RECENT DEVELOPMENTS — MABO

The Impact of Native Title on Financiers

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1. INTRODUCTION

"[In the High Court] rests the ultimate responsibility of declaring the law of the nation. Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture ... the skeleton of principle. The Court is even more reluctant to depart from earlier decisions of its own. The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed.... [N]o Case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system."[1]

In these terms in *MABO v Queensland [No 2]*[2] Justice Brennan sounded the deathknell for over 200 years of precedent rejecting the concept of native title on the basis of the doctrine that Australia was a *terra nullius* at the time of European settlement.

The decision of the High Court in *MABO [No 2]* was a watershed one. It has far reaching implications, which have already started to be felt, for the long established land management systems of the States and Territories of Australia and for industries such as mining, petroleum and pastoral.

Despite the extensive debate regarding the implications of the High Court's decision in *MABO [No 2],* the impact of the recognition of native title on the banking industry and for financiers has largely been ignored. I thus welcome the opportunity to address you today and to discuss this topic. I have been warned by a number of my banking and finance lawyer colleagues (who shall remain nameless) that I would be remiss if I assumed a great knowledge of matters native title amongst my audience today. In any event I do not believe that the impact of native title on financiers can be properly discussed unless some basic concepts regarding the common law concept of native title and Commonwealth and State native title legislation are understood.

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1 *MABO v Queensland [No 2]* (1992) 175 CLR 1, per Brennan, J at pp 29 and 30.

2 (1992) 175 CLR 1.

I therefore propose by way of background to:

- review what was decided by the High Court in *MABO [No 2]*;
- analyse some of the uncertainties relating to native title which were left unresolved by the High Court in the *MABO [No 2]* case;
- make reference to a number of recent important court and tribunal decisions which address some of those uncertainties; and
- look at the Commonwealth *Native Title Act* and State native title legislation.

This approach will hopefully provide the context within which my observations regarding the impact of native title on financiers will be more meaningful to you.

2. THE MABO [NO 2] DECISION

In *MABO [No 2]* Justice Brennan conveniently summarised in nine principles the Australian common law with regard to native title. The first principle is not relevant to our discussions. The remaining eight are:

- On acquisition of sovereignty over a particular part of Australia, the Crown acquired a radical title to the land in that part.
- Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.
- Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (eg authorities to prospect for minerals).
- Where the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation and other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of native title. Native title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over the land (eg., land set aside as a national park).
- Native title to particular land (whether classified by the common law as proprietary, usufructuary or otherwise), its incidents and the persons entitled thereto are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land. It is immaterial that the laws and customs have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains. Membership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.

- Native title to an area of land which a clan or group is entitled to enjoy under the laws and customs of an indigenous people is extinguished if the clan or group, by ceasing to acknowledge those laws, and (so far as practicable) observe those customs, loses its connection with the land or on the death of the last of the members of the group or clan.

- Native title over any parcel of land can be surrendered to the Crown voluntarily by all those clans or groups who, by the traditional laws and customs of the indigenous people, have a relevant connection with the land but the rights and privileges conferred by native title are otherwise inalienable to persons who are not members of the indigenous people to whom alienation is permitted by the traditional laws and customs.

- If native title to any parcel of the waste lands of the Crown is extinguished, the Crown becomes the absolute beneficial owner.[3]

To these principles, two further ones should be added:

- extinguishment of native title by the Crown by inconsistent grant does not give rise to a claim for compensatory damages, at least to the extent of the inconsistency; and

- the power of alienation and the power of appropriation vested in the Crown in the right of a State are also subject to the valid laws of the Commonwealth, particularly the *Racial Discrimination Act*.[4]

3. UNCERTAINTIES FROM MABO [NO 2] AND RECENT DEVELOPMENTS

3.1 Introduction

Despite these apparently clear principles stated by Justice Brennan in *MABO [No 2]*, the case gave rise to a number of uncertainties in relation to native title issues.

As has been stated by Michael Lavarch, the Attorney General: "... the judgment ... left many questions unanswered and a range of difficult problems for governments."[5]

3.2 Criteria for a successful native title claim

Introduction

The first area of uncertainty is the criteria for a successful native title claim. According to Justice Brennan's principles stated in *MABO [No 2]* there is a two step test for proof of native title.

Native title claimants must show that:

- Native title rights have survived any dealings with land since European settlement over 200 years ago. Upon the acquisition of sovereignty over Australia, native title rights became exposed to extinguishment by a valid exercise of sovereign power evidencing a "clear and plain intention" to extinguish those rights by either government legislative or executive action. As noted by Justice Brennan extinguishment most commonly occurs by the Crown's valid alienation of land by granting an interest that is wholly or partially inconsistent with a continued right to enjoy native title (such as estates of freehold) or by the Crown's

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3 *MABO [No 2],* per Brennan, J pp 69-70.

