

ABORIGINAL TITLE: EQUAL RIGHTS AND RACIAL DISCRIMINATION

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I. INTRODUCTION

*All animals are equal but some are more equal than others.*¹

In the debate that has followed the High Court's decision in *Mabo v Queensland (No 2)*² there have been calls from the Premier of Western Australia³ and the Pastoralists and Graziers Association⁴ for "one Australia, one Law" and from Aboriginal interest groups for "title rights" to be "the same".⁵ A survey conducted

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1 From George Orwell's *Animal Farm*

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

3 Speech to Aboriginal and Torres Strait Islander Mabo Conference, Perth, 1 July 1993.

4 T Boulton, speech to Australasian Law Students' Association Conference 1993, Seminar: "Mabo: Foreshadowing Further Changes to Common Law Notions of Proprietorship" 9 July 1993.

5 B Riley, Aboriginal Legal Service of WA Executive Director *The West Australian* 12 June 1993 p 6.

for the Australian Mining Industry Council (AMIC) and the Chamber of Mines and Energy WA concluded that it was the view of 79 per cent of Australians that Aborigines "should be treated in all respects just the same as other Australians".⁶

While there is a ring of similarity in the comments which are being made there is an underlying difference in the assumptions upon which the calls for equality are based. The Premier of Western Australia, the Pastoralists and Graziers Association, AMIC, and the Chamber of Mines and Energy commence with the position that the only titles to land which ought to be available are those which have traditionally been granted by the Crown, that is, the various forms of freehold or leasehold title granted pursuant to land or mining legislation. When Aboriginal interest groups speak of equality of rights, they are suggesting that the rights flowing to Aboriginal people from the common law concept of native title identified in *Mabo (No 2)* ought to be accorded the same status as property rights granted, according to statute, by the Crown.

The members of the High Court Bench in *Mabo (No 1)*⁷ tried to grapple with this distinction. The subject of those proceedings, the *Queensland Coast Islands Declaratory Act 1985* (Qld), declared that no property rights existing prior to annexation of the Meriam Islands to Queensland in 1879, survived the act of annexation. A minority of the Court comprising Wilson J and Dawson J were of the view that the Meriam people were left with the same rights to acquire property by Crown grant which other British subjects had; that there was no inequality consequential upon the legislation; and therefore, that there was no breach of the *Racial Discrimination Act 1975* (Cth), (the Racial Discrimination Act).⁸

The majority of the Court approached the matter from a different perspective. They classified the rights in question as property rights and did not descend to measuring the various forms of property right, one against the other, or to judging property rights in accordance with a particular form.⁹ The result of the case in *Mabo (No 1)* was that the High Court held that the right to property was a fundamental human right acknowledged in the *Convention on the Elimination of All Forms of Racial Discrimination*, (the Convention). The majority of the Court also referred to the *Universal Declaration of Human Rights* which includes the right not be arbitrarily deprived of property.¹⁰ The Court held that the operation of the legislation was to take, from a particular race of people, the right to equally enjoy their property rights. The Meriam people derived their property rights from

6 The survey was prepared by AMR: QUANTUM 96 Bridport Street, Albert Park, Victoria, sampling 1506 respondents; 33 per cent of the sample was deliberately chosen from WA.

7 *Mabo v Queensland* (1988) 166 CLR 186 (*Mabo (No 1)*).

8 *Ibid* at 206 per Wilson J, at 243 per Dawson J.

9 *Ibid* at 217-18 per Brennan, Toohey and Gaudron JJ.

10 *Ibid* at 217 per Brennan, Toohey and Gaudron JJ, at 230 per Deane J.

prior to annexation of the Islands to the colony of Queensland. The legislation was discriminatory in that it left intact property rights derived from the Crown but not those derived prior to the Crown's acquisition of radical title. The deprivation of property was said to be arbitrary in the absence of any provision for compensation.¹¹

The High Court in *Mabo (No 1)* was dealing with the interpretation of s 10 of the Racial Discrimination Act. Section 10 provides that:

If, by reason of...a law of the Commonwealth or of a State or Territory, persons of a particular race...do not enjoy a right that is enjoyed by persons of another race... then, notwithstanding anything in that law, persons of the first mentioned race...shall, by force of this section, enjoy that right to the same extent as persons of that other race...

