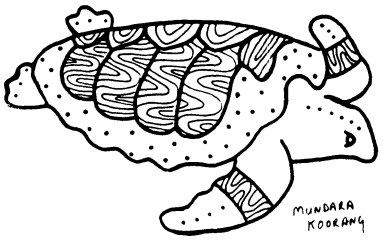
Briefs



NATIVE TITLE

A new legal shield

MICHAEL MANSELL looks at post-Mabo common law and statutory developments in Tasmania.

There have been many discussions within the Tasmanian Aboriginal community about native title issues since the handing down of the *Mabo [No.2]* decision in June 1992. It is only recently, however, that reliance on common law legal developments has been taken up by the Tasmanian Aboriginal community.

There is caution in Tasmania about relying or concentrating on common law rights. The fear is that immediate actions for native title may compound the false impression of Aboriginal rights being confined to native title, which of course they are not. For instance, the mutton bird islands in Bass Strait are regarded widely as the strongest chance for a successful native title claim in Tasmania. Aborigines have baulked at seeking a declaration from the National Native Title Tribunal over the islands because there is neither a threat to continued Aboriginal muttonbirding on these islands, nor any suggestion that Aborigines do not have particular rights to those areas. In such cases the question is, why bother seeking a declaration?

Native title nonetheless provides Aborigines with a new legal shield against further incursions into Aboriginal proprietary and cultural rights and is therefore seen as an important development.

Native title claims

The Wybalenna claim

The first native title claim within Tasmania was filed in the High Court in June 1993 and claimed the area known as Wybalenna on Flinders Island. The three plaintiffs in the case, Mrs Ruby Roughley and her son Chris, and Glen Shaw, are all well-known figures on Flinders Island. Ironically, the Flinders Island Aboriginal Association has now supported the State Government giving title to Wybalenna to the local council.

The Woolnorth case against VDL

The Van Dieman's Land Company (VDL) was established in England with one million pounds capital. In 1824, the company applied for a grant of 500,000 acres in the north west of Tasmania. The company surveyors explored the area from 1826 to 1830, and introduced sheep to the area.

Eight Aboriginal bands have traditional rights to the area. The Parperloihener and Peerapper people were the chief groups in the area.

The tribes frequented the area in November when the yellow flowers blossomed indicating the return of mutton birds to lay their eggs. When the shepherds tried to entice Aboriginal women into the huts the Aboriginal men strongly objected and a skirmish followed. One shepherd was wounded and an Aborigine shot. In retaliation, the Aboriginal group ran sheep off a cliff. The VDL workers then got their revenge. In George Augustus Robinson's words:

> On the occasion of the massacre a tribe of natives, consisting principally of women and children, had come to the islands. Providence had favoured them with fine weather, for it is only in fine weather that they can get to the islands, as heavy sea rolls between them. They swim across, leaving their children at the rocks in the care of the elderly people.
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> They had prepared their supply of birds, had tied them with grass, had towed them on shore, and the whole tribe was seated around their fires partaking of their hard earned fare, when down rushed the band of fierce barbarians thirsting for the blood of these unprotected and unoffending people.
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> They fled, leaving their provision. Some rushed into the sea, others scrambled around the cliff and what remained the monsters put to death. Those poor creatures who had sought shelter in the cleft of the rock they forced to the brink of an awful precipice, massacred them all and threw their bodies down the precipice, many of them but slightly wounded.

This factual background has resulted in the development of a case against VDL and the Government for breach of fiduciary duties. It will be argued that Aboriginal use and enjoyment of the area provided an interest recognisable by and capable of protection at common law; that a fiduciary duty arose and was to burden the Crown's dealings with the land and the Aboriginal people; and that the allocation of the interest in the north west area to VDL amounted to a breach of the duty. It will be argued that:

- government failed to ensure the rights of Aborigines, especially to life as well as enjoyment of their traditional lands;
- VDL falsely represented to the colonial government that the area was free of any existing rights and therefore available for allocation; and
- both VDL and the government deprived Aborigines of their rights to the area;

all of which breached the fiduciary duty.

Although much of the original land grant has been sold, a lot of it remains. Aboriginal people continuing the practice of mutton birding in nearby islands in Bass Strait have been denied access to the birding islands via the VDL property, causing great anger and resentment in the Aboriginal community towards the company. The company recently traded its shares to a New Zealand company, Tasag. Despite announcing publicly that it would permit Aboriginal use of the area, Tasag has continually refused to respond to correspondence from Aboriginal organisations, has not agreed to access and has refused to meet with Aborigines to discuss the issues.

The threatened action against VDL was prompted by the selling of the shares by the VDL company to New Zealand interests. The Foreign Investment Review Board declined to get involved with the sale despite the call from the Aboriginal community, confirming its greater interest in attracting foreign capital over protecting Aboriginal interests. Although the shares have been traded, the VDL company remains the

same, and its main asset, the land, remains with the company. This means there is no urgency in taking the action.

The case against Netgold

In a similar vein, the third common law case was also prompted by events external to the Aboriginal community. The financially strapped Tasmanian Government has opened up the north east of Tasmania for gold prospecting under its Netgold project. Aborigines warned the government in no uncertain terms — letters to the Premier and in press releases — of Aboriginal interest over the area. Dismissive of Aboriginal calls for dialogue, the Government allocated areas for mining exploration.

