NOTE

MABO V QUEENSLAND

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The topic of traditional native land rights continues to haunt Australian political debate. It is not in the forefront of discourse but it is a most persistent issue. This is because it is of crucial significance to the country's original inhabitants, especially. It is also because it is one of the principal agencies for confronting the reality of white Australia's historic treatment of the Aborigines and the reconciliation of that awful history today. For many, that "reconciliation" is achieved by drawing a curtain across this particular aspect of our past; the past is the past and this is the future. The signs are growing, however, that the legal system is gearing up to take a look, again, at traditional native land rights. In 1971, Justice Blackburn apparently said it all in *Milirrpum & Others v Nabalco Pty Ltd & Another* ("*Milirrpum*")[1] when he found that no native land rights survived white colonization in 1788. Subsequent Canadian Supreme Court cases, especially, have undermined the authority of that decision.[2] The High Court has now moved towards staging one more attempt at a legal atonement on the nation's behalf.

In late 1988, in *Mabo & Another v The State of Queensland & Another*,[3] ("*Mabo*") the High Court considered the topic of traditional Aboriginal land rights for the first time since 1979, in *Coe v The Commonwealth of Australia & Another*.[4] Those expecting an overturn-

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1. (1971) 17 FLR 141.
2. *Calder et al v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145; *Guerin et al v The Queen* (1985) 13 DLR (4d) 321.
3. (1988) 166 CLR 186; also reported at (1988) 63 ALJR 84. All references in this note are to the CLR.
4. (1979) 53 ALJR 403; (1979) 24 ALR 118.

ing of *Milirrpum* were disappointed, however. The majority stayed well clear of the central issue in the judicial component of the land rights debate: did Justice Blackburn err in *Milirrpum* in finding that no traditional native land rights survived the white settlement of Australia? The High Court concerned itself, instead, with argument over the validity of the Queensland Coast Islands Declaratory Act 1985 ("the Coast Islands Act").

The background to the case is as follows. Eddy Mabo is a Murray Islander. Murray Island is one of the Torres Strait Islands and was annexed to Queensland in 1879. The Murray Islanders have lived on the Islands since time immemorial and have fully maintained their association with the land (and the sea[5]) at all times.[6] In 1982, Mabo instituted proceedings stating, in effect, that the 1879 annexation had taken place subject to the existing traditional land rights of the Islanders.

The reaction of the then Queensland Government was malodorously predictable. They passed the Coast Islands Act. The Government claimed that no such rights existed but this Act purported to extinguish them, *from the date of annexation*, if they did exist and further provided that no compensation would be payable. It was a base attempt to crush the Mabo litigation. The Court could have heard argument on the substantive issue of whether or not the general law does recognise traditional native land rights (in keeping with developments in Canada and contrary to *Milirrpum*) but argument was confined to the issue of the validity of the Coast Islands Act. It was agreed by the parties that Mabo's statement of claim, inasmuch as it asserted traditional native land rights, ought to be *assumed* to be correct. If the Act were upheld, then, even if the assumption were correct, it would indeed stop the entire action in its tracks. The Act was, in fact, found to be invalid and the substantive issues were referred back to the Supreme Court of Queensland for hearing. The likelihood is strong, however, that they will wend their way back to the High Court.

5. The islanders have long exploited the resources of the surrounding seas. Their traditional claims *include* claims to the surrounding seas. These interests, if established, will add a new wrinkle to any consideration of the 1979 Australian Offshore Settlement. See further, R Cullen "Case Note: *Port MacDonnell PFA Inc v South Australia*" (1990) 16 Mon LR (forthcoming).
6. Unlike the mainland Aborigines, the Islanders did not have a vast continent over which to range. Their historical system of land allocation reflects this relative land scarcity.