As Mason J said in *Gerhardy v Brown*:

When racial discrimination proceeds from a prohibition in a State law directed to persons of a particular race, forbidding them from enjoying a human right or fundamental freedom enjoyed by persons of another race, by virtue of that State law, s 10 confers a right on the persons prohibited by State law to enjoy the human right or fundamental freedom enjoyed by persons of that other race. This necessarily results in an inconsistency between s 10 and the prohibition contained in the State law... s 10 is expressed to operate where persons of a particular race, colour or origin *do not enjoy* a right that is enjoyed by persons of another race, colour origin, or do not enjoy that right to the same extent... s 10 should be read in the light of the Convention as a provision which is directed to lack of enjoyment of a right arising by reason of a law whose purpose *or effect*,¹² is to create racial discrimination.¹³

As Mason J pointed out, s 10 does not strike down a law which is discriminatory or is inconsistent with the Convention:

Instead it seeks to ensure a right to equality before the law by providing that persons of the race discriminated against by a discriminatory law shall enjoy the same rights under that law as other persons.¹⁴

In a slightly different manner, s 9 of the Racial Discrimination Act also has an impact upon the valid operation of laws. Section 9(1) of the Racial Discrimination Act makes it unlawful for a person:

...to do any act involving a distinction...based on race...which has the purpose or effect of...impairing the...enjoyment or exercise on an equal footing of any human right...

Section 9 does not prevent a legislature from enacting legislation.¹⁵ It is only once the law is enacted pursuant to the power of the parliament of the state, as

11 *Ibid* at 232 per Deane J.

12 The writer's emphasis.

13 (1985) 159 CLR 70 at 99.

14 *Ibid* at 94.

preserved by s 107 of the Constitution, that a state law may become invalid pursuant to s 109 of the Constitution because of its inconsistency with the Commonwealth law. As Brennan J said in *Gerhardy v Brown*:¹⁶

There is an inconsistency between a State law which purports to authorise the doing of an act and a Commonwealth law which prohibits the doing of such an act, and the State law is, to the extent of the inconsistency, invalid: *Clyde Engineering Co Ltd v Cowburn*.¹⁷ If [an] Act authorizes the doing of an act, prohibited by s 9 of the *Racial Discrimination Act*, the provision of the...Act which confers the authority is invalid at least to that extent.

Brennan J was of the view that the issuing of land grants pursuant to inconsistent and invalid legislation may be unlawful,¹⁸ but stated that:

The inequality of treatment is produced by the law itself, not by any act done in exercise of the discretion created by the law. A discriminatory law or a discriminatory act done in due obedience to the law denies the human right of equality before the law, referred to in the third preamble to the Convention. The right to equality before the law without distinction as to race is guaranteed by the State Parties to the Convention: Art 5. The claim to equality before the law is, as Sir Hersch Lauterpacht wrote (*An International Bill of Rights of Man* (1945) p 115), 'in a substantial sense the most fundamental of the rights of man'.¹⁹

Deane J in *Gerhardy v Brown* drew his determination from s 9 of the Racial Discrimination Act.²⁰ He (unlike Gibbs CJ²¹ and Mason J²²) said that in applying s 9 one is not compelled to identify particular acts of a kind which are rendered unlawful. His view is that a

...comparison of the provisions of s 9 of the Commonwealth Act and [a] State Act [may disclose] a prima facie general inconsistency of a type which would ...necessarily involve invalidity of the provision of...the State Act under s 109 of the Constitution.²³

Deane J was of the view that the state *Pitjantjatjara Land Rights Act* operated to make the exercise of the right of free access to the land unlawful, and justified actions for ejectment or an injunction preventing entry to the land. However s 9 of the Commonwealth Act precluded such enforcement by reason that it comprised a restriction by reference to racial distinction resulting in a "fundamental and pervading inconsistency between the two provisions".²⁴ Perhaps the practical

15 *Ibid* at 81 per Gibbs CJ at 121 per Brennan J.

16 *Ibid* at 121.