Furley Gardner, Laurie Lowery and Jim Everett lodged a Notice of Objection to mining with the Director of Mines on 25 November 1994. The three plaintiffs objected to mining of the area on three grounds:

1. The area is subject to native title at common law;
2. Aborigines hold common law Aboriginal title; and
3. Aborigines are beneficiaries under a constructive trust which arises as a result of a Crown breach of a fiduciary duty to the members of the north east tribe.

Aboriginal claims and jurisdictional questions

It is clear from the issues on which common law Aboriginal rights are to be asserted in the three cases mentioned that not all of them will be in the jurisdiction of the National Native Title Tribunal. The Wybalenna claim for native title rights, although begun in the High Court, will be transferred to the Tribunal if it is to continue. Interestingly, the Wybalenna action is framed on the alternative ground that the land was "never ceded", as the Crown never "formally claimed Flinders Island", but had "coerced" Aboriginal people to reside on or near the area. Notwithstanding the inconsistency in this pleading, the issues of sovereignty and fiduciary duty are raised. These issues are well beyond the Tribunal's jurisdiction.

The Woolnorth case against VDL is effectively a breach of fiduciary duty case as well. At this stage no formal proceedings against the company or the Government have taken place.

The more likely case to be heard in the coming months is the north east case against Netgold. With the objections now before the Mining Warden's Court, a hearing date is to be set (none has been at the time of writing). The Warden is empowered by s.107 of the *Mining Act 1929* (Tas.) to reserve any question of law to the Supreme Court. Issues certain to rise in the action include whether Aboriginal objectors have an estate or interest sufficient to gain standing. From the Notice of Objection filed, the Aboriginal objectors will argue that the Crown lands the subject of mining applications are not vacant Crown lands but are subject to native title. The remainder of the exploration areas are private freehold. The most interesting aspect in this case will turn on the issue of who owns the minerals on private land; Aborigines, the Crown, or the private freeholder?

The objectors intend to argue that up to the 1820s, Aborigines remained in occupation of the north east area, thus establishing both customary law or native title rights as well as possessory title.

By the time the tribe was forcibly removed from the area to be subject to mining, it will be argued that they had acquired title by adverse possession against the Crown. If so, what rights did the Aboriginal group acquire as against the Crown at the time, and which of those rights has survived? These will be key issues to be resolved.

The matter of the fiduciary duty will also arise, both in relation to Aboriginal burial grounds and other sites in the north east area as well as the broader duty imposed on the Tasmanian Government to protect the interests of Tasmanian Aborigines. Given George Augustus Robinson's actions of enticing Aborigines to leave their traditional areas in exchange for being taken care of by governments, it may be that government neglect of Aboriginal views on the north east may constitute a breach of the general duty. Robinson was, of course, paid by the colonial authorities to carry out the action, and therefore had the lawful authority of government in making a promise to look after Aborigines. In any event, the north east case looks like developing some of the arguments promoted in *Mabo [No.2]* and the Wik case but which, at the time of writing, remain undecided.

Other post-Mabo statutory developments

Meantime, the Tasmanian Government has made two moves on native title and related issues. The first was to pass its own *Native Title Act* in 1994. The Act, practically duplicating certain provisions of the Commonwealth's *Native Title Act 1993*, was simple and limited: it validated any grants to whites made invalid by the existence of native title; provided compensation; confirmed existing Crown ownership of resources; and guaranteed public access to beaches, etc.

The Tasmanian Aboriginal Centre condemned the Bill (as it was then) for doing nothing for Aborigines while at the same time shoring up white land interests. Consequently, the Centre drafted two amendments to the Bill. One sought to revive native title wherever land was returned to the community, regardless as to how that occurred. The second declared the right ofAboriginal people to practise their culture, including hunting, fishing and gathering. The amendments were supported by the Labor Party and Greens but not by the Liberal Government, thus ensuring their defeat.

In the event that the Tasmanian validating law, or for that matter any of the other state laws, is challenged, it will be interesting to see the result. State validating laws purport to extinguish the rights of one group of people only — Aborigines — and on the face of it breach Australia's commitment to the Convention on the Elimination of All Forms of Racial Discrimination. The High Court invalidated the Queensland Government's attempt to extinguish native title in the Murray Islands on the grounds that it constituted a breach of the *Racial Discrimination Act 1975* (Cth), the Australian Government's legislative fulfilment of its obligations under the Convention. If Queensland could not thus breach the racial discrimination commitment of this country, how can other States?

Canberra purported to override the *Racial Discrimination Act 1975* (Cth) by virtue of s.7(2) of the *Native Title Act*. Under domestic law, it is likely s.7 will validly override an inconsistent earlier Federal law. However, it is at least arguable under domestic law that the wording of s.7 is not sufficiently unambiguous to amount to an overriding of a law passed (that is the *Racial Discrimination Act 1975*) pursuant to the Convention, and that clearer words are necessary.

