Can the State's Rewrite Mabo (No 2)? Aboriginal Land Rights and the Racial Discrimination Act

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1. *Aboriginal land rights established*

The High Court's decision in *Mabo v the State of Queensland*[1] (establishes the continuity of Aboriginal title to land in Australia, notwithstanding the occupation of Australia by British colonists and the acquisition by the Crown of sovereignty over Australia and radical title to land. As Brennan J expressed the central proposition in *Mabo (No 2)*, "[n]ative title to land survived the Crown's acquisition of sovereignty and radical title."[2]

However, Aboriginal title to land did not necessarily survive the actions of the Crown, over the years following occupation, in alienating land by granting interests inconsistent with native title to settlers, miners and other developers. The process of occupation and development have, in short, whittled away Aboriginal title to much of Australia, leaving perhaps only a remnant in the hands of the descendants of the original owners. Just how much has survived 205 years of incursion, development and grants of freehold and leasehold interests remains to be worked out, taking into account indigenous law, the historical connection between indigenous peoples and the land in question, and any dealings with that land over the short period[3] since the coming of the British colonists.[4]

2. *Can land rights be extinguished?*

My immediate concern is not with the complex, and politically and culturally sensitive process of identifying the remnant. Rather, I want to consider a shorter but equally sensitive question. How secure is that undetermined remnant? Can the High Court's hypothetical recognition of Aboriginal title to Australian land be undone by Australian governments or parliaments? More

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1 (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1 (hereafter *Mabo (No 2)* with all page references will be to (1992) 175 CLR 1.

2 Id at 69.

3 Just 205 years — a tiny fraction of the more than 40,000 years of Aboriginal occupation of Australia.

4 The larger remnants are likely to be found in Western Australia and the Northern Territory, where the process of alienation of Crown land has been pursued less enthusiastically than in the eastern and southern States.

specifically, can the surviving Aboriginal title be extinguished by the Australian States?[5]

The possibility of that extinguishment was acknowledged by Brennan J in *Mabo (No 2)*. First, the Crown could achieve extinguishment by alienating Crown land, through grants of freehold or leasehold, or by appropriating that land for its own use, as for roads or other permanent public works.[6] The Crown's actions must be valid: in particular, those actions must fall within the scope of the Crown's prerogatives, and, they must be consistent with the valid laws of the Commonwealth, including the *Racial Discrimination Act* 1975 (Cth).[7] Secondly, State parliaments can exercise their general legislative powers[8] and enact legislation extinguishing Aboriginal title. However, as with the Crown, legislative extinguishment of Aboriginal title must be consistent with the valid laws of the Commonwealth.[9]

3. *The Racial Discrimination Act*

The clearest constraint on executive or legislative initiatives to extinguish Aboriginal title derives from the Commonwealth's *Racial Discrimination Act* 1975, whose protective effect was acknowledged by most members of the Court in *Mabo (No 2)*.[10]

The Act includes two substantive provisions which might be read as constraining the States and Territories from acting to extinguish Aboriginal title. First, s9(1) of the Act declares unlawful the doing of any act by a person "involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin" which nullifies or impairs the recognition, enjoyment or exercise, on an equal footing, of a human right or fundamental freedom.[11]

Secondly, s10(1) of the Act overcomes any provision of a Commonwealth, State or Territory law which withholds from persons of one race, colour or na-

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5 It is not the purpose of this short comment to explore the parallel question — can the Commonwealth, through legislative or executive action, extinguish Aboriginal title? A Commonwealth legislative initiative would raise the issue of the proper scope of s51(xxvi) (the "race" power) and the issue of the limiting effect of s51(xxxi) (the acquisitions power), referred to by Deane and Gaudron JJ in Mabo (No 2), above n1 at 111.

6 Above n1 at 71. Although Deane and Gaudron JJ (at 121) and Toohey J (at 192-94) doubted the existence of a prerogative power to extinguish Aboriginal title, it appears that the majority of the Court accepted that the Crown's prerogatives would support extinction: see above n1 at 15 per Mason CJ and McHugh J.

7 Ibid per Brennan J.

8 For example, to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever: Constitution Act 1902 (NSW), s5; or to make laws in and for Victoria in all cases whatsoever: *Constitution Act* 1975 (Vic), s16.

