POLITICAL AND LEGISLATIVE RESPONSES TO MABO

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On 2 June 1992, the High Court declared that native title was part of the common law of Australia.[1] Native title is a concept that recognises the right of Aboriginal people to make traditional use of those residual areas of land where their rights have not been extinguished by inconsistent grants. Native title has been protected by the Racial Discrimination Act 1975 (Cth) since 31 October 1975.

The decision of the High Court in *Mabo* was predictable and unremarkable, doing no more than to bring Australia into line with the rest of the common law world. However, reaction to the decision in Western Australia was hostile.

This note will review the legislative responses to *Mabo* by the State of Western Australia and the Commonwealth. It remains unclear whether there is any prospect of a long-term resolution of the question of the rights to land of Aboriginal people.

THE STATE OF WESTERN AUSTRALIA

Reaction to the High Court decision was initially muted. However, in October 1992, Mr Bill Hassell, President of the Liberal Party in Western Australia, publicly rejected the decision in so far as it provided "a basis for judicially generated Aboriginal land rights".[2] In January 1993, in the lead up to the State election, the then Opposition leader, Mr Richard Court, declared his rejection of "land rights as the solution to problems faced by Aborigines".[3] The Labor Government responded that a land rights strategy would be

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1. *Mabo v Queensland No 2* (1992) 66 ALJR 408.
2. *The West Australian* 24 Oct 1992.
3. Id, 26 Jan 1993, 26.

developed in response to *Mabo* based on consultation with Aboriginal groups, industry and the Federal Government.[4]

On 6 February 1993, Mr Court was sworn in as Premier, after the Coalition won the State election. The policy of the State Government thereafter was to reject the application of *Mabo* in Western Australia. That policy is consistent with the first response to *Mabo* of Mr Hassell, and with the historic position taken by previous Coalition governments in this State, in particular the government headed by Mr Court's father, Sir Charles Court.[5]

On 10 March 1993, Mr Court announced, days before the Commonwealth election and the expected win by the Coalition, that the State Government would legislate in conjunction with the Commonwealth Government to remove any uncertainties and validate all land titles irrespective of native title.[6] On 13 March 1993, the Labor party was unexpectedly returned after the Commonwealth election. On 26 March 1993, the Premier affirmed his rejection of *Mabo* and questioned the legitimacy of the role of the High Court in reaching the decision.[7] By May it was being suggested that a constitutional referendum should be held to reverse *Mabo*.[8]

On 8 June 1993, the Council of Australian Governments ("COAG") met to consider the settlement of native title. Prior to that meeting the Premier had suggested that the Racial Discrimination Act 1975 (Cth) should be "watered down". At the COAG meeting the Prime Minister proposed a national approach to the protection, determination and management of native title and that the "integrity of the Racial Discrimination Act 1975 [should] be maintained", including the payment of compensation where native title was overridden. The Premier opposed the proposal. Following the meeting, Mr Hassell and the Premier embarked upon a campaign against the High Court decision, suggesting that "suburban backyards" throughout the State were under threat.[9]

At the end of July the WA Liberal Party's State Conference adopted a resolution in favour of a national referendum to overturn the High Court decision and its application on the mainland.[10] The Premier suggested that the only other "legal" solutions were that:

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4. Id, 30 January 1993, 34.
5. See R Bartlett "Aboriginal Claims at Common Law" (1983) 15 UWAL Rev 293.
6. *The West Australian* 11 March 1993.
7. Id, 27 March 1993, 5.
8. See C Howard, legal adviser to the State Government, *Adelaide Review* May 1993, 10.
9. *The West Australian* 19 & 21 June 1993, 4 respectively.
10. Id, 26 July 1993, 1.

- A case could be brought before the High Court and the High Court could limit the scope of the *Mabo* ruling and clear up the legal problems created by the Court; or
- The Federal Government could repeal or limit the Racial Discrimination Act 1975 (Cth) to enable the States to exercise their constitutional powers in the handling of land titles and their administration.[11]

The Premier declared that legislation to validate land titles would probably not include provision for compensation and this would enable the State to argue in the High Court that the "original *Mabo* ruling was flawed and discriminated against all Australians in the States".[12] He affirmed this intention in a speech to a conference in Sydney on 24 August 1993,[13] where he observed that since Victoria had not compensated Aboriginal people when they were dispossessed, there was no reason for Western Australia to do so.