Mabo's arguments against validity included: that the law was not for the peace welfare and good government of Queensland; that there were limits on the powers of the Queensland Parliament to deal with waste lands of the Crown; that Queensland was prohibited from interfering in the judicial process in this way; and that the Government could not deprive persons of property rights without compensation. All these arguments were rejected by the Court. But the argument that the legislation was inconsistent with the Commonwealth Racial Discrimination Act 1975 ("the Racial Discrimination Act"), and thus invalid pursuant to section 109 of the Constitution, was accepted. Section 10(1) of that Act says that, where a law of the Commonwealth or a State provides that a particular right enjoyed by persons of one racial or ethnic group shall not be enjoyed by another racial or ethnic group (or shall be enjoyed only to a lesser extent) then that law shall have no effect.[7]

Mabo argued that the Coast Islands Act discriminately limited or removed property rights of the Murray Island Aborigines. The Court ultimately split four:three in favour of this argument. Justices Brennan, Toohey and Gaudron, in a joint judgment, were not at all impressed with the Queensland legislation describing it as "Draconian"[8] and "destroy[ing] traditional legal rights"[9] and effecting an "arbitrary deprivation of property".[10] Their view essentially was that the Act discriminated against the Murray Islanders vis-a-vis other persons with interests on the Island contrary to section 10(1) of the Racial Discrimination Act.[11] Justice Deane arrived at a similar conclusion in a separate judgment.[12]

7. The effectiveness of this provision in binding the Commonwealth must be doubted. Any post-1975 Commonwealth legislation which conflicted with the Racial Discrimination Act would likely be construed as overriding the former Act due to it being later in time. It is possible (though not, I think, likely) that the High Court might follow the lead of the Canadian Supreme Court in their interpretation of Canada's 1960 *statutory* Bill of Rights in *R v Drybones* [1970] SCR 282 and *Hogan v The Queen* [1975] 2 SCR 574. That document was held to be effective to override later inconsistent Federal statutes. The Bill of Rights was characterized as a "quasi-constitutional instrument".
8. Supra n 3, 213.
9. Ibid, 218.
10. Ibid.
11. Ibid, 218-219.
12. Ibid, 232.

Justice Wilson was in the minority. He took the view that rather than being discriminated against, the Murray Islanders were just being *put on the same footing* as other Queenslanders by the Coast Islands Act. He acknowledged that this view likely would still leave the Murray Islanders with a deep feeling of injustice. But this was the legal position.[13] This judgment certainly shows great respect for the autonomy of the legislative arm of government but it is a fact of life that the Court wields political power also. It has to make judgments, frequently, on whether to defer to the legislature or not. When one bears this in mind, Justice Wilson's triumph of form over substance has little to commend it.

The other minority judges, Chief Justice Mason and Justice Dawson, essentially found themselves unable to draw any final conclusions about the validity of the Coast Islands Act without *first* establishing whether the law now recognized traditional native land rights.[14] Presumably if a majority of judges had taken this view, the assumption of the parties referred to earlier would not have been agreed to and Mabo's case would have been argued out in full.

In the event, the Coast Islands Act was struck down by a majority who doubtless recognized the egregious misuse of legislative power which confronted them. An important consequence for State Governments follows from the case: if traditional native land title *does* exist, then no post-1975 act of extinguishment can currently be effective. Thus the States will need to rely on pre-1975 acts of extinguishment or repeal (explicit or implied) of the Racial Discrimination Act if they wish to negate any otherwise recognizable traditional native land title.

Finally, neither of the minority judgments of Chief Justice Mason and Justice Dawson used the 1971 judgment of Justice Blackburn in *Milirrpum*[15] to help resolve the problems they faced in *Mabo*. *Milirrpum* still represents the law on traditional native land rights in Australia. Very simply put, Justice Blackburn found that no such rights existed in Australia. He acknowledged that the Aboriginal people of Australia lived according to an organized set of laws and rules prior to white

13. Ibid, 206.
14. Ibid Mason CJ, 199; Dawson J, 243.
15. Supra n 1.

annexation *but* he also found that Australia had been settled rather than conquered and deduced from this that any rights which may have existed were extinguished in 1788. The judgment has been subjected to repeated scrutiny, analysis and criticism.[16] It is arguable that the treatment of *Milirrpum* in *Mabo* could signify that, legally speaking, *Milirrpum* is not long for this world.

16. J Hockey "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?" (1972) 5 FL Rev 85; G Lester and G Parker "Land Rights: Australian Aborigines Have Lost a Legal Battle But..." (1973) 11 Alba L Rev 189; L J Priestly "Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case" (1974) 6 FL Rev 150; B Hocking "Does Aboriginal Law Now Run in Australia" (1979) 10 FL Rev 161; M Barker "Aborigines, Natural Resources and the Law" (1983) 15 UWAL Rev 245; R H Bartlett "Aboriginal Land Claims at Common Law" (1983) 15 UWAL Rev 293.

Review of P N Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector*, Canberra: Australian Institute of Criminology 1989. pp 1-344.