Alternatively, a complaint to the United Nations against Australia's purported reneging on its obligations to honour the Convention may force the Commonwealth to amend s.7. State laws would then clearly be challengeable.

The Tasmanian Government has negotiated draft legislation to establish a statutory land council with the promise to also give land. At the moment, Aborigines want Cape Barren Island, mutton bird islands, Rocky Cape and other small sites. For the Government's part, it wants to be more limited in terms of lands returned.

Another sticking point is the rights to go with land returned. Aborigines expect rights to forests and waters, wildlife and minerals to flow with the title, and not to pay rates and taxes on the land. These issues are difficult for governments at the best of times, and are apparently causing some agonising within Liberal circles in Tasmania. It may well be that the process of negotiation, seen by Aborigines and government alike as a good thing, may break down on the question of rights to go with the title. A decision will be known by March, when the Bill is due to be introduced into the Tasmanian Parliament.

Michael Mansell is an Aboriginal activist and solicitor with the ALS, Hobart.

ABORIGINAL HERITAGE

Protecting burial sites

An area of immense cultural significance is under threat at Lake Victoria. ANDREW CHALK examines.

Lake Victoria, in the far south west corner of New South Wales, contains the largest known Aboriginal burial site in Australia. Archaeologists who examined the site in 1994 estimate that the number of burials at the Lake is likely to be between 6000 and 18,000. Most of these are located in a group of islands along the Lake's southern edge. Naturally, the area is of immense cultural significance to its traditional owners, the Barkandji people, and is also recognised as having international archaeological significance, since it dwarfs even the largest pre-industrial burial sites in Europe, Asia and the Americas.

While it was always known that Lake Victoria was an important burial ground, the true extent of the burials only became apparent when the waters of the Lake, which are artificially held at maximum level, were lowered to enable work on the Lake's regulator. An inspection of the area which occurred when the Lake was empty revealed 268 burials exposed to the surface.

Studies commissioned by both the New South Wales Aboriginal Land Council (NSWALC) and the Murray Darling Basin Commission (MDBC) following the discovery of the burials revealed significant damage to the sites from wind and wave erosion associated with the regulation of Lake Victoria. The level of the Lake is controlled by the MDBC and is integral to the supply of water to South Australia. The land on which the burials occur, although within New South Wales, is vested in the State of South Australia.

In the latter half of 1994, Barkandji elders began campaigning for the protection of the area. They were concerned about both the physical damage occurring to the sites from erosion as well as the desecration of the burials through their artificial inundation. Under the *National Parks and Wildlife Act 1974* (Cth), it is an offence for any person to knowingly permit the destruction, defacement or damage of a relic (which is defined to include Aboriginal remains) without first obtaining the consent of the Director-General of National Parks and Wildlife.

While the MDBC recognised the significance of the site and took prompt interim measures to help address some of the erosion problems, the measures were not regarded as sufficient by any of the parties to prevent further damage to the sites. Nor did the interim measures address the Aboriginal community's underlying concern about desecration to the burials through inundation. As the MDBC regarded the return of the Lake to full supply levels as essential, particularly given the drought conditions affecting much of the Basin, it applied to the Director-General on 19 October 1994 for consent to continue its normal operation of the Lake despite the likelihood that it would result in the further destruction of burials.

In late October 1994, the NSWALC commenced proceedings in the Land and Environment Court against the Director-General as well as the MDBC. NSWALC took this action after the Director-General informed the Land Council that she had received legal advice from the Crown Solicitor that she was obliged to grant any application lodged by the MDBC for consent to destroy the burials in connection with its operations under the Murray Darling Basin Agreement. The Agreement is an inter-government agreement between the Commonwealth, New South Wales, South Australia and Victoria (and now also Queensland) to ensure an equitable allocation of the waters from the rivers of the Murray Darling system.

In the proceedings, NSWALC sought declarations that the Director-General was obliged to exercise her independent discretion in deciding any application from the MDBC for a consent to destroy burials and was not duty bound to give her consent to such an application. NSWALC also sought an injunction preventing the MDBC from raising the level of Lake Victoria above a height of 26.5m AHD, which was considered by both the Director-General and NSWALC's geomorphological experts to be the maximum height at which the Lake could be operated without damage to burials in an area known as Snake Island.

NSWALC's application was granted expedition by the Court on 31 October 1994, and the proceedings for the declarations were heard by His Honour, Mr Justice Bignold, on 25 November 1994. The hearing of the remainder of the application seeking an injunction against the MDBC was deferred by consent to a date in March to allow the MDBC sufficient time to prepare its case and on the basis that the normal operation of the Lake would see the levels fall significantly over the summer months.

On 25 November, His Honour granted the amended declarations sought by NSWALC. In particular, he declared 'that it was open at law under section 90 of the *National Parks and Wildlife Act 1974* to refuse an application for consent to destroy or damage Aboriginal relics at Lake Victoria notwithstanding Clause 56 of the Murray-Darling Basin Agreement contained in Schedule 1 to the Murray-Darling Basin Act, 1992'. His Honour also ordered the Director-General to pay NSWALC's costs.

The hearing of NSWALC's application for an injunction against the MDBC has been deferred to May 1995 following