4 *Pareroultja v Tickner* (1993) 117 ALR 206, per Lockhart, J at pp 209-210.

5 Native Title, Legislation with Commentary by the Attorney General's legal practice, 1994, Foreword p iii.

appropriation and use of land where the appropriation is wholly or partially inconsistent with those rights. Appropriation and use of Crown Land for roads, railways, post offices and other permanent public works are examples given by Justice Brennan of circumstances in which native title would be extinguished by Crown appropriation.

- Native Title claimants must also show that they have maintained, in accordance with their laws and customs, a connection with the relevant land. If an Aboriginal clan or group ceases to acknowledge those laws, and observe those customs or loses its connection with the land, native title is extinguished.

Both the first and second limbs of the test have created uncertainty.

As regards the first limb debate has centred around question as to the degree to which the grant by the Crown of leasehold interests will extinguish native title.

As regards the second limb the question arises as to the nature of the connection with land which must be maintained by an Aboriginal clan or group in order to preclude extinguishment of their native title.

First limb

The Commonwealth *Native Title Act*, 1993 addresses the effect of the grant of leasehold interests by the Crown on the continued existence of native title, where those grants were invalid by reason of the *Racial Discrimination Act*, 1975. That Act provides that pastoral, agricultural, commercial and residential leasehold grants[6] made by the Crown prior to 1 January 1994 and which were invalid by reason of the operation of the *Racial Discrimination Act* are validated and extinguish native title over the area of land the subject of the grant.[7] However section 16 of the *Native Title Act* provides that such a grant does not affect the rights or interests of Aboriginal people under a reservation or condition for their benefit contained in a leasehold grant.

In many Australian jurisdictions, pastoral leases granted by the Crown have traditionally included reservations or conditions in favour of Aboriginal people. For example this has consistently been the case in South Australia. The provisions of section 16 of the *Native Title Act* give rise to the possibility that the grant of invalid (now validated) pastoral leases prior to 1 January 1994 have not completely extinguished native title rights. It is possible that the native title rights of access, fishing, hunting and the right to erect traditional dwellings reflected in those reservations and conditions have been preserved despite the pastoral lease grant.

In addition two recent cases, subsequent to the *MABO [No 2]* decision, dealing with native title issues have raised doubts as to whether valid leasehold grants made before 1 January 1994 will always operate to extinguish native title.

The cases are *Pareroultja v Tickner* (1993) 117 ALR 206, a decision of Justice Lockhart before the full bench of the Federal Court and the decision of Justice French, the President of the National Native Title Tribunal, in the matter of the Waanyi People's Native Title Determination Application, Application No QN94/9.

In the *Tickner* case Justice Lockhart said that:

> "... the extent to which native title over land may co-exist with leasehold tenure is not a question fully explored in *MABO [No 2]*. Much may depend on the nature and extent of the

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6 The terms "Lease", "Commercial Lease", "Agricultural Lease", "Pastoral Lease" and "Residential Lease" are all defined in sections 242, 246, 247, 248 and 249, respectively of the *Native Title Act* (Cth).

7 Section 15(1)(a) of the *Native Title Act*. Each of these leases are what is termed in the *Native Title Act* "Category A past acts".

> leasehold estate (eg a monthly tenancy or lease for 99 years) and inconsistency, if any, between native title and the lessor's reversionary interest."[8]

The *Waanyi Peoples* case was a decision by Justice French as to whether the native title claim of the Waanyi Peoples should be accepted under the Commonwealth *Native Title Act* by the National Native Title Tribunal. In the course of his judgment Justice French considered in detail the general principles relating to the extinguishment of native title by leasehold grants. After analysing the judgments of each of the High Court judges in *MABO [No 2]* Justice French concluded that:

> "In my opinion, the decision of the High Court in *MABO [No 2]* establishes a principle that generally speaking the grant of a leasehold interest conferring rights of exclusive possession upon the lessee unqualified by any right of access in favour of Aboriginal people is inconsistent with the continuance of native title rights and interests. That general proposition is subject to the terms and conditions of particular leases which, for one reason or another, may negative the characterisation of the grant as intending extinguishment. Thus, the short term of the lease or wide rights of general public access may defeat a contention that it has extinguished native title. However where a native title is extinguished the common law position seems to be that it cannot be revived by the common law."[9]

Both of these judgments seem to open up the possibility that a leasehold grant, without reservations in favour of Aboriginal people, may not extinguish native title under the common law despite the fact that exclusive possession is granted pursuant to the lease. Where the lease is of short duration or wide rights of general public access or other terms and conditions indicate an absence of an intention to extinguish native title, native title may be preserved.