9 Above n1 at 111-12 per Deane and Gaudron JJ; at 214-15 per Toohey J.

10 Id at 15 per Mason CJ and McHugh J; at 71, 74 per Brennan J; at 111-12 per Deane and Gaudron JJ; at 214-15 per Toohey J.

11 Under s9(2) of the Act and Art 5 of the International Convention for the Elimination of All Forms of Racial Discrimination, the rights thus protected include the right to own and the right to inherit property; and, according to Brennan, Toohey and Gaudron JJ in *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 217, the protected rights also include the right not to be arbitrarily deprived of property.

tional or ethnic origin a right that is enjoyed by persons of another race, colour or national or ethnic origin by declaring that the first-mentioned persons are to enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.[12]

The operation of these provisions is modified by a third provision, s8(1), which declares[13] that Part II of the Act, including ss9 and 10, does not apply to special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring protection to ensure equal enjoyment or exercise of human rights and fundamental freedoms.

4. *The impact on State initiatives*

The operation of the Racial Discrimination Act in relation to State or Territory initiatives which might reverse the effect of the decision in *Mabo (No 2)* appears to be as follows: if a State government were to assert its prerogative power in relation to waste lands of the Crown,[14] and alienate or appropriate to its own use land held by a group of Aboriginal people under Aboriginal title, the question would arise whether the Crown in right of the State or Territory, a person bound by the *Racial Discrimination Act*,[15] had done an act involving a distinction based on race which had the effect of nullifying or impairing the exercise, on an equal footing, of the right to own and not to be arbitrarily deprived of property within s9(1). It might be said that, ordinarily, property is acquired for a public purpose only on terms which provide for payment of fair compensation.[16] If the Crown were to act so as to remove the rights to land held by Aboriginal people on terms which did not provide for fair compensation, then the people's right to hold property and to resist arbitrary deprivation of property would have been nullified or impaired in a way which distinguished between members of the Aboriginal race and others. The Crown's act would offend s9(1) and would be unlawful.

The impact of the *Racial Discrimination Act* on State legislation is illustrated by the High Court's decision in *Mabo v Queensland (No 1)*.[17] The *Queensland Coast Islands Declaratory Act* 1985 (Qld) ("*Queensland Act*") was enacted after the commencement of the proceedings which eventually resulted in the High Court's decision in *Mabo (No 2)*. The Act was construed by a majority of the Court[18] as extinguishing all land rights of the indigenous in-

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12 Again, the rights to which equal access and enjoyment are thus guaranteed include the right to own and the right to inherit property and the right not to be arbitrarily deprived of property: below n17 at 216-17 per Brennan, Toohey and Gaudron JJ; above n1 at 215-16 per Toohey J.

13 When read with para 4 of Art 1 of the Convention.

14 As recognised, eg, by Brennan J in *Mabo (No 2)*, above n1 at 63-4.

15 *Racial Discrimination Act 1975* (Cth), s6.

16 In *Mabo (No 2)*, above n1 at 214, Toohey J made this point and referred to Commonwealth, State and Territory legislation which provided for the payment of compensation on compulsory acquisition.

17 (1988) 166 CLR 186; (1989) 63 ALJR 84; (1988) 83 ALR 14 (hereafter all page references will be to (1988) 166 CLR 186), .

18 Mason CJ, Wilson, Brennan, Dawson, Toohey and Gaudron JJ, Deane J dissenting on this

habitants of the Murray Islands in the Torres Strait, in so far as those rights had survived the annexation of those islands by Queensland in 1879.

When the State of Queensland amended its defence in the proceedings brought against it by Eddie Mabo and others so as to plead the *Queensland Act*, the plaintiffs demurred to that defence, contending that the *Queensland Act* was invalid because it was inconsistent with ss9 and 10 of the *Racial Discrimination Act*. A majority of the Court[19] concluded that the *Queensland Act* was inconsistent with the *Racial Discrimination Act* and was, by virtue of the operation of s109 of the Constitution, invalid. The *Queensland Act* was not inconsistent with s9 of the *Racial Discrimination Act*: that provision "proscribes the doing of an act [but] does not prohibit the enactment of a law",[20] a point which had been made in the earlier case of *Gerhardy v Brown*.[21]