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Illegality by government agencies and agents in Australia is the material for this overdue contribution to the literature on the misuse and abuse of power. Peter Grabosky's earlier work on the effectiveness of regulatory agencies in the environment, consumer and occupational health areas is aptly extended in this review of the nature of government wrongdoing. The insights gleaned from an Australian Institute of Criminology seminar on Government Illegality held in Canberra in October 1986[1] provided further stimulus. At this seminar the thrust was not corruption by individual officials but illegal conduct by agencies and officers in the furtherance of government policy. Grabosky both refines and broadens this definition to include agencies at all levels of government from local council to federal agency and to assess the iatrogenic effects of machinery designed to control government illegality.

In this latest account the author adds to our perception of the problems and, in a brief introduction and more lengthy conclusion, seeks to locate the causes and remedies of "Wayward Governance". A synthesis of public administration, organisational theory, and theories of deviance (especially rational versions like Sutherland's differential

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1. P N Grabosky (ed) *Government Illegality* Seminar Proceedings 1-2 October 1986 (Canberra: Australian Institute of Criminology, 1987).

association) is attempted. This refreshing blend of political science and criminology should encourage others to consider the potential for collaboration on neglected topics such as state crime.

Grabosky has provided a compelling account of the diversity, voracity and sheer bloody-mindedness of some of Australia's bureaucratic crime. Illegal behaviour within government has generally been well understood in the context of police and prison cultures (the first five examples in fact deal with such matters), so it is interesting to observe similar phenomena in more diverse settings. There are 17 case studies, including the institutionalised brutalities of Grafton prison, special branch surveillance in South Australia, sexual harassment in the New South Wales Water Resources Commission, and the systematic electoral fraud, nepotism and financial chicanery of the Richmond City Council. Government illegality also involved diverse organisations such as the Deputy Crown Solicitor's Office, the Australian Dairy Corporation, the Housing Commission of Victoria, the Department of Transport and Works, and the Electricity Trust of South Australia ("ETSA").

Grabosky, applying a simple organising formula (how, why, response and consequences), dissects some familiar and not so familiar scandals, goofs, malicious practices and cover-ups which we Australians have begun to regard as a commonplace cost of government. This collection of malfeasance and calamity (the creation of a nuclear wasteland, the destruction of Australia's longest living life form and the desecration of a priceless cultural heritage) insists that we not only acknowledge but clean our dirty linen. As a society, our capacity for indignation is not inexhaustible, and as this book shows, our ability to institute and bolster effective remedies is considerably more difficult than we suppose. Although the exact extent of the threat of government illegality is unclear, it's danger is more fatal to treasured freedoms than other forms of crime.

Australia, the author suggests, has a relatively good record in terms of illegal government activity: people don't disappear into the bowels of police headquarters never to be seen again (although the odd mental patient may fall between the bureaucratic cracks) and torture is almost unknown in this country (if you exclude Grabosky's description of the calculated terror meted out by prison authorities at Grafton). Grabosky rightly argues that the costs of government illegality are considerable but the real harm is to intangibles like the principle of the rule of law.

While we are all victims, the costs are frequently borne disproportionately by the disadvantaged (Aborigines like John Pat, the custodians of Injalkajanama, migrants deprived of legitimate social security in the 'Greek Conspiracy' case, and ordinary Australians like Jane Hill and the electricity linesman of the ETSA), those who, "have the fewest resources, whether psychological, political or financial, with which to defend themselves".[2]

Grabosky has guided his selection of cases on the slender requirements of recency, and the display of variations in the nature and location of the problem. Consequently, the fundamental question of how representative these examples are and how prevalent government illegality is remains unclear, although by default the problem is apparently widespread. Admittedly, Grabosky starts with the proposition that governments should be and are expected to be moral exemplars in our society, unlike private corporations where illegality may be anticipated by their natural quest for profit.

Grabosky catalogues the causes of governmental deviance in terms of characteristics loosely defined as "organisational pathology",[3] perhaps suggesting that government illegality is abnormal - a highly debatable point. Amongst these characteristics of organisational pathology, a lack of resources in the agency itself gets short measure (in most of his examples, the agencies if anything, had too many resources). However, poor communication, (especially excessive secrecy), organisational fragmentation, bad leadership, the absence of internal monitoring, rapid expansion, little or no external control and extreme goal orientation (ends justify the means) are all factors that foster the climate for illegal activity. Here, the author provides a diagnostic checklist open to empirical scrutiny and a tool other researchers will find useful as a means for analysing risk.

