Mabo: Another Triumph for the Common Law

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Mabo v the State of Queensland[1] demonstrates the great virtues of the common law. Those virtues make the decision of inestimable benefit to the society and economy of Australia. The day the decision was handed down was a great day for both resource development and human rights in Australia.

The opinions expressed above are not those generally reported by the media in Australia. The public debate has failed to address the virtues of the common law and the benefits the decision confers. Rather the media have focused on the criticisms of conservative politicians and spokespersons for the resource industry.

1. *The Critics*

The critics of the decisions offer the following concerns:

A. *It makes a fundamental change in the law.*

Bill Hassell, president of the WA Division of the Liberal Party has observed:

> The *Mabo* decision overturned two centuries of clearly established law on which the Federal constitution was founded. The law's effect was that the Crown owned all land in Australia under the legal control of Parliament. The High Court overturned that law and in effect legislated for new laws providing a basis for judicially generated Aboriginal land rights.[2]

B. *Native title at common law is not a fundamental right and should be immediately denied by legislation.*

Tim Fischer, Leader of the National Party, announced that a Liberal-National Party Government would legislate to overturn the *Mabo* decision.[3] The announcement followed pleas by the idealogue of the mining industry, Hugh Morgan of Western Mining Corporation, for just such legislation.[4] The implicit assumption of this approach is that Aboriginal rights to land are not

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1 *Mabo v The State of Queensland (No 2)* (hereafter *Mabo (No 2)*)(1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1 (hereafter all page references will be to (1992) 66 ALJR 408. The plaintiff's argument in Mabo repeated verbatim large parts of the author's article "Aboriginal Land Claims at Common Law" (1983) 15 *UWALR* 293 at 295-304, 330, 332-336 on the concepts of native title and its extinguishment. The conclusions of the High Court are essentially those of the jurisprudence there set forth at 330-343.

2 *West Australian* 24 October 1992 at 2. To similar effect, Morgan, H M, *The Australian* 13 October 1992 at 3; McGuiness, P, *Australian* 17 October 1992 at 2; Stone, J, *Financial Review* 22 October 1992 at 4.

3 ABC Radio News *Daybreak* 13 January 1992.

4 Morgan, H M, *The Australian* 13 October 1992 at 3.

significant and can summarily be dispensed with. It raises fundamental questions as to the nature and value of the common law.

C. *The decision is a threat to the holding of property and to resource development.*

Hugh Morgan is reported to have declared that "... the High Court had plunged property law into chaos and 'given substance' to the ambitions of Australian communists and the Bolshevik left ... "[5] Hardly less dramatic are the remarks of Padraic McGuiness: "As a result of the High Court's epochmaking decision in the *Mabo* case of 3 June, the whole structure of property rights in the greater part of the Australian continent is now unclear."[6]

D. *The decision is political and emanates from unknown or improper sources.*

Bill Hassell observed that the decision of the High Court:

> ... indicates a complete change of its direction and an unprecedented involvement in contentious political issues. ... The High Court of Australia has clearly become political. It has moved away from its traditional task of interpreting and applying the law, into a clearly legislative role of making laws as the courts thinks they ought to be.[7]

Gerard Henderson commented that "the court is now influenced by sources unknown".[8]

The purpose of this essay is to refute *all* these suggestions, and to assert that the significance of the *Mabo* decision lies in its affirmation of the virtues of the common law. The media commentary also makes necessary observations on why common law rights should not be summarily dealt with and, in the long-term, why they cannot be.

2. *The Nature of the Common Law*

The common law is founded on human experience. It is judge-made law that responds and seeks to resolve particular disputes and fact patterns that come before the courts. Its wisdom has always been derived from the need to provide a solution in practice and not in the abstract. It is essentially pragmatic in nature.

In its development over the millennium the common law has entrenched certain propositions which form the basic minimum standard of human rights. The entrenchment takes effect as a presumption against legislative interference with fundamental rights to the person and property.[9] Such entrenchment arises from the role of the common law as "an ultimate constitutional foun-

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5 Ibid.