In addition, in the *Waanyi Peoples* case Justice French reviewed the question whether at common law the grant of a pastoral lease operates to extinguish native title. In his view the incidents of a leasehold grant such as the right to exclusive possession may be implied in relation to a pastoral lease grant. On the other hand Justice French was of the view that a reservation in favour of Aboriginal people could not be so implied. Justice French held that the pastoral lease under consideration in that case operated to extinguish native title. The lease did not contain any reservation in favour of Aboriginal persons. He expressly reserved his opinion on the effect on native title of a pastoral lease grant containing reservations of this kind. He said:

> "The question whether or not a pastoral lease containing a reservation [in favour of Aboriginal people] extinguishes native title remains open.... It may be ... that a distinction is to be drawn between pastoral leases containing reservations expressly mandated by the Act under which they were granted and pastoral leases containing reservations not so mandated but inserted in the exercise of an administrative discretion. However, that is a matter for another day."[10]

Second limb

In the *Waanyi* case Justice French also made some interesting observations regarding the second limb of the test for native title ie. that claimants must show that they have maintained an ongoing connection with the relevant land in accordance with their laws and customs.

In determining whether the applicants had a prima facie case for the existence of native title Justice French held that there was evidence that the land under claim was occupied by an

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8 *Pareroultja v Tickner* (1993) 117 ALR 206, per Lockhart, J, at p 214.

9 Waanyi Peoples Native Title Determination Application, per French, J, at p 28.

10 Waanyi Peoples Native Title Determination Application, per French, J, at pp 707.

Aboriginal group or clan other than the Waanyi people prior to the 1880s in accordance with their traditional laws and customs and that:

> "... Upon the disappearance or extinction of the Injilarija people it was possible for the Waanyi people to acquire rights and interests in the land according to their own traditional laws and customs, and/or laws and customs common to themselves and the Injilarija."[11]

These views are important because they acknowledge that native title claimants may be able to satisfy the second limb of the test for native title not only through their own connection with land but through the connection of their "predecessors in title".

On the other hand in the recent decision of *Coe v Commonwealth*[12] Chief Justice Mason appeared to require a physical connection with land on the part of native title claimants for the second limb of the test to be satisfied. The Chief Justice said:

> "... If the plaintiff asserts native title to land, then the plaintiff must establish the conditions according to which native title subsists. Those conditions include (a) that the title has not been extinguished by inconsistent Crown grant and (b) that it has not been extinguished by the Aboriginal occupiers ceasing to have a requisite *physical* connection with the land in question."[13] (My emphasis).

Interestingly in the Yass Shire Council Non-Claimant Native Title Determination Application delivered by Tribunal Member Sean Flood on 5 October 1994, Mr Flood bravely(?) observed:

> "I respectfully disagree with the Chief Justice that a physical connection with the land is required.... In my opinion a lot more needs to be known of Aboriginal beliefs and culture before the requisite connection can be limited to *physical*."[14]

At best the current status of the law as to the connection required to be proved by native title claimants in relation to land is uncertain. Further judicial decisions will be required before clarity is obtained as to whether the requisite connection with land must be physical or whether some lesser connection will suffice.

3.3 Validity of titles - Racial Discrimination Act

The second area of uncertainty created by *MABO [No 2]* arose as a result of the earlier decision of the High Court in *MABO v Queensland [No 1]*.[15] In that case, the High Court held invalid the *Queensland Coast Islands' Declaratory Act* 1985. That Act purported to extinguish the native title of the Murray Islanders to the Murray Islands. That decision was made on the assumption that the common law of Australia recognised a form of native title. When *MABO [No 2]* was decided, the full effect of the decision in *MABO [No 1]* became felt.

In particular, it raised issues as to whether land titles and mining tenements granted after the commencement of the Commonwealth *Racial Discrimination Act*, 1975 on 31 October 1975 were invalid because of the provisions of that Act or whether that Act only operated to give rise to a right to compensation on the part of native title holders whose rights were extinguished or impaired.

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11 Waanyi Peoples Native Title Determination Application, per French, J, at p 20.

12 (1993) 118 ALR 193.

13 *Coe* case per Mason, C J at p 206.

14 Yass Shire Council Non-Claimant Native Title Determination Application, per Tribunal Member Flood, at p 12.

15 *MABO v Queensland* (1988) 166 CLR 186.