On 4 November 1993, the Goverment of Western Australia introduced legislation into Parliament to extinguish native title at common law throughout the State. The Land (Title and Traditional Usage) Act 1993 (WA) repeals *Mabo*. The former holders of native title at common law will instead be invested with "rights of traditional usage". The right is expressly made subject to all other interests in land. The State is empowered to take any action, including making grants of any interests, in mining tenements or otherwise, irrespective of whether it extinguishes or impairs the "rights of traditional usage". The Supreme Court can award compensation, but regard for "special attachment" or "spiritual or cultural connection with the land" is limited to 20 per cent of a right of traditional usage. Legal action by native title holders for compensation must be commenced by notice of a claim within 18 months.

The effect of the Act is to subordinate the rights of Aboriginal people to traditional land to the rights of all others and to offer minimal compensation. The Government argues that the Act complies with the Racial Discrimination Act 1975 (Cth) because it provides some measure of compensation for the extinguishment of rights. Only the most formalistic approach to what constitutes racial discrimination could sustain such an argument and even then it appears weak. The Act singles out and diminishes the rights of one racial group as compared to the rights of others. The Act will undoubtedly be challenged in the High Court of Australia as a violation of the Racial Discrimination Act 1975 (Cth). The challenge will succeed.

11. WA Premier "Media Statement" 22 July 1993.
12. *The West Australian* 20 July 1993, 1.
13. AIC Conference "Mabo: Sovereign Risk or National Opportunity" (Sydney, 1993).

THE COMMONWEALTH

1. The development of Commonwealth legislation

The Prime Minister, Mr Paul Keating, heralded the decision in *Mabo* as "a large step towards reconciliation and away from the injustice dealt to Aborigines over 200 years".[14] On 27 October 1992, the Commonwealth Government announced that consultation with State and Territory Governments, Aboriginal & Torres Strait Islander organisations, and industry would be directed by a committee of ministers chaired by the Prime Minister. An inter-departmental committee of officials ("IDC"), chaired by a member of the Department of the Prime Minister and Cabinet, Mr Sandy Holloway, was established to carry out the consultations and report to the Prime Minister.

A Discussion Paper prepared in October 1993 for the consultation process suggested that options might include (i) a statutory framework codifying native title (thereby providing more certainty); (ii) a specialist statutory tribunal to adjudicate claims; and (iii) the negotiation of settlements between governments and Aboriginal people, as was done in Canada. The Discussion Paper suggested that such a result could be achieved by complementary Commonwealth, State and Territory Legislation or by Commonwealth legislation based solely on Commonwealth constitutional powers.

In the course of consultations on the Discussion Paper the Australian Mining Industry Council expressed concern as to the validity of existing mining leases issued after 1975. The IDC recommended to Federal Cabinet in January 1993 that past and future grants of titles should extinguish and override native title upon the payment of compensation, except in the case of mining leases which would suspend native title. It also recommended supplementing the process with "negotiation, where appropriate, and governments should encourage that".[15]

On 12 March 1993, the day before the Commonwealth election, the IDC delivered a report to Cabinet entitled "*Mabo*: The High Court Decision on Native Title". This reiterated the January recommendations and also recommended against the Canadian approach of negotiating settlements of native title. The report stated:

> [T]o give effect to the concept on a national basis, a very long and difficult negotiation would be inevitable, in which concepts such as self-government over native title

14. *The Australian* 17 Oct 1992.
15. Memorandum of Mr S Holloway to the Prime Minister 27 Jan 1992.

> lands, constitutional protection of title and the granting of substantial economic and other benefits would come into play as part of the 'grant bargain'. It is not therefore a practicable approach for dealing with immediate land management issues.[16]

The report also recommended that a "system of specialised tribunals for the registration and determination of claims should be canvassed with the States and Territories as a quicker, more efficient, less adversarial and more systematic process than reliance on the courts". It did not support an exclusively Commonwealth regime, citing State opposition.[17]

Aboriginal organisations became alarmed by the tenor of the report and the apparent pressure upon the Commonwealth to extinguish native title. A common position between the organisations was developed at a meeting in Alice Springs and presented to the Prime Minister and principal Cabinet members on 27 April 1993. The Aboriginal organisations proposed that the "Commonwealth cover absolutely the policy field on Aboriginal title by implementing legislation which sets national standards which proscribe any dealings with Aboriginal title by regional governments". Native title should not be extinguished by future grants except upon the consent of the Aboriginal title holders. The organisations proposed a Commonwealth tribunal to issue declarations of Aboriginal title and a long-term process of comprehensive settlement agreements. In return the Aboriginal organisations undertook to "go to our people and strongly recommend that they accept this validation of titles issued between 1975 and 1992".

