IMPLICATIONS OF THE HIGH COURT'S MABO DECISION

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The High Court's decision in the *Mabo* case in June 1992 is likely to have a lasting effect on Australian political debate for many years. The High Court affirmed that a form of 'native title' continues to exist in Australia, and overturned the concept of *terra nullius*. The decision could represent the beginning of a significant historic change in the relationship between Aboriginal and non-Aboriginal people. As the Prime Minister, Mr Keating, stated in his speech at the Australian launch of the International Year of the World's Indigenous People:

> Mabo is an historic decision - we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians. The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians (Keating 1992, 7).

The debate about the decision may also prove to be the catalyst for a significant deterioration in the relationship between Aboriginal and non-Aboriginal people. The prospect of an upsurge of racism in the sections of the Australian community directed at Aboriginal people seems a likely prospect.

The practical implications of the decision are yet to be determined. If the experience of Canada is any guide, many of the issues raised by the High Court's decision will not be resolved quickly (Jull 1991), despite the Prime Minister's attempts to produce a national legislative response

to the decision. Canada has been grappling with many of the same issues for many decades. Many of these issues were given a great deal of prominence after the Canadian equivalent of the *Mabo* decision, the Canadian Supreme Court's 1972 decision in the *Calder* case. It is likely that some issues, such as the nature of Aboriginal rights and the rights associated with native title, could be broadened as other cases come before the Australian courts.

Some of the issues have recently been clarified by the Federal Court's decision in September 1993 in the Lake Amadeus case. This decision not only confirmed that native title exists on the mainland, but also indicated that the degree of inconsistency between native title and other interests in the land is the most important test of whether grants of freehold or leasehold extinguish native title. That is, if the use of the land after the grant of leasehold or freehold is not inconsistent with native title, then native title is not extinguished unless the government granting the interest in the land was explicitly intending to extinguish native title (Lockhard, O'Loughlin & Whitlam 1993).

Mabo and the Mining Industry

The potential impact of the High Court's decision on the mining and exploration industry has received the most public attention. This attention is due in no small part to the ability of some sections of the mining industry to mobilise the financial and other resources necessary to substantially influence public debate. The mining industry has been arguing for some time that access to land is a major problem. The Australian Mining Industry Council, for example, has argued that much of the Australian land mass is effectively closed to the industry because of the existence of national parks, conservation reserves, Aboriginal land and other State, Territory and Commonwealth land restrictions. Legislation and regulations do restrict access by the mining industry to some of these areas of land, including some agricultural land in the southern part of Western Australia. However, the situation varies in different parts of Australia. The industry's arguments have tended to exaggerate the difficulties of access. Sections of the industry give the

clear impression that access to (Aboriginal) land is the key issue facing the industry.

In the Northern Territory, for example, access to Aboriginal land is determined by the provisions of the Commonwealth's *Aboriginal Land Rights (Northern Territory) Act*. This legislation has been the subject of repeated criticism by sections of the mining industry and the Australian Mining Industry Council. It has been amended a number of times following industry pressure. The access provisions were amended in 1987, ostensibly to facilitate easier access by the industry. Despite the amendments, however, access to Aboriginal land requires negotiations with the Aboriginal land owners and the relevant land councils. The Act specifies the role of each of the parties, the time limits for negotiations, and the type of information that must be provided to the Aboriginal land owners before access can be considered. Some sections of the mining industry have argued that these provisions unduly restrict access to the land by the mining industry, and that the ability to control access by the land owners should be either severely curtailed or removed altogether. It is an exaggeration to say, however, that mining companies are prevented from entering Aboriginal land. For example, comprehensive agreements have been negotiated between some mining companies, including North Flinders Mines Ltd and Zapopan N.L. with Aboriginal land owners in central Australia (Central Land Council 1992). What is correct is that the mining industry does not have unrestricted access to the land. In other words, the industry's development proposals must be acceptable to a significant section of the regional population.