3.4 Fiduciary obligations

Finally, a last area of uncertainty arises from the decision of Justice Toohey in *MABO [No 2].* Justice Toohey was the only member of the High Court in that case who expressly recognised that the Crown had a fiduciary duty, as a constructive trustee, to ensure that native title was not impaired or extinguished without the consent of or otherwise contrary to the interests of the title holders.

Although it is not clear from Justice Toohey's judgment, presumably any breach by the Crown of this fiduciary duty would not invalidate any legislative or executive Crown act which operates to extinguish native title but would only give rise to a right of compensation or damages on the part of native title holders for breach of the fiduciary obligation.

4. COMMONWEALTH NATIVE TITLE ACT AND STATE LEGISLATION

4.1 Introduction

A detailed analysis of the Commonwealth *Native Title Act* and State native title legislation is beyond the scope of this paper. There are however a number of features of the Commonwealth Act which need to be addressed in order for the implications of native title issues to financiers to be understood.

4.2 Features of legislation

Title validation

The uncertainty created by the decisions in *MABO [No 1]* and *MABO [No 2],* together with the provisions of the *Racial Discrimination Act*, as to the validity of land titles and mining tenements granted after 31 October 1975 is addressed by the Act. All Commonwealth land titles and mining tenements in existence as at 31 December 1993 are validated by the Act, to the extent that they need validation. This qualification is important, because the Commonwealth *Native Title Act* has no application to land titles and mining tenements in existence as at 31 December 1993 and which are valid despite the fact that they affected native title.

The Commonwealth Act also only expressly provides for the validation of Commonwealth land titles and mining tenements existing as at 31 December 1993. The Act provides that State and Territory parliaments may validate invalid past land title and mining tenement grants in the same way as the Commonwealth Act. The Act divides validated existing land titles and mining tenements into four categories as regards their effect on native title.

The first category comprises grants of freehold estates and of commercial, agricultural, pastoral and residential leases.[16] These titles operate to extinguish native titles.

The second category comprises other leases (excluding mining leases) and these titles operate to extinguish native title to the extent that they are inconsistent with the continuance of that title.

Mining leases form the third category. As defined in the *Native Title Act* "mining lease" extends to all mining tenements. In this case native title is not extinguished by the grant of the mining tenement but the "non-extinguishment principle" applies.

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16 The terms "Commercial Lease", "Agricultural Lease", "Pastoral Lease" and "Residential Lease" are all defined in the Commonwealth *Native Title Act.*

The final category is a residual one comprising all titles not included in the previous three categories. Again the grant of these titles does not operate to extinguish native title and the "non-extinguishment principle" applies.

The non-extinguishment principle provides that a title or tenement grant does not operate to extinguish native title, but to the extent that the grant is inconsistent with the continued existence of native title interests, those interests are "suspended" for the duration of the grant. Thus for example in the case of a mining lease over native title land the lease does not extinguish native title but the native title holders have no right to exercise their interests during the period of the lease to the extent that such exercise would be inconsistent with the mining lease grant. When the mining lease expires the native title interests "revive" and are fully exerciseable by the native title holders.

Complementary legislation to validate past land titles and mining tenements has been passed in South Australia,[17] New South Wales,[18] Queensland,[19] Victoria,[20] Tasmania,[21] Northern Territory[22] and Australian Capital Territory.[23]

Any compensation for impairment or extinguishment of native title by reason of validation is payable by the Commonwealth, State or Territory government.

Right to negotiate procedure

In a number of specific cases a future land title or mining tenement grant which affects native title can only validly be made after 31 December 1993 if a "right to negotiate" procedure is followed. That procedure applies to:

- the creation of a right to mine;
- extension of the area to which a right to mine relates;
- the extension of the period for which a right to mine has effect (other than under an option or right of extension or renewal created by the original grant);
- the compulsory acquisition of native title interests for the purpose of conferring interests in land or waters upon a non-government third party; and
- any other act approved of by the Commonwealth Minister who administers the *Native Title Act*.

The right to negotiate provisions do not apply where one is dealing with the renewal of any interest after 31 December 1993 which takes place in exercise of a legally enforceable right created before that date. The procedure must be undertaken before the relevant title or tenement is issued and basically involves a three stage process to establish whether the title or tenement should be issued

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17 *Native Title (South Australia) Act* No 92 of 1994.

18 *Native Title (New South Wales) Act* No 44 of 1994.

19 *Native Title (Queensland) Act* No 85 of 1993 as amended by the *Native Title (Queensland) Amendment Act* No 61 of 1994.

