ABORIGINAL LAND RIGHTS AT COMMON LAW: MABO v QUEENSLAND

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On 3 June 1992 the High Court of Australia delivered its long-awaited judgment in *Mabo & Others* v *The State of Queensland*.[1] This was the High Court's first opportunity to rule upon the question of whether the common law of Australia recognised rights deriving from traditional use and occupation of land by the indigenous inhabitants. For almost 150 years, Australian courts had held that on the acquistion by the British Crown of territorial sovereignty over the Australian colonies, the Crown acquired absolute beneficial ownership of 'every square inch' of land.[2] In *Milirrpum* v *Nabalco Pty Ltd and the Commonwealth of Australia*[3] Blackburn J relied upon the earlier authorities to conclude that the acquisition of title by the Crown was necessarily exclusive of any rights of the aboriginal inhabitants. By a six to one majority the High Court has now declared that the rights of the indigenous inhabitants of Australia to the continued enjoyment of their traditional homelands are recognised by the common law, subject to the Crown's power to extinguish the rights by lawful means.

The plaintiffs were three individuals from the Murray Islands. These are a group of three islands with a total area of some nine square kilometres, lying in the eastern-most part of the Torres Strait which separates Australia from Papua New Guinea. The islands have for many generations been inhabited by an indigenous people of Melanesian extraction known as the Meriam people, numbering less than 1000 individuals. The islands were annexed to the colony of Queensland by Proclamation in 1879, under imperial authority. The annexation was effected for primarily strategic reasons, and did not lead to settlement by non-indigenous people. A fair measure of local self-government was permitted by the Queensland Government, including the establishment of an island court in which the native chief or 'mamoose' resolved disputes, including land disputes, by the application of traditional law. The traditional use and occupation of their lands by the Meriam people continued for the most part undisrupted.

The Meriam people were notable for their unique system of land use and tenure. The people lived in settled villages. Within villages definable plots of gardening land were owned by individuals or family groups and were transmitted by inheritance down the male line. There was no concept of communal

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1 (1992) 66 ALJR 408; (1992) 107 ALR 1.

2 Per Blackburn J in *Milirrpum* v *Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141, referring to *Attorney-General* v *Brown* (1847) 1 Legge 312; 2 SCR (NSW) (App) 30; *Williams* v *Attorney-General for New South Wales* (1913) 16 CLR 404, and *Council of the Municipality of Randwick* v *Rutledge* (1959) 102 CLR 54. In none of the cases relied upon by Blackburn J was the question of aboriginal title directly in issue.

3 Ibid.

ownership of property. After annexation, boundary disputes between residents were resolved by the Murray Island Court by application of traditional law and custom.[4] The rights enjoyed were so recognisably proprietary in nature that the Queensland Government had purchased land from islanders for valuable consideration for the purpose of building a kindergarten and other government offices.

In 1982 plaintiffs issued proceedings in the High Court seeking declarations that they and the Meriam people generally held land rights under customary law and that those rights had survived the acquisition of sovereignty by the Crown. The proceedings were prompted by the enactment of the *Land Act (Aboriginal and Islander Land Grants) Amendment Act* 1982 (Qld) which provided for a system of deeds of grant in trust.[5] Anticipating that the Queensland Government might attempt to invoke this procedure in respect of the islands, they sought a declaration that such an action would be unlawful.

In 1985 the Queensland Government sought to defeat the plaintiffs' claim by enacting the *Queensland Coast Islands Declaratory Act* 1985 which stated that any traditional land rights which might have existed before the annexation in 1879 were deemed to have been extinguished without any right to compensation. By a four to three majority, the High Court in *Mabo* v *Queensland*[6] (hereafter referred to as *Mabo No 1*) ruled in 1988 that the Queensland Act was invalid under the Australian Constitution because it was inconsistent with a Commonwealth law, namely s 10(1) of the *Racial Discrimination Act* 1975. The Queensland Act contravened the Commonwealth law because it purported selectively to extinguish the property rights of one ethnic group while leaving the rights of all others intact.

The proceedings came before the High Court in the form of questions reserved for its consideration pursuant to s 18 of the *Judiciary Act* 1903 (Cth). The leading judgment was that of Brennan J, with whom Mason CJ and McHugh J concurred. Deane and Gaudron JJ delivered a joint judgment which, together with that of Toohey J, made up the majority. Dawson J delivered a dissenting judgment.

THE PREVIOUS LAW

Prior to the High Court's decision in *Mabo*, the status of native title under the common law of Australia has been directly considered in only one judicial decision. In *Milirrpum & Ors* v *Nabalco Pty Ltd and the Commonwealth of Australia*[7] a group of Aborigines from the Gove Peninsula in Northern Aus-

[4] These were the findings of Moynihan J in the Queensland Supreme Court, quoted in the judgment of Brennan J in *Mabo* v *State of Queensland* (1992) 66 ALJR 408, 411–4. The High Court had remitted the matter to the Queensland Supreme Court to make findings of fact that would be the basis of legal argument before the High Court.