17 (1926) 37 CLR 466 at 490.

18 *Ibid* at 122.

19 *Ibid* at 128.

20 *Ibid* at 146-7.

21 *Ibid* at 81.

22 *Ibid* at 93.

23 *Ibid* at 146.

24 *Id.*

application of the view of Deane J in the case of native title asserted over land which is the subject of a Crown grant, is that the Crown grantee will not be empowered to enforce the grant by ejectment or injunction in the face of an established claim to native title.

Mason J was of the view that it was not s 9, but s 10 which was intended to apply to the operation of laws.²⁵ He suggests, while refraining from deciding it, that a discriminatory act pursuant to statute may not be prohibited by the Racial Discrimination Act but s 10 merely confers an equality of enjoyment of rights to a person against whom there has been discrimination.²⁶ Applying this view to land grants conflicting with native title is difficult. Does it mean that where a title is granted over a particular tract of land, the native title holder to the same land may enjoy equal rights to it? That could not be so when the exercise of those rights would be in direct conflict. It could apply in relation to the issue of access to the land, as in *Gerhardy v Brown*, where the question was whether an individual could traverse a vast tract of land. It would not apply so readily to the question of who can build a residence on the same piece of land, or who can excavate an open cut mine on the land.

The better answer was found in *Mabo (No 1)* where the Court held that the legislation did not operate to deprive native title holders of their rights as a consequence of s 10,²⁷ though the law would still be valid.²⁸ If one reaches that conclusion then it is arguable that a conflicting grant under legislation which would operate to deprive native title holders of their rights would not be accorded such an operation because of its inconsistency with s 10 of the Racial Discrimination Act and the consequential operation of s 109 of the Constitution. The result would be that the legislation would not operate to clothe a grant with validity which purported to be made in conflict with a native title.

Usually grants under land legislation are at the discretion of the Governor in Council. The Cabinet recommends whether or not to make the grant and to whom to make the grant. That is to be distinguished from the position referred to by Gibbs CJ in *Gerhardy v Brown* under the *Pitjantjatjara Land Rights Act 1981* (SA) which conferred a power on the Governor to make a grant to Anangu Pitjantjatjara but to no one else. Gibbs CJ held that, while the Governor could issue or refrain from issuing the grant, and he could grant the whole or part of the lands, because he was restricted as to the beneficiary of the grant, his grant did not involve a distinction, preference, exclusion or restriction of any kind.²⁹ Chief

25 *Ibid* at 92-3.

26 *Ibid* at 94.

27 Note 7 *supra* at 215-6 per Brennan, Toohey and Gaudron JJ.

28 *Ibid* at 232 per Deane J.

29 Note 13 *supra* at 82.

Justice Gibbs was limiting his conclusion to the particular range of circumstances to which he refers. That differs from the more generally applicable views of Brennan and Deane JJ.³⁰

TA Gray QC, relies on the view of Gibbs CJ to describe s 9 of the Racial Discrimination Act as being "very limited in its operation".³¹ That general conclusion does not follow from the words of Gibbs CJ. Mr Gray states in his article that the finding of Gibbs CJ is that s 9 does not apply to the act of a public official issuing a grant of freehold, leasehold or mining or petroleum interest where that act is an administrative function which does not involve the exercise of a discretion. What Mr Gray does not say is that it is a rare circumstance for the issue of a grant of land not to involve the exercise of a discretion vested in the executive arm of government.

II. LEGISLATION BEFORE AND AFTER THE RACIAL DISCRIMINATION ACT

It would appear from *Gerhardy v Brown* that the result of the Racial Discrimination Act is that it is the *operation* of legislation which is either invalid under s 9 or inoperative under s 10. It is irrelevant that the legislation was enacted prior to the Racial Discrimination Act if acts done pursuant to the legislation have occurred since the commencement of the earlier 1975 Act. Where an act is done pursuant to legislation then the legislation is operating at the time of the act. There is nothing in the majority judgment in *Mabo (No 1)* which limits it to the proposition that the legislation, in order to be inoperative pursuant to s 10 of the Racial Discrimination Act, must have been enacted since the enactment of s 10 of the Racial Discrimination Act. It is equally applicable to legislation enacted prior to 1975. In principle, therefore, it is arguable that legislation may be invalid, as being inconsistent with s 9 of the Racial Discrimination Act whether it was enacted before or after 1975. Such a conclusion is consistent with the reasoning of Mason and Brennan JJ in *Gerhardy v Brown*.

