Western Australia and Native Title: Western Australia v The Commonwealth; Wororra Peoples v Western Australia; Biljabu v Western Australia (1995) 128 ALR 1

Prue Vines[1]

Background

Mabo v Queensland (No 2)[2] was decided by the High Court in 1992. In that case, as is well known, the High Court, by majority, held that native title had survived the annexation of the Murray Islands by Queensland in 1879. In determining this issue the Court had to decide whether native title was recognised by the common law in Australia generally. Previously, of course, it had been held that native title was inconsistent with the feudal doctrine of tenures which was the basis of the land law of Australia which had been introduced into the country by the arrival of British settlers in 1788 and after.[3] This view was based on an assumption that sovereignty of the Crown necessarily included ownership or possession of the land over which the right to govern existed; and an acceptance of the doctrine of terra nullius. The High Court's decision that native title had survived or could survive in certain circumstances arose from a rejection of both those views. Briefly, the circumstances in which native title could survive were where there were traditionally held lands, which continued to be held to the present day. Native title was to be ascertained by reference to the traditional customary law of the indigenous inhabitants of the area. The radical title to the land was vested in the Crown, which was burdened with native title until the Crown extinguished that title.[4]

The *Racial Discrimination Act* 1975 (Cth) ("Racial Discrimination Act") protected native title from any extinguishment of title which affected Aboriginal holders of native title in a way which was adverse compared with non-Aboriginal holders of land.[5]

Western Australia was the last State of Australia to be settled by the British, being settled in 1829 as a separate colony from New South Wales and Van Diemen's Land[6] after South Australia was settled. Western Australia as a State contains very large

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1 MA, Dip Ed, LL B, Senior Lecturer in Law, Faculty of Law, University of New South Wales

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 ("*Mabo (No 2)*").

3 *Attorney-General v Brown* (1847) 2 SCR (NSW) App 30, *Randwick Corporation v Rutledge* (1959) 102 CLR 54, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, *Cooper v Stuart* (1889) 14 AC 286 (PC).

4 Per Brennan J. Brennan J's judgment, with which Mason CJ and McHugh agreed, was the leading judgment in the case. As it is the narrowest statement of principle consistent with the majority decision it is the one referred to here.

5 *Mabo v Queensland (No 1)* (1988) 166 CLR 186. The Racial Discrimination Act commenced on 31 October 1975.

6 *Swan River Act* 1829 (Imp).

amounts of unalienated Crown land[7] in comparison to other parts of Australia. It thus was particularly subject to the possibility of native title claims.

The facts

The plaintiff State of Western Australia enacted the *Land (Titles and Traditional Usage) Act* 1993 (WA) ("Western Australia Act") which purported to extinguish native title and replace it with statutory rights of traditional usage. The *Native Title Act* 1993 (Cth) ("Native Title Act") commenced on 1 January 1994, shortly after the Western Australia Act came into operation on 2 December 1993. The Native Title Act defined native title in terms which incorporated the view of native title outlined in *Mabo (No 2)*.

Western Australia was also the defendant in two proceedings brought by representatives of the Wororra, Yawuru and Martu peoples of Western Australia. These actions challenged the validity of the Western Australia Act. The Court decided to hear all these matters together.

The arguments

In the High Court, Western Australia argued that the effect of *Mabo (No 2)* was to establish that the Crown may extinguish native title and that the survival of native title is a mere presumption rebuttable by proof of actual intention of the Crown. The plaintiff's submission was that the history of Western Australia showed that native title was either extinguished by the establishment of a settled colony there or, alternatively, at the latest, by the Western Australia Act. The Commonwealth argued that native title survived the establishment of the colony and that the Western Australia Act was inconsistent with the Racial Discrimination Act and thus, native title in Western Australia survived until the Native Title Act commenced. Western Australia further argued that the Native Title Act was beyond the legislative power of the Commonwealth parliament, inter alia, because it was not a law with respect to either the race power (s 51(xxvi)) or the external affairs power (s 51(xxix)) given by the Commonwealth Constitution.

Did the establishment of the colony of Western Australia extinguish native title?