[5] M Mansell, 'The Court Gives an Inch but Takes Another Mile' (1992) 2:57 *Aboriginal Law Bulletin*, 4.

[6] *Mabo & Anor* v *State of Queensland & Anor* (1988) 166 CLR 186.

[7] (1971) FLR 141.

tralia on behalf of certain clans sued a mining company and the Commonwealth in the Supreme Court of the Northern Territory for declaratory relief.

The plaintiffs' claim to relief on the basis of common law native title to the lands was unsuccessful. They failed to satisfy the court that their ancestors had the same links to the subject lands at the time of annexation of the colony to the Crown. In addition, Blackburn J expressed the view that their claim would have failed on the ground that the law did not provide for the continuance of traditional native land rights. Upon the acquisition by settlement of the Australian colonies all land vested in the Crown, including land inhabited by the Aborigines. Even if the common law of a settled colony did allow for recognition of native rights, the plaintiffs' tenure was not capable of recognition. Blackburn J relied upon the decision of the Privy Council in *In Re Southern Rhodesia*[8] as establishing two requirements for proof of traditional title. The native rights must belong to the category of rights of private property, and must arise from a system recognisable by our law as a system of law.

Applying these criteria, Blackburn J found that the Gove Aborigines had a system of rules of conduct which was recognisable as a system of law, but it did not provide for a form of tenure that was proprietary in nature. The essential characteristics of a right of property were the right to use, to exclude others and to alienate one's interest. The plaintiff clans did not possess the lands to the exclusion of other aboriginal people, although they had the right under traditional law and custom to exclude others from their sacred sites. They had the right to use the land, but this was of little significance if others had concurrent use. The plaintiffs did not claim the right to alienate the land, since their relationship to the land was spiritual rather than solely economic. Although the evidence established that neighbouring aboriginal people consistently attributed the subject land to the plaintiff clans, this locally recognised special relationship was insufficient to classify the rights as proprietary.

Even if the rights claimed by the plaintiffs were capable of recognition, Blackburn J added, they did not survive the acquisition of sovereignty. Their survival depended upon recognition by the Crown after annexation. The history of Crown dealings with lands following annexation indicated a policy inconsistent with recognition. Alternatively, if the rights survived annexation they had since been extinguished by those dealings.

The decisions of Blackburn J in *Milirrpum* largely defined the issues argued in *Mabo*. Prior to the High Court's decision, observers foresaw a danger if the Court were to place undue weight upon the Meriam people's unique system of land tenure as a ground for distinguishing Blackburn J's decision. A narrow victory for the plaintiffs on those terms would disadvantage other indigenous peoples by confirming an approach that discriminated between peoples according to cultural differences in their systems of law and land tenure. It will be seen that this danger was partially realised.

[8] [1919] AC 211, 233.

THE 'SETTLED COLONY' ISSUE AND THE COMMON LAW

It was conceded by all parties and accepted by the Court that Queensland had acquired sovereignty of the islands in 1879. Folowing the High Court's decision in *Coe* v *the Commonwealth*,[9] it was not open to the plaintiffs to challenge the validity of the Crown's claim to sovereignty in proceedings before a domestic court. The Court could, however, examine the consequences of acquisition of sovereignty, including the question of what body of law applied in the new colony and whether that law allowed for the recognition of native title.

The Governor of Queensland's Proclamation of 21 July 1879 which annexed the Murray Islands to Queensland, declared that the laws of Queensland (including the common law) were to apply. The common law of Queensland was derived from that of the colony of New South Wales, from which Queensland had separated in 1859. The issue then was whether native title was recognised under the common law of the colony of New South Wales from the time the colony was annexed in 1788. The answer depended in part upon the mode by which the Crown had annexed the colony.[10]

Previous authorities involving native title in the British dominions had distinguished between territories acquired by conquest or cession, and territories acquired by settlement. The category to which a particular territory belonged determined whether native interests in land would be recognised by the Crown.[11] In conquered or ceded territories, pre-existing interests in land remained effective until abrogated by the Crown. In settled colonies, the common law applied to the extent that it was appropriate to the local circumstances. Australia had long been classified as a settled colony, despite the presence of aboriginal inhabitants.[12] This was possible under the doctrine of *terra nullius*, which held that land could be treated as effectively unclaimed if the inhabitants lacked a sufficiently organized system of government and land tenure.