III. LEGISLATION AND ACTS PRIOR TO THE RACIAL DISCRIMINATION ACT

In *Mabo (No 1)* and *Mabo (No 2)*, the High Court has proceeded on the basis that any law or act extinguishing native title prior to the Racial Discrimination Act

³⁰ *Ibid* at 121-22 and 146.

³¹ TA Gray "The Myths of Mabo" 12(1) *AMPLA Bulletin* 62 at 82.

would not be invalidated by the Racial Discrimination Act.³² However it is arguable and worthy of further consideration, that insofar as ss 9 and 10 of the Racial Discrimination Act relate to the operation of legislation and insofar as any grants pursuant to legislation have, since 1975 continued to operate in such a way as to deny property rights of native title holders, then such operation is inconsistent with the Racial Discrimination Act. It seems to have been assumed in *Mabo (No 2)* that, once a grant was made, the operation of the law empowering the grant or the act pursuant to the empowering legislation, ceased. It is this writer's view that it is not so. The operation of both the law and the act empowered by it, continues. The line of reasoning that the Court assumes is that the native title, once impaired in its exercise, is irretrievable. However, as a matter of fact, the corpus of the right remains intact in many instances. That is, the land is still there. The only difficulty is that somebody else has been granted some rights to that same piece of land which, if exercised, are inconsistent with the exercise of the rights of the native title holder. There is no distinction in principle between such grants made prior to 1975 and those grants made since 1975; the same difficulty of concurrent exercise of rights exists.

It is only the exercise of the inconsistent rights since 1975 which is impacted by the Racial Discrimination Act. If that limitation is assumed, one is not dealing with any retrospective operation of the legislation.³³ The contentious issue is whether legislation empowering a grant ceases to have an operation in relation to a particular grant immediately upon the grant being made, and whether it continues to operate.

No law existing prior to the Racial Discrimination Act is rendered void ab initio upon the coming into operation of that Act.³⁴ As Taylor J said in *Butler v A-G (Vic)*: "The Federal Act can 'prevail' only whilst it remains in force..."³⁵

Justice Mason points out in *University of Wollongong v Metwally*,³⁶ (*Metwally*), that at common law the rule was that when an Act was repealed or it expired, it was regarded as never having existed except as to "matters and transactions past and closed".³⁷ If the question for the purpose of the present discussion is whether a grant of a title to land over which there is a native title in existence prior to the Racial Discrimination Act is a concluded matter, the answer to that question is, unarguably, yes. However, if the matter being raised is the

32 *Mabo (No 1)* note 7 *supra* at 217-19; *Mabo (No 2)* note 2 *supra* at 70 per Brennan J, at 111 per Deane and Gaudron JJ, at 196 per Toohy J.

33 This was discussed in the case of *University of Wollongong v Metwally* (1984) 158 CLR 447.

34 *Ibid* at 467 per Mason J; *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573, 599.

35 (1961) 106 CLR 268 at 183 (referred to with approval in *University of Wollongong v Metwally* note 33 *supra* at 462 per Mason J and at 473 per Brennan J).

36 Note 33 *supra*.

37 *Ibid* at 465.

question of the exercise of rights pursuant to a grant then the answer must be different. As Brennan J said in *Metwally*:

During the "period...the Commonwealth law and the inconsistent State law are contemporaneously on the respective statute books...an act, matter or thing to which the State law would have applied is barren of the legal effect that the State law would otherwise have attributed to it".³⁸

IV. PRE 1975 GRANTS AND REMEDIES

A. DAMAGES

All members of the Court in *Mabo (No 2)* took the view that where there had been a grant which was inconsistent with native title prior to 1975, then there was no remedy which would allow recovery of the rights of the native title holder to exercise the native title upon the land. Justice Brennan is said by Mason CJ and McHugh J in their judgment, to be of the view that an extinguishment by grant prior to 1975 is not unlawful.³⁹ However, that is not exactly what Brennan said. He said:

...the *validity* of a particular grant depends upon conformity with the relevant statute. When *validly* made, a grant of an interest in land binds the Crown and the Sovereign's successors. The Courts cannot refuse to give effect to a Crown grant "except perhaps in proceedings by scire facias or otherwise on the prosecution of the Crown itself" (*Wi Parata v Bishop of Wellington* (1877) 3 NZ (Jur) NS 72 at p 77). Therefore an interest *validly* granted by the Crown, or a right or interest dependent on an interest *validly* granted by the Crown cannot be extinguished by the Crown without statutory authority.⁴⁰

Justice Brennan makes it a clear precondition that the grant must be valid. He suggests that it will be valid if it complies with the empowering statute. But if the empowering statute is deprived of its legal effect by the combination of s 109 of the Constitution and the Racial Discrimination Act from 1975, insofar as the effect is to deprive Aboriginal title holders of property, then the effects of a pre-1975 grant, would from 1975 be "barren".⁴¹

The other three majority judges are said to be of the view that an extinguishment by inconsistent grant is wrongful. Even those who say it is wrongful suggest that the only remedy is in damages.⁴² There is no discussion in the judgments as to why they reached that conclusion.

38 *Ibid* at 473.

39 Note 2 *supra* at 15.

40 *Ibid* at 63-4 (writer's emphasis).

41 Note 33 *supra* at 473.

42 Note 2 *supra* at 122 per Deane and Gaudron JJ, at 196 per Toohey J.

B. INDEFEASIBILITY

It may be argued that the concept of indefeasibility of title which applies to a grant of land pursuant to statute under the Torrens system protects the grantees of fee simple titles from any disturbance to their titles in the absence of proof of fraud, upon the registration of those titles such that the only remedy available would be damages.

However, the concept of indefeasibility of title relates to the priority of interest holders. Its purpose is to avoid encumbrance upon a title by virtue of grants of interest without notice. That concept is not relevant to the resolution of the competition between a grant and native title because native title is not based in grant. By definition it pre-dates any grant, and the argument is as to whether or not the grant can be valid in the face of the pre-existing native title. If it is not valid then registration cannot validate. If it is valid then the native title is extinguished or impaired depending upon the level of inconsistency between the two titles.

C. SCIRE FACIAS

Brennan J also considered the prospect of proceedings by *scire facias*, which would allow the upsetting of a Crown grant where fraud had been perpetrated on the Crown.⁴³ Frank Brennan is of the view that *scire facias* would not be available to traditional owners whose claim might be that the fraud was perpetrated by the Crown itself.⁴⁴ Peter Poynton suggests that it is arguable that the monarch was 'deceived' by the fallacy of *terra nullius* promulgated by colonial, state and national Australian administrations for 204 years.⁴⁵ It is difficult to accept that a distinction can be drawn in that way between the 'monarch' and the 'administration'. In any event, Poynton's suggestion that the 'deceit' remains actionable because the accrual of the limitation period under the *Statute of Limitations* runs from 3 June 1992 for this cause of action is unsustainable. The Court's decision delivered on that date did not alter the ability of the monarch to know of the facts.

43 *Ibid* at 64.

44 F Brennan "Mabo and the Racial Discrimination Act" (1993) 15 *Sydney Law Review* 206 at 212.

45 P Poynton "'Scire facias' We've Come for Your Freehold" (1993) 3(62) *Aboriginal Law Bulletin* 13.

VI. LIMITATIONS OF ACTIONS - BREACH OF FIDUCIARY DUTY AND THE RACIAL DISCRIMINATION ACT

Scire facias does however bear some resemblance to the concept of breach of fiduciary duty of the Crown in making the grant. Toohey J discussed that matter at some length in his judgment.⁴⁶ Toohey J draws together the concept of breach of fiduciary obligation and the operation of the Racial Discrimination Act.⁴⁷ He is of the view that anything done to constitute interference with traditional title would be a breach of fiduciary obligation of the state towards the traditional title holder. He draws a parallel with such a breach and a law that extinguishes a traditional title without compensation. He concludes that such a law would offend s 10 of the Racial Discrimination Act and be inconsistent with that Act, within the meaning of s 109 of the Constitution. The Racial Discrimination Act would therefore prevail and the proposed law would be invalid to the extent of the inconsistency. This conclusion might be said to contrast with those who would argue that the effect of the Racial Discrimination Act is not to invalidate grants inconsistent with native title but to 'enhance' native title rights to provide compensation equivalent to that available to other title holders where another interest is granted which impairs title.⁴⁸