Western Australia argued that the settlement of the colony of Western Australia was different from the settlement of New South Wales, which was the focus of the *Mabo (No 2)* decision. Western Australia argued that when the British Crown set up the colony of Western Australia, its intention was to extinguish native title generally and not only to acquire sovereignty but to have ownership of the land. It argued that

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7 The joint judgment refers to an amount of more than 52%: *Western Australia v Commonwealth* (1995) 128 ALR 1 ("*WA v Commonwealth*") at 19.

this could be inferred from the terms of the Commission which was given to Governor Stirling, the first Governor. This Commission provided for the division and sale of all land in the Colony in so far as that was then possible. In New South Wales the policy had been to grant land according to the value of investment in the colony, but this policy had proved unsatisfactory and was changed in New South Wales at the same time as the Commission was given in Western Australia.

The Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ in a joint judgment with Dawson J generally agreeing) was unanimous in holding that native title was not extinguished by the establishment of Western Australia. The Court rejected the argument that the establishment of Western Australia was different from the establishment of other Australian colonies in this respect. The joint judgment said:[8]

> ...the true inference to be drawn — if not the certain fact — is that the Aborigines and their title to land were ignored in the establishment of Western Australia and that Stirling was intended to exercise the power which a Sovereign possesses to dispose of land within the Sovereign territory by such means as the law of the Sovereign prescribes. The title of Aboriginal peoples in land was ignored because, at that time, there was a common opinion (which *Mabo (No 2)* holds to be erroneous) that the Aborigines had no legal interest in land....Once it is realised that the common law theory which underlay the acquisition of sovereignty in "settled" colonies at the time of settlement of Western Australia regarded the territory of a colony inhabited by indigenous people to be "desert uninhabited", an inference that the British Crown intended a general extinguishment of native title cannot be drawn. Extinguishment would have been seen to be an unnecessary step to take.

The joint judgment held that the presumption remained that native title was not extinguished by settlement. Dawson J differed slightly in that he could see no need for a presumption that the Crown did not intend to extinguish native title.[9] Thus, native title in Western Australia has been extinguished only "parcel by parcel".[10] So, native title may still have existed at the time of the Western Australia Act.

Is the Land (Titles and Traditional Usage) Act 1993 (WA) consistent with the Racial Discrimination Act 1975 (Cth)?

The Court also held unanimously that the Western Australia Act was inconsistent with s 10 of the Racial Discrimination Act. The joint judgment said:

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8 *WA v Commonwealth* at 19-20.
9 *WA v Commonwealth* at 70.
10 *WA v Commonwealth* at 21.

> The Racial Discrimination Act does not alter the characteristics of native title, but it confers on protected persons rights or immunities which, being recognised by 'the tribunals and all other organs administering justice', allow protected persons security in the enjoyment of the title to property to the same extent as the holders of titles granted by the Crown.

This includes both security of property and entitlement to compensation if those are guaranteed within the State generally. The question, therefore, was whether the rights conferred by s 7 of the Western Australia Act ensured the same security of possession and enjoyment as those conferred by the Racial Discrimination Act. The Court held that the s 7 rights did not confer the same security of possession and enjoyment, as those rights could be diminished pursuant to various Western Australian Acts.[11] Nor did the Western Australia Act provide adequate compensation for this shortfall in security of possession and enjoyment. The Court also held that s 5 of the Western Australia Act which purported to confirm grants of title made after the Racial Discrimination Act was ineffective.

The Race Power

The Native Title Act protects native title subject to the stated exceptions in the Act. It thus removes the common law defeasibility of native title. The exceptions to the protection of native title include past and future acts.[12] Western Australia argued that the Native Title Act was not supported by the race power. In order to use the race power, it must be "deemed necessary" that "special laws" be made for the "people of any race", these being the terms of s 51(xxvi) of the Constitution. That is, there must be special needs or threats to the people which make the law necessary.[13] This judgment is for Parliament to make. The Court said "the removal of the common law general defeasibility of title...is sufficient to demonstrate that the Parliament could properly have deemed that Act to be 'necessary'".[14]

The Court said:

> ...the Native Title Act is 'special' in that it confers uniquely on the Aboriginal and Torres Strait Islander holders of native title...a benefit protective of their native title. Perhaps the Act confers a benefit on all the people of those races.