The industry's access to many areas of land is restricted, but its arguments tend to overestimate the importance of access considerations. Very rarely are the other commercial considerations given any emphasis by the industry. For example, the state of domestic, but more particularly, international markets, largely determine the commercial viability of particular projects, and the exploration programs of the companies in the industry. While exploration activity at the present time is at its lowest level for many years, this is not primarily because of restrictions on access to land. World commodity markets have been experiencing difficulties in recent years because of the world wide

recession, and many countries, particularly Russia, have large stockpiles of many commodities that are overhanging the markets and depressing prices. Many of these commodities are also produced by Australia. A recovery in Australian exploration activity and mineral exports would not occur if Aboriginal control over access to land in the Northern Territory were removed, or if mining companies were to obtain access to national parks in Western Australia. It is highly misleading for sections of the mining industry to suggest that the main problem of the mineral industry, and the main factor determining its future prospects, is access to land.

Clearly there will be implications for the mining industry in some parts of Australia as a result of the *Mabo* decision. Justice Brennan suggested that native title may not be extinguished by the granting of State and Territory governments of authorities to prospect for minerals. It is also not clear who owns the subsurface mineral and petroleum resources on land that is held under native title, and how State and Territory mining legislation applies to land that is held under native title. The Council for Aboriginal Reconciliation suggested that:

> Although legislation reserves significant resource rights, such as minerals, to the Crown, it may be the case that native title to some resources might continue on the basis that the rights reserved by the Crown are not incompatible with some continuing native title interest, especially if traditional use of those resources could be proven ... It is likely that any continuing native rights would extend to the use of such resources for subsistence rather than contemporary commercial exploitation depending on the relevant traditional customs (Council for Aboriginal Reconciliation 1993, 25-6).

The Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC), Lois O'Donoghue, argued that while the decision did not contain any finding in relation to the ownership of minerals or other natural resources in land,

> It is our view moreover that the States and Territories validly extinguished private ownership of most minerals before 1975 (O'Donoghue 1993, 4).

anthropological and archaeological evidence about the complexities and sophistication of Aboriginal culture and society, Mr Morgan has argued that it was understandable that *terra nullius* has been the basis of property law in Australia:

> The Aborigines had no agriculture nor did they graze animals. Their few utensils, weapons and ornaments were crude. They had no written language, no sense of time or history, no common spoken language, and no political institutions which went beyond the life and boundaries of their many clans. They were unable to mount anything but local and sporadic resistance to British settlement (Morgan 1992, 4).

His comments have not been confined to a restatement of outmoded and blatantly racist views, but have also attacked the institution of the High Court itself. It is remarkable that an Australian citizen in the 1990s would suggest that the *Australian* High Court should be answerable to the *British* Privy Council.

> In the thirties our High Court was constrained by the fact that appeal from their decisions could be made to the Law Lords of the Privy Council. Today, that is no longer possible, and the High Court is answerable to no one except, in the final analysis, the Australian people (Morgan 1992, 3).

Similar types of criticisms of the High Court were made in a booklet published by the Institute of Public Affairs, *Mabo and After*.

> After *Mabo*, it will no longer be possible to look at the High Court (at least as constituted at present) as we have for most of its ninety-year life: as the senior court of the land, particularly entrusted with the grave task of continually reassessing the constitutional propriety of legislation and with the continuous evolution of an Anglo-Australian tradition of common law. Rather, we have now to take explicit account of the Court's strongly political and legislative tendencies (Durack, Brunton & Rutherford 1992, 27-28).

exploration manager of Stockdale Prospecting, Mr Danchin, in a letter to *The Australian* (22 February 1993) stated that there is a:

> ... reluctance of mining companies to negotiate Aboriginal land access with some land councils ... the suggestion that traditional owners are unable to decide their own priorities and negotiate accordingly is typical of the new paternalism which prevails the 'Aboriginal industry' and explains why we regard the Aboriginal industry itself as the major impediment to the economic advancement of Aborigines in outback Australia.