On 3 June 1993, one year after the High Court's decision, the Commonwealth released its discussion paper.[18] This affirmed the earlier IDC report. It also proposed a "justice and economic development package" to address "past dispossession" and reduce conflict between native title holders and resource development. The package would include a land acquisition fund, a royalty equivalent scheme and the transfer of Aboriginal reserves to Aboriginal people.

The COAG met in Melbourne on 7 and 8 June 1993. The core propositions of the Commonwealth requiring payment of compensation where validated titles overrode native title, and a consistent national strategy for the protection and determination of native title, were rejected by the States of Western Australia and Victoria.[19]

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16. Para 33.
17. Para 42.
18. Commonwealth of Australia DP "*Mabo*: The High Court Decision on Native Title" (Canberra: Govt Print, 1993).
19. *The West Australian* 11 & 14 June 1993, 6 & 4 respectively.

On 9 June 1993, the Prime Minister declared that the Commonwealth would legislate to establish "national minimum standards regulating native title irrespective of whether agreement was reached with the States".[20]

On 27 July 1993, the Cabinet adopted, with some amendments, the proposals put forward by the IDC. The Cabinet recognised "a right of negotiation" with respect to future grants. Grants would only override and extinguish native title if the consent of native title holders was obtained, unless either a tribunal or the Crown, State or Commonwealth, dispensed with the requirement of Aboriginal consent in the State or national interest.

On 6 August 1993, a meeting of Aboriginal & Torres Strait Islander representatives from throughout Australia (the Eva Valley Group) rejected the Commonwealth proposals and accused the Commonwealth of betrayal. Objections included the dispensation with the requirement of consent to extinguish native title, the role of the States, and the suspension of the Racial Discrimination Act 1975 (Cth) to validate existing titles.[21]

2. Outline of the proposed legislation

On 2 September 1993, the Commonwealth released its "Outline of Proposed Legislation on Native Title". The Outline was consistent with the position developed during the year. The introduction declared that the legislation will validate and enable the validation of grants, establish a tribunal to determine native title claims and set standards for dealing with native title. It explicitly provided that "the Commonwealth Act is not intended to cover the field. Where a State or Territory Act is not inconsistent with the Commonwealth Act, the State or Territory Act will apply."[22]

a. Validation of existing titles and overriding of native title

(i) Past grants[23]

The proposed legislation will provide for the validation and overriding of native title by all other interests where the invalidity arose from the "combination of the existence of native title and the operation of any law."

Upon validation, freehold grants and residential, pastoral and tourist leases will override and extinguish native title, albeit if a pastoral lease contains a clause reserving a right of access for traditional purposes that right

20. *The Australian* 14 June 1993, 4.
21. *The West Australian* 7 Aug 1993.
22. Outline of Proposed Legislation on Native Title, cl 6.
23. Id, cls 21–28.

is not extinguished or impaired. Presumably the latter interests are supposed to co-exist as they did at common law.

Mining and petroleum tenements and other grants will override native title, but native title is not extinguished. Rather it is made subject to the other interests and suspended for their duration.

(ii) Future grants[24]

A Crown grant or action will override and suspend native title if it can be made over freehold land.[25] Native title will be extinguished upon compliance with compulsory acquisition and requirements applicable with respect to other interests.[26]

"Right to negotiate"[27] — Three to four months are to be allowed to negotiate an agreement, failing which the Tribunal must determine within two to three months whether a grant should be made and any conditions which should be attached. There is no right to negotiate unless native title holders or registered claimants can show a direct interference with community life, interference with sacred sites, major surface disturbance or an automatic consequent right to mine. It is intended that exploration licences generally not be the subject of the right to negotiate.[28]

The Tribunal is to be required to take into account: the effect on native title; the way of life of the title holders; the growth of social, cultural and economic structures; the interests and wishes of the title holders; the title holders' freedom of access to the lands and the preservation of sacred sites; the preservation of the natural environment; the economic and other significance to Australia and the State or Territory; and the public interest. The listed factors are essentially those of the Pitjantatjara Land Rights Act 1981 (WA) with the addition of the reference to "the public interest".

The decision of the Tribunal may be overturned by the government proposing to issue the grant in the "State or national interest." Such a determination is notoriously difficult to challenge even if the Bill contemplates that a court may do so.[29] It is question of fact which the courts are inclined to regard as more properly a question for Parliament.