6 McGuiness, P, *Australian* 17 October 1992 at 2. Also Fischer, T, ABC Radio News *Daybreak* 13 January 1992.

7 Above n2.

8 Henderson, G, *Sydney Morning Herald* 1 December 1992, at 17. To similar effect: Stone, J, *Financial Review* 22 October 1992.

9 See, eg, *Potter v Mirahan* (1908) 7 CLR 277; *Bishop v Chung Bros* (1907) 4 CLR 1262; *R v Snow* (1965) 20 CLR 315;. *Wade v NSW Rutile Mining* (1969) 121 CLR 177.

dation".[10] That role is a tribute to the virtues of the common law. They have long been recognised in Australia. Mason CJ recently affirmed their substance:

> The framers of the Constitution accepted, in accordance with prevailing English thinking, that the citizen's rights were best left to the protection of the common law in association with the doctrine of parliamentary sovereignty.[11]

Former Chief Justice Dixon emphasised the common law's concern "to presume in favour of innocence and against the invasion of personal freedom".[12] Common law jurists have stressed the role of the common law in upholding "justice" and human rights.[13] These rights have been given effect by the common law as part of a recognition of the basic minimum human rights which a legal system must sustain. The common law gave effect to such rights because practice and human experience demanded, then and now, that it should. The common law did not adopt the presumption of innocence as an exercise of political or criminological theory. It did so because the functioning of society required that it should.

The functioning of society is of course determined by the social, economic and political considerations that make up that society. The common law is merely a reflection of the society. Commentators who would suggest that a decision is not consistent with the needs of the society must carefully evaluate their rationale. The common law only reaches a decision on the basis of those considerations. If the decision is founded upon a series of previous decisions it, of course, emphasises the regard *repeatedly* given to those considerations.

Hugh Morgan is a foremost critic of the *Mabo* decision. He has urged that property rights be respected because of their "centrality ... as the foundation of a growing confident economy" and that government regulation limiting property rights is properly termed "theft".[14] He is, of course, adhering to the common law's perception of the proper place of rights in property. The common law has long maintained a presumption against interference with property rights and has construed narrowly legislative attempts to limit the exercise of those rights.[15] The common law has perceived that the proper functioning of society, and the social, economic and political considerations associated therewith requires the entrenchment of property rights. The perception is derived from the countless disputes the common law has resolved. It is what pragmatism and experience demand.

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10 Dixon, O, "The Common Laws on an Ultimate Constitutional Foundation" (1957) 31 *ALJ* 240.

11 *Australian Capital Television v Commonwealth of Australia* (1992) 66 ALJR 695 at 702.

12 Dixon, O, "Concerning Judicial Method" *Jesting Pilate and other Papers and Addresses* (1965) at 152.

13 See Pollock, *The Genius of the Common Law* (1912) at 124-125, Holmes, O W, *"The Spirit of the Common Law"* (1909).

14 Morgan, H M, *"The Same Wind that carries them back would bring us thither"* (1992) 11 *AMPLA Bull* 7 at 12.

15 *Greville v Williams* (1906) 4 CLR 694; *Colonial Sugar Refining v Melbourne Harbour Trust Commissioners* [1927] AC 343; *Central Control Board (Liquor Traffic) v Cannon Brewery* [1919] AC 744.

It becomes evident that the "genius", "spirit", and worth of the common law is derived from

- its basis in human experience
- its pragmatic nature
- its reflection of social, economic and political considerations
- its longevity and its concern with the long-term

It is these elements which have caused commentators, particularly those of a conservative bent, to value the common law. It is those elements which led to the common law protection of property rights. Those elements are equally present, if not more so, in the protection accorded Aboriginal rights to land at common law.

3. *The Nature of Native Title at Common Law: Its Basis in Pragmatism and Experience*

The common law world has developed a uniform jurisprudence upon native title. The leading case is unquestionably the 1823 decision of Marshall CJ in the United States Supreme Court in *Johnson v McIntosh*.[16] Marshall CJ was required to resolve the conflicting claims of settlers and aboriginal people in the European settlement of the United States. He arrived at his decision following a comprehensive examination of the history of the policies and practices of European nations in North America.[17] He adopted the compromise known as native or aboriginal title at common law. The Court upheld a grant by the United States over the claims of a private purchaser from the Indian tribes of the same lands. Marshall CJ declared that "discovery gave title" to the discovering nation.[18] He explained the principle of native title at common law:

> ... the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent *impaired*. They were admitted to be the rightful occupants of the soil, with a legal as well as joint claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was devised by the original fundamental principle, that discovery gave exclusive title to those who made it.[19]

He declared that the Crown had an "absolute title ... to extinguish that right" and indeed could "grant the soil, while yet in possession of the natives".[20]

The concept of native title at common law effects a compromise between the rights of settlers and aboriginal people. Marshall CJ described it as a

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16 8 Wheat 543 (1823).
17 Id at 572-591.
18 Id at 573.
19 Id at 573-574.
20 Id at 574, 588.

"new and different rule, better adapted to the actual state of things".[21] He expressly rejected application of the "law which regulates ... the relations between the conqueror and the conquerors". Such a law would have fully recognised the rights to land of the aboriginal people. Rather he considered that pragmatism and the social, economic and political conditions demanded the "impairment" of those rights to the degree recognised in the concept of native title at common law. Marshall CJ explained the need to recognise the rights of the settlers:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the *property of the great mass of the community originates* in it, it becomes the law of the land, and cannot be questioned.[22]

Native title at common law is not founded upon any theory of fairness or justice. It was the only possible accommodation of the rights of settlers and aboriginal people. It was what pragmatism demanded. Marshall CJ rejected any inquiry:

> ... into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.[23]

The European nations wanted the land and they took it. The common law responded by devising a concept that sustained the property rights sanctioned by the government and yet in part maintained the rights of the aboriginal people.

4. *The Universality and Longevity of Native Title at Common Law*

A concept that is based on human experience and pragmatism is likely to be universal in application and of great longevity and so native title at common law has proven to be. The concept is the foundation of the law relating to Indians in the United States. It has been repeatedly affirmed by decisions of the Supreme Court.[24] By 1941 the Court was able to declare in *United States v Sante Fe Pacific Railroad*:

> Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States ... This policy was first recognised in *Johnson v McIntosh* and has been repeatedly reaffirmed ... Indian right of occupancy is considered as sacred as the fee simple of whites.[25]

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21 Id at 591.
22 Id at 588.
23 Ibid.
24 *Worcester v Georgia*, 6 Pet 515 (1832); *United States v Cook*, 86 US 591 (1873); *Cramer v United States*, 261 US 219 (1922).

In *Oneida Indian Nation v County of Oneida* in 1974, it was observed:

> It very early became accepted doctrine in their Court that although fee title to the lands occupied by Indians when the colonials arrived became vested in the Sovereign — first the discovering European nations and later the original states and the United States — a right of occupancy in the Indian tribes were nevertheless recognised. That right, sometimes called Indian title and good against all but the Sovereign, could be terminated only by Sovereign act.[26]

Not only the law, but the policy of the United States, has been founded on recognition of the concept of native title at common law. The policy of treaties and agreements with the Indian peoples and the establishment of the statutory Indian Claim Commission is founded on the settlement of native title.

A similar pre-eminence is evident in Canada. The settlement of Ontario and Western Canada was founded on treaties and agreements providing for the settlement of native title. The concept has strengthened over the years. By 1979 the Federal Court of Canada could declare: "The value of early American decisions to a determination of the common law of Canada as it pertains to Aboriginal rights is so well established in Canadian courts, at all levels, as not now to require rationalisation."[27]

The concept was applied very early on in New Zealand. In 1847 it was acknowledged that the concept was part and parcel of the common law of New Zealand. Chapman J in *R v Symonds*[28] relied on the principles declared in *Johnson* and asserted " ... that in solemnly guaranteeing the Native title ... the Treaty of Waitangi confirmed by the Charter of this Colony, does not assert either in doctrine or in practice anything new and unsettled."[29] The Privy Council approved the analysis of Chapman J and the reliance on *Johnson* in *Nireaba Tamaki v Baker*.[30]

All members of the High Court in *Mabo*, who found in favour of the concept of native title, relied upon the North American jurisprudence.[31] The tendency was to cite the Canadian cases of *Calder* and *Guerin*, but they explicitly relied upon *Johnson*. The concept devised by Marshall CJ in 1823 has been recognised throughout the common law world.