Australia's constitutional classification raised two main issues. First, should Australia's classification as a settled colony, based as it was on the controversial doctrine of *terra nullius*, be reviewed? Secondly, did the common law as it applied in settled colonies allow for the recognition of native title? While the majority judgments in *Mabo* made a strong attack on the *terra nullius* doctrine, the Court considered itself unable to determine the first issue. Deane and Gaudron JJ said that as the Crown's claim to sovereignty

[9] (1979) 24 ALR 118; 53 ALJR 403.

[10] The act of annexation was accomplished when, after the arrival of the First Fleet, Captain Arthur Phillip caused his second Commission as Governor to be read and published on 7 February 1788 *Mabo* v *State of Queensland* (1992) 66 ALJR 408, 438 per Deane and Gaudron JJ).

[11] *Cooper* v *Stuart* (1889) 14 App Cas 286; Blackstone, *Commentaries*, (17th ed, 1830) Vol I, para 1.

[12] The principal authorities were *Cooper* v *Stuart* (1889) 14 App Cas 286; *Attorney-General* v *Brown* (1847) 1 Legge 312 *Council of the Municipality of Randwick* v *Rutledge* (1959) 102 CLR 54 and *New South Wales* v *The Commonwealth* ('The *Seas and Submerged Lands Case*') (1975) 135 CLR 337.

over the territories designated in Governor Phillip's commissions could not be questioned in the domestic courts, the Court was bound to accept that the acquisition was effected by settlement.

The proposition that the common law of a settled colony did not recognise native title also depended upon the *terra nullius* doctrine, which had been transposed from the international law of the eighteenth century into the common law of property. If an inhabited colony could be *terra nullius* for the purpose of acquisition of sovereignty that would be recognised by other European powers, it was thought to follow that there could be no sufficiently organised system of native law and tenure to admit of recognition by the common law. The domestic application of the doctrine was linked to its purpose in international law.

Brennan J noted that the International Court of Justice in its 1975 *Advisory Opinion on Western Sahara*[13] rejected the doctrine of *terra nullius* as a basis for the colonial acquisition of inhabited territories. If the doctrine had ceased to command acceptance under international law, its application in the common law of property was brought into question.

All six majority judges strongly criticised the discriminatory doctrine in *In Re Southern Rhodesia* which had been applied to the detriment of the Gove clans in *Milirrpum*. The Privy Council's formulation had implied the existence of some natural hierarchy of societies, some being 'so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of a civilized society'.[14] This was linked to the notion that some inhabited colonies could be annexed to the Crown by settlement if the land was *terra nullius*, in the sense that the inhabitants had no meaningful or recognisable system of land tenure. Brennan J described the doctrine as unacceptable and inconsistent with international human rights norms. He clearly repudiated the *In Re Southern Rhodesia* doctrine to the extent that it dismissed *a priori* the claims by the native inhabitants of settled colonies. He did not reject the distinction between indigenous peoples according to whether their land tenure systems are proprietary in nature. That distinction was retained as the test for determining which forms of native title are capable of recognition by the common law.

In repudiating the *terra nullius* doctrine, the Court has challenged the classification of Australia as a settled colony upon which is based the Crown's claim to sovereignty. Because of its view that the acquisition of sovereignty cannot be questioned in the domestic courts, the Court has precluded any review of the classification. That the legal foundation for the Crown's assertion of sovereignty has been challenged and left unresolved by Australia's highest court strengthens the force of arguments for aboriginal sovereignty while denying any means of attaining judical recognition for the claims.

The Court's decision does, however, reduce the relevance of the classification issue for property law by holding that the common law that applies in

[13] [1975] 1 ICJR 12, 39.
[14] [1919] AC 211, 233–4.

settled colonies presumptively recognises native rights to land. The strong presumption would be rebutted only by clear acts or a declaration contemporaneous with the annexation of the colony denying recognition of the interests of the native peoples.[15] Once the act of state annexing the colony is complete, the rights of native inhabitants at common law are not at risk of being altered by an exercise of the sovereign's prerogative power. In this respect the inhabitants of settled colonies are better protected than are inhabitants of conquered or ceded colonies. This conclusion deprives the classification issue of much of its sting.

