MABO v. QUEENSLAND[1]

INTRODUCTION

This is the first stage in litigation which will eventually confront the High Court with an explosive question: does Australian law recognize traditional native title?

The plaintiffs argued their case on three grounds. Their submission that the Queensland Coast Islands Declaratory Act 1985 (Qld) ('the State Act') failed to extinguish the native title claimed by the plaintiffs was accepted only by Deane J.. Secondly, the plaintiffs submitted that the State Act was beyond the power of the State Parliament on a variety of grounds. The majority joint judgment (Brennan, Toohey, Gaudron JJ.), Deane J. (also in the majority), and Mason C.J. gave scant recognition to these arguments. But the case is chiefly interesting for the division of opinion over the plaintiffs' third submission. On their interpretation, s. 10 of the Racial Discrimination Act 1975 (Cth) ('the Commonwealth Act') was inconsistent with the State Act. Contrasting views were expressed by Wilson J. (dissenting) and the majority. No concluded opinions were expressed by the other members of the minority, Mason C.J. and Dawson J., who refused to decide the case because questions of fact about the nature and extent of the claimed rights were unanswered.

FACTS

The plaintiffs were Murray Islanders and members of the Miriam people. On their own behalf, and on behalf of their family groups, they claimed declarations that they were the owners by custom of, the holders of traditional native title in, and the holders of usufructuary rights over the Murray Islands in the Torres Strait. They also claimed damages and injunctions against the State of Queensland.

The Murray Islands became part of the Colony of Queensland on 1 August 1879. When the action was instituted in 1982, Queensland contested the existence of the various rights and interests asserted by the plaintiffs. To buttress its defence, the Queensland Parliament later enacted the Queensland Coast Islands Declaratory Act 1985 (Qld). The Act provides:

> 3. For the purpose of removing any doubt that may exist as to the application to the islands of certain legislation upon their becoming part of Queensland, it is hereby declared that upon the islands being annexed to and becoming part of Queensland and subject to the laws in force in Queensland—
> (a) the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland for the purposes of sections 30 and 40 of the Constitution Act;
> (b) the laws to which the islands became subject included the Crown lands legislation then and from time to time in force;
> (c) the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation then and from time to time in force in Queensland.
> 4. Every disposal of the islands or part thereof purporting to be in pursuance of Crown lands legislation after the islands were annexed to and became part of Queensland shall be taken to have been validly made and to have had effect in law according to its tenor.
> 5. No compensation was or is payable to any person —
> (a) by reason of the annexation of the islands to Queensland;
> (b) in respect of any right, interest or claim alleged to have existed prior to the annexation of the islands to Queensland or in respect of any right, interest or claim alleged to derive from such a right, interest or claim; or
> (c) by reason of any provision of this Act.

After the Act was passed, Queensland amended its defence to rely on the Act. The plaintiffs demurred to the amended defence in so far as it relied upon the State Act.

By consent of the parties, the hearing proceeded on an important assumption. The traditional legal rights claimed by the plaintiffs were presumed to exist unless they had been validly extinguished by the State Act. The propriety of this assumption was questioned by two of the dissenting judges. Dawson J. considered that until questions of fact about the precise character and extent of the rights claimed by the plaintiff were determined, 'it is not possible to say whether the defences impugned by

[1] (1988) 83 A.L.R. 14.

the demurrer are entitled to succeed or not'.[2] For this reason alone it was impossible to allow the demurrer.[3] Similarly, Mason C.J. held that the plaintiffs' principal argument, namely that s. 10 of the Racial Discrimination Act 1975 (Cth) applied to them and was inconsistent with the State Act, could not finally be answered until findings were made about the precise nature and extent of the rights and interests asserted.[4] This view may be contrasted with that of Deane J.[5] Although acknowledging the 'difficulty and artificiality' involved in dealing with the plaintiffs' first argument on such an assumption, he considered that the alternative would be 'wasteful of judicial and professional time and effort and unfairly burdensome on the parties.'

