Chapter Five

The Second Native Title Case

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I have to start with a disclaimer. When I was asked by John Stone to speak on this topic I had no idea that when the time camefor me to do so I should have been appointed Crown Counsel to theAttorney-General for Victoria. In light of that event I think it wouldbe at least circumspect for me to make clear that should I from timeto time inadvertently express an opinion, which would of course beentirely out of character, it would be my own and is not to be taken in any sense as the opinion of my Minister or the Victorian Government.

The term Second Native Title Case may be confusing to some. They will recall the first one as being Mabo v. Queensland [No.1](1988) and the second as being Mabo v. Queensland [No.2] (1992), which makes the next time around number three. The reason why I regard the High Court decision that was handed down on 16 March,1995 as the second of its kind is that the Mabo cases were two stages of the same proceeding.

The official description of the Second Native Title Case is Western Australia v. Commonwealth (1995). It was actually three cases heard together, the other two being Wororra and Yawuru Peoples v. Western Australia and Biljabu and Others (representing the Martu peoples) v. Western Australia. Procedurally, the litigation took the form usual in High Court constitutional matters of the parties formulating questions of law which are then submitted to a single Justice, in this case the Chief Justice, who settles them and reserves them for the opinion of the Court.

In substance what was at stake was whether native title survived in Western Australia, the validity of the Land (Titles and Traditional Usage) Act 1993 (WA) ("the WA Act"), the validity of the Native Title Act 1993 (Cth) ("the NTA") and the operation of the Racial Discrimination Act 1975 (Cth) ("the RDA").

A particular issue was the impact of native title and the Native Title Act on Western Australia.

Having regard to the implications of native title for the whole country, this was a matter on which the Western Australian Government might reasonably have expected support from other State governments and mining, agricultural and grazing interests. In theevent only South Australia sought, and was granted, leave to intervene.

You will recall that Mabo [No.2] was widely criticised for the unsatisfactory character of the majority reasoning, the diversity of opinion among the majority and, in some passages, the emotive language.

It is evident from the Second Native Title Case that the Court took at least some of this to heart. The most outward and visible sign is that instead of three majority judgments of three, two and one respectively, there is only one. The three, two and one managed to put their differences aside and speak with a single voice.

The results at which they arrived were then made unanimous by Dawson J., the sole dissenter in Mabo [No.2], on the basis that although he still held the views he expressed in dissent in the earlier case, no good purpose would be served by his persisting in them. I take the opportunity to

say that his short and dignified concurring judgment illustrates to perfection why he is regarded by many as a judicial exemplar.

The Court's rapid retreat from the diversity of opinion which so often makes it hard to know what a case stands for encourages me to suggest that henceforth their Honours give consideration, or further consideration, as the case may be, to adopting the usual practice of the American Supreme Court whereby one author writes for all the majority. Certainly under the American practice the other members of the Court who concur in the outcome influence the final text of their single judgment, but they do seem in general to avoid our judicial tendency to arrive at a common result by separate judgments that differ only in relatively marginal ways.

Majority unanimity in the Second Native Title Case is not the only sign of the Court's having been taken aback by critical comment. The reasoning throughout the main judgment, while it does not by any means have the quality of inevitability, is nevertheless much tighter than was the case in Mabo [No.2].

One notes also, with sincere gratitude, that the Court this time has dispensed with the merely emotive or rhetorical. So far, so good.

Now for what the Court actually decided. I will not try your patience by taking you through each and every painstaking point made, but clearly it would be inadequate for me merely to recite the answers given to the technical questions put to the Court without conveying how those answers were arrived at.

Indeed, I can confidently assure you that it would be not only inadequate but also incomprehensible. In fact in one case the answer trembles on the brink of incomprehensibility even when explained.

Western Australia opened its case with a proposition which would have made all else, including its own statute, irrelevant had it been established. This was that the survival of native title after an assumption of sovereignty by the British Crown was no more than a presumption which could be rebutted by proving that the Crown intended to extinguish it. That this was the case in Western Australia was demonstrable from the instruments establishing the State. This argument failed because, even if it were correct to describe the survival of native title in Western Australia as a rebuttable presumption, the history of the establishment of the State did not support such an intention on the part of the Crown. On the contrary, if anything it supported the opposite conclusion. Moreover Mabo [No.2] required not merely an intention to extinguish but also a positive lawful act pursuant to that intention.