THE CROWN'S TITLE

It was conceded by the plaintiffs that as a corollary of the acquisition of sovereignty the Crown had acquired ultimate or radical title over all land in the islands. The notion of radical title is part of the feudal doctrine of tenure, under which all property titles held by subjects are derived from the Crown by means of actual or presumed grants. In England, the Crown's radical title survived as an essentially meaningless concept, since it carried no rights and did not in practice limit the rights of other interest-holders.[16] The purpose of the doctrine was to justify the overlordship of the Crown, not to dispossess subjects of their holdings nor to acquire land for the Crown. On the contrary, it confirmed the title of subjects to their lands by presuming that Crown grants had been duly made.[17]

The judgments of Brennan, Deane and Gaudron JJ in *Mabo* expressed some doubts as to whether the feudal doctrine of tenure was appropriate to the circumstances of the Australian colonies. These doubts were quickly dismissed, the judges asserting that the doctrine was now too deeply embedded in Australian land law. The issue to be decided was whether in acquiring radical title the Crown had also acquired full or absolute title, in the sense of beneficial ownership, of land to the exclusion of any rights of the aboriginal inhabitants. The Crown's assertion of full title to the lands of Australia had been accepted as self-evident in previous judicial decisions.[18] It had been justified sometimes as a corollary of the doctrine of tenure, sometimes by the *terra nullius* doctrine — that the land was practically unoccupied and was available for acquisition of original title by right of first occupation.[19] In all but one of these authorities, the issue of the Crown's title arose in a context that did not involve any claims by aboriginal people.

The six majority judges held that the Crown's radical title to land did not of itself oust or extinguish the traditional interests of aboriginal people in the

[15] The majority found that the act of state annexing New South Wales was not accompanied by a denial of recognition of native rights to land.
[16] D C Jackson, *Principles of Property Law* (Sydney, Law Book Company, 1967) p 48.
[17] K McNeil, ' A Question of Title: Has the Common Law been Misapplied to Dispossess the Aboriginals?' (1990) 16 *Mon LR* 91.
[18] Supra fn 2.
[19] McNeil, op cit pp 99–103.

land. The acquisition of radical title gave the Crown absolute property in unoccupied lands only. The incidents of the Crown's title were not fixed by the situation that applied at the time of annexation. Radical title was conceived of as an elastic right that could expand into full ownership as soon as the encumbrance of native rights was removed.

Scant attention was given to explaining why the Crown's radical title expanded to full ownership of those lands to which native title had been extinguished after annexation, the proposition being assumed to follow from the feudal doctrine.[20] Yet it is doubtful that the doctrine of tenure as it applied in England had the effect of acquiring for the Crown absolute ownership of unclaimed land.[21] The expanded role given to the feudal doctrine in the colonial context fills the gap left by the now-disfavoured *terra nullius* rationale for Crown ownership of all the lands of Australia. The Crown is no longer said to have acquired ownership as first occupier of lands that were 'practically unoccupied',[22] but by virtue of the expansion of its radical title upon the extinguishment of any native rights to the lands.

NATURE OF NATIVE TITLE

All seven judges accepted that the common law could recognise rights in land variously called 'native title' (Brennan J), 'common law native title' (Deane and Gaudron JJ), 'traditonal title' (Toohey J) and 'Aboriginal title' (Dawson J). Brennan J defined 'native title' as:

> '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.'[23]

The rights must be shown to have been enjoyed at the time that the territory was annexed to the Crown. This would exclude any common law recognition of native title to lands such as reserves established by governments after annexation, to which aboriginal people were forcibly moved. The claimants must be part of an identifiable community which can trace its links to the occupiers of the land at the time of annexation.

On the nature of the rights that qualify for recognition at common law, Brennan J added:

> 'If it be necessary to categorise an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category.'[24]

[20] The notion that radical title could give rise to full ownership had been accepted in some overseas authorities: eg *St Catherine's Milling and Lumber Co* v *The Queen* (1888) 14 App Cas 46, 55.
[21] McNeil, op cit p 147–8.
[22] *Cooper* v *Stuart* (1889) 14 App Cas 286, 291.
[23] (1992) 66 ALJR 408, 429.
[24] Id 426.

Although Brennan J did not expressly require that a communal interest be proprietary in order to qualify for common law recognition, he did not suggest that any lesser interest would suffice. His formulation is wider in two respects than that of Blackburn J in *Milirrpum*. Firstly, while the common law recognises only those forms of communal native title that are proprietary in nature, usufructuary rights of individuals that derive from the proprietary communal title also qualify for recognition. Secondly, he broadens the test for categorising a communal interest as proprietary in nature. The inalienability of title under traditional law is no longer a barrier to its categorisation as a proprietary right, provided that the claimant community enjoys exclusive possession of the land. The test for exclusive possession as formulated by Brennan J is strict:

> '[A] community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in land that must be proprietary in nature: there is no other proprietor.'[25]

This formulation suggests that a claimed right to exclusive possession that is never enforced may not suffice, for then the claim would not be 'asserted effectively'. The requirement of exclusive possession potentially discriminates between different communities according to an essentially European notion of property. In the case of the Meriam people the requirement of exclusive possession was amply satisfied.[26] The tenure of some mainland aboriginal communities, such as that of the Gove clans considered in *Milirrpum,* is not exclusive of the rights of other clans to use the lands for certain purposes. It is likely that the plaintiff clans in the *Milirrpum* case would be denied recognition of their claims under Brennan J's test, on the findings made by Blackburn J.