CONSTRUCTION OF THE STATE ACT

The plaintiffs argued that the State Act was not sufficiently specific to extinguish their proprietary rights. All except Deane J.[6] held that the State Act extinguished the traditional legal rights asserted by the plaintiffs. They relied on s. 3(a) of the State Act which 'declares that all rights which would otherwise have survived annexation to encumber or affect the Crown's title to the whole of the islands were extinguished.'[7] The joint judgment of Brennan, Toohey and Gaudron JJ. also relied upon the intention revealed by the Minister's second reading speech.[8]

The joint judgment was anxious to find an alternative construction. To extinguish the claimed rights and deny any rights to compensation would be 'draconian'[9], but no other reasonable interpretation was possible. This approach reflects the traditional presumption that statutes do not divest people of proprietary rights without compensation.[10] It may also show sympathy with the view that native title can only be extinguished if the legislation is 'specific' and the intention 'clear and plain'[11]

Deane J. adopted the traditional presumption and rejected the plaintiffs' assertion that title could not be displaced by legislation in general terms which failed to identify specifically the particular proprietary rights and interests to be confiscated or extinguished. His Honour considered such a stance equivalent to a constitutional constraint on legislative power, and more than a mere rule of construction.[12] Two alternative constructions of s. 3 of the State Act were discussed: first, that s. 3 extinguishes any surviving traditional rights whether or not they would jeopardise or invalidate any past dealings with the islands or part of them; second, that s. 3 only extinguishes a right which might affect the enjoyment of an interest purportedly acquired pursuant to Crown lands legislation. The second more confined construction was only briefly examined by the joint judgment, but Deane J. built a cogent argument to support it. His reasons included: the strong presumption already discussed; long established notions of justice which can be traced back at least to Magna Carta;[13] common sense; and textual considerations suggesting that s. 3 is designed to lay a declaratory foundation for s. 4. Deane J. argued that the introductory words of s. 3 indicate that the declarations are made for a limited purpose. Moreover, because s. 3 is framed in the past tense, its purpose is to 'set the stage for the validation of past transactions'.[14]

Deane J.'s textual considerations are, it is submitted, not convincing. He does not address the argument implicitly accepted by the other judges, that s. 3 is the principal provision, and that s. 4 is merely designed to clarify the consequences of the declarations in s. 3.[15] Further, the introductory

2 *Mabo v. Qld.* (1988) 83 A.L.R. 14, 51.
3 *Ibid.* 53.
4 *Ibid.* 18.
5 *Ibid.* 39.
6 *Ibid.* 15, 20, 30, 51.
7 *Ibid.* 30.
8 *Ibid.* No Queensland statute expressly authorizes recourse to the Minister's second reading speech to ascertain the intention of an Act.
9 *Ibid.* 29.
10 *E.g. Clissold v. Perry* (1904) C.L.R. 363, 373; *Colonial Sugar Refining Co. Ltd v. Melbourne Harbour Trust Commissioners* (1927) 38 C.L.R. 547, 559.
11 *Calder v. A-G of British Columbia* [1973] S.C.R. 313, 402, 404 (*per* Hall J.).
12 *Mabo v. Qld* (1988) 83 A.L.R. 14, 38.
13 (1215) 17 John.
14 *Mabo v. Qld* (1988) 83 A.L.R. 14, 39.
15 *Ibid.* 15, 20, 29, 51.

words of s. 3 (the declarations are made for the 'purpose of removing any doubt that may exist as to the application to the islands of certain [Crown lands] legislation upon their becoming part of Queensland') are consistent with either construction. Finally, use of the past tense is of no particular significance because declarations may deny historical fact.

It is submitted that the reasoning of the joint judgment is correct. According to Deane J.'s preferred construction, unalienated Crown land on the Islands would still be subject to traditional rights. Such rights would only abate when the land was alienated. Yet this is inconsistent with the declarations in s. 3(a), that the Crown's title was freed of other rights at the date of annexation. In addition, s. 3(a) refers to 'the islands', whereas s. 4 refers to 'the islands or part thereof'. This indicates that the declaration in s. 3(a) applies to *all* of the islands, whereas s. 4 is only directed to those parts of the islands disposed of by Crown lands legislation.

QUESTIONS OF STATE CONSTITUTIONAL POWER

The plaintiffs advanced four reasons to support their argument that the State Act was beyond the power of the Queensland legislature.