20 *Land Titles Validation Act* No 114 of 1994.

21 *Native Title (Tasmania) Act* No. 81 of 1984.

22 *Validation of Titles and Actions Act* No. 2 of 1994.

23 *Native Title Act* No. 71 of 1994.

and if so on what conditions (including payment of compensation). That three stage process involves:

- a requirement on the part of the government party proposing to issue a land title or mining tenement to negotiate in good faith with native title parties with a view to obtaining agreement on the issue of the title or tenement and the conditions applicable;
- mediation by an arbitral body to assist in obtaining the agreement of the parties; and
- if agreement is unable to be reached, determination by the arbitral body as to whether the title or tenement may be issued and, if so, subject to what conditions.

The procedure has been criticised, particularly by the mining industry. It is undoubtedly an added complicating factor for resources companies in managing and implementing mining projects.

First, the time period for the procedures to be followed to conclusion can extend to up to 14 months.

Secondly the procedure is required to be followed in respect of each mining tenement to be granted for a mining project - in other words both at the exploration and mining stages. This "double jeopardy" situation places resources companies in an invidious position. Substantial expenditure is required to be made in respect of the exploration activities to prove the mining viability of a resource. However there is a lack of certainty whether mining operations can ultimately be undertaken or the conditions which will ultimately apply to those mining operations.

Finally, the criteria for the arbitral body to make its determination as to the issue of a mining tenement or the conditions upon which tenement may be issued have been criticised by the mining industry as having an inherent bias towards Aboriginal native title parties.

An arbitral body must take into account a variety of factors designed to protect the interests of native parties such as:

- the effect of the grant on native title rights and interests;
- the effect on the way of life, culture and traditions of native title parties;
- the effect on the development on the social, cultural and economic structures of native title parties;
- the freedom of access by native title parties to the land concerned to carry out rights, ceremonies and other activities of cultural significance;
- the particular significance of any area or site to native title parties;
- the interests, proposals, opinions or wishes of the native title parties in relation to the management, use and control of the relevant land.

Factors relevant to the mining industry are few and comprise the economic significance of the grant to Australia or the State or Territory concerned and any public interest in the grant being made. These criteria must be taken into account in addition to the application of Aboriginal Heritage legislation of the relevant State or Territory.

Procedural rights

In cases where the right to negotiate procedure does not apply, the Commonwealth *Native Title Act* accords to native title holders the same procedural rights in respect of a land title or mining tenement grant proposed to be made after 31 December 1993 which affects native title land as

those holders would have in relation to the grant on the assumption that they instead held freehold title. Again these provisions have been criticised as elevating procedural rights of native title parties to an unwarranted extent. In many instances native title rights and interests will fall well short of the rights and interests of a freehold owner and be either personal or usufructuary in nature rather than proprietary.

Validity and non extinguishment

A land title or mining tenement grant after 31 December 1993 which affects native title interests is only valid if the right to negotiate procedure is followed (where it applies) or if native title parties are accorded the same procedural rights as freehold title owners (where the right to negotiate procedure does not apply). In the absence of these requirements being followed the grant will be invalid.

Apart from a number of isolated exceptions, the grant of land titles or mining tenements over native title land after 31 December 1994 will not operate to extinguish native title interests. The "non-extinguishment principle" will apply to all such grants.

Compensation

Where a future land title or mining tenement grant is made over native title land compensation will be payable to native title parties to the extent that the grant impairs their right to exercise their native title interests. In respect of these future grants the compensation is payable by the party to whom the grant is to be made.

5. IMPACT ON FINANCIERS

5.1 Introduction

This review of the common law, legislation and judicial decisions relating to native title enables some meaningful conclusions to be drawn regarding the steps which should be taken by the banking industry to take account of the impact of native title on financing and security arrangements entered into with customers. It is convenient to divide these steps under four headings:

- due diligence to be undertaken in relation to financing and security arrangements;
- provisions to be included in financing and security documentation and related opinions;
- mortgagee sales of secured property; and
- financing and security arrangements in relation to native title land.

5.2 Due diligence

Introduction

It is critical for any financier in assessing and managing the risk associated with any finance arrangement that the financier be satisfied as to:

- the ability of the borrower to meet its repayment obligations under the financing arrangements. In many instances this ability will be dependent upon the financed project satisfying projected returns and meeting anticipated cash flows; and

- the adequacy of the security provided by the borrower for its obligations under the financing arrangements.

Where project or secured land may be subject to native title either of these risk factors may be increased.