Toohey J in his decision refers to reports of Aboriginal Land Commissioners administering the statutory land rights scheme in the Northern Territory, which confirm that traditional occupation may not be exclusive. Toohey J also points out that the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) does not require claimants to establish exclusive possession of the subject lands. Brennan J's test is in this respect more restrictive than the statutory scheme.

The approach of Deane and Gaudron JJ avoids the risk of discrimination implicit in Brennan J's test for recognition. They require only that a claimant show an established customary entitlement of an identified group of individuals to occupy or use particular land for social, economic or ritual purposes, giving rise to a locally recognised special relationship. If this test were applied to the Gove clans in the *Milirrpum* case, the existence of a qualifying form of land tenure would probably have been established.

Deane, Gaudron and Toohey JJ expressly rejected any requirement that traditional rights conform to English concepts of a proprietary interest in

[25] Ibid.

[26] Moynihan J found that 'there was a clear insistence on exclusive possession by the "owners" of particular blocks of land' (*Mabo* v *State of Queensland* (1992) 66 ALJR 408, 414 per Brennan J).

land. Traditional land rights are typically not of this nature. A common pattern is communal possessory rights, not necessarily to the exclusion of other groups, combined with usufructuary[27] rights in individual members. In their view, a variety of types of rights are capable of recognition, because the incidents of native title are determined not by the common law but by the traditional law and custom as currently observed. Rights of user may be enjoyed concurrently with other groups within the native system.

PERSONAL OR PROPRIETARY?

All judges agreed that native title was inalienable, except to the Crown. The reasons for this restriction were various. For Deane and Gaudron JJ, inalienability was a corollary of the non-proprietary nature of the rights. Brennan J said that the incidents of the title derived from traditional law, which did not provide for alienability.

There was diversity of opinion as to whether common law and equitable remedies appropriate to a proprietary interest would be available to protect the recognised native title or whether it was only enforceable against the Crown as a personal right. This issue is linked to but distinct from the threshold question discussed above of whether the rights under traditional law must be proprietary in character to qualify for recognition as common law native title.

Deane and Gaudron JJ said that common law native title gave rise to a personal and usufructuary right, not a proprietary one, but since it had some of the incidents of a property right it should be regarded as *sui generis*. The title is sufficiently akin to property to attract the protection of s 51 (xxxi) of the *Constitution*, which requires that a law of the Commonwealth with respect to the acquisition of property provide just terms. It is also to be classed as a property right for the purposes of the *Racial Discrimination Act* 1975 (Cth).[28]

They added that declaratory relief would generally suffice to protect native title against the Crown, but it could in appropriate circumstances be protected as a proprietary interest by the imposition of a remedial constructive trust. This refers to the new type of constructive trust expounded by the High Court in *Baumgartner* v *Baumgartner*.[29] The court may impose a constructive trust, regardless of the intention of the parties, to prevent the holder of the legal title from denying a beneficial interest in the subject property to another if such a denial would be unconscionable in the circumstances. The beneficiary under the constructive trust has a proprietary interest protected by equitable remedies.

[27] A usufruct is a right to use and enjoy property vested in another without wasting or destroying it. The right is temporary, usually for the lifetime of the party entitled.

[28] In *Mabo (No 1)* 166 CLR 186, the parties agreed that the Court should assume, for the purposes of its ruling, that the plaintiffs' claim to native title was well-founded. The Court made no finding as to the nature of that form of title.

[29] (1987) 164 CLR 137.

In *Muschinski* v *Dodds* Deane J, whose reasoning was subsequently approved by the majority in *Baumgartner*, cautioned against the imposition of a remedial constructive trust simply to achieve justice.

> 'As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles . . .'[30]

The judgment of Deane and Gaudron JJ does not identify the 'established equitable principles' that would warrant the imposition of a constructive trust to protect native title. Their honours may have in mind circumstances such as those that were held in *Guerin* v *The Queen*[31] to give rise to a constructive trust when the Crown, in breach of its fiduciary duty, breached the terms of an agreement under which it had induced an Indian band to surrender its land.

Dawson J said that Aboriginal title was non-proprietary, being little more than a usufructuary right. Brennan and Toohey JJ considered that the classification of title depended on the content of the traditional rights. In some cases these may have the characteristics of proprietary rights as understood by common lawyers, and would be protected by common law and equitable remedies appropriate to the type of interest established. It appears that communal title would, on Brennan J's test for common law recognition, be necessarily proprietary in nature while individual rights deriving from the communal title could be either proprietary or personal.

