



RESEARCH NOTE

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The Native Title Case

On 16 March 1995, the High Court handed down its judgment on the *Native Title Act 1993* (Cwlth) and the *Land (Titles and Traditional Usage) Act 1993* (WA). The judgment dealt with the following matters:

- *The State of Western Australia v. The Commonwealth* - a challenge by the Western Australian Government to the Commonwealth's *Native Title Act 1993*;
- *The Wororra Peoples & Ors v. The State of Western Australia* - a challenge to the Western Australian *Land (Titles and Traditional Usage) Act 1993* filed by the Kimberley Land Council in the name of the Wororra Peoples; and
- *Teddy Biljabu & Ors v. The State of Western Australia* - a challenge to the Western Australian Act filed by the Aboriginal Legal Service of Western Australia in the names of Teddy Biljabu and other Martu People.

Background

Conventional legal wisdom was that Australia was *terra nullius* - land belonging to no one. However in 1992, in *Mabo v. Queensland (No.2)*, the High Court recognised that a form of native title continued to exist after European settlement of Australia. The Court also found that native title could be

extinguished under the common law in a number of ways - including enactment of legislation, and inconsistent Crown grants of freehold and possibly some leasehold grants.

In another High Court case decided in 1988 - *Mabo v. Queensland (No.1)* - the Court looked at the *Queensland Coast Islands Declaratory Act 1985* which purported to extinguish without compensation, native title rights claimed by the plaintiffs in the Murray Islands. Importantly, the Court held that the ability of a State or Territory to extinguish native title was restricted by the Commonwealth's *Racial Discrimination Act 1975*.

The *Racial Discrimination Act 1975* (Cwlth) does not permit either the 'bare legislative extinguishment of native title' or any treatment of the rights of holders of native title which is discriminatory in comparison with the treatment of other holders of titles to land. In *Mabo (No.1)*, the Queensland Act was held to offend against the *Racial Discrimination Act 1975* (Cwlth) and thus to be invalid by force of section 109 of the Commonwealth Constitution. Section 109 states that where a State law is inconsistent with a Commonwealth law, then the Commonwealth law prevails and the inconsistent parts of the State law are invalid.

After the decision in *Mabo (No.2)*, the Commonwealth Government began consultations which con-

cluded with a proposal for a national legislative scheme to deal with native title. In 1993, the Western Australian Parliament passed the *Land (Titles and Traditional Usage) Act* which commenced on 2 December 1993. The *Native Title Act 1993* was passed by the Commonwealth Parliament in December 1993. The majority of its provisions commenced on 1 January 1994.

The Native Title Act 1993 (Cwlth)

The *Native Title Act 1993* (Cwlth) recognises native title rights, and provides a scheme for the determination of the existence of those rights and the payment of compensation to native title holders. The Act also enables grants of land made in the past which may have been invalid because of the existence of native title to be validated and provides a regime to protect native title rights in the future. Native title can only be extinguished as permitted by the Native Title Act.

With the exception of Western Australia, the States and Territories generally enacted validation legislation complementary with the Commonwealth's *Native Title Act 1993*.

The Land (Titles and Traditional Usage) Act 1993 (WA)

The Western Australian Act purported to extinguish any native title in Western Australia and replace it with more limited statutory rights to traditional usage of land. The Act purported to validate past grants of title. It also provided for limited rights to compensation for extinguishment of those statutory rights and for the effects of validation.

The Challenges - A Summary

The Statement of Claim lodged by Western Australia was extensive. Among other things, it was claimed that native title had been extinguished in Western Australia by the time the *Native Title Act 1993* (Cwlth) commenced; that the *Native Title Act 1993* (Cwlth) was not an exercise of the Commonwealth's constitutional powers over races or external affairs; and that the *Native Title Act 1993* (Cwlth) discriminated against the State of Western Australia and impaired its capacity to function as a government.

The challenges lodged by the Wororra and Martu Peoples claimed, among other things, that the *Land (Titles and Traditional Usage) Act 1993* (WA) discriminated against the plaintiffs in relation to their rights to land (and other matters), was inconsistent with the *Racial Discrimination Act 1975* (Cwlth) and was thus inoperative or invalid by virtue of section 109 of the Commonwealth Constitution.

The High Court Decision

In *The Native Title Case*, the High Court unanimously held that:

- the *Native Title Act 1993* (Cwlth) is valid and involves an exercise of the races power in the Commonwealth Constitution;
- one section of the Commonwealth's *Native Title Act 1993* (section 12) is invalid but can be severed from the rest of the Act and does not affect the validity of the remaining provisions of the Act; and
- the *Land (Titles and Traditional Usage) Act 1993* (WA) is inoperative.

The High Court held that the *Land (Titles and Traditional Usage) Act 1993* (WA) was inconsistent with the *Racial Discrimination Act 1975* (Cwlth) - in that it provided inferior security of title to native title holders in comparison with that enjoyed by other holders of land title in Australia. As a result, section 109 of the Commonwealth Constitution was activated, making the Western Australian legislation inoperative. The Court also found the Western Australian Act to be inconsistent with the *Native Title Act 1993* (Cwlth).

The Court found that native title had not been extinguished in Western Australia. It held the *Native Title Act 1993* (Cwlth) did not discriminate against Western Australia. It also held that the *Native Title Act 1993* (Cwlth) did not impair the State's "capacity to exercise" constitutional functions although it may affect the ease with which those functions are exercised.'

As a result of the High Court's decision:

- the recognition, protection, impairment and extinguishment of native title in Western Aus-

tralia (as in the rest of Australia) is governed by the provisions of the *Native Title Act 1993* (Cwlth);

- uncertainty will attach to some of the 8,000-10,000 mining and other titles that have been granted in Western Australia since the commencement of the *Land (Titles and Traditional Usage) Act 1993* (WA) as some of these titles may be the subject of native title claims;
- validation of past grants of land in Western Australia will need to be addressed, especially where grants of land were made in the period from the commencement of the Commonwealth's *Racial Discrimination Act 1975* until 1993; and
- compensation issues for native title holders in Western Australia will need to be addressed.

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