THE IMPACT OF NATIVE TITLE ON DOMESTIC LAW

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The primary focus of administrative law is the interrelationship between the state and the citizen. Systematic study of this relationship is, however, a relatively modern phenomenon in our legal system. There was very little legal analysis as to the legal relationship between the crown and its new indigenous Australian subjects in 1788 and the decades that followed. My brief historical researches suggest that this Institute was not flourishing in 1800.

The first principle which is relevant to this period is that the courts of this country will neither consider as justiciable arguments concerning the legality of the acquisition of sovereignty over Australia by various acts of the British crown (those being "acts of state") nor will it enforce any undertakings or promises made by the crown as part of the acquisition of sovereignty. (This latter point has arisen in a number of cases concerning the Indian subcontinent, but not in relation to Australia.)

As an aside, it is interesting to note that the colony of South Australia was established, not by an act of crown prerogative but pursuant to a statutory power. One of the interesting (and legally curious) aspects of the settlement of South Australia was a proviso to the Letters Patent establishing the state recognising the prior rights of the native inhabitants and providing that the establishment of the state was not intended to interfere with those rights. The effect of that proviso, together with other instruments relating to the foundation of South Australia, is something which the High Court has been asked to consider in the matter of *Fejo v Northern Territory* in which judgment was reserved on 23 June 1998.[1]

The second aspect of the colonisation of Australia concerns the extent to which the British common law introduced into this country at the time of the acquisition of British sovereignty, recognised and made enforceable the law and custom of the native inhabitants. As we now know, the correct legal understanding of what happened in those days is that the radical title in all the land was acquired by the British crown but it was burdened by native title, which was recognised and enforceable at common law. Native title was not extinguished by the acquisition of sovereignty, a concept which we have now lived with for six years since the decision of the High Court in *Mabo v Queensland [No. 2]* (192) 175 CLR 1. That conclusion immediately gives rise to a question of state power to abrogate native title, either expressly or by way of inconsistent grants of interests in the same land. The question of express abrogation may be briefly dealt with: although it was suggested that native title was extinguished for all time upon the acquisition of the colony of Western Australia by the crown, that argument was rejected by the High Court in *WA v Commonwealth (Native Title Act* case*)* (1994-5) 183 CLR 373. Further, the attempt by the WA Government in 1993 at express abrogation and replacement of native title with a scheme of statutory rights was found to be inconsistent with the Native Title Act. In 1985, a similar attempt by Queensland to extinguish native title in the Torres Strait Islands and other places was found to be invalid because of inconsistency with the Racial Discrimination Act: *Mabo v Queensland* (1988).

Accordingly, the real issue which has needed to be considered is whether the crown had power to grant interests in land inconsistent with native title rights and, what the effect of such grants may have been where they occurred.

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1 Editor's note: This decision has been handed down. See 156 ALR 721.

The general principle accepted in *Mabo [No. 2]* was that native title was peculiarly susceptible to extinguishment by inconsistent grant. Whereas the crown can not make a grant inconsistent with an earlier grant, it could validly make a grant inconsistent with native title. However, the significance of this general proposition of law is doubtful in that there was little alienation of land in Australia which did not take place pursuant to a statutory scheme. Once the various Waste Lands Acts came to be passed, whether by the imperial parliament or the colonial legislatures, they effectively abrogated the power of the crown to alienate land pursuant to its prerogative. The relevant question is then whether statutory powers to grant estates and interests in land were intended to provide for grants which would be burdened by native title, or which would override native title to the extent of any inconsistency. It has been recognised by the High Court in each of the cases dealing with native title that a legislative or executive power to extinguish native title would not be implied in the absence of a plain and clear statutory intention to that effect.

Throughout Australia, statutes providing for land grants were passed at a time when there were two contending views of the circumstances pertaining in the colonies. One view was that the native inhabitants had undoubted prior rights of a proprietary kind in relation to the land. The alternative view was that Australia was uninhabited; either literally or inhabited by people with a sufficiently sophisticated culture to reflect the enjoyment of proprietary rights in any sense recognisable by the common law. With the possible exception of South Australia, which may have resolved the tension in favour of the view now accepted by the High Court, the legal issue remained unresolved and the practical effects were the parcel by parcel dispossession of the native title holders.

This process was legally constrained by two later events, of which the latter was more important than the former. The first was the imposition on the Commonwealth of a requirement that acquisition of rights in land only occurs where just terms compensation was provided, in accordance with section 51(31) of the constitution. That restraint was largely inconsequential for present purposes as the High Court has held that it only applies to land in a state, where Commonwealth land acquisitions have been relatively minor. The second and highly significant event was the commencement on 31 October 1975 of the Racial Discrimination Act. Section 10 of that Act clothed native title holders with similar protection in relation to their rights as the protections enjoyed by those who held title under statutory grants. The parcel by parcel dispossession now cannot occur without a compulsory acquisition of outstanding interests by the crown.