It is unlikely that much will depend on whether the recognised native title is classed as a property right. Disputes between members of the native system are to be determined in accordance with the traditional laws and customs. The rights of native title-holders are enforceable against the Crown in accordance with the principles articulated by the High Court, and therefore the classification of the title as personal or proprietary is of little assistance in predicting its incidents. As against persons outside the native system other than the Crown, the most important remedy that titleholders are likely to seek is trespass. Their actual possession of the land would be sufficient to support their right to maintain an action in trespass against an intruder.[32]

DAWSON J

Dawson J, in dissent, differed on all of the above points. He said that the vesting of radical title in the Crown was inconsistent with the continuance of prior rights over the land. Regardless of the mode by which the territory is annexed, the Crown's subjects have only those rights in land which the Crown chooses to recognise. Whether the Crown has recognised rights is a question of

[30] (1985) 160 CLR 583, 615.
[31] (1985) 13 DLR (4th) 321.
[32] *Halsbury's Laws of England* (4th ed, London, 1985) Vol XLV, para 1395; *Bristow* v *Cormican* (1878) 3 App Cas 641.

fact. While recognition may be inferred from acquiescence, it may not be presumed.

In Australia the Crown had consistently claimed full rights to own and dispose of all land without regard to the rights of the Aboriginal inhabitants. Native rights had failed to survive, either because they were not recognised, or because they had been extinguished by withdrawal of permission to occupy the land. Regrettable though the facts of history might be, it was for the legislature, not the courts, to overturn established principles of land law.

EXTINGUISHMENT

1 By the Crown

All judges agreed with the plaintiffs' concession that native title could be extinguished by legislation that clearly and plainly indicated an intention to do so, and by certain actions of the executive government taken with the same intention pursuant to statutory authority.

Deane, Gaudron and Toohey JJ said that the extinguishment of native title by legislation was subject to the ordinary canons of interpretation that apply to statutory interference with the property rights of any subject: the legislation would be presumed not to have been intended to derogate from native title, and any interference with traditional rights would give rise to a presumptive entitlement to fair compensation.[33] The rules must give way to clear legislative indication of a contrary intention.

Brennan and Dawson JJ did not accept that the ordinary rules applied. Brennan J said that the presumption that the Crown did not derogate from its grants was not applicable to native title which did not derive from a Crown grant. Native title could be extinguished by legislation evincing a 'clear and plain indication of intention' to do so. The test derives from Canadian and U.S. decisions,[34] and imports the jurisprudence of those countries into the common law of Australia.

The existence of intention is manifested by the effects of the legislation or executive action on the native titleholders. The effects are presumed to have been intended. The test as applied in North America is primarily an objective one, since there is usually no evidence that the legislature has expressly considered the effects on native titleholders. This not to say that the court is precluded from taking account of the actual or subjective intention of the legislature if there is evidence of it.[35]

Intention to extinguish is judged by effects, but the extinguishment dates from the time that the intention was implemented and not retrospectively to

[33] *The Commonwealth* v *Hazeldell Ltd* (1918) 25 CLR 552, 563.

[34] See eg *Calder* v *Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, 210; *R* v *Sparrow* (1990) 70 DLR (4th) 385; *United States* v *Santa Fe Pacific Railroad Co* (1941) 314 US 339, 353–4.

[35] *Hamlet of Baker Lake* v *Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513; R Bartlett, 'Resource Development and the Extinguishment of Aboriginal Title' (1990) 20 UW ALR 453.

the date of the authorising legislation. Native title is not extinguished until the titleholders' traditional use and occupation are actually displaced. For example, native title survives the enactment of general legislation authorising the disposal of Crown lands, but is extinguished parcel by parcel if pursuant to that legislation the Crown makes grants to settlers of fee simple interests in the land.

Deane and Gaudron JJ observed that native title may be extinguished by an inconsistent dealing only where third party rights intervene or the titleholders' use and occupation is actually terminated. A less serious interference, such as the grant of an authority to prospect for minerals, may restrict the enjoyment of the title without extinguishing it.

Brennan J suggested that native title may survive the reservation of the subject land as a national park, but did not define the circumstances in which this may occur. Survival of title may depend on the extent to which the regime of control operating in the park permits the continued enjoyment of traditional usufructuary rights. Native title is not extinguished by a law which merely regulates the manner in which traditional usufructuary rights may be enjoyed.[36] While all judges accepted that an unconditional lease by the Crown to a party outside the native system would extinguish title, there was a difference of views on the effect of certain Crown leases to non-indigenous persons with respect to two of the islands. Deane and Gaudron JJ thought it doubtful that the leases had extinguished native title because they were expressly subject to the usufructuary rights of the islanders. Brennan J said that the grant of a lease gives the Crown an interest in reversion, expanding the Crown's radical title in a manner inconsistent with the continued existence of native title. He concluded that the grant of a lease by the Crown to a third party necessarily extinguishes native title, even if the lease expressly reserves the rights of the traditional titleholders to the continued use and enjoyment of the land. Toohey J was inclined to agree with Brennan J's conclusion, without indicating whether he supported the reasons therefor.

