
Chapter 1

BACKGROUND

Introduction

1.1 On 25 November 1993 the Selection of Bills Committee recommended that the provisions of the *Native Title Bill 1993* be referred to the Committee for inquiry and report¹. This recommendation was agreed to by the Senate. The Committee was required to report on or before 9 December 1993.

Background

1.2 The Bill was introduced into the Senate on 25 November 1993. The Bill is the first part of the Commonwealth's response to the decision of the High Court of Australia on 3 June 1992 in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. In the *Mabo (No 2)* decision the High Court stated that under the common law in Australia Aboriginal peoples and Torres Strait Islanders maintain that title to land which their ancestors held prior to the coming of the Crown, provided that since then it had not been extinguished.

The Mabo Decision

1.3 By a majority of 6 to 1 (Dawson J dissenting) the High Court declared that, apart from the Islands of Dauer and Waier and a small part of the island of Mer,

the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands.

The Meriam people inhabit the Murray Islands, which are the most easterly of the islands of Torres Strait. The Islands were annexed by Queensland in 1879. In upholding the claims of the plaintiffs the Court

¹ *Selection of Bills Committee Report No 7 of 1993*, 20 October 1993.

held that the inhabitants of the islands had their own customs and laws, and that their 'native title' to the land survived the annexation of the islands by Queensland.

What is 'Native Title'?

1.4 The concept of native title is not a creation of the High Court of Australia. It was a recognised part of the English common law well before Australia was settled by Britain. International law recognised conquest; ceding of power by the incumbent authority; and occupation or settlement of territory over which no right of ownership is asserted (territory that was *terra nullius*) as three of the effective ways of acquiring sovereignty over territory. Once the colonising power conquered, settled or was ceded the new territory, it obtained sovereignty over that territory and had the power to make new laws for and govern the territory. In the case of British colonies this meant that the common law of Britain was extended to the territory to the degree to which it was applicable. This included, of course, the common law with respect to the acquisition of rights in property.

1.5 It was pointed out by Brennan J in *Mabo* that:

[t]he general rule of the common law was that ownership could not be acquired by occupying land that was already occupied by another. As Blackstone pointed out:² "Occupancy is the thing by which the title was in fact originally gained; every man seizing such spots of ground as he found most agreeable to his own convenience, *provided he found them unoccupied by any one else*" (emphasis added).³

1.6 Under the common law the Crown has the ultimate title to all land with people holding subordinate interests in the land. The underlying title to land held by the Crown is known as the radical title, or the root title from which all others spring. Since the Crown holds the radical title to all land within a new colony it is able to grant any interest

2 *Commentaries on the Laws of England* 17th ed (1830) Book II, chapter 1, p 8.

3 *The Mabo Decision* Commentary by Richard H Bartlett and the full text of the decision; Butterworths 1993 p 31.

in land, which would be held of the Crown. If the land in question was uninhabited, truly a *terra nullius*, the Crown would take an absolute title to the land because there would be no other proprietor. But if the land was occupied, for example by indigenous inhabitants, and their rights and interests in the land are recognised by the common law, then the radical title which is acquired with the commencement of sovereignty does not destroy those rights.⁴

1.7 If there was a settled society with settled laws living within the territory before it was colonised then the change in sovereignty would not automatically extinguish existing rights to property. However, the pre-existing property rights were subject to extinguishment by the new sovereign power, either expressly or by necessary implication. Indeed, during the decade long Mabo litigation, the Queensland Government endeavoured to expressly extinguish any pre-existing title to the land by enacting the *Queensland Coast Islands Declaratory Act 1985* which declared that, upon the islands being annexed, they were 'vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever.' However, in 1988, the High Court of Australia ruled that this Act was invalid as it was contrary to the *Racial Discrimination Act 1975* (*Mabo v Queensland* (1988) 166 CLR 186 - known as *Mabo (No 1)*).

1.8 The High Court, in its *Mabo (No 2)* decision, analysed the decisions of English and Australian courts dealing with questions of the title to land in the colonies acquired by Britain, such as *The Case of Tanistry* (1608) Davis 28 dealing with the conquest of Ireland, *Witrong v Blany* (1674) 3 Keb 401 dealing with the conquest of Wales, and *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 397 dealing with the property rights of the indigenous people of Papua New Guinea.

1.9 Native title is not freehold title. This is because native title is a continuation of the interests in land which applied in the traditional community before the acquisition of sovereignty by the Crown. Thus the features of native title will vary, and will depend upon the laws, customs and usages of the community.

4 Brennan J p 34.

1.10 The six members of the High Court who found in favour of the applicants were in agreement about the proof required to establish native title. Proof of the existence of native title is relatively difficult to establish. The elements include the need to show the existence of an identifiable community or group; that there be a traditional connection with the land under the laws and customs of the Aboriginal group; and that there has been a substantial maintenance of the connection since Crown sovereignty. These elements will place strict limits upon the making of successful claims to native title.