First, the Act was not a law for the 'peace, welfare and good government' of Queensland. Wilson J., with whom Mason C.J. agreed, reiterated that the power of a legislature to make laws for the 'peace, welfare and good government' of a State is a plenary one, 'the exercise of which lies within the discretion of the legislature itself.'[16] As the Murray Islands were part of Queensland,[17] this argument failed. No other judgment examined the issue.

Second, the plaintiffs contended that the Queensland legislature has limited powers to deal with waste lands of the Crown. Dawson J. traced the constitutional history by which the Queensland Parliament inherited power to deal with waste lands.[18] He concluded that 'the limitation upon the power to deal with waste lands cannot, in any event, affect that power in relation to the Murray Islands'.[19] Mason C.J. and Wilson J. were in agreement,[20] while the other judgments were again silent.

Third, it was argued that the Queensland Parliament lacks power to interfere with the judicial process. According to the minority, this argument was misconceived because the State Act 'is not directed to the judicial process itself', but rather 'extinguishes the rights of persons who happen to be litigants seeking a vindication of those rights.'[21] In any event, Wilson J. doubted whether the doctrine of separation of powers, upon which the argument was apparently based, is entrenched in the Queensland constitutional framework.[22] The final reason, that the Queensland Parliament cannot acquire property without paying just compensation, was rejected by Wilson J.. Provided that an acquisition is effected 'according to law', there is no constitutional obligation on the States[23] to pay compensation.[24] Mason C.J. and Dawson J. were again in agreement, and the majority was silent.

INCONSISTENCY QUESTION

Was the State Act inconsistent with s. 9 or s. 10 of the Racial Discrimination Act 1975 (Cth)? Sections 9 and 10 of the Commonwealth Act provide:

> 9. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal

16 *Ibid.* 20. See the discussion of these words as a possible limitation upon State power to legislate with extra-territorial effect in *Union Steamship Co. of Australia Pty Ltd v. King* (1988) 82 A.L.R. 43, 47-51. Also see Killey, I., '"Peace, Order and Good Government": A Limitation on Legislative Competence' in this edition of the *M.U.L.R.*

17 *Cf. Wacando v. Cth* (1981) 148 C.L.R. 1.

18 *Mabo v. Qld* (1988) 83 A.L.R. 14, 46-50.

19 *Ibid.* 50.

20 *Ibid.* 15, 20.

21 *Ibid.* 21 *per* Wilson J.

22 *Australian Building Construction Employees' and Builders Labourers' Federation v. Cth* (1986) 161 C.L.R. 88.

23 *Cf.* Commonwealth Constitution s. 51(31).

24 *Mabo v. Qld* (1988) 83 A.L.R. 14, 21.

footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.
(2) The reference in sub-section (1) to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes a reference to any right of a kind referred to in Article 5 of the Convention . . .

10. (1) If, by reason of, or a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
(2) A reference in sub-section (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
(3) Where a law contains a provision that —
(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander, not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which sub-section (1) applies and a reference in that sub-section to a right includes a reference to a right of a person to manage property owned by that person.

The joint judgment posed the question of inconsistency as 'whether, under our municipal law, the Miriam people enjoy the human right to own and inherit property — a right which includes an immunity from arbitrary deprivation of property — to a more limited extent than other members of the community.'[25]

The right to own and inherit property is a combination of two rights identified in Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination, and is therefore within the scope of s. 10. The judgment placed a gloss upon the right to own and inherit property by referring to Art. 17 of the Universal Declaration of Human Rights 1948, which declares that no one shall be arbitrarily deprived of their property. 'Arbitrarily' means 'unjustly' as well as 'illegally' in international law.[26] Use of such extrinsic material would certainly be justified by s. 15AB(2)(d) of the Acts Interpretation Act 1901 (Cth).

