ABORIGINAL LAND CLAIMS -

AN AUSTRALIAN PERSPECTIVE

1995 SEVENTH INTERNATIONAL APPELLATE JUDGES CONFERENCE

OTTAWA - 25-29 SEPTEMBER 1995 **The Hon. Sir Gerard Brennan, AC KBE**

Chief Justice of Australia

27 September 1995

On 26 January 1788, the British flag was raised on land that is now part of the City of Sydney. The colony of New South Wales was established. Later, other colonies were formed in other parts of Australia or by separation of territory from New South Wales. The colonial boundaries included some offshore islands. Included within Queensland's maritime boundary are the Murray Islands, the largest of which is Murray Island or Mer, in the Torres Strait between Papua New Guinea and Australia. In 1982, Eddie Mabo and four other Murray Islanders instituted proceedings against the State of Queensland claiming ownership of parcels of land on Mer as the holders of native title. This litigation, bearing Mabo's name, defined the modern Australian law on native title.

In 1788, the territory that is now the Commonwealth of Australia was populated by Aboriginal hunters and foodgatherers whose numbers are uncertain, probably between 300,000 and 500,000. The legal theory espoused by the Privy Council in the 19th and early 20th centuries regarded these peoples, and the peoples of at least some other settled colonies, as "so low in the scale of social organization" that it was "idle to impute to [them] some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them" [1]. The land in these colonies was treated as ownerless and thus available for acquisition by the European power which settled the territory. This doctrine was known inaccurately as terra nullius. It supported the proposition that, on settlement, the Crown acquired not only sovereignty but beneficial ownership of all land in the acquired territory. Universal ownership of land by the Crown allowed the adoption of the feudal doctrine of tenure - a basic doctrine of the common law of real property - whereby all private ownership of land was held to depend ultimately on a Crown grant [2]. As Aborigines had received no grant, they had no title to the land. When the self-governing Australian colonies were given control of the alienation of land within the colony, the theory was that the power of alienation was merely a political function transferred from the Government in Westminster to the Colonial Government [3], but the Crown in right of the Colony had had the beneficial title to that land

since the colony was acquired. Alienation of land has been governed by statute since the early days of colonization.

In each colony, land was reserved from alienation for public purposes including the provision of land for Aborigines. The reserves did not, however, give security of occupation, much less title. Then, in 1976, the Commonwealth Parliament enacted a law for the Northern Territory [4] under which Aborigines with a traditional connection with unalienated land could apply for a grant of an inalienable fee simple - a freehold title. This title allows Aborigines to use the land in accordance with Aboriginal tradition [5] except where a lease or licence of a particular parcel of land is granted or issued for specified purposes with the consent of the Aboriginal Land Council for the area and with the assent of the traditional owners of the land [6] . A refusal of consent can be overridden by the Government where a grant of a mining tenement is required in the national interest [7] . Some of the States, especially South Australia, subsequently enacted laws designed to give or to allow Aborigines to acquire a secure title or comparatively secure right to possession of land [8] .

Then the two cases that bear the name of Eddie Mabo were decided by the High Court. By this time, the authority of Privy Council decisions was no longer binding on the High Court [9] or, indeed, on any Australian Court [10] . The High Court, in the absence of any prior decision of its own or any prior decision of any appellate court in Australia, had to define the common law relating to native title for Australia.

When the plaintiffs claimed ownership of land on Mer by virtue of their native title, the Queensland Parliament countered with an Act [11] that declared that the Queensland coastal islands were vested in the Crown freed of all other rights or claims [12] . However, there stood - and there stands now - on the Commonwealth statute book the *Racial Discrimination Act* 1975 which gives effect in municipal law to the key provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. In *Mabo [No.1]* [13] the High Court held that the Queensland Act discriminated against the people of the Murray Islands in the enjoyment of their right to own property, assuming that the traditional rights of ownership existed. On that assumption, the Queensland Act was inconsistent with the *Racial Discrimination Act* . Under the Australian Constitution [14] , a State law that is inconsistent with a law of the Commonwealth is, to the extent of the inconsistency, invalid. The Queensland Act thus failed in its purpose.

That left for determination the critical question whether the common law of Australia recognized native title or whether native title had been extinguished and the Crown had become beneficial owner when the Crown acquired sovereignty. In *Mabo [No.2]* [15] , the Court held that native title to the land on Mer, with the exception of a few parcels, is vested in the people of the Murray Islands as a communal title recognized by the common law, and that that title is protected by the *Racial Discrimination Act* from discriminatory extinction. The content of native title is ascertained by reference to Aboriginal laws and customs [16] .

The Court held the acquisition of sovereignty to be a non-justiciable question in a municipal court but the effect of the acquisition of sovereignty on native title to be a justiciable question [17] . The acquisition of sovereign power and the acquisition of beneficial ownership of land were not necessarily linked [18] . Rejecting the notion of "terra nullius", native title was held to survive the acquisition of sovereignty [19] . Although sovereign power enabled the Crown to extinguish native title, any instrument purporting to exercise that power would be rigorously construed. No legislative or executive instrument would be taken to extinguish native title unless it revealed a clear and plain intention to do so [20] .

However, the sovereign power of the Crown included the power to make grants of land. As that power might be exercised to create a tenure of land in the grantee, it was tantamount to a radical title to the land [21] . Native title was ousted when the sovereign power had been exercised inconsistently with the continued enjoyment of native title, but otherwise native title survived. Crown grantees were secure in their titles but the holders of native title were unprotected at common law against an exercise of the power of alienation. By majority [22] , it was held that the expropriation of native title pursuant to any valid legislative authority is not compensable. But the holders of native title are now protected by the *Racial Discrimination Act* to the same extent as are the holders of other forms of title. They are therefore no longer amenable to expropriation without compensation.

