THE MABO CASE

The Court gives an inch but takes another mile

For over two hundred years
Aborigines have waited for Australian law
to respond properly to the injustices
caused by the white invasion.
The Mabo decision will prove
a great disappointment.

The Murray Islands lie well to the east of the gap between Cape York Peninsula and New Guinea., The total land mass of the three islands is a mere 9 square kilometres. These islands have been owned and occupied by the Meriam people for longer than anyone knows.

The Queensland Government wanted to remove any doubt that the it had total rights over the islands. So in 1985 it had Parliament pass the Queensland Coast Islands Declaratory Act. This Act was to abolish any claims to title to the islands by the Murray Islanders.

Three Islanders, including Eddie Mabo, took legal action against this Act, successfully arguing that the Act was contrary to the Racial Discrimination Act, and was therefore invalid.

Fearing renewed attacks from the Queensland Government, further action was taken in the High Court to have the rights of the Meriam people declared. Eddie Mabo died before the decision was handed down.

What the case decided.

The High Court ruled that :

1. Native title to lands in the Murray Islands were recognised and had survived the take-over of this country by whites.

2. The previous view by the courts, that neither Aborigines nor Murray Islanders existed at the time whites invaded this country, was wrong.

3. The rights of the Meriam people to their land could be taken away at any time by Government, now or in the past, provided it was done legally.

4. It was possible that Aborigines in the same situation as the Murray Islanders could likewise have their right to their traditional lands recognised.

5. Neither Aborigines nor, for that matter, anyone else could challenge in court the legitimacy of the white take-over of this country.

6. By a narrow majority, where native rights were recognised as having existed but have been taken away by government legally, either in the past or in the future, no compensation is payable.

Looking more closely:

Some very important preliminary matters :

1. The Murray Islanders did **not** argue against the claim by whites that the whole continent, including the Murray Islands, passed into the hands of the British when a flag was stuck in a beach at Botany Bay and proclamations read. The Islanders did not dispute this point. Consequently the case did not dispute the sovereign rights exercised by Australian governments.

2. **Nor** did they contest that from the day the British stepped on Australian shore, the common law of England applied throughout the length and breadth of the continent and its islands. In fact the case was dependent on that being so.

3. The issue was whether the Crown also took over native title as well as sovereignty when the flag was struck. The Queensland Government argued that this right also passed to the Crown. It was on this point that the Court ruled in favour of the Islanders and rejected the Government argument.

If the Murray Islanders sought no more than some legal protection from the Queensland Government's efforts to keep the "Fed's from our Aborigines," then for them the case was good news. However, the importance of the case is its anticipated bearing on the land rights of Aborigines elsewhere. In arriving at its decision the Court had to comment on the Aboriginal situation generally, because of the striking similarity of the circumstances of Aborigines and their claims, and that of the Murray Islanders.

Speaking of the form of title recognised as belonging to the Murray Islanders, the Court wondered how extensive were these rights. It was said -

> " Obviously the proportion [of the continent] was a significant one. Conceivably, it was the whole. "[1.]

The issues raised by the case:

a. EFFECTS of WHITE INVASION : TERRA NULLIUS and SOVEREIGNTY.

The first and most positive new step taken by the Court was to abandon the long held legal fiction that Australia was "no-man's" land when whites first arrived. In the Court's view:

> "Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788, *terra nullius* in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. These propositions provide a legal basis for and justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use. The official endorsement...provided the environment in which the Aboriginal people of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional lands. "

Normally constrained by previous decisions of the courts, the Judges pondered the problem and concluded that this fictitious legal theory, at least in relation to terra nullius, provided a basis
for acts forming the "darkest aspect of the history of this nation."[3.] In the circumstances, the Court felt compelled to review the previously accepted doctrine of terra nullius, and duly rejected it.

The sovereign rights of Aboriginal people, notwithstanding that the Islanders did not argue it, necessarily arose during the case for consideration. The Court was at pains to point out that it was the Crown and not the judges who took away the territory of Aborigines. In their view, the courts have failed only by not recognising any form of Aboriginal title.The physical loss of their territory and sovereignty was nothing to do

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[1.] per Deane and Gaudron JJ., at page 92
[3.] ibid.

with the courts. This attempt at distinguishing one area of injustice attracting the court's attention from another is palpably absurd and unsustainable.

The Court refused to follow precedent on the issue of terra nullius for to do so would be to maintain a legal fiction based on political convenience. Yet the very same convenience was relied on by the judges to shut the door to any Aboriginal hopes for arguing Aboriginal sovereignty in the courts.This aspect of the judgement is pure hypocrisy.

The Court sought to justify their pulling of the shades after having made their token response to the cries for justice from Aboriginal people, by suggesting that taking issue with the actions

of the Crown on sovereignty is a matter for the politicians, not the Court. How even more convenient! The politicians have not urged this view on the courts, making it all too obvious that the judges themselves want to wipe their hands of the whole issue and return to matters with which they are more familiar. Apart from relying on innapropriate and old legal precedent, the Court gave no reasoned arguments as to why this approach was adopted. Paradoxically, this same approach which was previously applied by the courts on the question of terra nullius was implicitly denounced by the Court.

