ibid., s. 2.13.2.
36. By the combined effect of s. 7.01 of the *Aboriginal Land Act* and s. 7.6 of the *Mineral Resources Act* 1989. As to exploration permits, see *Mineral Resources Act*, s. 5.4.1(a)(ii).

the situation could well be complicated, first, by an inquiry to see whether such title does exist, and secondly (if the first question were answered "Yes"), by claims of breach of trust and/or racial discrimination.[37]

Accordingly, commentators[38] who suggest that there is a good deal more to *Mabo* than modish symbolism may yet be proved correct. *Mabo* clearly asserts that land under the jurisdiction of the Crown is not necessarily Crown property,[39] and that some historical uses of land by the Crown may be consistent with the continuance of native title.[40] While these possibilities are of little concern to city and town dwellers or to proprietors of freehold or established Crown leases, they may yet confront some who seek mining and other concessions from the Crown in remote parts of the State. "*Mabo* titleholders" cannot be bought out by private entrepreneurs[41] and a State government which seeks to displace them in the interests of economic progress may now find itself enmeshed in racial discrimination laws or judicially constructed trusts — to say nothing of political exercises sustained by interpretations or misinterpretations of *Mabo's* more Delphic passages. The concept of a State land-use "not inconsistent" with native title is slippery and leaves some room for supplementary judicial legislation. Discrimination laws are cast in broad, American terms formerly avoided in Anglo-Australian legislation, wide open to creative interpretation. "Fiduciary duties" are one of several highly fashionable terms which enable courts, beneath veils of expensive technicality, to rearrange property rights according to their perceptions of "fairness", and in *Mabo* we are reminded that the categories of fiduciary duty are not closed.[42]

The interaction of *Mabo* and mining in Queensland may turn out to be marginal, but to the legal observer it may also be interesting.

37. See nn. 24, 25, 26 and 29, supra, and corresponding text.
38. Including the Rev. Frank Brennan S.J.
39. See n. 9, supra, and text.
40. See nn. 15, 16, 20, supra, and text.
41. See n. 11, supra, and text.
42. Supra, n. 1, per Toohey J. at 493.