Brennan, Toohey and Gaudron JJ. acknowledged that 'in respect of property rights arising under Crown lands legislation, the answer [to the question asked] must be no'.[27] But if it is assumed that the rights asserted by the plaintiffs survived annexation, then aside from the Act, there are two categories of legal rights in and over the Murray Islands. Both traditional rights and rights granted under Crown lands legislation would be recognised. No distinction is however drawn by reference to the source or history of the two types of legal rights; in the view of these judges, their existence is sufficient. At this point a divergence of opinion among members of the court is manifest in defining the relevant human right for the purposes of s. 10. The joint judgment identifies it as 'immunity from arbitrary deprivation of legal rights in or over the Murray Islands'.[28]

If the relevant human right is thus characterized, it is but a small step to conclude that the native title of the Miriam people is protected by s. 10. The 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of some of their legal rights in and over the Murray Islands. Thus it infringed the human rights of the Miriam people. However, the State Act does not infringe the corresponding human rights of those whose rights in and over the Murray Islands do not originate from the laws and customs of the Miriam people.

The State Act purports to limit the immunity of the Miriam people from legislative interference with the enjoyment of the human right to own and inherit property. The effect of the Commonwealth Act is to restore that immunity to the extent enjoyed by those who are not members of the Miriam people. The inconsistency is resolved by s. 109 of the Commonwealth Constitution, and the State Act fails.

25 *Ibid.* 33.
26 Meron, J. (ed.), *Human Rights in International Law: Legal and Policy Issues* (1984) vol.I, 122, n.40.
27 *Mabo v. Qld* (1988) 83 A.L.R. 14, 33.
28 *Ibid.*

With other members of the majority, Deane J. identified the moral entitlement to own and inherit property as the relevant human right. This includes an implicit right to enjoy immunity from arbitrary dispossession of one's property. The operation and effect of the State Act is to distinguish between proprietary rights and interests in and over the islands. The criterion is whether or not the rights are founded in pre-annexation traditional law and custom, or in post-annexation European law. The State Act thus 'discriminates against the former by singling them out for impairment or extinction while leaving the latter unaffected or enhanced.'[29] In the light of this reasoning, the inevitable conclusion was that s. 10 applies to the State Act. The State Act 'single[s] out the Torres Strait Islanders for discriminatory treatment' in relation to traditional rights to their homelands. The extinction of such rights 'is a denial of the entitlements to ownership and inheritance of property including the implicit immunity from arbitrary dispossession'. Such denial is confined to the 'Torres Strait Islanders'.[30]

To reinforce the conclusion, His Honour argued that s. 10(3) would make any other result 'anomalous'. However, the intention of the Commonwealth Act appears to be to implement the Convention, not to protect the traditional rights of Aboriginal people.[31] It may also be doubted whether the conclusion really does reflect the practical operation of the State law.[32]

We might represent the source of this doubt as follows. Suppose that ethnic group X is able to enjoy a human right by pursuing two avenues, (A) and (B), but ethnic group Y is only able to enjoy that human right by pursuing avenue (A). Did the Commonwealth Parliament really intend that a statute preventing group X from pursuing avenue (B) should contravene the Convention?[33]

It is arguable that the Miriam people are able to enjoy the human right to own and inherit property in the Murray Islands by claiming traditional rights or by claiming rights under Crown lands legislation, whereas other persons can only pursue the second avenue. Section 10 focuses on the *extent* to which particular ethnic groups enjoy a human right. Even if it is assumed that the two categories of legal rights over the Murray Islands are equivalent rights of ownership, the Miriam people have more scope for exercising those rights than the general community. Murray Islanders can claim rights of ownership from two sources. Other persons have only one source upon which to rely. Thus the State Act merely places both groups in the same position. It removes an inequality in favour of the Miriam people.

Wilson J., dissenting, adopted this alternative argument. He distinguished formal equality before the law, a theme which pervaded the Convention, from effective and genuine equality. When applied to the State Act's effect on 'rights with respect to the ownership of property and rights of inheritance',[34] the distinction meant that formal equality before the law was achieved. The State Act removed 'a source of inequality formerly existing between the plaintiffs and persons of another race because, on the facts as disclosed in the statement of claim, the plaintiffs were alone in the enjoyment of traditional rights.'[35] Thus there was no inconsistency between the State Act and s. 10 of the Commonwealth Act.

Mason C.J., dissenting, dismissed on two grounds the plaintiffs' argument that the State Act was inconsistent with s. 9 of the Commonwealth Act. He held that the enactment of a statute by the Queensland legislature could not be construed as an 'act' done by a 'person'.[36] In any event, by virtue of s. 107 of the Commonwealth Constitution, the Commonwealth Parliament 'does not possess

29 *Ibid.* 43.