A cause of action arising in equity out of a breach of fiduciary duty is not governed by any statutory period of limitation with respect to the commencement of the action. Justice Toohey's suggestion that:

...where there has been an alienation of land by the Crown inimical to the continuance of traditional title, any remedy against the Crown may have been lost by the operation of limitation statutes,⁴⁹

may not apply to a cause of action based on the breach of a fiduciary duty. In any event the continuing operation of the alienation may bring it within the operation of the Racial Discrimination Act, and s 109 of the Constitution.

This view extends the views which the judges expressed in *Mabo (No 2)*.⁵⁰ Those views were however not necessary for the decision in *Mabo (No 1)* and may be regarded as *obiter*. They are largely expressions of opinion without accompanying supporting authority and might be said to have a level of inconsistency about them which leaves them open to further argument.

46 Note 2 *supra* at 199-205.

47 *Ibid* at 214-16.

48 Note 31 *supra* at 84.

49 Note 2 *supra* at 196.

50 Note 44 *supra* at 212.

VII. POSSIBLE LEGISLATIVE RESPONSES

At the time of writing this paper⁵¹ the question of legislative responses by the Commonwealth and the states to the impact of *Mabo (No 1)* on title granted by the Crown is the subject of much political debate and a variety of actual and proposed legislative responses.

A. VICTORIA

The *Land Titles Validation Act 1993 (Vic)* introduced into the Victorian Parliament purports to deem all grants of title to land other than a "customary title" made after 31 October 1975 to have had effect, "according to its tenor".⁵² Such titles are deemed "never to have been invalid because of the existence, when the title was granted, of a customary title to the land".⁵³ Such title to land is deemed never to have been "affected to any extent by the existence of such customary title" and is deemed "never to have been subject to the exercise of enjoyment of rights under any customary title".⁵⁴

The legislation seeks to give retrospective effect to titles granted from the Crown on the assumption that titles granted since 1975 may be invalid as infringing the Racial Discrimination Act. The legislation purports to extinguish native title in conformity with the Racial Discrimination Act by providing a mechanism for compensation which is comparable to that available to other title holders in the State whose title has been acquired. In that regard it seeks to rely on the provisions of s 10 of the Racial Discrimination Act, in conformity with the view expressed, for instance, by Mason J in *Gerhardy v Brown*.⁵⁵ It does not take account of the thesis of this paper, that grants prior to the 1975 Racial Discrimination Act may also not have a valid operation, nor of the view of the High Court in *Metwally* that retrospective legislation cannot overcome a s 109 constitutional conflict.

B. WESTERN AUSTRALIA

A draft Cabinet Minute was prepared for the Government of Western Australia and became public in May 1993 suggesting a *Land Management Act 1993 (WA)* in which it was proposed that:

51 30 July 1993.

52 *Land Titles Validation Act 1993 (Vic)* s 6(1).

53 *Ibid* s 6(2)(a).

54 *Ibid* s 6(2)(b).

55 Note 13 *supra* at 94.

1. The Act would "confirm the Crown's ultimate power over all land in Western Australia, including the right to take land for lawful purposes, irrespective of any Crown title or claimed native title interest".
2. The Act would validate, "any Crown title previously issued, notwithstanding that it might be inconsistent with any native title subsisting in the land over which title is granted".
3. "Where the grant of title cannot be made to co-exist with native title, native title will be extinguished".
4. The Act "must guarantee due process and compensation to all holders of titles equally, including native title, or it will contravene the *Racial Discrimination Act* (effective 31 October 1975)".