Once common law recognition of native title was established as part of the law of Australia in June 1922, it became necessary to consider the validity of grants made in possible contravention of either the constitutional protection or the Racial Discrimination Act protection. It also became necessary to establish a statutory scheme which would allow for the formal recognition of native title where it continued to exist. That statutory scheme is to be found in the Native Title Act. That Act also provides a code in relation to the protection and possible extinguishment of native title and provides a level of protection for possible native title in circumstances where the existence or otherwise of that title has not been judicially determined or accepted by government.

The Native Title Act itself, much criticised when first enacted under the Keating government, has now been accorded a level of respect for the relative simplicity with which it dealt with a myriad of complex land tenure issues across the country. However, it is not without its flaws and the present calls for amendments to the legislation are to some extent irresistible.

The weaknesses of the Act have been highlighted by two circumstances, each of which was predictable but difficult to avoid. First, whilst the Act establishes a set of principles with a remarkable level of clarity, those principles have to be applied to complex and differing schemes of land management and ownership across the country. Difficulties of application

are, accordingly, inevitable. Secondly, the Act provides, and was intended to provide, a major constraint on development of land where native title might still exist. Accordingly, enforcement of the Act has put native title claimants into conflict with large and powerful sectors of the Australian economy. Loopholes and weaknesses have inevitably been exposed and exploited.

One of the great strengths of the Act was the establishment of an administrative tribunal as a mechanism for the initial consideration and mediation of claims, with a view to settlement outside the judicial process. As to that role, there is little I need to say for present purposes. More significantly for my purposes, the fact of registration of a claim with the registrar gives the registered native title claimant a status and valuable right to have a say in relation to developments on claimed land, in certain circumstances. The two categories of case which became the subject of the right to negotiate provisions were the grant of mining leases and the compulsory acquisition of land for purposes involving the conferral of interests on non-government parties. The importance of those provisions was recognised by the High Court in *North Ganalanja Corporation v Queensland (the Waanyi case)* (1995-6) 185 CLR 595. The right to negotiate provisions were found by the Court to impose a constraint on state and territory power to deal with land inconsistently with the scheme of the Act. The importance of those constraints were such that the Court found it inappropriate to determine whether native title might have been extinguished as a matter of fact in circumstances where it held that a claim should properly have been registered.

The purpose of the Act seems to have been that a registered claim precluded a state or territory government from determining whether or not the claim was good. A procedure, by way of unopposed non-claimant application, could be invoked, but, if after notice of a non-claimant application, claimants lodged and obtained acceptance of their own application, the power to act on the basis that there was no native title in relation to the land appeared to be removed. Nevertheless, *Fejo* is a case in which the Northern Territory government sought to make grants of interests in land in circumstances where there was an accepted native title claim. Whether the government has power to do so, in apparent contravention of the scheme of the Act, is a matter which is presently reserved before the High Court.

The importance of the administrative nature of the scheme needs to be emphasised. It appears from the *Waanyi* case that the status acquired by a registered native title claimant is sufficient to entitle the claimant to obtain an injunction to stop the grant of a mining lease or a compulsory acquisition in circumstances where the right to negotiate procedures are not being followed. The basis for a grant of relief would not be the existence or otherwise of native title but rather the existence of a registered claim. The issue before the High Court at the present time is whether a government can avoid that result simply by making a grant without purporting to acquire native title, which may not exist. If it can so act, then the registered claimant would have to establish an arguable case of native title and not merely the fact of a registered claim. On the other hand, in relation to a mining lease, it would be sufficient to rely upon a registered claim. This would, in my view, be a curious result and probably not one intended by the drafters of the Act.

This issue, however, highlights a weakness of the Act (one of the few) which has been exploited by native title claimants. The weakness is that there is no real constraint upon the right of a person to register a claim and thereby obtain the statutory protections. It is, I think, common ground between responsible parties from industry, government and Aboriginal organisations that an appropriate threshold test needs to be imposed to avoid overlapping claims and claims which have no real prospect of success. On the other hand, the need to have an administrative process which will protect land from inappropriate development pending determination of native title claims is one of the few major benefits given by the Native Title Act to indigenous people and should be maintained as a right of universal application across the country.

In this paper, I have done little more than identify the areas of conflict between native title and state grants of interest in land. It may be that I have covered nothing that you do not already know, nevertheless, the fact that so many of these issues remain controversial and lie outside the scope of current judicial determinations, suggests that they will remain important topics for consideration for some little time to come.

For example, there are a number of unresolved issues in relation to the role of the Registrar and the registration of claims. Is the Registrar *functus officio* once details are entered on the register pursuant to section 190 or section 66 of the Act, or can details be removed? Is there any obligation on a native title claimant to advise the Registrar if a belief that native title has not been extinguished, sworn to in an affidavit required to accompany the affidavit, is changed because of information later acquired? Where an application contains details, some only of which the Registrar thinks it appropriate to put on the register, can the details be so restricted or can the Registrar request amendment of the application? These and other questions remain unresolved, although proposed amendments to the Act may assist in some cases.