The recognition of native title by the High Court in *MABO [No 2]* and Commonwealth and State native title legislation require that financiers make informed assessments of the risk and implications of native title existing over project or secured land, prior to finance and security arrangements being entered into with a borrower.

Has native title been extinguished by title grants?

(i) Introduction

The initial task for financiers is to endeavour to determine whether native title has been extinguished in the past by land titles granted by the Crown in respect of the project or secured land. We are not here concerned only with the question whether the current title held over the project or secured land is such as to have extinguished native title. More importantly the question is whether titles historically granted over that land have had that effect. Financiers must, therefore, undertake an historical land tenure search in respect of project and secured land to determine whether past land title grants are of a nature to have extinguished native title interests.

(ii) Freehold title

If that search evidences that a freehold title has been granted over the project or secured land prior to 1 January 1994 then the risk that native title interests will impact upon the financing arrangements can be discounted. The grant of a freehold title prior to that date over the project or secured land will have extinguished native title either because:

- the title is independently valid and on the basis of the common law enunciated by the High Court in the *MABO [No 2]* decision, native title interests have been extinguished by the freehold grant; or

- the freehold title was invalid because of the operation of the *Racial Discrimination Act*, but has now been validated by the provisions of the Commonwealth *Native Title Act* or complementary State legislation which provide that a validated freehold title operates to extinguish native title interests.

(iii) Leasehold title

If, however, a freehold title has never been granted over the project or secured land, but only a leasehold title, further investigations are required of financiers to determine whether the leasehold grant operated to extinguish native title. This is a difficult question for financiers.

If the leasehold grant was originally invalid, but now validated under the Commonwealth *Native Title Act* or complementary State legislation as a commercial, agricultural, pastoral or residential lease, the grant of the lease operates to extinguish a native title, except for any reservations in favour of Aboriginal peoples contained in the lease. In theory, therefore, if financiers are dealing with project or secured land over which an originally invalid (but now validated) lease of this kind has been granted native title will have been extinguished by the lease unless it contains reservations or conditions in favour of Aboriginal people.

The problem with this approach is that it remains unclear whether the provisions of the Commonwealth *Racial Discrimination Act* operate to invalidate land grants affecting native title made in conflict with that Act or whether it only gives a right to compensation to native title holders.

It is therefore practically impossible for financiers to rely with certainty on the application of the validation provisions of the Commonwealth *Native Title Act* and complementary State legislation.

Where the past leasehold grant was originally valid the question whether the grant extinguished native title is to be determined in accordance with the common law set out in the *MABO [No 2]* as applied in subsequent court and tribunal decisions. As is apparent from the common law in this regard it will be necessary for a detailed review to be undertaken of any past leasehold grant to determine whether it has operated to extinguish native title. That review would need to examine two factors in order to determine whether native title has been extinguished.

First, a determination would have to be made as to whether the leasehold grant confers exclusive possession on the lessee. If not grant will not have extinguished native title.

Even if the leasehold grant confers exclusive possession on the lessee, the period of the lease and its other terms and conditions will have to be examined to determine whether the length of the period of the lease or any other provisions of it are sufficient to reveal "a clear and plain intention" on the part of the Crown to extinguish native title or not.[24]

If not, the impact of native title on the proposed financing arrangements would have to form part of the financiers assessment and management of the risks associated with the proposed loan and security.

If the review of the terms and conditions of the relevant lease does evidence "a clear and plain intention" to extinguish native title, native title issues become irrelevant to the proposed financing arrangements.

(iv) Mining and lesser interests

If the historic tenure audit reveals that the project or secured land:

- has always been and remains Crown land;
- has only been subject to interests granted to third parties of a lesser nature than freehold or leasehold interests; or
- has only been subject to mining tenements,

native title rights and interests survive and those interests must be taken account of by a financier in assessing and managing the risks associated with the proposed financing arrangements.

Has the required connection with land been maintained?

(i) Introduction

Where native title rights and interests have not been extinguished by prior land title grants, there is a second due diligent step which could be undertaken by a financier to assess the impact of those possible interests on the proposed financing and security arrangements. That is an anthropological review to determine whether any Aboriginal clan or group has maintained the required connection with the project or secured land in order to found a successful claim for native title over that land.

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[24] The need for this second step depends on whether or not one accepts the views of Justices Lockhart and French in the cases referred to in paragraph 3.2(b) of this paper. Future court or tribunal decisions should clarify this.