It is difficult to reconcile Brennan J's reasoning regarding the leases with his formulation of the 'clear and plain indication of intention' test. The grant of the leases on terms that preserved the islanders' traditional rights indicates that the Crown did not intend to abrogate native rights of occupancy, and the grant did not actually terminate the continued use and enjoyment of those rights. Brennan J's modification of the intention test may be prompted by a perceived need to accommodate the interests of Crown lessees within the doctrine of native title.

The Crown's power of extinguishment is subject to constraints. The Court will carefully scrutinise the validity of the particular exercise of legislative power or executive power conferred by statute. The authorising legislation must be clear and unambiguous, and must not contravene the *Racial Discrimination Act* 1975 (Cth) or other Commonwealth laws.

Although the *Racial Discrimination Act* is presently the major obstacle to state legislation seeking selectively to extinguish native title, the protection it

[36] *R* v *Sparrow* (1990) 70 DLR (4th) 385.

provides is precarious. As an Act of the Commonwealth Parliament it may be repealed at any time. Its effect is uncertain with respect to pre-1975 extinguishment of native titles under the authority of state legislation. While the Act ousts inconsistent state legislation enacted at any time, it is doubtful that it can in any circumstances revive extinguished native titles, particularly where tribal lands have been alienated by the Crown.

2 Other Modes of Extinguishment

The majority judges identified ways that native title could be extinguished without action on the part of the Crown. Rights could be surrendered to the Crown, removing the encumbrance on the Crown's title. The title could expire by the extinction of the community or by discontinuance of occupation. Brennan J suggested that title could be lost if the community abandoned the observance of the traditional laws and customs that were the source of the title. Deane, Gaudron and Toohey JJ were of the view that abandonment of the traditional way of life should not lead to loss of title, at least if the titleholders continued to use or occupy the land.

FIDUCIARY DUTY

A doctrine proposed by Toohey J potentially offers a more potent basis for protection of native title from extinguishment. Applying a clear stream of Canadian authorities,[37] he suggested that the defendant State was under a fiduciary duty not to act in a way that would adversely affect the rights of the titleholders.

In *Guerin* v *R*, Dickson J had said that the fiduciary duty arose from the special vulnerability of native title to extinguishment at the defendant's hands, and from the restriction on that title which rendered it inalienable, except to the Crown. The purpose of the restriction on alienation was to protect the indigenous peoples from exploitation. It was the Crown's assumption of a policy of protection, coupled with the dependence of the native titleholders on the exercise of the Crown's discretion, that transformed the Crown's obligation into a fiduciary one. Since the native title was not created by legislative or executive action, the Crown's obligation was not a public law duty but was in the nature of a duty arising under private law. It differed from the type of 'political trust' considered in *Tito* v *Waddell (No. 2)*[38] and in *Kinloch* v *Secretary of State for India*[39] which was the creation of a treaty or statute. The duty assumed by the Crown in those cases was held to be a matter for governmental discretion, not enforceable as an equitable obligation.

Toohey J described the nature of the Crown's fiduciary duty towards

[37] *Guerin* v *R* (1985) 13 DLR (4th) 321; see also *R* v *Sparrow* (1990) 70 DLR (4th) 385; *Delgamuukw* v *British Columbia* (1991) 79 DLR (4th) 185, 482, and *Attorney-General for Ontario* v *Bear Island Foundation* [1991] 2 SCR 570.

[38] [1977] Ch 106.

[39] (1882) 7 App Cas 619.

holders of native title as similar to that of a trustee under a constructive trust. The content of that duty varied from one case to another. In the instant case the Crown would breach the duty by an action which adversely affected the native titleholders' interest, such as by alienating the land or revoking the Order-in-Council which reserved the Murray Islands. While the existence of the duty did not fetter the power of the Queensland Parliament, legislation contrary to the interests of the titleholders would amount to a breach. Whether any remedy lay to redress a breach of fiduciary duty by the legislature was not discussed.

COMMON LAW POSSESSORY TITLE

Toohey J was the only majority judge to consider the plaintiffs' argument that the Meriam people had a possessory title to their lands. This submission, which owes much to the writings of Professor Kent McNeil,[40] started from the common law principle that occupation of land confers a presumed fee simple that is effective against anyone who cannot show a better title. If indigenous people were in occupation of the land at the time of annexation, the Crown could not acquire a title by possession unless it actually dispossessed them. The Crown acquired only a bare radical title which did not confer a better right to possession. At the moment of annexation, the occupation of land by aboriginal peoples gave rise to a possessory title in the form of an inchoate fee simple. Upon expiry of the relevant limitation period which commenced to run from the date of annexation, that inchoate interest matured into a title that was good against the whole world.