The Aboriginal Affairs Planning Authority obtained advice on those proposals which included the following comments:

...reference to confirmation of 'the Crown's ultimate power over all land in Western Australia' may misrepresent the true legal position in that it tends to suggest that the Western Australian Crown has sovereign rights over Western Australia land. The Crown's power over land in Western Australia is exercised subject to the Constitution, Commonwealth laws and valid exercises of the power under those laws. As a general comment, although the Cabinet submission later acknowledges the position of the *Racial Discrimination Act* 1975, in places it seems to lose sight of the fact that, constitutionally, State laws are subject to valid Commonwealth laws.⁵⁶

Recent comments by the Premier of Western Australia indicate that it is the present view of the Western Australian Government that they do not have sufficient power to pass legislation which would achieve the objects they are seeking without infringing the *Racial Discrimination Act*. They are considering whether or not to proceed to pass such legislation or to await Commonwealth legislation in conjunction with state legislation. The Premier is reported to be relying on advice from Dr Colin Howard that legislation seeking to validate state laws retrospectively would be ineffective; and the most appropriate approach is for the Commonwealth to legislate to limit the impact of the *Racial Discrimination Act*.⁵⁷ This writer would agree with the view expressed as to retrospective legislation.

C. NORTHERN TERRITORY

The *Confirmation of Title to Land (Request) Act* 1993 (NT) unusually requests the Commonwealth to enact a bill which is set out in a Schedule to the Act. It proposes that all Crown titles be declared valid irrespective of native title. The Schedule contains a clause declaring "for the purpose of resolving doubts" that the *Racial Discrimination Act* "does not have the effect, has never had the effect and

⁵⁶ Phillips Fox, ref Gordon Brysland, letter to Aboriginal Affairs Planning Authority, 21 May 1993.

⁵⁷ *The West Australian* 23 July 1993 p 9.

shall not hereafter be treated as having or ever having had the effect directly or indirectly of invalidating, impairing or otherwise adversely affecting any title to land granted before or after the commencement of this Act".⁵⁸ Such legislation, if ever enacted, would run the grave danger of falling foul of the majority view of the High Court in *Metwally*, that a declaration of retrospectivity cannot alter the fact of a pre-existing conflict of laws infringing s 109 of the Constitution.

On 28 May 1993 the Northern Territory Government introduced into the Territory Parliament a Bill to amend the *McArthur River Project Agreement Ratification Act* of 1992 with the intent of confirming by 1 July 1993 the validity of mineral leases granted pursuant to an Act given royal assent on 18 December 1992. The Bill is lying in the House awaiting negotiations between the interested parties. Professor Nettheim suggests that the Bill will not achieve its object of avoiding the operation of the Racial Discrimination Act merely by making provision for compensation after extinguishing native title.⁵⁹ He points out that mining leases are granted subject to freehold and leasehold titles granted under land legislation. If such titles are not extinguished then native titles would be treated less favourably if they were extinguished by the legislation. The legislation would suffer the same fate as the legislation considered by the High Court in *Mabo (No 1)*.

VIII. CONCLUSION

The legislatures are obviously wrestling with the requirements of the Racial Discrimination Act in trying to accommodate the concerns of those Crown grantees of title. Whether they succeed in enacting valid legislation will depend on the specific terms of the legislation. One would hope that the Federal Government, in any overriding legislation, will maintain a steady eye on its international obligations to avoid racial discrimination and not diminish the human rights of Aboriginal people to their property.

As Brennan, Toohey and Gaudron JJ said of the Racial Discrimination Act:

When inequality in enjoyment of a human right exists between persons of different races, colours or national or ethnic origin under Australian law, s 10 operates by enhancing enjoyment of the human right by the disadvantaged persons to the extent necessary to eliminate the inequality.⁶⁰

One wonders whether Aboriginal Australians will, in the end, be more, less, or more or less equal.

58 *Confirmation of Title to Land (Request) Act* 1993 (NT) cll 6-7. See discussion by R Bartlett (1993) 3(62) *Aboriginal Law Bulletin* 14.

59 G Nettheim "Mabo - McArthur River and the Mabo Response" (1993) 3(62) *Aboriginal Law Bulletin* 15.

60 Note 7 *supra* at 217.