Would the mining companies be prepared to negotiate commercial agreements without legal and other forms of advice? Would the management of these companies be prepared to let their own shareholders negotiate commercial agreements directly with Aboriginal land owners?

The Western Australian Premier has made it clear that he interprets his responsibility as the elected State leader to be the promotion and protection of the interests of the mineral and other resource extractive industries. It is the mining industry that has received the guarantee of security of title from the Premier, not Aboriginal people. On this issue, the chairperson of ATSIC has argued that:

> ... ATSIC strongly supports the amendment of existing legislation to recognise native title alongside other interests in land ... [and] Governments should also be required to acquire the native title interest in land in the same way as other interests in land are normally acquired under land acquisition statutes, before making grants of inconsistent interests in native title land (O'Donoghue 1993, 13).

The Western Australian Premier has suggested that he will legislate to extinguish native title. It is important to note, however, that while governments can extinguish native title, their actions in doing so need to be in accordance with the provisions of the *Racial Discrimination Act 1975*. Extinguishment of native title by governments cannot occur in any way that represents discriminatory treatment of Aboriginal land owners. In most cases, it will not be possible for governments to

Australia. The present owner has prevented access to the station by people from the community on the grounds that all of the station is 'enclosed' and 'improved' (*The West Australian*, 13 September 1993), and because the community 'had abused them [their privileges] to the extent that his ability to run his cattle station had been threatened'. The President of the Pastoralists and Graziers' Association was reported to have said that the previous Government's 'tampering with the pastoral industry had created an impossible situation' because it had 'forced' excisions upon certain pastoralists (*The West Australian* 14 September 1993). The previous Labor Government had introduced the Land Amendment (Pastoral Leases) Bill to widen these access provisions. The then Leader of the House explained the new provisions during his second reading speech:

> The Bill broadens the rights, much along the lines of the Northern Territory legislation which has been found to work well since it came into operation some years ago. The amendment will allow a person of Aboriginal descent, or his or her spouse or child, to enter any pastoral lease land and pass through it or camp on it for a cumulative period of up to two weeks in any three months, for a purpose of following the traditional pursuits of the Aboriginal people. A person intending to enter must have a traditional affiliation, or a long-standing association, with land in the land division of the State in which the lease is located.
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> Underlying the provisions is the fact that, even though the land is leased for the grazing of stock, it remains publicly owned land and the public retains a very real interest in its use. It constitutes a very large proportion of the State, held in very large individual holdings embracing the best of the lands with which the Aboriginal community has an affinity and to which Aboriginal people need access to maintain their traditional pursuits. It is equitable to make provisions for its broader availability to the Aboriginal community where this can reasonably coexist with pastoral operations (*Parliamentary Debates*, Legislative Assembly, 3 June 1992, 3266-7).

The bill was not passed, and the relatively restrictive provisions of the *Land Act* still apply. At the time the Pastoralist's and Graziers' Association expressed its reservations about the changes to the Aboriginal access provisions, and commented:

> It has been a perfectly good working relationship in the majority of cases, and there is no need to confuse the issue and spoil the Aboriginal/pastoralist relationship by putting access agreements in legislation (*Kimberley Echo*, 26 October 1992).

It is arguable that the provisions in the Northern Territory and Western Australian legislation, restricted as they are in Western Australia, to some extent protect 'native title' (Amankwah 1993). While the legal position is not yet clear, it would appear that it is only when the utilisation of the lease amounts to use and occupation of the land that is inconsistent with the continuing enjoyment of native title that native title is extinguished or impaired. Apart from the fact that there are reservations in pastoral leases in some States relating to Aboriginal people, historian Henry Reynolds has gone further, and suggested that between 1836 and 1855 the British Government actually recognised native title. He has argued that in fact the British Government never regarded the land of the Australian colonies before non-Aboriginal settlement as *terra nullius* (*The Australian*, 3-4 July 1993). If this view is proved to be correct, then it may impact on the situation in Queensland where pastoral leases do not include reservations for Aboriginal people. Reynolds' research has suggested that limitations and reservations were built into the constitutional powers of the Parliament of New South Wales in 1855 which critically affected the powers of successor Parliaments [particularly but not exclusively the Queensland Parliament] to pass laws extinguishing native title in the forms of leases or otherwise.