The *Mabo* decisions gave rise to considerable controversy. After much public debate, in 1993 the Commonwealth Parliament enacted the *Native Title Act* which, adopting the common law as defined in *Mabo [No.2]* [23] prescribed a system for dealing with native title. The Act contemplates the enactment of complementary laws by the States and Territories [24] . The *Native Title Act* provided, inter alia, for determinations as to the existence or non-existence of native title to particular parcels of land. Access to native title land for mining or other non-Aboriginal purposes can be obtained [25] but there are extensive provisions relating to negotiation, arbitration and ministerial intervention in respect of proposals to grant access [26] . A National Native Title Tribunal [27] , presided over by a Judge of the Federal Court, has certain mediation and administrative functions and is presently dealing with the processing of claims. The Federal Court has jurisdiction [28] over issues calling for judicial determination, including appeals from the Tribunal on questions of law.

The State of Western Australia, in which 52% of the land is unalienated and which contains significant deposits of minerals, took serious objection to the *Native Title Act* . Its Parliament enacted a law to deal with native title [29] and mounted a challenge to the validity of the Commonwealth law. However, the High Court upheld the validity of the *Native Title Act* and held the Western Australian law to be invalid [30] .

The modern development of Australian law governing Aboriginal title to land is part of that post-colonial jurisprudence that has been developed in other countries to protect the relationship between the descendants of the indigenous inhabitants and their traditional lands. In other jurisdictions, although the paramount power of government has been accepted, there has been a recognition of some form of native title. The basis of title has been variously supported by reference to proclamations [31] , legislative acts [32] , treaties [33] , the fiduciary duty of the Crown [34] , use or

possession [35] and the common law [36] . The post-colonial relationship of the indigenous population with their traditional land is not only, or even chiefly, a problem for the courts. But the courts, sensitive to the demands of justice for minorities and the disadvantaged in society, are likely to remain a forum in which indigenous peoples will seek to right what are now perceived to be historic wrongs.

1 *In re Southern Rhodesia* [1919] AC 211 at 233-234; see also *Cooper v Stuart* (1889) 14 App Cas 286.

2 *Attorney-General v Brown* (1847) 1 Legge 312 at 316, 319 (NSW); *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71 per Windeyer J; *New South Wales v. The Commonwealth* (1975) 135 CLR 337 at 438-439 per Stephen J.

3 *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 453-454.

4 *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth).

5 s 71.

6 s 19.

7 ss 40, 45, 46.

8 *Pitjantjatjara Land Rights Act* 1981 (SA); *Maralinga Tjarutja Land Rights Act* 1984 (SA); *Aboriginal Land Rights Act* 1983 (NSW); *Land Act (Aboriginal and Islander Land Grants) Amendment Act* 1984(Q.).

9 *Viro v The Queen* (1978) 141 CLR 88; *Cook v Cook* (1986) 162 CLR 376; *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals from the High Court) Act* 1975 (Cth).

10 The *Australia Act* 1986 (identical Acts contemporaneously enacted by the Parliaments of the Commonwealth of Australia and the United Kingdom) whereby the last legal ties, other than monarchical succession, between Australia and the United Kingdom were severed.

11 *The Queensland Coast Islands Declaratory Act* 1985 (Q.).

12 ibid, s 3.

13 Mabo v Queensland (1988) 166 CLR 186.

14 s 109.

15 Mabo v Queensland [No.2] (1992) 175 CLR 1.

16 *Mabo [No 2]* at 58, 110.

17 *Mabo [No 2]* at 31-32, 81-82 and see also 129-130.

18 *Mabo [No 2]* at 57, 80-81, 180.

19 *Mabo [No 2]* at 57-58, 109, 180, 182, 192, 216.

20 *Mabo [No 2]* at 64, 110-111, 195-196.

21 *Mabo [No 2]* at 48.

22 *Mabo [No 2]* at 15; cf at 111, 119, 195-196.

23 See *Native Title Act* , ss 10 and 223.

24 See the *Native Title (New South Wales) Act* 1994 (NSW); *Native Title (Queensland) Act* 1993 (Q); *Native Title (South Australia) Act* 1994 (SA); *Validation of Titles and Actions Act* 1994 (NT); *Land Titles Validation Act* 1993 (Vic); *Native Title (Tasmania) Act* 1994 (Tas).

25 *Native Title Act* , s.23.

26 Sub-division B of Div 3 of Pt 2.

27 *Native Title Act* , Pt 6.

28 *Native Title Act* , ss 81, 145, 169.

29 *The Land (Titles and Traditional Usage) Act* 1993 (W.A.)

30 *Western Australia v The Commonwealth* (1995) 69 ALJR 309; 128 ALR 1.

31 *St Catherine's Milling and Lumber Co v The Queen* (1888) 14 App Cas 46 at 54-55; *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 at 151-152, 203; *Guerin v The Queen* (1984) 13 DLR (4th) 321 at 335.

32 *Tee-Hit-Ton Indians v United States* (1955) 348 US 272 at 278-279.

33 *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 at 686.

34 *R v Sparrow* (1990) 70 DLR (4th) 385 at 408; *Guerin v The Queen* (1984) 13 DLR (4th) 321 at 334, 356-357; and see per Toohey J in *Mabo [No 2]* (1992) 175 CLR at 203-205.

35 *United States v Santa Fe Pacific Railway Co* (1941) 314 US 339 at 345, 347; *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 at 156, 200-201; *Guerin v The Queen* (1984) 13 DLR (4th) 321 at 335; *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 at 690, 692.

36 See *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 542-543.