5. *The Codification of Native Title by Australian Legislatures*

The concept of native title has a universality and longevity of the character of a fundamental tenet of the common law. The analysis offered above would suggest that its application in Australia was always inevitable and any

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25 314 US 339 (1941) at 345.
26 414 US 661 (1974) at 666 per White J.
27 *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 545.
28 (1847) NZPCC 387.
29 Id at 390.
30 (1901) NZPCC 371.
31 Above n1 at 423, 429, 433 per Brennan J, at 440 per Deane and Gaudron JJ, at 484 per Toohey J.

argument which would deny its application would, in the long term, fail. But the only instance of the judicial application of the concept is *Mabo*.

The answer lies in the codification of native title by Australian legislatures. Native title has been recognised in Australia. Unlike the other jurisdictions cited above, the legislatures in Australia have, in the main already moved to give effect to such rights to land as native title at common law recognises. Indeed the rights recognised in the Northern Territory and the northern part of South Australia may exceed those recognised under settlement agreements in Canada and the United States. The fundamental tenets of native title at common law have generally been given effect in Australia. The exception is Western Australia. It is the principal jurisdiction which has failed to recognise any interest resembling native title. It is also the State where the concept's application outside settled areas has important implications for resource development.

6. *Native Title at Common Law: A Long-standing Tenet of the Common Law of Australia*

The critics of the *Mabo* decision assert that recognition of the concept of native title brings about a change in the common law of Australia. Indeed they go further and assert that the law prior to the decision had been "clear" and "settled" ever since *Attorney General v Brown*[32] in 1847. Nothing could be further from the truth.

All that the High Court did in *Mabo* was to explicitly recognise what had already become clear: that native title was a part of the common law of Australia and the decision of Blackburn J in *Milirrpum v Nabalco*[33] was wrong. Almost immediately the decision in *Brown* was handed down in 1847 it was construed so as to contemplate native title at common law. *Brown* declared that title vested in the Crown upon settlement. The decision was cited the same year in *R v Symonds*[34] as being consistent with native title at common law. And such, of course, was the position declared in *Johnson* in 1823. As indicated above Canada acted upon the doctrine of *Johnston* thereafter.

Australia remained without a judicial declaration upon native title at common law until 1970. In that year Blackburn J handed down his decision in *Milirrpum*.[35] Blackburn J concluded that the "doctrine of communal native title ... does not form, and never has formed, part of the law of any part of Australia".[36] He did not rely on Australian authority because none of the cases raised any issue as to native title. He reached his conclusion only after declaring that the question whether Australian law recognised native title at common law "is one which can be answered only by an examination of what has happened in the laws of the various places where English law has been applied".[37] He then proceeded to examine the laws of those jurisdictions,

32 (1847) 1 Legge 312.
33 (1971) 17 FLR 141.
34 (1847) NZPCC 387 at 395.
35 (1971) 17 FLR 141.
36 Id at 245.

particularly the United States, Canada and New Zealand. He grossly misinterpreted the law of the United States,[38] and as a result could make no sense of it.[39] His analysis of the law of Canada was described by Hall J of the Supreme Court of Canada as "wholly wrong as the mass of authorities previously cited, including *Johnson v McIntosh* and *Campbell v Hall,* establishes".[40] Blackburn J concluded that New Zealand law embodied no doctrine of native title at common law, only after dismissing Chapman J's comments in *R v Symonds* as obiter and founded on an erroneous interpretation of the United States jurisprudence. He ignored Privy Council approval of Chapman J's analysis. Blackburn J's analysis of the native title at common law in all three jurisdictions was hopelessly flawed and wrong. And it was clear that it was wrong at that time as commentators made clear.[41] The High Court unanimously recognised that the decision in *Milirrpum* was "an arguable question if properly raised."[42]

In the result the decision in *Mabo* is merely an explicit statement of the common law of Australia which, given a suitable case, could have been made a long time before. The Privy Council[43] long ago made clear its acceptance of the doctrine of *Johnson.* Native title is properly recognised as a longstanding tenet of the common law of Australia. *Mabo* did not bring about a change in the law. It merely afforded the first explicit statement. It came so late only because legislative action throughout Australia had forestalled litigation.