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11 The *Public Works Act* 1902 (WA), *Land Act* 1933 (WA), *Mining Act* 1978 (WA) and *Petroleum Act* 1967 (WA).

12 "Acts" include legislative acts, acts carried out by the Crown in any capacity, and acts by any other person. Past acts include categories A,B, C and D, each category having a particular effect in relation to native title. Generally, future acts are permissible or impermissible. See Nettheim RG, "The Native Title Act 1993" in "Aborigines and Torres Strait Islanders, 1.3 Land Law" in Riordan JA (ed), *The Laws of Australia*, (Melbourne, Law Book Co, 1994), pp 30-80 and "Native Title Act Commences Operation" (1994) 66 *Aboriginal Law Bulletin* 3 at 4-5.

13 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 210.

14 *WA v Commonwealth*, joint judgment at 43.

> The special quality of the law thus appears. Whether it was 'necessary' to enact that law was a matter for the Parliament to decide and, in the light of *Mabo (No 2)*, there are no grounds on which this Court could review the Parliament's decision, assuming it had power to do so.[15]

The Court thus held that an Act which protected native title from extinguishment was a valid Act under the race power.

Is the Native Title Act 1993 (Cth) invalid as a law which impermissibly interferes with the State's legislative power?

Western Australia argued that ss 11, 19, 20, 22, 23, 26, 28, 43 and 211(2) of the Native Title Act were beyond the legislative powers of the Commonwealth Parliament. The Court rejected the State's submission that the true character of the Act is as a law with respect to governments and governmental activity. Section 107 of the Constitution provides that the Parliaments of the States retain the legislative powers vested in them at the time of federation, except where power is expressly vested in the Commonwealth, or, s 109 applies. Western Australia thus argued that the Native Title Act interferes with the exercise of the powers of the State in an impermissible way. To this argument the Court replied that the general principle is:

> If the application of State law to a particular subject matter be expressly excluded by a valid law of the Commonwealth, a State law which is expressed to apply to the subject matter is inconsistent with the Commonwealth law and s 109 of the Constitution is thereby enlivened. Such a State law is rendered inoperative not because the Commonwealth law directly invalidates the State law but by force of s 109 of the Constitution.[16]

and

> Where it is within the legislative competence of the Commonwealth Parliament to prescribe an exclusive statutory regime, a Commonwealth law which merely expresses an exclusion of the operation of a State law is not construed as an attempt to invalidate the State law directly.[17]

The question is, therefore, whether the Native Title Act is within the power. The Court held that it was valid under the race power as a law which protected native title from extinguishment.

The Court also rejected the argument that the Native Title Act attempted to prescribe which State and Territory laws were valid or invalid, saying rather that the sections

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15 *WA v Commonwealth*, at 44.
16 *WA v Commonwealth*, at 48.
17 *WA v Commonwealth*, at 49.

of the Act which prescribe which State laws were operative did so purely on the basis of their inconsistency with the Commonwealth law, and thus, any invalidity derived from s109 of the Constitution. One example considered was the requirement that a State provide compensation for the extinguishment or impairment of native title caused by that State's law. The Court rejected the argument that this singled out the States for an arbitrary burden. The provision of the Native Title Act applied to all the polities — Commonwealth, State and Territories — which could have the effect of impairing or extinguishing native title.

Impermissible discrimination against Western Australia and impairment of its ability to function as a State

Western Australia argued that the Native Title Act had a greater impact on it than on the other States and that it was thus discriminated against. Western Australia also argued that the Act impaired the State's ability to function as a State, arguing that this, thus, contravened the principle in *Melbourne Corporation v The Commonwealth*.[18] The Court rejected the first limb of the argument shortly, but the second limb required greater consideration. The State had argued that the capacity to deal with land and other resources, particularly mineral resources, in the State was a fundamental sovereign function of its government. The Court held that the second limb of the *Melbourne Corporation* principle:

> ...relates to the machinery of government and to the capacity of its respective organs to exercise such powers as are conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth. A Commonwealth law cannot deprive the State of the personnel, property, goods and services which the State requires to exercise its powers and cannot impede or burden the State in the acquisition of what it requires.[19]

Since the Native Title Act does not purport to affect the machinery of government of the State in any way, it does place the burden of compensation on the State but it does so as an incident of the protection of native title which is valid.

