Chapter One

The Racial Discrimination Act 1975 and Mabo

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There is a tired old cliche that journalists and other commentators on the ephemeral trot out with appalling reliability whenever they feel the need to enlighten us about law and the legal system. It is always misquoted and invariably taken out of context. It concerns a Dickensian character who, in a moment of understandable frustration at being thwarted by anything as piffling as the law of the land, took it upon himself to characterise the law as an ass.

Now, whatever people in general may think about that profound observation, it is usually overlooked that the vast majority of the laws are not made by lawyers but by politicians. In that capacity they rejoice in calling themselves lawmakers and frequently claim mandates to that effect, or, as a cartoonist recently suggested, persondates. How the law can be an ass without the lawmakers sharing that character is unclear.

Nevertheless, if we put the tired old cliche aside we can surely agree that the legal system sometimes throws up, if that be the appropriate expression, conundrums of intricate intellectual beauty. They remind me of such matters as the arithmetical theorem which proves the existence of at least one more undiscovered prime number; or the spectre of the Brocken; or the phantom of the opera; or the Himalayan Yeti: everyone knows there is something there, but no–one knows what it is.

Most of you will have assumed by now that the something I have in mind is native title according to St Mabo. As Winston Churchill once remarked about the former Soviet Union, native title is a mystery wrapped in an enigma. Actually Mabo in itself is not what I have in mind. My concern today is with one of the more weirdly beautiful intellectual structures to which even Mabo has given rise.

Note that I say "given rise". Not even Mabo actually created it. It took the Commonwealth lawmakers to actually create it but Mabo put the idea into their heads. So on this occasion you have a fair range of candidates for the 1993 Ass of the Year prize. The mystery that I am about to unfold is the relation between Mabo and one of our best known Acts of Parliament: the Racial Discrimination Act 1975 of the Commonwealth.

The starting point is that, leaving aside the federal Territories, Australia has seven Parliaments: the Commonwealth Parliament and the Parliaments of the six States. The Commonwealth Parliament can make laws on certain subjects set out in the Constitution. The States can make laws on almost anything. A Commonwealth law normally applies to the whole country. A State law applies only to the State which enacts it. It follows that a Commonwealth law may conflict with a State law on the same subject which says something different.

The framers of the federation foresaw this difficulty and sought to deal with it in s.109 of the Constitution. This section says: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." This rule is often mis-stated as saying that the Commonwealth can override State laws. In the Mabo debate it has even been put in the form that the Commonwealth Government can override State laws.

This is quite wrong. As the Keating Government has discovered on a number of recent occasions, it is the Parliament that makes the laws, not the Government. Also, s.109 does not talk

about a law overriding another law. It talks about inconsistency between the two. You can have a Commonwealth law on the same subject as a State law without the least inconsistency between them. Even if there is an inconsistency, s.109 says that the State law is invalidated only to the extent of the inconsistency. If the inconsistency can be removed without bringing the whole of the State Act down, the rest of it survives.

The last point to be made about the operation of s.109 is that, although the section does not say so, it necessarily assumes that the Commonwealth law is valid, for if it were not valid it would not be a law. For the Commonwealth law to be valid it has to fall within the scope of one or more of the subjects upon which the Commonwealth has power to make laws. This is yet another reason why it is a gross exaggeration to say, as journalists usually do, that the Commonwealth can override State laws.

Against that background I turn now to the Racial Discrimination Act of the Commonwealth, which came into operation on 31 October, 1975. I shall refer to it for short as the RDA. One looks first for the head of power on which the Parliament relied in passing that Act. It is in s.51(xxix) of the Constitution. This confers power on the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to external affairs.

I do not pause to repeat here comments that I have made in previous addresses to this Society on the extraordinary manner in which the High Court has expanded the scope of this modestly worded subsection to convert it into a major source of Commonwealth power to legislate on almost anything. Suffice it to say that, as now understood, it will support a law which carries into effect in Australian domestic law any international obligation entered into by a Commonwealth government.

In the case of the RDA the obligation rejoiced in the name of the International Convention on the Elimination of all Forms of Racial Discrimination, which is an accurate enough description of what it purports to do. I shall refer to this document as the Convention.

Personally I find it distinctly odd that Australia can in all solemnity adopt the Convention at the same time as it retains in its Constitution s.51(xxvi), which gives the Parliament power to make laws with respect to "the people of any race for whom it is deemed necessary [by the Parliament] to make special laws". Any law which applies to people on the basis of their race is a racially discriminatory law. If it benefits the people of that race it necessarily discriminates against everyone else.