It does not appear to have been argued that the mere assumption by the Crown of sovereignty over the land was enough in itself to extinguish native title. No doubt this was because such a contention would have run counter to Mabo [No.2]. The forensic tactic seems to have been not to directly challenge anything in that case but to persuade the Court, should the initial submission about the survival of native title fail, that the Western Australian Act complied with the principles laid down in it. This approach was consistent with the aim of the draftsmen of the Act but meant losing an opportunity to persuade the Court to at least modify some of Mabo [No.2].

Personally I regret that decision because I think that the majority judgments in Mabo [No.2] were in many particulars not well argued, and would have benefited from modification without any need to impair the concept of native title. Still, the cash value of regrets is nil so I move on to the next stage of the Court's approach in the Second Native Title Case.

Having decided that native title had not been abolished in Western Australia as a necessary consequence of the establishment of the State, the Court took up the question whether the WA

Act was inconsistent with the Racial Discrimination Act, specifically section 10(1), and, if so, to what extent and with what effect. This led to a complex analysis which I shall try to put simply.

The deceptively unhelpful answer to the question the Court asked itself is that, by virtue of section 109 of the Constitution, if the WA Act was inconsistent with the RDA of the Commonwealth it would be inoperative to the extent of the inconsistency. Section 109 questions are usually, and perhaps always, a matter of definition of the word "inconsistent". This is never easy but the Second Native Title Case produced a novel subtlety of its own. This was how to divine what section 10(1) of the RDA actually means. The text of that subsection is as follows: "If, by reason of, or of 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, 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".

There was some discussion of section 10(1) in Mabo [No.1]. I disagree with the interpretation arrived at by the majority in that case.

I agree with the minority, in particular the analysis made by Wilson J., which still seems to me unanswerable. As with the regrets to which I referred earlier, however, the cash value of arguing with the present High Court on this point is nil.

Fortunately, nothing which was said by the majority in Mabo [No.1] seems to have much bearing on the Second Native Title Case.

The Court's starting point was the distinction drawn in the WA Act between title and native title. The Act treats title as an interest in land arising from Crown grant, and native title as an interest in land arising from Aboriginal law and custom via the common law. It is to be noticed that under any definition native title is necessarily a narrower concept than Crown grant. In section 3 the WA Act gives this legal situation greater precision by defining "native title" as a right or entitlement to the occupation or use of land, or otherwise relating to land, exercisable by Aborigines in accordance with their tradition.

In my opinion that is an entirely reasonable rendering in statutory form of both the legal and the philosophical essence of Mabo [No.2].

I say that because immediately after the judgments in the Second Native Title Case were handed down there was an outbreak of hindsight in the Western Australian media severely critical of the Premier, Mr Richard Court.

The prevailing attitude seemed to be that by passing and defending his own Act, attacking the Commonwealth's NTA, and in the meantime carrying on business as usual in the matter of land titles, he was recklessly wasting public money because he knew that his cause was hopeless. This was highly hypocritical. The outcome of the Second Native Title Case was by no means legally inevitable. In my view the WA Act was an intelligent, sincere and reasonable response at State level to Mabo [No.2]. The High Court could without difficulty have upheld it, as I hope I shall be able to demonstrate.

On the basis of the foregoing definition the WA Act abolished common law native title, to the extent that it might exist in that State, and created the statutory entitlements which it recites. It had to deal also, however, with the uncertainty surrounding titles (as opposed to native titles) granted on and after the RDA came into operation on 31 October, 1975. It did so by confirming the validity of all such titles and providing that if in any instance this had extinguished a native title without compensation, a claim for compensation could be made.

In dealing with the relation between these features of the WA Act and section 10(1) of the RDA the Court first set aside the alternative possibility of inconsistency with the NTA, making the curious observation that that was not in issue. What this passage appears to mean is that logically the RDA came first in the inconsistency stakes because, if the WA Act failed that test, there was no need to proceed to the NTA on the inconsistency point. The only NTA question would be whether the Commonwealth had power to enact all or any part of it in the first place.

Let me now analyse section 10(1) of the RDA, abbreviating the references to people of any race, colour or national or ethnic origin simply to the people of any race. The subsection starts by hypothesising the existence of a law of the Commonwealth, a State or a Territory. This law has the effect of preventing the people of one race from enjoying a right to the same extent as the people of another race.

Being a common lawyer I have always had difficulty in understanding as a practical matter the concept of a right which is not a legal right. It is for this reason that I have never grasped the relevance of the insight, which we owe to the majority in Mabo [No.1], that the rights with which section 10(1) is concerned are not confined to legal rights but encompass also human rights. The consequence of that is said to be that, when deciding whether the law hypothesised by the subsection has the effect of limiting the enjoyment of a right by one race as against its enjoyment by another, we must look to substance and not mere form.