The Aboriginal interest was embodied in several Orders-in-Council and in 1855 was protected by Imperial legislation which continued to operate with paramount force in Australia until 1986. The Aboriginal interest on all pastoral land held under lease is far older and far more potent than has commonly been recognised (Reynolds 1992, 10).

The Commonwealth Government's response to the *Mabo* decision

In September 1993 the Prime Minister announced the Government's initial response to the *Mabo* decision. To some extent the pressure from the mining industry and other major commercial interest groups about the issue has been successful. Since there is a public debate occurring about the proposed legislation, is it too early to tell whether the legislation will be passed in its present form, or whether it will be delayed as some Aboriginal groups have requested.

The Government's response recognises the existence of native title, and proposes to establish a National Native Title Tribunal to determine native title claims and compensation. The Federal Court will have jurisdiction to determine claims throughout Australia. The Government will fund a number of Aboriginal and Torres Strait Islander organisations to assist claimants prepare and present claims. The proposed legislation outlines time periods for consultation and negotiation between Aboriginal land owners and interests wanting access to the land subject to native title. There is no doubt that the time periods are far too short, and will put enormous pressure on Aboriginal land owners and land councils, as the experience with the *Aboriginal Land Rights (Northern Territory) Act* demonstrates. If negotiations cannot be completed satisfactorily within the specified time periods, a determination will be made by the Tribunal or a recognised State or Territory body. However, the Commonwealth, the State and Territory governments will be able to override the decisions of the tribunal on the grounds of 'the economic and other significance' of the project, and 'the public interest'.

The Government's discussion paper suggests that the proposed legislation will include a preamble which, among other things, will outline how the legislation meets Australia's international obligations. The initial proposals suggested that the legislation would include a 'reassurance that where there is, or has been, valid freehold or leasehold, native title does not exist (Commonwealth of Australia 1993, 4). Although native title will in all likelihood be extinguished across most of Australia, particularly the very large areas of pastoral lease land

in Western Australia, the Northern Territory, the legal position and the Government's intentions are not entirely clear. However, the legislation will also validate freehold or leasehold grants that 'were in whole or part invalidated by the existence of native title and the operation of any law' (Commonwealth of Australia 1993, 8). The Commonwealth Government is proposing to validate all freehold and leasehold titles, regardless of whether the titles were validly issued by governments or not. However, following extensive discussions with a group of Aboriginal representatives, the Government's amended package announced in mid-October 1993 included the provision that native title on pastoral leases owned by Aboriginal interests, or purchased in future, will be revived in a statutory form.

The Government's response has been designed to overcome the alleged uncertainty created by the High Court's decision. The uncertainty factor has to some extent been eliminated, because the Government has decided that extinguishment of native title is required in those areas where there is any uncertainty of non-Aboriginal title. The mining industry in particular has been very successful in creating a degree of public hysteria over this issue, and along with the State and Territory governments, the industry has largely had its interests protected. In some respects, the mining industry's position has been strengthened, because the provisions of the native title legislation will be used to argue against the much stronger provisions of the Northern Territory land rights legislation. Not only will native title holders throughout Australia have minimal rights, but the traditional land owners in the Northern Territory could see their existing rights eroded in coming years.

The Prime Minister also announced that a 'social justice' package would be unveiled late in 1993 or early 1994. Presumably this package will include funding for land purchases. Some Aboriginal organisations have argued that the package should include provisions for the negotiation of comprehensive regional agreements and Aboriginal self government.

The Possibilities of Regional Agreements

One issue to have arisen in the debate about the *Mabo* decision is the time that the Native Title Tribunals will need to register native title. If every piece of land that may be subject to native title is dealt with on a case by case basis, it could be many years before the claims are settled. This has certainly been the case with land claims in the Northern Territory under the *Aboriginal Land Rights (Northern Territory) Act*, although most of the delays have been due to legal action take by the Northern Territory Government.