30 *Ibid.* 44.

31 One of the objects, if not the sole object, of the Commonwealth Act is to give effect to the Convention. *Koowarta v. Bjelke-Peterson* (1982) 153 C.L.R. 168 held that ss 9 and 12 of the Act were valid laws with respect to external affairs within the meaning of s. 51(29) of the Constitution. The validity of s. 10 has not been determined by the High Court: *Gerhardy v. Brown* (1985) 159 C.L.R. 70, 85, 94-5. The writer's submission that s. 10(3) does not affect the proper construction of s. 10(1) is the view adopted by Dawson J., although he gives no reasons: *Mabo v. Qld* (1988) 83 A.L.R. 14, 52.

32 S. 10 'is to be construed as concerned . . . with the practical operation and effect of an impugned law': *Mabo v. Qld* (1988) 83 A.L.R. 14, 42 *per* Deane J.

33 Note, though, that we cannot morally assess claims of each group until we know something of its past. Then it may be possible to discern rights or obligations which attach to its members.

34 *Mabo v. Qld* (1988) 83 A.L.R. 14, 24.

35 *Ibid.*

36 *Gerhardy v. Brown* (1985) 159 C.L.R. 70, 81, 121.

legislative power to prohibit [a State Parliament] from enacting a law on a topic falling within a head of concurrent Commonwealth legislative power.'[37] Wilson J. agreed that it was constitutionally impossible for the passage of the State Act to fall within s. 9. Secondly, there was no direct inconsistency between s. 3 of the State Act and s. 9 of the Commonwealth Act. Section 3 was merely declaratory and did not authorise the doing of an act prohibited by s. 9.[38]

No conclusion was expressed by Mason C.J. as to whether s. 3 is inconsistent with s. 10.[39]

Dawson J. dismissed the s. 9 argument. Like Mason C.J. and Wilson J., he held that the prohibition imposed by s. 9 does not extend to the steps required to enact a statute. His Honour did not answer the question of the possible inconsistency between s. 10 and the State Act, although he indicated that the point was arguable either way. On the one hand, to deprive the plaintiffs of land rights of the kind alleged 'would not necessarily be to deprive them of rights enjoyed by persons of another race, colour or national or ethnic origin', since those rights were not enjoyed generally by Queenslanders. But, depending on the nature and extent of the rights alleged, 'to deprive them of those rights may be to deprive them of rights of ownership equivalent to the rights of ownership enjoyed by others, albeit in a different form.'[40]

What is to be made of this divergence of opinion? Clearly, the relevant 'right' for the purposes of the Racial Discrimination Act 1975 (Cth) may be characterised in several different, but equally tenable ways. Section 10(2) of the Commonwealth Act provides that a 'right' for the purpose of s. 10(1) includes a 'right of a kind referred to in Article 5 of the Convention'. This indicates that the word 'right' is used in the same broad sense as it is used in the Convention. In the words of Deane J., the concept is that of a 'moral entitlement'. Such a concept is inherently highly elastic. Indeed, often rival views will not be susceptible to negotiation and reconciliation.[41]

In effect, the Court was required to interpret a Bill of Rights. The result of the case can hardly fail to provoke emotional responses diametrically opposed to one another. Whether public respect for the law has been enhanced depends upon one's point of view. However, it is certainly arguable that this type of case is likely to obscure the independence of the judiciary from the view of many Australians. In any debate on the wisdom of enshrining a Bill of Rights, the problem must be considered.

Future litigation in this matter, which will consider the existence of traditional native title, is certain to stir emotions even more.

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[37] *Mabo v. Qld* (1988) 83 A.L.R. 14, 17.

[38] There can be no question of the 'covering the field' type of inconsistency since the State Act could not be characterised as an Act with respect to racial discrimination. *Cf. Viskauskas v. Niland* (1983) 153 C.L.R. 280.

[39] *Supra* n. 2.

[40] *Mabo v. Qld* (1988) 83 A.L.R. 14, 52.

[41] Stephen, N., 'Southey Memorial Lecture 1981: Judicial Independence — A Fragile Bastion' (1982) 13 M.U.L.R. 334, 345-6.

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