What then is the practical effect of the courts closing their doors to Aborigines in this form, given that the most sympathetic politicians refuse to consider, let alone discuss, Aboriginal
sovereignty?

It is established law in Australia that government actions which go beyond their powers can be challenged in courts. Even if governments did attempt to take action on the issue of Aboriginal sovereignity, the courts would open their doors to challenges on the basis that the interests of white people should be protected from governments seeking to interfere with those rights. The High Court in effect puts Aborigines in a no-win situation. The Court knew full well the difficultiesAborigines have in getting access to the international law courts, and must be taken to know the politicians' attitudes. The Judges have effectively sought to quell any Aboriginal thoughts of sovereignty by closing off access to the usual forum, the courts.

The Court has given a clear and unambiguous message to Aborigines : "you want sovereignty, you'll have to retrieve it by the same process which led you to lose it." It amounts to tacit approval for self help, yet if Aborigines took up this calling the court would then deal with any "acts by Aborigines as unlawful". This was the kind of circular argument which courts also applied in the past, which the High Court now condemns. The inconsistencies in the judgements highlight the difficulties whites people have,whether they be professionals or not,in wanting to be seen as sympathetic, whilst at the same time supporting by their actions, white domination of not just Aboriginal people, but also our inherent rights.

b. TREATING ABORIGINAL SOCIETY AS BEING INFERIOR

There were three matters discussed in detail by the Court which are important if for no other reason but to show the inability of judges to pay due regard to Aboriginal legal rights without fearing the white backlash. It appears the Court had predetermined not to upset the established white control over Aborigines, and in going about their task let slip some pretty shoddy thoughts on the subject. The statements made by the judges provided an insight into the difficulties Aborigines will continue to have in seeking justice under white law.
The three matters were :

(i) Seeing Aboriginal society as "primitive".

Although the judges tried to portray their view as sympathetic to Aborigines the Judges apparently believed that, at the time of invasion, Aborigines were inferior to the people who invaded their lands.

The Court quite rightly examined contemporary international developments which showed that nomadic people in the Western Sahara had rights demanding recognition, and that it was no longer acceptable to draw adverse inferences from cultural differences. But having made the statement, the Court must only have paid it lip service. The Court went on to rule on the status of Aboriginal rights to land at the time of the invasion as not being equivalent to that of Europeans, but something less.They may have been "no less clear, substantial and strong than were the interests of the Indian tribes and bands of North America..."[5] . The analogy drawn with other native people and not whites amounts to a view that indigenous people were something less than Europeans, a racist position indeed. The judgements are heavy with positive information about Aboriginal political and social organisation, and connection with the land. What was it then which, apart from some underlying philosophy, led the Court to presume that Aborigines weren't quite up to scratch with Europeans. There was certainly nothing in the elaborate forms of material from which they quoted.

(ii) Seeing Aborigines as a race, not a nation of people.

It is clear from the judgements that the Court was dealing with Aborigines as a race and not a nation of people. One has some sympathy for the Judges here, for there has been too much acceptance by Aborigines themselves of white imposed definitions of what are Aborigines. This acceptance without murmur places the judiciary in something of a predicament : alter the definition of Aborigines away from "race", a term accepted by Aborigines as applying to them, and thereby run the risk of being attacked for imposing yet another white definition; or suffer attack for sticking with the term which found its suitability in bygone days and thereby reduce the rights of Aborigines accordingly.

[5] per Brennan J., at page 91

The importance of this distinction is critical in the finding of the existence of native title. Interests in land, whether held by individuals or the collective is, as we all know, capable of being handed down or disposed of. Aboriginal native title is not, according to the Court, as the group must retain their identity in a biological manner[6], the right being a personal one only[7]. This reduces the test of survival of Aboriginal rights to land to the "strains of blood ", and it is but a short step to once again class Aborigines as animals capable of having their entitlement accorded with the degree of "original blood".

At a time when Aborigines are moving in the direction of nationhood and joining all other peoples, including Australians, in determining their membership on non-biological lines, the High Court is marching to the tune of a different drum. The Court was unable to explain, let alone justify, its acceptance of the right of all peoples, except Aborigines, to determine the make-up of their communities in this way.

(iii) Setting the scene for assimilation

Enabling any community to exist in a non-dependent way involves having an economic base. Land, or rights over it, is the common foundation. For the Murray Islanders or Aborigines generally to be able to provide for their people independently of whites, land sufficient for their changing future needs is essential.

> The High Court ruled on this point that -
> "The rights are not, however, assignable outside the overall native system. They can be voluntarily extinguished by surrender to the Crown. They can also be lost by the abandonment of the connection with the land or by extinction of the relevant tribe or group."[8]

It seems that what the gods give, they can taketh away. Meantime, native rights are lost by removal of the group from the area, provided the removal is lawful. Australians can do as they wish with "their" land, unlike Aborigines. Effectively, these impositions on Aboriginal title anticipate the eventual dispersal of the communities with title reverting to the Crown. The so-called title then, amounts to no more than occupational rights. It is also made abundantly clear that the occupational rights are meant to represent a humane gesture by white authority.