This is a familiar judicial concept but none the less vague for that.

As soon as I read it I look for the imminent arrival of suspect reasoning. In this respect the Second Native Title Case did not disappoint me. Having hypothesised its law, section 10(1) goes on to say that, notwithstanding anything in it, the people of the disadvantaged race should enjoy the right in question to the same extent as the other race. What could this mean in terms of native title? Surely a straightforward analysis would say that, by reason of Mabo [No.2], native title has placed one race, the Aboriginal race, in a position of advantage over everyone else in the matter of enjoyment of interests in land. This is a situation to which section 10(1) can, at the very least, have no application. As things stood immediately after Mabo [No.2] the Aboriginal race had acquired a common law right which, by definition, no one else could enjoy. This was not in itself contrary to section 10(1), because that provision is directed to legislatures, but it was certainly contrary to the intention of section 10(1), and indeed of the RDA as a whole.

The logical consequence of this was that any Australian State or Territory legislature had power to abolish native title without running foul of section 10(1). Subject to any relevant constitutional limitation on its powers, it was also open to the Commonwealth to legislate to confirm or enlarge native title rights without regard to section 10(1).

The later statute would have displaced the RDA to the extent of any incompatibility between them.

The WA Act did not merely abolish native title. On the contrary, it reproduced it in a statutory form, the object of which was to bring a potentially chaotic land title situation under proper governmental control in a manner not inconsistent with the principles of Mabo [No.2]. On the face of things, therefore, there should have been no question of inconsistency with the RDA.

The High Court in the Second Native Title Case avoided this straightforward conclusion by a simple device which might in a less dignified context be described as moving the goalposts. The right in question for the purposes of section 10(1), it now appeared, was not the legal right to enjoy entitlements to property but the human right to do the same thing. That meant, by some step in the reasoning which continues to elude me, that each and every right to enjoy an

entitlement to property should be as unfettered as every other such right. Hence a right to enjoy native title should be co-extensive with all other rights to enjoy title in land.

From this position it was not hard to find provisions of the WA Act which could be plausibly said to place a more restrictive limitation on the enjoyment of native title than existed for other forms of title.

Two immediate comments are in order. The first is that since the Court was not comparing like with like (native title bearing no serious resemblance to any other form of title), the exercise, although prolonged, was not difficult. Secondly, this part of the judgment displays a notable attention to statutory detail at the expense of what some might have thought the substance of the matter.

Observe what has gone on here. There is a perfectly rational argument, not to mention common sense if that ever plays a part in race relations, that the WA statute comes nowhere near inconsistency with the RDA. Conscious, no doubt, of the need to deal with that argument, but being unable to meet it in its own terms, the Court retreats into a non-legal, indeed mystical, concept of human rights. It then uses that concept to create a kind of supra-legal criterion of what amounts to equal enjoyment of property rights.

That in turn entrenches for the foreseeable future a land title regime which is highly and undeniably discriminatory on a racial basis. The justification for this dismal progression is that the non-Aboriginal component of the population, which is nearly all of us, must atone for alleged wrongs committed by none of us. That sentiment too departs from justice, let alone law, and finds its home in judicial mysticism.

An interesting feature of this aspect of the Second Native Title Case is that it bears an eerie resemblance to the High Court decision on 5 April, 1995 by a 4:l majority in what has become known as the Teoh Case: Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh (1995). The majority held that before a Commonwealth decision-maker acts adversely to a person in contravention of an international obligation binding on Australia, the decision-maker must give that person an opportunity to be heard on why the international obligation should be adhered to. That was held to apply even where neither party was aware of the international obligation.

Teoh startled everyone because it clearly gave an instrument of international law a degree of direct operation in Australia without its having been enacted by Parliament as domestic law. The degree of operation is admittedly limited, but that is hardly the point. Ironically the federal Government, which has been more gung ho than any previous government about using external affairs as a source of domestic legislative power, took great fright and is now putting a bill through Parliament which it hopes will nullify the decision. I suspect that it would have been less alarmed had the case not involved its own bureaucracy.

As it happens, the High Court, if given the opportunity, may well come to the Commonwealth's rescue. McHugh J. delivered a strong and cogent dissent, Mason CJ has now retired and Brennan CJ, Dawson and Gummow JJ. are thought unlikely to support the decision, so that a full Court of seven may well reverse it.