These causes and characteristics are strung together to provide a "provisional theory of government illegality".[4] At best this is a good description of the organisational environment and processes that lead to illegality, but it says little directly about power and the psychology of authority. Such an ambitious conceptualisation warrants more syn-

2. P N Grabosky *Wayward Governance: Illegality and its Control in the Public Sector* (Canberra: Australian Institute of Criminology, 1989) 285.
3. Ibid, 286-294.
4. Ibid, 297-299.

thesis before an articulate "theory" capable of addressing more than descriptive processes emerges. The work will provide the ground for some lively debate, although many public servants will always find the ambiguities of real life decision making - determining what is justified and what is venal - a fine line. The virtue of the case studies is that the more subtle aspects can be recognised by the reader familiar with the culture of public servants and the nature of office politics.

Given the current enthusiasm of public service commissions for decentralisation, performance indicators, targeted auditing, unit accountability and other measures derived from the rubric of corporate planning and rational economics, it would be surprising if these measures did not bite. Grabosky gives little credence to these "administrative reforms" (he is also scathing about the limitations of remedies such as criminal and civil law); although such measures are effective in controlling financial risks, especially at lower levels, they do not prevent other forms of misconduct. Public servants may be scrupulously monitored in relation to their expenses and budgets but this often has no bearing on abuse or neglect of office. For such matters a number of checks and balances external and internal have grown up alongside traditional audits, judicial review and parliamentary overseeing.

Perhaps the best known of these mechanisms is the office of the Ombudsman, given the nickname "the mirror man" by prisoners, because he is always "just looking into it". Resistance, the author argues, especially by police unions to extensions of Ombudsman powers of review, suggests that this form of overseeing is not as toothless as the office's frequent failure to punish wrongdoers and prisoners' assessment would suggest. And in an unexpected way, the energy expended by officials to thwart such probing and to respond to lengthy inquiries, often leads to useful compromises and changes in practice. At worst, such reviews provide cold comfort to otherwise powerless victims and act as a ubiquitous check on bureaucratic behaviour.

Grabosky also reviews the role of the news media, noting that defamation laws and media concentration dilute their role as watchdogs. While freedom of information laws (available in only two jurisdictions - Victoria and the Commonwealth) have proven efficient "window dressing" covered by exemptions and retrieval costs. For the author, such an outcome does more harm than good: the symbolic power of "freedom of information" is fully exploited even though obtaining such information is expensive and easily frustrated. But

worst of all is the plight of the individual who, seeking to address illegality, is frequently vilified or shamelessly treated. Superintendent Daniels, for insisting on the truth about the prostitution business in Western Australia, and Detective Sergeant Phillip Arantz, for exposing the fraud in NSW police statistics are but two of many examples.

The approach that begins with broadly framed injunctions against communication and criticism by public servants should be abandoned and the courts should readily support principled disclosure by serving officials. As Grabosky perceptively notes, "Until appropriate structures are created to encourage principled organisational dissent in Australia, the likelihood that whistle blowing can serve as an effective countermeasure against government illegality is remote".[5]

While the culpability of officials and agencies varies from benign neglect to outright malice, the overriding impression is that government activity is administered in a culture of indifference. The solutions, in the eyes of the author, lie in invigorating our culture of participatory democracy and "... replacing a tradition of secrecy and cover-up in public affairs with an activist democratic culture, a new tradition of candour, openness and self-assessment".[6]

Exposé (author's disclaimer aside) of the kind reviewed here is useful, often putting into perspective what only hindsight can, and reminding us potential whistle-blowers of the byzantine character of Australian officialdom. The case studies, for the most part, make excellent vignettes, with his conclusion a sound explanation of the more instrumental aspects of the problem. Power, the engine for many of these calamities, seems neglected in this otherwise complete account and arguments about under control and over control are undeveloped. Newly created watchdogs such as the NSW Independent Commission on Corruption and the mechanisms created in the wake of the Fitzgerald inquiry were too new for inclusion in this account but will ensure a continued interest in Australian attempts to control government illegality. The works following this perceptively summarised account will be indebted to it. As an introduction to the issue of government illegality in Australia, this book should find itself on all our reading lists.

5. Ibid, 322.
6. Ibid, 331.