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What is native title?

Native title is the right of occupation of a certain area of land, by a particular group who practice their traditions over it. The title may be used by the people to prevent interference with their occupation.

The use of the term "title" may be misleading. It is unlike a form of ownership as Australians know it. In fact, it is based on occupation, not ownership and is more

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[6] seeBrennan J., at page 59
[7] Deane and Gaudron JJ., at page 101
[8] ibid.

appropriate to be described in that way. Its status in relation to other interests in land is well down the scale, much closer to the bottom than the top.

It provides less than freehold, or land held under land rights legislation, or leasehold or even perhaps "deeds of grant in trust". It cannot be sold, traded or dealt with in any way except to be returned to the crown.

How can title be recognised?

The starting point for people claiming it is to show:

(a) they are in occupation of their traditional lands and have been since before the white man came;

(b) that their occupation of the land is based on traditions, customs and law.

Whether these two starting points can be established is a matter of fact to be decided by hearing from the people themselves, and others, as to how those customs etc. connect them to that land. If they successfully establish native title, the next question is:

Has native title survived white occupation?

The usual way for the title to be lost is, according to the Court, when :

1. The people lose their connection with the land, even where they have been forcibly removed;

2. The particular clan or tribe or individuals in whom title is recognised, have died out. The test for the demise of the relevant people is a genetic one.

3. The title has been effectively extinguished by some act inconsistent with native title. This will usually come from legislation or Crown grant which allows for :

(a) a church, school or other public facility to to be built on the land;

(b) land is set aside for a public purpose inconsistent with native title.

It is not enough, however, if such public purpose land -

* merely regulates the enjoyment of the land and is not thereby inconsistent with native title;
* simply creates a body to control the land but gives them no powers to interfere with native enjoyment;
* stops the land from being sold only, for this is consistent with what native title confers;
* creates reserves for Aboriginal people, or national parks, but does not confer title;
* or even prohibits people from a particular area. It would need to specifically refer to the particular Aboriginal group.

What if native title has been wrongly terminated?

If this occurred many years ago, it is not possible to to get a remedy through the courts because time limits are placed on such actions.

Where governments attempt nowadays to get rid of native title illegally i.e. through invalid legislation, it has no effect on the title. The attempts may be invalidated because, for instance, it may offend against the Racial Discrimination Act

because it was especially aimed at a "racial" group and would have denied them equal treatment.

Compensation.

Although three of the seven Judges were in favour of compensating people for their loss of native title in certain circumstances, the majority were opposed to it. Therefore the court ruling is that Aboriginal people forced from traditional lands not only cannot get native title recognised, but get no compensation either.

This is another factor showing the lack of worth of native title when compared with other forms of title to land.

Conclusion

The Mabo decision will find support in two groups : firstly among Aboriginal groups seeking application of the more useful aspects of the case. Groups in isolated areas who have, in substance, maintained their traditions and their relationship with the land, can arguably rely on the decision as an effective device to prevent interference with their occupation of those areas. Drafters of legislation will not find much difficulty however in circumventing the defence lines put up by the case where governments are intent upon extinguishing Aboriginal rights in these areas.

The second group to find joy in the decision will be those whose ideas on the destiny of Aboriginal people rests entirely upon manipulation of white compassion to our advantage. Our rights are determined by the strength of support we can muster from the white population. So if land rights is popular, you have it; otherwise you await the turning of public opinion in your favour. For them, our only hope is to remain loyal to whites, their institutions and forms of justice. They would portray the decision in the best possible light, as a most symbolic turn in the direction of Aboriginal matters. On analysis however, it is difficult to see any substance in this view.

On the other hand, the decision will find many critics within the Aboriginal community, all of whom justifiably expected more. Out of the 300,000 Aborigines in Australia, no more than a third live in rural areas [9]. Of these, very few live in the isolated areas so necessary to attract the cover of Mabo. What
then of the remaining 250,000 or more Aborigines? Is their fate pre-determined by the extent to which they have suffered even more hardship through being more exposed to white contact?

There will be two other grounds for criticism. One is that the Court did not overturn anything of substance, but merely propounded white domination and superiority over Aborigines by recognising such a meagre Aboriginal form of rights over land. The Judges did little more than ease their own conscience of the guilt they so correctly feel for maintaining white supremacy. The other criticism is the effective

[9] 1986 census

abandonment by the legal system of the most disadvantaged and least powerful people in Australia to compete amongst other more powerful lobbyists for government favours. If Mabo represents the best that the legal system has to offer, then Aborigines will be put off by the effort and costs involved in litigating for such puny reward.

Mabo offers something for those who are grateful for small blessings, but nothing in the way of real justice.

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