McHugh J. pointed out, among other things, that the doctrine of legitimate expectation on which the majority judgments were based (in this case an expectation that Commonwealth decision-makers would observe Australia's international obligations), could not arise from international law because the injunctions of international law are directed to the international community, not to members of national communities. There is also something other-worldly about the notion of legitimate expectations where the person concerned is unaware of the critical fact.

The reason why I make reference to Teoh in the present context is that by its treatment of inconsistency in the Second Native Title Case, as indeed in Mabo [No.1] in 1988 also, the High Court did very much what it has just done again in Teoh, only less obviously. By going back to the Convention on which the RDA is based in order to extract from it a supra-legal concept of human rights which in some mysterious way reversed the plain meaning and effect of a provision of a domestic statute, the Court gave the Convention, an instrument of international law, an area of direct operation in domestic law.

In the native title context, of course, this was widely accepted as a right and proper thing to do. Far from unsettling the Commonwealth bureaucracy, it resulted in a lot more jobs for them and proved yet again that the famous Yes Minister television series was a masterpiece of verisimilitude.

Returning then to the Second Native Title Case, the conclusion at which the Court arrived on inconsistency was that the WA Act was wholly inoperative by reason of section 10(1) of the RDA. An interesting little quirk of the way in which the High Court has interpreted and applied section 109 of the Constitution is that, although the section says that the inconsistent State statute shall be "invalid" to the extent of the inconsistency, it has always been treated as if it said "inoperative". The significance is that if the relevant Commonwealth statute is repealed, the State statute revives. This produces the irony that if a future federal government were to repeal, or in relevant ways modify, the RDA and the NTA, the WA Act would at once become not only operative but the most enlightened native title legislation in the country. That would be an appropriate political memorial to a Premier who happens to have an adopted Aboriginal daughter and undoubtedly knows a great deal more about the realities of Aboriginal problems than his largely academic and dogmatic critics. The major remaining features of the judgment in the Second Native Title Case are perhaps of greater interest to constitutional lawyers than others, so I will content myself with summarising them.

They covered the questions whether the NTA was within the power of the Commonwealth, under section 51(xxvi) of the Constitution, to legislate with respect to the people of any race for whom it is deemed necessary to make special laws; and if so, whether the NTA nevertheless made so great an intrusion into the power of the States to govern themselves, with particular reference to Western Australia, as to be invalid by reason of implied constitutional limitations.

The States went nowhere along either of these lines. At least under section 51(xxvi) the Court confirmed that the power could validly operate to the disadvantage of the relevant race as well as to its advantage, as for example where for some reason that race was regarded as a menace. No challenge was made to the rule that Parliament is the proper body to decide whether a special law under section 51(xxvi) is necessary. Constitutionally this is clearly right because it is Parliament which decides whether to legislate about anything.

Leaving aside inconsistency questions, the NTA was not an attempt to control the exercise by the States of their legislative powers. It was simply a comprehensive exercise by the Commonwealth of one of its own legislative powers, together with the regulatory consequences. Neither did the NTA amount to an unconstitutional interference with the management by the States of their land management and related policies. In a distinctly lofty fashion the Court dismissed Western Australia's impressive demonstration of the degree of interference involved as illustrating merely that performing some of its functions would become more difficult. That was not the same thing as becoming impossible. The one win that the States had brings me particular personal satisfaction, as I shall shortly explain. It also embodied an important constitutional issue, although not one that attracted attention in the surrounding stormy context. When the NTA was

passing through Parliament in December, 1993 I suggested to S.E.K. Hulme, QC, with whom I was briefed, that the proposed section 12 would be clearly invalid. He was kind enough to agree and we duly made this view known.

A question was asked and the Acting Solicitor-General of the Commonwealth, Dennis Rose, QC, in a short advice written under great pressure, assured Parliament that the provision was clearly valid.

It was therefore a source of boundless gratification when I discovered in due course that the High Court had decided that section 12 of the NTA was the only flaw in an otherwise peerless Act. I am on very good terms with Dennis Rose, whom I have known for two or three decades, but there is no room for sentiment in these matters.

What section 12 said was this: "Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth." An innocuous sentence you may think, and you may well be right, but one pregnant with constitutional significance nevertheless.

There is nothing wrong with the Parliament passing an Act, pursuant to one of its enumerated legislative powers, which refers to a specific text which is not part of a Commonwealth statute and declares that henceforth that text shall be a law of the Commonwealth. The text referred to becomes the legislative content of the Act. The fault with section 12 was that the common law is not a text. It is a series of declarations by the courts of what the law is.