Purpose

1.11 The main purposes of the Native Title Bill are:

- to recognise and protect native title;
- to validate existing Commonwealth land titles where they may be invalid due to the existence of native title, and to allow States and Territories to validate their own titles;
- to establish procedures for determining claims to native title; and
- to establish procedures for dealing with native title land.⁵

1.12 The Bill is structured with the definitions at the back and a table at the front of the definition sections identifying where each definition may be found.

1.13 Part 2 of the Bill recognises and protects native title. Native title may not be extinguished except in accordance with the Bill. The Mabo decision held that native title continued after the acquisition of sovereignty by the British Crown, and clearly indicated that the Crown may affect or extinguish native title. Third persons became concerned about the validity of their title. Accordingly, Division 2 of Part 2 provides for the validation of existing titles to land. The Bill enables the States

⁵ *Native Title Bill 1993 Explanatory Memorandum.*

and Territories to validate their 'past acts' on the same terms as is done for the Commonwealth's 'past acts'.⁶

1.14 Briefly, where freehold titles or commercial, agricultural, pastoral or residential leases may be invalid the Bill enables them to be validated and all native title is extinguished (unless it is preserved in a reservation). Where a mining lease is validated, native title is not extinguished, but aspects of it which are inconsistent with the mining lease will be suspended, and revive when the lease expires. (This is what the Bill calls the 'non-extinguishment principle'.) Compensation for any extinguishment of native title will usually be payable by the Government (Federal, State or Territory) which did the act which caused its extinguishment.⁷

1.15 Division 3 of Part 2 of the Bill sets out how native title may be affected by future acts. It provides a regime for the extinguishment of native title and other processes relating to future acts.

1.16 Division 5 of Part 2 of the Bill sets out the rules for the payment of compensation, and Division 6 requires native title to be held by a body corporate.

1.17 Part 3 of the Bill sets out the procedure by which people can claim native title, and how it is to be determined.

1.18 The remainder of the Bill deals with matters including the setting up of the National Native Title Tribunal and the Registrar thereof, as well as the procedural aspects of hearings before the Tribunal and the Federal Court.

The Western Australian Legislation

1.19 The Western Australian Government has enacted the *Land (Titles and Traditional Usage) Act 1993*. This Act:

6 The expression 'past act' is a defined term: see clause 213 of the Bill.

7 Bills Digest No. B.63 - Native Title Bill 1993 Department of the Parliamentary Library p 2.

- confirms the validity of all titles already granted;
- extinguishes common law native title throughout Western Australia, and replaces it with statutory rights of traditional usage. These rights are defined in the Act by reference to the 'traditional laws and customs' criterion used by the High Court of Australia in the Mabo judgments;
- gives legal protection to rights of traditional usage without the need for any proceedings, declaration, determination or registration;
- provides that if the Crown moves to take action which would extinguish or impair rights of traditional usage those claiming to be affected will be entitled to be heard and, where the claim is made out, to be compensated; and
- separates the matter of granting the title, and that of providing compensation for extinguishment.

1.20 The Western Australian Act received the Royal Assent on 2 December 1993. It commenced operation on the same day, pursuant to section 2 of the Act.

The Committee's Inquiry

1.21 The Committee received 109 submissions. Appendix 1 lists the names of those who made submissions.

1.22 The Committee held public hearings to discuss the provisions of the Bill in Brisbane on 1 December 1993, in Darwin on 2 December 1993, in Perth on 3 December 1993 and in Canberra on 6 and 7 December 1993. Appendix 2 lists the persons and organisations who gave evidence to the Committee at the public hearings.

Consultation

1.23 The Committee acknowledges the breadth and diversity of opinion about the *Native Title Bill 1993* presented during the five days of hearings in Brisbane, Darwin, Perth and Canberra. The Committee thanks all those who contributed to its inquiry. Clearly the High Court's

decision has generated considerable interest as Australians adjust to the reality of native title within the common law.

1.24 The Committee received written and oral submissions, and suggested amendments, from a wide range of community members (see appendices 1 and 2). Despite the short timetable for reporting the Committee was able to hear from many interested parties and was assisted by detailed submissions. The views presented to the Committee included representations from the following groups:

- Aboriginal Elders;
- Aborigines who have been dispossessed of their native title;
- Aborigines and Torres Strait Islanders who have access to remnant native title in Australia;
- Land Councils;
- Aboriginal legal service groups;
- Counsel involved in the *Mabo (No 2)* litigation;
- Practising lawyers engaged in *Mabo* style litigation;
- Academic lawyers;
- Mining industry representatives;
- Pastoral and grazing industry spokespersons;
- Aviation industry representatives;
- Representatives of cattlemen in the Northern Territory;
- Fishing industry representatives;
- Churches;
- Members of Government and Opposition at State, Territory and Commonwealth levels, and their officials;

- Small business representatives; and
- Academics from a range of disciplines.