"Registration of Claim" — In the absence of objection by a *registered*

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24. Id, cls 29–53.
25. Id, cls 30, 51.
26. Id, cl 54.
27. Id, cls 34–40 (called "consultation process" in the Summary Guide).
28. Id, cls 41–47, 50, 57–63
29. See Sankey J in *Re Application of Amalgamated Anthracite Collieries* (1927) 43 TLR 672.

claimant a grant will proceed without any regard for native title. Registration requires the submission of a fully substantiated claim, including information as to "on-going traditional connection" and representative capacity.

(iii) Compensation

"Just Terms" — Compensation on "just terms" is payable for impairment or extinguishment by the maker of past grants.[30] The obligation to pay compensation with respect to future grants arises where "the holder of a freehold title has a right to compensation".[31]

"Tribunal Determination" — The Tribunal, in the absence of agreement, will determine the amount of compensation. Compensation can not include resource rents or equivalents, nor can the Tribunal direct anything other than monetary compensation.[32]

b. Surrender and exchange agreements[33]

Native title holders can exchange native title for statutory title on such terms and conditions as are acceptable to them. There is no requirement to seek to reach or to enter into such agreements.

c. The Federal Court and the National Native Title Tribunal

The Federal Court[34] will determine claims to native title and to compensation made after the commencement of the Act. Claims made before that date may be referred to the Court. The Federal Court will determine if native title provides for exclusive possession, occupation, use and enjoyment, or if not, what rights are provided for.[35]

A non-judicial body, the National Native Title Tribunal,[36] will have jurisdiction to determine whether a grant should be made over native title land. The tribunal will not be bound by the rules of evidence and proceedings will, as far as possible, be conducted informally.[37]

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30. Supra n 22, cls 21(b), 24(c), 28.
31. Id, cl 73.
32. Id, cls 69–73.
33. Id, cl 29.
34. Id, cls 75–77.
35. Id, cls 80(c), 116–117.
36. Supra n 34.
37. Id, cl 82.

d. State and Territory jurisdiction

The outline of proposed legislation contemplated that States and Territories would have the following powers: (i) to validate and override native title by *past* grants upon the same principles as the Commonwealth;[38] (ii) to override native title[39] by *future* grants upon establishment of processes meeting specified criteria; and (iii) to determine native title by means of "an appropriate body which performs similar functions to the Tribunal".[40] Recognition by the Commonwealth will require a nationally consistent procedure and approach to recognition and determination of native title. There must be consultation on appointments.

A SETTLEMENT?

The essence of the Commonwealth approach contained in the September "Outline of Proposed Legislation" had not changed since March 1993. This contemplated:

- The overriding of native title upon the payment of monetary compensation irrespective of Aboriginal agreement;
- The validation of all existing interests, irrespective of native title and the Racial Discrimination Act 1975 (Cth);
- The conferment of State power to validate Crown grants and to override native title provided there is compliance with national minimum standards;
- Provision for State tribunals with nationally consistent procedures to determine native title.

The Commonwealth approach rejected the most crucial elements of the position put forward by Aboriginal spokespersons. It treated the question as one of land management rather than of the human rights of Aboriginal people.

On 9 October 1993, Aboriginal organisations launched a bitter attack on the Commonwealth proposals. The Prime Minister then attempted to allay Aboriginal concerns. On 18 October 1993, the Prime Minister and representatives of some Aboriginal organisations indicated that an agreement had been reached. The proposals have been modified as follows:

- To allow the determination of native title to be made by the Federal

38. Id, cls 5–6, 21–28.
39. Id, cls 49, 67.
40. Id, cl 77.

Court if Aboriginal claimants so desire;

- The "justice and economic package" may be linked to the native title legislation;
- The provisions of the Racial Discrimination Act (Cth) 1975 will not be suspended in order to validate existing interests;
- Native title may not necessarily be extinguished on existing pastoral leases.

In return, the deadline for the validation of existing interests may be extended to 31 December 1993.[41] The State of Western Australia has rejected the modified proposals.

It remains unclear whether the modified proposals provide a long-term settlement. Such may be assured only by a process which contemplates agreement with native title holders.[42] It appears, in any event, that the Western Australian legislation has been passed before that of the Commonwealth. The State and Commonwealth governments are set to do battle. A short-term solution is not in sight.

41. *The Australian* 15 Oct 1993.
42. See eg the Agreement between Zapopan Mining Ltd, the NT Govt and the Jawoyn Assoc Aboriginal Corp, 28 Jan 1993.