The declarations frequently change by reason of successful appeals to a higher court, by modification of a previous declaration or by outright overruling of what the law was previously said to be.

If the common law had the force of an Act of the Australian Parliament, which is what the term "law of the Commonwealth" means, every time a court altered the common law it would be legislating, which it cannot constitutionally do. That was enough to dispose of section 12, but for good measure the High Court added that in any event the section did not fall within either the race power or the external affairs power.

The immediate response in business circles to the Second Native Title Case was to congratulate the High Court on having clarified the situation. Actually the Court has not clarified very much. We know that the WA Act is inoperative for inconsistency with the RDA, but the price of that information is thorough obfuscation of what section 10(1) of the RDA means. We know also that unless legislation intervenes after a change of government, native title is here to stay in an extreme and complex form, most of the nuts and bolts of which remain obscure. We know that even Dawson J. has now given up, deeply though he believes that the Mabo decisions were both legally and morally wrong. That is about all we know.

So what of the future? I mentioned earlier the hypocritical criticism directed at Premier Court as soon as the judgments in the Second Native Title Case were handed down. He was accused of wasting public money. No-one seems to think that the hugely greater expenditure of public money by the Commonwealth on Mr Keating's peculiar version of law reform might be a waste. That is not going to stop in a hurry.

Vast amounts have been poured into Aboriginal affairs organisations over the years. Much of it has disappeared without trace and without any noticeable improvement in the conditions of the Aborigines it was meant to benefit. Anyone who doubts these observations would do well to read the article "Black Money" by Trevor Sykes and Joanna Doyle in the March, 1995 issue of the unfortunately now defunct Australian Business Monthly. Now the nation has to gear up for the

astronomical sums which are going to disappear into the sprawling Mabo bureaucracy, probably for decades to come.

What the exercise is supposed to be all about is reconciliation. I have no idea how you measure reconciliation. What seems to me to have happened so far has been an enormous land grab, which is scarcely surprising. So far as the courts are concerned, none of the claims made has been successful thus far, but that fails to take into account the considerable pressure to cut a deal outside the courts. In some quarters there is also pressure to amend the NTA to reduce even further the capacity of leasehold title to extinguish native title.

Entirely foreseeably, and foreseen, the land grab has been accompanied by much talk of Aboriginal independence in one form or another. I suspect that this owes more to an emerging Australian version of a cargo cult mentality than anything else: only ask and you shall be given, complete with yet another layer of bureaucracy run by compliant nominees of your friendly neighbourhood strong man.

To an increasing extent, Aboriginal interest groups squabble with each other over the loot while the genuinely needy at the bottom of the heap stay there. Apparently even the Meriam Islanders are muttering about secession. The picture is not inspiring and reconciliation does not seem to be flourishing. Yet as these predictable, and predicted, consequences of the retrospective guilt industry inexorably unfold, the most obvious way of improving the situation in the general public interest has been discarded by the federal Opposition.

This would be to repeal, or at least radically amend, the NTA. Repeal would not in itself abolish native title. Whether that consequence would follow from amending the NTA would depend on the nature of the amendments, but in light of the High Court's latest observations on section 51(xxvi) of the Constitution there is ample legislative power to modify the present situation. What is missing is the political will. With a federal election looming, one can understand the Opposition not wanting to make a charitable donation to the Government's scare campaign at this stage. Nevertheless I hope they return to the matter if and when they are in a position to do so.

Encouraging though it would be to see the NTA repealed, or at least repealed so far as any future claims are concerned, it has to be recognised that that would be only the first of two steps which need to be taken to return to a self-respecting basis for race relations in this country. The second is to repeal the RDA as well. I have always regarded that statute, and still do, as a self-inflicted national insult enacted only to court cheap popularity on the international stage, a governmental attitude to which Australia is becoming all too addicted.

You will have gathered that in the present context I am not exactly optimistic about the future. Nevertheless let me end by discerning one faint ray of hope. At the moment the politics of native title is a dismal story of inverted racism, phoney guilt, distorted history, devalued land titles, extreme Commonwealth centralism and non-accountability for public money. Surely a program like this has minimal staying power, however much sentimental rhetoric is poured out by Mr Keating, Mr Tickner, assorted academics and clerics and a handful of self-identifying representatives of 1.5 per cent of the population, most of whom do not seem to accept them.

What we need is not sentimental rhetoric but a sharp dose of common sense, which in the present context means a return to a sense of proportion unfettered by international grandstanding.