In Canada, there have been a considerable number of regional agreements negotiated between indigenous land owners and governments. Many of these agreements have dealt with land ownership, the ownership and management of marine and land resources (both surface and subsurface) and self government and service delivery issues. The recent agreement for the creation of the new territory of Nunavut in the north of Canada is probably the most comprehensive and wide-ranging package ever entered into between a national government and indigenous peoples (see Jull 1992). However, the joint management arrangements for the Uluru-Katatjuta and Kakadu National Parks are in some respects similar to these regional agreements, although issues such as self government are not specifically addressed in the national park management arrangements.

In some areas of Australia Aboriginal people have suggested that regional agreements could be negotiated. These agreements could overcome the time delays in ascertaining whether native title exists to every piece of land, although this would not necessarily be precluded under such agreements. Regional agreements could assist Aboriginal people to exercise more control over larger areas of land than they are actually recognised as owning.

The Kimberley Land Council has been particularly active in outlining the terms of a possible regional agreement. The Kimberley region, in the northern part of Western Australia, covers an area approximately half the size of New South Wales. Half of the 23,000 people living in the region are Aboriginal people, and the overwhelming majority of the

long term residents of the region are Aboriginal people. Aboriginal interests own more than 20 pastoral leases, and there are large areas of Aboriginal reserve land, national parks, conservation reserves, and vacant crown land. In all likelihood, native title will be demonstrated to exist for at least half of the land in the region. If more pastoral leases are purchased from the funds allocated from the social justice package, an even higher proportion of the land would be subject to native title. Aboriginal people also have a strong interest in the management and use of the land held by non-Aboriginal pastoralists, but their ability to influence development on this land is minimal.

Most of the service delivery to Aboriginal people in the region is already undertaken by more than 100 Aboriginal organisations, and Aboriginal people are also involved in a wide range of commercial activities. The Aboriginal contribution to the economy of the region is substantial (Crough & Christophersen 1993), and with the exception of the Arygle diamond mine in the east Kimberley region, there are few other significant commercial projects.

The Kimberley Land Council has argued that a comprehensive regional agreement could be negotiated between Aboriginal people, the Western Australian Government and the Commonwealth. This agreement could include many of the provisions to those of similar types of agreements in Canada (Kimberley Land Council 1991). The Government's package, announced in October 1993, refers to the possibilities of regional settlements, although it is not clear that the Prime Minister has a thorough understanding of what such agreements might encompass. It is likely, however, to become a more important part of the future debate about the implications of the High Court's decision.

Conclusion

The unwillingness of most non-Aboriginal Australians and the country's governments to recognise the economic importance of Aboriginal people in many parts of Australia is not surprising (Crough 1992). After all, it has taken the Australian courts more than two centuries to formally recognise that Aboriginal people not only lived in Australia

before the arrival of non-Aboriginal people, but actually, from a common law perspective, owned the land as well. If a concept as patently absurd as *terra nullius*, which has been an extremely important ideological concept for non-Aboriginal Australia, can survive two hundred years, there is little reason to expect that the contribution of Aboriginal people to the economic development of Australia will be readily acknowledged.

There is increasing evidence of the indispensable role Aboriginal people played in the economic development of Australia, including their contributions to the exploration of the continent by non-Aboriginal people, the contribution their labour made to the development and expansion of certain industries, particularly pastoralism, and as native police. These contributions are quite distinct from the wealth that has been generated from the land that Aboriginal people had taken away from them. As Justice Brennan commented in his decision in the *Mabo* case:

> Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation (Brennan 1992, 50).

The Prime Minister's public statements recently have been welcomed by many Aboriginal and non-Aboriginal people. Whether these bold statements will actually result in social justice for Aboriginal people remains to be seen. There is no doubt that the issues associated with the *Mabo* decision have hit a very sensitive nerve in parts of the Australian community.

References

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