(ii) Difficulties

An anthropological review presents difficulties to financiers:

- anthropological data regarding native title rights and interests over land is unlikely to be readily available to financiers;
- financiers do not have the necessary expertise to undertake such a review and anthropological consultants would normally need to be engaged to advise financiers in this regard;
- the costs associated with undertaking an anthropological review are unlikely to be justified other than in cases of major project financing;
- in any event the criteria required to be satisfied by Aboriginal clans or groups with regard to maintenance of their connection with land, in accordance with their traditional laws and customs, is uncertain as the current common law and judicial decisions regarding this requirement presently stand.

In my view, it would therefore be prudent for financiers to assume in respect of any proposed financing arrangements that there is a possibility that native title parties may exist in relation to project or secured land where native title has not been extinguished by prior land grants.

Statutory compliance

Where finance arrangements are to be entered into in respect of project or secured land over which native title may still exist there are further steps which the financier needs to undertake as part of its due diligence investigations.

First the financier must determine whether the provisions of the Commonwealth *Native Title Act* or complementary State legislation either:

- granting procedural rights to native title holders as if they held freehold title; or
- requiring the "right to negotiate" procedure to be followed,

apply to any land title or mining tenement granted or to be granted to the borrower in respect of the project to be financed by the financier.

If either those procedural rights or the "right to negotiate" procedure apply the financier must carefully check to ensure that the required procedural rights have in fact been afforded to native title parties or that the "right to negotiation" procedure has been followed.

Right to negotiate

(i) Already followed

In addition, if the "right to negotiate" procedure applies and has already been followed, the financier must also carefully check any agreement between the borrower and native title holders or any determination of an arbitral body. The purpose here is to determine that the grant of the relevant land title or mining tenement has been authorised by that agreement or determination and, if so, the conditions applying under that agreement or determination to that grant. Those conditions may materially affect the risk associated with the financing arrangements to be entered into between the financier and its customer.

(ii) Still to be followed

If the "right to negotiate" procedure applies and is still to be followed the financier's due diligence investigations involve a further step.

In these circumstances, the financier needs to take full account of:

- the possibility that ultimately a determination by an arbitral body will not authorise the granting of the relevant land title or mining tenement;
- the possible delays of up to 14 months for the "right to negotiate" procedure to be followed and the relevant land title or mining tenement to be granted; and
- the conditions which may be imposed in relation to the land title or mining tenement ultimately granted over the project or secured land.

By their nature these risks are not able to be fully assessed and determined by a financier prior to the "right to negotiate" procedure having been completed.

If confronted by this situation financiers should adopt one of two courses.

Defer entering into financing arrangements with the proposed borrower until the "right to negotiate" procedure has been completed and these risks can be more adequately assessed.

Alternatively financing arrangements entered into should make express provision for the possibility that these risks might ultimately arise and be unacceptable to the financier. The borrower's right to draw down on any facility granted should be subject to and conditional upon the ultimate grant of the relevant land title or mining tenement and any conditions imposed in relation to the grant being acceptable to the financier.

(iii) Double jeopardy - mining projects

Where the financier is financing a mining project involving the grant of mining tenements to which the "right to negotiation" procedure applies, greater difficulties arise particularly where finance is sought from the financier for the exploration stage of the project. In these circumstances the mining project developer is required to follow the "right to negotiate" procedure separately in respect of both the exploration and mining stages of the project. A "double jeopardy" situation exists.

The fact that the mining project developer has been granted an exploration licence on acceptable conditions through the "right to negotiate" procedure does not mean that the same situation will apply to the grant of a mining lease.

A financier is faced with the difficult situation that the repayment obligations of the mining project developer under the financing arrangements for the exploration stage may not be able to be financed through cash flows generated from mining operations ultimately undertaken pursuant to a mining lease.

It would be prudent for a financier in these circumstances to ensure that adequate security is taken by it over assets of the mining project developer not connected with the project and not affected by native title.

Compensation

The final factor that needs to be taken into account by a financier as part of its due diligence investigations is the possibility that the borrower may be liable for payment of compensation to native title holders in relation to the project or secured land. This possibility arises where the

project or secured land is a land title or mining tenement granted after 31 December 1993 which may affect native title interests. Here, native title holders could be entitled to compensation in relation to the land title or mining tenement either through the procedural rights afforded to native title holders or the "right to negotiate" procedure.

Where the land title or mining tenement has already been granted to the project developer either through the implementation of those procedural rights or the "right to negotiate" procedure, the financier must carefully check whether compensation is payable to native title holders. If so, the financier must clearly take full account of the impact of the borrower's obligations to pay that compensation on the borrower's ability to meet its repayment obligations under the proposed financing arrangements.