However, the *Queensland Act* was inconsistent with s10(1) of the *Racial Discrimination Act*. On the assumption that the plaintiffs had a surviving traditional title to land in the Murray Islands, Brennan, Toohey and Gaudron JJ said that the general law of Queensland would recognise two categories of legal rights over the Murray Islands: traditional rights and rights granted under Queensland Crown lands legislation. The former rights were held by the Miriam people, the latter by people of various races, and national or ethnic origins etc:

> By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. The Act thus impaired their human rights while leaving unimpaired the corresponding human rights of those whose rights in and over the Murray Islands did not take their origin from the laws and customs of the Miriam people.[22]

Deane J analysed the problem in substantially the same terms: assuming that traditional titles to land in the Murray Islands survived the annexation of the Islands by Queensland in 1879, the subsequent law of Queensland recognised two categories of proprietary rights or interests — those founded on traditional claims and those founded on "European law".[23] The rights extinguished by the *Queensland Act* were confined to rights falling in the first category, so that the practical operation or effect of the Act was to extinguish traditional rights while leaving intact rights whose ultimate source lay in European law. The practical effect was to deny to the Miriam people, the traditional inhabitants of the Murray Islands, a right enjoyed by persons of another race, colour or ethnic origin and so attract the protective provisions of s10(1).[24]

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point.

19 Brennan, Deane, Toohey and Gaudron JJ; Wilson J dissenting; Mason CJ and Dawson J declining to decide.

20 Above n17 at 216.

21 (1985) 159 CLR 70 at 81 per Gibbs CJ; at 120-21 per Brennan J.

22 Above n17 at 218.

23 Id at 230.

24 Id at 231-32.

The result of this reading of the *Racial Discrimination Act* is to attach considerable protection to the rights recognised by the Court in *Mabo (No 2)* — a protection which, it appears, would not otherwise be available against State or Territory[25] attempts to undo that decision.[26] However, there are two ways in which a State or Territory may be able to take steps to adjust or even extinguish traditional land rights, without offending the *Racial Discrimination Act.*

5. *Indiscriminate interference with rights in land*

First, State legislation which affects Aboriginal title will not offend the *Racial Discrimination Act* if that legislation does not single out indigenous interests in and rights to land, that is, if the legislation applies indiscriminately to both traditional interests and those interests which derive their force from the legal concepts and systems introduced at the time of British occupation. A State law which authorised the extinction of all interests, other than those held by the Crown, in land would not, on its face, offend the *Racial Discrimination Act*. Of course, in assessing the validity of the State law, the law's practical effect must be taken into account. A law which is non-discriminatory on its face might be found to impact in a discriminatory fashion on the rights and interests of those holding traditional native or Aboriginal title to land, in a way which the law does not impact on those who hold non-traditional title to land. For example, a Queensland law declaring that absolute and unencumbered title to all land within a geographically defined area is now vested in Crown and that all competing claims to the land are extinguished would offend s10(1) of the Racial Discrimination Act if it were established that the land in the relevant area was exclusively, or even predominantly, held by Aboriginal or Torres Strait Islander people under traditional title.

On the other hand, real difficulties appear to lie in the path of the Crown taking advantage of this exception. As an exercise of the Crown's prerogatives in relation to Crown land is essentially specific[27] rather than general, a Crown alienation or appropriation of land still held under Aboriginal title would seem on its face to discriminate against the holders of Aboriginal title. The difficulty here is that titles which derive their legal force from earlier alienations are not amenable to extinction through a further alienation or appropriation by the Crown: the Crown's prerogatives in relation to that land are spent; so that any assertion of those prerogatives in relation to land held under Aboriginal title would expose indigenous title-holders to a jeopardy not faced by those whose rights in and over land derived, not from indigenous law and custom, but from an earlier Crown grant and Anglo-Australian legal con-

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25 In the absence of the *Racial Discrimination Act*, a Territory's attempt to extinguish native title would also confront the question of the extent of the prerogatives exerciseable by the Crown in right of that Territory. It might also call for a review of the orthodox view that s51(xxxi) of the Constitution does not impinge on exercises of legislative power in the Territories: *Teori Tau v Commonwealth* (1969) 119 CLR 564.

26 In *Mabo (No 2)*, above n1 at 15, Mason CJ and McHugh J indicated that the Crown's ability to extinguish native title was constrained only by the *Racial Discrimination Act* 1975 (Cth).