The generosity with which the High Court has developed the interpretation of the external affairs power is not entirely open-ended. It includes the limitation that the Act of Parliament that relies for its validity on an international obligation combined with s.51(xxix) must adhere reasonably closely to both the letter and the spirit of the obligation relied on. This is the beginning of the intricate mystery to which I referred at the outset of this paper.

At this date I need hardly refer to what the great Mabo debate is all about. The only time in the past 15 months that the media have not been full of it was in the lead-up to the federal election in March, 1993, when all political parties tacitly decided to leave Mabo in the too hard basket and fight about tax instead. It came to life again when the Prime Minister, searching no doubt for emotive issues which might take people's minds off unemployment, took it up with missionary fervour.

Whatever anyone originally intended, what has now happened is that the Prime Minister has launched a sustained attempt to bring into being a Commonwealth statutory regime to deal with native title which he appears determined to force on the States whether they like it or not. One of the many practical difficulties that he has encountered is the effect of the RDA on titles to land granted by the States on or after 31 October, 1975, the date when the RDA came into effect.

The argument runs as follows. The RDA prohibits discrimination on the basis of race, including discrimination in matters of property. A title to land which derives from native laws and customs is as much an item of property as any other title to land, but it has the peculiarity that it can be held only by people of a certain race. These are Aborigines who have certain connections with the land in question. Hence if you abolish or curtail native title, you are necessarily discriminating on the basis of race, for the only people affected are people of the Aboriginal race.
Now, when the RDA came into force exactly 18 years and one week ago, no-one had ever heard of native title. For this very good reason it never occurred to anyone that the RDA had any relevance to the normal course of issuing titles to land, be they freehold ownership, leases of one kind or another, or mining tenements or whatever. For the next 17 years or so everything went on as usual. This happy state of affairs came to an end shortly after 3 June, 1992, the day on which the High Court, in Mabo v. Queensland [No.2] (1992) 175 CLR 1, broke the news that the common law recognised this new type of claim to land called native title.
Ever since then quite a lot of people have been trying to work out what it is, what it does and what can be done about it. I do not need to go into all this today, fascinating though it is. I need add only that, having invented native title, the High Court, in its inimitable way, went on to say that all sorts of events could extinguish it and indeed, in many parts of the country, had done so already. One of the ways was by the Crown granting a title inconsistent with the continued existence of native title over the same land, the standard example given being freehold title.
Except for the fact that the court was a trifle coy about precisely which common law titles had this effect and which did not, at least we had a comprehensible rule, at all events in principle. Not for long. Anyone who had the simple-minded idea that the quickest way of disposing of native title was to freehold all the land in sight was confronted by another High Court observation. It received so little discussion that it amounted almost to a throwaway line. It said that State action on the matter would of course have to be consistent with relevant Commonwealth laws, particularly the RDA.
Let us consider what this observation meant in terms of the idea that a State could solve the Mabo problem by granting freehold titles all over the place (freehold having the effect, according to Mabo, of extinguishing native title) or simply passing an Act abolishing native title. There is no doubt that were it not for the inconsistency rule of s.109 of the Constitution, combined with the RDA, the States could easily get rid of native title. The question therefore became whether State action to this effect would be inconsistent with the RDA.
The fascination of this question was not lessened by the course of events in the first Mabo case in 1988. Even now not everyone is aware that the 1992 decision was actually Mabo number 2. Its fame has tended to obscure the significance of Mabo number 1. The immediate cause of the earlier case was an attempt by Queensland to do exactly what I have just mentioned: abolish native title by legislating it out of existence. In Mabo 1 the High Court by a majority of 4:1, 4:2 or 4:3, depending whether you believe the headnote or the judgments, held that the attempt failed.
The reasoning was interesting and arose to a considerable extent out of the way the case was structured as a technical matter. What eventually became Mabo 2 had been progressing slowly through its preliminary stages in the courts when Queensland interrupted this progress by passing its native title abolition legislation. As soon as that happened, the Queensland legal team amended their defence to rely on the Act as a complete answer to the claims for native title. The claimants hit back by arguing that Queensland could not do this because the Act was inconsistent with the RDA and therefore ineffective under s.109 of the Constitution.
The court then decided, at the request of the claimants, to settle this question as a separate issue because if the claimants were wrong, the rest of the case could not proceed. The Queensland Act

would be a complete defence. In order to give the case a notional factual basis however, the court proceeded on the assumption, for the purpose of deciding the inconsistency argument only, that the claimants did indeed have the native titles they were claiming.

The outcome of this distinctly artificial proceeding was that one member of the court found that there was no inconsistency between the Queensland Act and the RDA, four found that there was an inconsistency and two decided that the question could not be answered at that stage because, notwithstanding the assumption on which the court was proceeding, there were not enough facts.