Toohey J accepted that the Meriam people might have acquired a possessory title on annexation. Like the other majority judges, he found it unnecessary to reach a firm conclusion since the plaintiffs had succeeded in their alternative argument with respect to the common law recognition of native title. He added that the consequences of a possessory title would be no more beneficial for the plaintiffs.

In dismissing the possessory title thesis as no more than an alternative route to the same result, the Court has overlooked three important differences in the two forms of title. Firstly, possessory title arises upon the reception of the common law in the new colony, and does not depend upon the existence of rights or interests under traditional law and custom. Secondly, the quality of possessory title is inherently stronger than the title provided under the recognition doctrine, a fee simple being superior to a mere encumbrance upon the Crown's radical title. If indigenous people enjoy a fee simple, their title would be free of the vulnerability to extinguishment and the restriction on alienation that applies to recognised native title. Thirdly, in order to establish possessory title it is not necessary to show that the present aboriginal occupiers are descendants of the group that was in occupation at the time of

[40] McNeil, op cit, and K McNeil, *Common Law Aboriginal Title* (Oxford, Clarendon Press, 1989).

annexation. Provided that there were people in occupation at the time of annexation, the Crown did not acquire a possessory title and can therefore show no better title than that of the present occupiers.

THE DECISION

By a majority of six to one, the High Court declared that the Meriam people were entitled against the whole world to possession, use and enjoyment of the lands of the Murray Islands, subject to the power of the Queensland Parliament and the executive government of Queensland to extinguish the islanders' title. To be effective to extinguish title, the exercise of the power must be valid and not inconsistent with the laws of the Commonwealth.

The six majority judges agreed that the rights of the Meriam people were capable of recognition under the common law, and were presumed to have survived the change of sovereignty. The defendant State conceded that any rights that survived the vesting of radical title had not been subsequently extinguished. Despite the concession, the Court proceeded to examine the history of legislation and government actions since annexation to determine whether titles had been extinguished.

The majority of six agreed that the titleholders' rights were not destroyed by the 1882 reservation from sale of the islands 'for the Aboriginal inhabitants of the State', nor by the 1939 appointment of trustees, since these actions did not interfere with the continued occupation and enjoyment of their lands. Crown lands legislation authorising sale of disposal of wastelands did not indicate clearly and plainly an intention to divest the islanders. There had been no grants in fee simple of land on the Murray Islands under the legislation.

Certain lands over which Crown leases had been granted were excluded from the declaration, the Court finding it unneccessary to reach a firm conclusion on the status of the islanders' title to them.

The Court declared that the land in the Murray Islands was not Crown land within the meaning of the *Land Act* 1962 (Qld) because it had been reserved from sale. It follows that unless the reservation is rescinded, the Governor-in-Council cannot make a deed of grant in trust under s 334(1) of the *Land Act*. Since no such action was currently proposed, the Court declined to make a declaration concerning the lawfulness of invoking s 334(1).

CONCLUDING COMMENTS

The *Milirrpum* decision, which drew an outpouring of criticism over two decades, has now been comprehensively overruled. By a convincing majority the High Court has now held that the common law of Australia recognises and protects the traditional rights of those aboriginal inhabitants who have remained in occupation of their traditional lands.

The majority judgments evince substantial consensus on many issues, but four main areas of disagreement are apparent. First, the majority is evenly

divided on the question of whether communal native title must be of a proprietary nature in order to be capable of recognition at common law. Secondly, there are differing views on how the recognised title is to be classified for the purpose of determining the type of common law and equitable remedies available to protect it. Thirdly, Deane and Gaudron JJ disagree with the rest of the majority as to how the 'clear and plain indication of intention' test for the extinguishment of native title by inconsistent dealings should be applied in the case of Crown leases. Fourthly, the Court divided four to three against the proposition that extinguishment of native title gives rise to a presumptive right to compensation.

Despite the Court's protestations of its determination to oust discriminatory doctrines from the common law, the goal has been imperfectly achieved. First, Brennan J's test for recognition of native title discriminates against communities whose traditional system of land tenure does not make and enforce a claim to exclusive possession. Secondly, native title amounts to little more than a personal right of occupation, inferior to the rights enjoyed by settlers whose titles derive from Crown grants. Thirdly, the judgment offers no redress to aboriginals whose remedies against wrongful interference with their rights have been barred by limitation of actions legislation, except perhaps to strengthen their moral claim to restitution.