27 In that the alienation of Crown land or the appropriation of that land to the Crown's use calls for the identification of the land which is to be alienated or appropriated.

cepts.[28] Although members of the High Court acknowledged in *Mabo (No 2)* that the Crown had extinguished Aboriginal title in much of Australia through alienation[29] and that further alienations were conceptually possible,[30] the passage of the *Racial Discrimination Act* has probably closed off that possibility for the future.

6. *Special measures*

Secondly, the *Racial Discrimination Act* permits a state Parliament to single out indigenous rights to land where the legislation constitutes a special measure falling within s8(1) of the Act, that is, where the legislation extends to a particular racial or ethnic group or individual protection in order to ensure to them equal enjoyment or exercise of human rights and freedoms.

The provisions of s19 of the *Pitjantjatjara Land Rights Act* 1981 (SA) ("*South Australian*"), considered in *Gerhardy v Brown*,[31] provide an example of a racially-discriminatory law upheld on this basis. The provision denied any person who was not a member of the Pitjantjatjara people access to a large tract of land, comprising some ten per cent of the State. The Court held that, although s19 was prima facie inconsistent with s9 or s10[32] of the Racial Discrimination Act, it was a special measure because it was intended to protect and preserve the culture of the Pitjantjatjara.[33]

It is difficult to imagine how State action which impinged on or reduced traditional Aboriginal title to land could be justified in the terms required by s8(1) of the *Racial Discrimination Act*.[34] The legislation considered in *Gerhardy v Brown* reinforced the position of the traditional owners of the Pitjantjatjara lands; in the words of Brennan J, s19, by excluding nonPitjantjatjaras, enabled the Pitjantjatjara people to "foster their traditional affiliation with the lands, to discharge their traditional responsibilities, and to build or buttress a sense of spiritual, cultural and social identity"[35] in order to counteract "the [sadly familiar] phenomenon of landless, rootless Aboriginal peoples . . . incapable of enjoying and exercising 'on an equal footing' the human rights and fundamental freedoms that are the birthright of all Australian citizens".[36] However, State or Territory laws which interfered with or diminished those Aboriginal land rights which might now be recognised after *Mabo*

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28 To adapt the language of Brennan, Toohey and Gaudron JJ in above n17at 218, the Crown's necessarily selective exercise of its prerogative would "impair the human rights [of the holders of Aboriginal title] while leaving unimpaired the corresponding human rights of those whose rights in and over land did not take their origin from the [indigenous] laws and customs".

29 Above n1at 68 per Brennan J; at 110 per Deane and Gaudron JJ.

30 Above n1 at 70-1 per Brennan J.

31 See above n21.

32 The majority (Gibbs CJ, Mason, Murphy and Brennan J) were of the view that s19 of the *South Australian Act* would have been inconsistent with s10 of the *Racial Discrimination Act*; Brennan and Deane JJ would also have found inconsistency with s9 of the *Racial Discrimination Act*.

33 Above n21 at 104 per Mason J; at 113 per Wilson J.

34 Although this possibility was acknowledged by Brennan J in *Mabo (No 2)*, above n1 at 74.

35 Above n21 at 136 per Brennan J.

36 Ibid.

(No 2) would be more likely to retard the traditional affiliation of Aboriginal people with the land and accelerate the process of dispossession which has helped exclude Aboriginal people from the enjoyment of full citizenship.

Conclusion

This discussion of the protective impact of the *Racial Discrimination Act* suggests that it is that Act which is presently underwriting the Aboriginal titles recognised in *Mabo (No 2)*. The accuracy of that observation may be tested in the near future. In the week beginning 21 February 1993, the Northern Territory Government floated the notion of a legislative initiative to undo the effects of the decision in *Mabo (No 2)*. The Government acknowledged that the Commonwealth's *Racial Discrimination Act* would probably frustrate unilateral legislative action, but went on to call for a national co-ordinated approach. At the same time, that Government introduced a Bill in the Territory's Legislative Assembly, the confirmation of Title to Land (Request) Bill 1993. The Bill would, if passed, request the Commonwealth to legislate so as to validate existing non-customary title in the Territory and to declare that title to land in the Territory should not be affected by the *Racial Discrimination Act*. The return of the Keating Government to office on 13 March 1993 raises the question: will it respond to the Northern Territory Government's proposal (and to pressure from the development lobby for "clarification" of Aboriginal title)? If that response were to take the form of qualifying the *Racial Discrimination Act*, where would *Mabo (No 2)* stand?