The judge who decided that the Queensland Act and the RDA were not inconsistent with each other, Sir Ronald Wilson, did so on a commendably straightforward basis. He pointed out that the RDA required the elimination of discrimination on a racial basis and that this was exactly what the Queensland Act did. By abolishing native title it put the claimants on a basis of equality with everyone else in matters of land ownership.

The majority said that the RDA was intended to protect human rights as well as legal rights. The right to own and inherit property was a human right. By depriving the claimants of their right to hold and inherit land according to their own laws and customs the Queensland Act would deprive them of that human right. They did however lay repeated emphasis on what they called the arbitrary nature of the deprivation. By this they seemed to mean removing native title without compensation.

The apparent result was that it was inconsistent with the RDA to extinguish native title but not inconsistent with the RDA to convert native title into a claim for compensation. This presented everyone with a problem when Mabo 2 on 3 June, 1992 confirmed that native title did indeed exist. The problem was what to do about native title that had been extinguished without compensation by actions taken on and from 31 October, 1975, the date on which the RDA came into operation.

Only one thing seemed to be certain: that no native title that had been extinguished since the RDA came into operation had been compensated, for at the time no–one knew that native title existed, let alone been extinguished. But what was the result of non–compensation? Did it mean that none of the supposedly extinguished titles had been extinguished after all? Or did it mean that the native titles had indeed been extinguished but someone was liable to pay unspecified compensation?

Once puzzles like these began to appear, a clamour arose for the Commonwealth to do something about the RDA so that, whatever the future held in store, at least the past title situation could be cleared up. It was pointed out, reasonably enough, that until 3 June, 1992 the grant of titles to land in the usual way had proceeded without any intention to prejudice native title because no–one knew native title existed. Were people to whom normal titles had been granted to find themselves at risk of either paying substantial compensation or else perhaps losing their titles after expensive litigation? The cry went up, "validation of titles".

Various ways of responding to this cri de coeur were debated but the general conclusion reached was that the validity of titles granted by the States since the RDA came into operation should be confirmed. To the extent that State legislation to that end might be inconsistent with the RDA, the Commonwealth should restrict the operation of the RDA. After dithering for a while over this last point, the Prime Minister, Mr Keating, personally assured the nation that that would be done.

The way in which it was going to be done however was not by any such commonplace method as amending the RDA. Heaven forbid! To do that would be discriminatory, which was absolutely unthinkable. No, the magic formula was to be the inclusion in the proposed Native Title Act of the Commonwealth of a section that said that State validation of title Acts would be valid "notwithstanding any law", including the RDA.

There is an expression in the English version of the English language that disparages excessive ingenuity. It describes people who go in for that sort of thing as too clever by half. I do not know who thought up the "notwithstanding any law" device, but I suspect that in England he or she would have been rather unkindly called too clever by half. I say "unkindly" because the officer concerned would only have been doing his or her best to work miracles for a Prime Minister who apparently takes them for granted if the facts displease him.

The legal system however is a prosaic institution not given to the miraculous, as opposed to the unexpected. As far as the law is concerned, an Act which modifies the effect of an earlier Act prevails to that extent over the earlier Act. It follows that the "notwithstanding any law" formula would have restricted the RDA just as effectively for the purpose in hand as if it had been amended.

With most statutes the discovery that the magic formula was no more than a misleading device would have been the end of the matter. The earlier statute would have been modified in its effect and life would have continued as usual. With the RDA however the discovery merely brings us to the heart of the conundrum of intricate intellectual beauty to which I referred earlier.

The RDA is an unusual Act in several ways. One of them is its dependence on the power of the Parliament to make laws with respect to external affairs. You will recall that I also mentioned earlier that any Act dependent on that power has to conform reasonably closely with both the letter and the spirit of the international obligation that it is enacting into Australian domestic law. You may now be beginning to perceive the havoc that the "notwithstanding any law" formula threatened to wreak. Consider what it was intended to do.

It was intended to restrict the scope of the RDA in a manner that would permit State Acts to retrospectively confirm the extinguishment of native title by any extinguishing event that occurred on and from 31 October, 1975 to the present day. The extinguishment of native title is in itself a racially discriminatory act: the High Court said so in Mabo 1. Admittedly the majority in that case also implied that this might be all right if compensation was given in return for the extinguishment; but they did not actually say so.

Furthermore, although compensatory damages for past extinguishment were envisaged by three members of the court in Mabo 2, the other four disagreed. So there was, and is, some uncertainty about the healing powers of compensation. All one can say is that, constitutionally speaking, compensation makes State legislation safer. The Commonwealth of course has no choice. Under s.51(xxxi) of the Constitution it can legislate with respect to the acquisition of property only on just terms, which means fair compensation.