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18 (1947) 74 CLR 31, discussed by Mason J in *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 where he said, "...the principle consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or diabilities; and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments....The second element of the prohibition is necessarily less precise than the first; it protects the States against laws which, complying with the first element because they have a general application, may neverthelelss produce the effect which it is the object of the principle to prevent." Quoted in *WA v Commonwealth* at 56.

19 *WA v Commonwealth* at 59.

The Native Title Act 1993 (Cth) and the Racial Discrimination Act 1975 (Cth)

Western Australia argued that the Native Title Act discriminated in favour of Aborigines and Torres Straits Islanders and thus offended the Racial Discrimination Act, which was expressly saved by s 7(1) of the Native Title Act. The Court held that if there were any discrepancy between the Racial Discrimination Act and the Native Title Act (and the Court could not see any discrepancy), the Native Title Act could be regarded as a special measure under s8 of the Racial Discrimination Act or as a law which, while making racial distinctions, was not racially discriminatory. Section 7(1) did not make the Native Title Act subject to the Racial Discrimination Act.

Section 12 of the Native Title Act 1993 (Cth)

Section 12 of the Native Title Act provides that "subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth". The Court held that this part of the Act was invalid because if the common law is taken to be judge made law, then s12 offends the separation of powers, as it is an attempt to confer legislative power on the judiciary.It would thus offend the principles in *The Boilermakers' Case*.[20]

If the common law is taken to be a changing thing, the section would offend the race power which is the basis of the validity of the Native Title Act. Section 51(xxvi) of the Constitution requires that Parliament must consider such a law necessary for the people of a race before the law can take effect. This would no longer be possible. A law made under the race power must be considered by Parliament. In relation to the external affairs power, the Court said that the "common law relating to native title has no external element which might attract the support of the external affairs power".[21]

Further, if s 12 operated to withdraw effective legislative power to override the common law from the States, it is an invalid attempt to use s 109 of the Constitution. This use of s 109 breaches s 107 of the Constitution. Section 109 is not to be used in this way. It operates only on State laws which were made in exercise of their powers confirmed in s 107. The States retain their power to override the common law by their legislative acts. However, the invalidity of s 12 did not affect the validity of any other part of the Native Title Act.

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20 (1956) 94 CLR 254. Cited in *WA v Commonwealth* at 63.

21 *WA v Commonwealth* at 64.

Decision

In the result, the Native Title Act was held to be valid except for s 12, which was severable. The whole of the Western Australia Act was held invalid as inconsistent with both the Racial Discrimination Act and the Native Title Act.

Comment

The High Court's decision in this case has clarified the validity of the Native Title Act and decisively quashed attempts by State governments to avoid the implications of *Mabo (Nos 1 and 2)*. However, this remains the smaller part of the game. Except in Western Australia, the number of Aboriginal people who are eligible to claim native title is a very small proportion of the whole, because dispossession by the State, however it was achieved, is most likely to have disrupted the nexus required with the land to prove native title.[22] Similarly the amount of unalienated Crown land which is available to be claimed is very small. As a human rights matter, the land funds set up under the Native Title Act[23], the State and Territory Native Title Acts[24] and the *Land Rights Act* 1983 (NSW) are vital, albeit a small beginning, and it is on them we should be focussing our attention.

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22 And it is still true to say that the proportions are quite small even in Western Australia where the amount of unalienated Crown land is high against the national average.

23 The National Aboriginal and Torres Strait Islander Land Fund, commenced 1 July 1994; and the *Aboriginal Land Rights Act* 1983 (NSW) which provides for 7.5% of State revenue collected as State land tax from 1994-1998 is to be paid to the NSW Aborignal Land Council.

24 The *Native Title Act* 1994 (NSW) and legislation in the ACT and NT are the only State/Territory legislation which are entirely consistent with the Commonwealth legislation. South Australia supported Western Australia in challenging the Native Title Act. The *Native Title Act* 1993 (Qld), and *Land Titles Validation Act* (Vic) will need to be amended to be consistent with the Commonwealth legislation. There is a long way to go.