7. *The Compatibility of Native Title, Property Holding and Resource Development*

Hugh Morgan would have it that the *Mabo* decision allows the "Bolshevik left" to triumph and that property holding and resource development are imperilled by the decision. Tim Fischer, has asserted that resource development in Western Australia and the Northern Territory are threatened. The remarks of Morgan and Fischer are grossly inaccurate.

Native title at common law effects a pragmatic compromise between the existing interests of property holders and the residual interests of Aboriginal people.[44] It differentiates between the settled and urban areas, which are not subject to claim, and the unsettled undeveloped and more remote regions, which are. Existing property holdings are not under threat. Future development in remote regions must however, be prepared to accommodate native title. The ability to bring a claim for native title does not bar or imperil resource

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37 Id.

38 Bartlett, R, "Aboriginal Land Claims at Common Law" (1983) 15*UWALR* 293 at 297.

39 Id at 298.

40 (1973) 34 DLR (3d) 145 at 200.

41 Lester and Parker "Land Rights: The Aborigines have lost a Legal Battle, But ... " (1973) 11 *Alta LR* 189; Hookey, J, "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia" (1973) 5 *FLR* 85; Bartlett, R, above n38.

42 *Coe v Commonwealth of Australia* (1979) ALJR 403 at 408 per Gibbs and Aikin JJ, at 411 per Jacob J , at 412 per Murphy J .

43 *St Catherine's Milling & Lumber Co v The Queen* (1888) 14 AC 46; *In re Southern Rhodesian* [1919] AC 211; *Amodu Tijani v Secretary Southern Nigeria* [1921] 2 AC 399; *A-G for Quebec v A-G for Canada* [1921] 1 AC 401.

44 Bartlett, R, "Land Subject to Claim: the Implications of *Mabo*" (1993) 22 *UWALR* 272.

development. It does, however, mean that resource developers, such as Hugh Morgan's Western Mining Corporation, must be prepared to recognise the Aboriginal interest in the land and to provide for it by agreement or by such provision as is consistent with the *Racial Discrimination Act*.

The foregoing essay has made clear the fundamental role of native title at common law in the United States and Canada. Yet both countries are leaders in mining, oil and gas and resource development.[45] And in both countries property rights are valued after the Western tradition and interfered with more reluctantly than in Australia. There is, of course, no inconsistency. Native title is properly compatible with resource development. Indeed the common law devised the concept as an effective workable compromise that enables resource development to proceed relatively harmoniously.[46] It is probably more accurate to view native title, not as a threat to resource development, but as a supportive concept. Aboriginal people, judging by North American experience, are likely to be proponents of resource development once given an opportunity to participate.

8. *Conclusion*

The decision in *Mabo* is of benefit to resource development in Australia. The decision gave explicit recognition to the concept of native title at common law. The common law has over two centuries established the concept. It is a pragmatic compromise derived from experience and disputes over that time between settlers, resource developers and Aboriginal peoples. It provides a long-term regime that enables the interests of all parties to be substantially met. The concept enables resource development to proceed with the support of the Aboriginal people.

The decision in *Mabo* is also of significance in the establishment of human rights in Australia. The common law has long set the minimum standard of human rights. The *Mabo* decision gives explicit recognition to native title as part of that threshold standard.

The concept of native title demonstrates the virtues of the common law tradition. It should not lightly be interfered with. All the values the common law brings to the concept would thereby be denied. But perhaps more fundamentally, some such concept as native title cannot be denied for ever. The common law seeks a long-term solution to disputes. Adoption of native title is inevitable.

Why would legislators interfere with the concept of native title? Argument for such interference is founded on a short-term, misguided view of the relationship of native title and property holding and resource development. Comparative experience rejects the argument. Native title at common law is a supportive concept in the legal regime governing resource development. Australia would threaten its property and resource development regime much more by denial of the concept than by adjusting to and accommodating it.

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45 See *Business Review Weekly*, 7 August 1992, "Land Rights versus Miners".

46 See remarks of Atkinson, W, in Bartlett, R (ed), *Resource Development and Aboriginal Land Rights in Australia* (1993).