The significance of these matters for the RDA is that for that Act to remain valid it has to continue to conform with the International Convention on the Elimination of All Forms of Racial Discrimination. Yet here was the Commonwealth proposing to enact a statutory formula that would inevitably result in the RDA not applying to State title validation Acts of a racially discriminatory character. It might get away with it by trying to insist on compensation, but then again, it might not. It is not at all clear that the Commonwealth can so manipulate the statute book as to pick and choose among the States to dictate the terms on which their own legislation will or will not be inconsistent with Commonwealth legislation.

The "notwithstanding any law" formula raised the possibility therefore that it might bring about the validation of titles for which everyone was clamouring, but only at the cost of invalidating the RDA, either wholly or in part, for failure to adhere to the international obligation upon which it depended for its validity. For those who enjoy irony, that would have been a pleasing instance of a Prime Minister hoist with his own petard. Unfortunately Mr Keating is not famous for rejoicing in irony at his own expense. Neither was it a result likely to appeal to Aboriginal

interests or those who regard the Racial Discrimination Act as the foundation of civilisation as we know it.

The Aboriginal lobbyists in particular became very upset at the prospect of any tinkering with the RDA and made their views known in no uncertain manner. This appears to have wounded the Prime Minister's feelings. Indeed, he was wounded so deeply that he became inspired to make a timely but remarkable discovery. He suddenly announced that everyone could live happily ever after because, upon further reflection, he had realised that there was no need to tinker with the RDA after all. It is wonderful what the attentive study of French clocks and Siamese tables can do for you.

Upon hearing the announcement, the media with one voice proclaimed that our great leader had achieved a triumph and a victory. He then departed to Cyprus trailing clouds of glory. He also trailed some fair-sized clouds of obscurity. In spite of the media, omniscient though it no doubt is, some of us remained a trifle puzzled about the precise character of the PM's latest insight into the nature of things. The triumph was not obvious. The victory did not leap to the eye. Particularly elusive was the reason why the RDA no longer hampered the validation of past titles.

The answers to these questions remain in doubt. I do however have a concluding suggestion to make. It derives from the possibility that someone has advised the Prime Minister to the following effect.

Some confusion has appeared in the public debate owing to the imprecise use of the words "validate" and "invalidate" in relation to grants of land titles, the RDA and s.109 of the Constitution. The idea has gained currency that the RDA of its own force can invalidate land titles. This is a misapprehension which probably derives from lack of understanding of s.109. The section has no direct effect on any grant of title. The inconsistency rule is directed to laws, meaning Acts of Parliament and subordinate legislation (that is to say, regulations) made under them.

A grant of land title is not a law but an executive action taken under the authority of an Act. The grant therefore is invalid only if the law authorising it is invalid. This means that the Mabo problem about past titles is not whether the RDA invalidates them but whether it invalidates State land title Acts. As far as I can see, the only way this could happen would be by arguing that to the extent (and to the extent only) that the State Act authorises a grant of title (eg. freehold) which extinguishes native title otherwise than on just terms, it is inconsistent with the RDA. But this argument encounters the difficulty that no State land title Act either is or ever was discriminatory in the Mabo 1 sense.

The majority in Mabo 1 held that the Queensland legislation there in question could affect no-one but the Meriam people and was clearly directed at them. State land title Acts affect everyone and are not aimed at any section of the community. Moreover, although the majority in Mabo 1 stressed the "arbitrary" (ie. non- compensatory) nature of the deprivation of native title, only a minority in Mabo 2 were prepared to hold that past loss of native title should be compensated.

It may be therefore that the Prime Minister has been advised that existing State titles are in no danger from the RDA and hence do not need to be validated. If that is the advice he has received, it may explain his present position. More importantly, it may be right. Personally I have the greatest difficulty in envisaging that even the present High Court would retrospectively invalidate either wholly or in part State land title statutes of general application for authorising grants of title issued in good faith.

Nevertheless, this remains speculation. So does the wider question, what will happen next? It is less than two days since I had the privilege of sitting in the chamber of the House of Assembly of this State listening to the Premier of Western Australia, Mr Richard Court, read the second

reading speech with which he introduced his Government's Land (Titles and Traditional Usage) Bill. If I may be permitted to express the opinion, that Bill represents by far the most constructive response to the Mabo situation thus far.

In saying as much I have to make clear that I may be a trifle biased because I had the honour of being a member of the team that brought the Bill into existence. Notwithstanding that handicap I still think it is a good Bill. I am comforted in that opinion by the fact that the senior member of the team in recent weeks has been Mr SEK Hulme QC, who finished up as the principal author of the second reading speech. He was sitting next to me in Parliament House on Thursday. I believe that we both thought the speech sounded rather well.