If finance is proposed to be granted to a borrower before the land title or mining tenement in respect of the project or secured land is granted to the borrower, the assessment of the risk as regards the borrower's liability for compensation is more difficult.

Here again it would be prudent for a financier to include express provisions in the financing and security arrangements restricting the right of the borrower to draw down upon the facility granted until the question of compensation has been resolved.

5.3 Documentation and opinions

Introduction

It is not only financiers that need to take full account with regard to financing arrangements of the recognition by the High Court of native title, but also legal advisers to the banking industry. There are two primary areas where legal advisers will need to address native title issues:

- preparation of financing and security documentation; and
- the provision of legal opinions in relation to financing transactions.

Documentation

It is beyond the scope of this paper to endeavour to provide a comprehensive list of the native title issues which need to be addressed in financing and security documentation. However, I would suggest legal advisers must take the following matters into account:

- the need for express provisions to be included in documentation to qualify the right of a borrower to draw down on any facility granted to it in a number of circumstances. These provisions must be considered where the land title or mining tenement over the project or secured land is to be granted after 31 December 1993 and the grant may affect native title interests. It must also be considered where the possible liability of the borrower to pay compensation to native title parties has yet to be determined. Finally, provisions of this type may be necessary where finance is to be provided to a mining project development at the exploration stage of that project;
- covenants and warranties in financing and security documentation must take account of relevant native title issues.

Where appropriate, a warranty should be included that native title has been extinguished over the project or secured land. Furthermore, where native title has not been extinguished, a warranty should be incorporated that no pending or instituted native title claim has been made in respect of the project or secured land.

The borrower should provide a warranty that, having made due enquiries, the borrower has no knowledge of any circumstances which may give rise to native title claims. The financier and its legal advisers should take steps to ensure that procedures have been followed by the borrower which satisfy them that this warranty can be substantiated.

Where native title interests may exist over project or secured land, a covenant might be included requiring the borrower to institute a non-claimant native title determination application with a view to establishing with certainty whether native title exists over the project or secured land or not.

Finally where the "right to negotiate" procedure applies but has yet to be followed, covenants should be included in the documentation setting out agreed procedures for the conduct of and reporting and consultation in relation to the "right to negotiate" procedure and any agreement to be reached with native title holders under that procedure.

The notice provisions of financing and security documentation should extend to a requirement on the part of the borrower to notify the financier of any notices and other information received by the borrower in relation to native title claims over the project or secured land.

Opinions

Opinions provided by legal advisers in relation to financing transactions must now:

- review and assess the native title position;
- quantify the native title risks which exist in relation to the transaction;
- contain appropriate qualifications and assumptions in relation to native title issues.

It is trite to say that legal advisers now require a good understanding of the common law, judicial decisions and legislation in relation to native title in order to be able to provide adequate opinions in relation to financing transactions to their clients.

5.4 Mortgagee sales

Neither the common law recognition of native title by the High Court in *MABO [No 2]* nor Commonwealth and State native title legislation restrict or preclude in any way the rights of a financier to enforce, by way of mortgagee sale, security held by it over which native title exists. It is however self-evident that the value which may be realised on enforcement of a security held over land in respect of which native title exists could be materially prejudicially affected if a native title claim is pending or has been successful in relation to that land at the time of sale.

This possibility needs to be assessed by financiers and their legal advisers at the time when required security in relation to a proposed financing transaction is being considered. In the event that a possibility exists that native title interests have not been extinguished in relation to the secured land and a future native title claim may be made, additional security must be taken by the financier to ensure that the possible negative impact of native title claim on the value of secured land is adequately compensated for.

5.5 Security over native title land

Any financier that is considering taking security over native title land would be foolhardy to do so unless due account is taken of the provisions of the Commonwealth *Native Title Act*. Section 56(5) of that Act provides that (unless authorised by the regulations) native title rights held by a body corporate on behalf of native title holders cannot be:

> "(a) assigned, restrained, garnisheed, seized or sold; or

(b) made subject to any charge or interest; or

(c) otherwise affected;

as a result of:

(d) the incurring, creation or enforcement of any debt or other liability of the body corporate...; or

(e) any act done by the body corporate."

In practice, this means that security in relation to a financing transaction entered into in respect of commercial operations on native title land will be restricted to security not extending to the land itself.

The *Native Title Act* includes provisions which could be invoked to overcome this obstacle. Section 21 of the Act permits native title holders to surrender their native title interests under an agreement with the Commonwealth, a State or a Territory. Such a surrender extinguishes native title rights and interests. The agreement may be given for any consideration which may extend to the grant of a freehold estate in land or any other interests in relation to land in substitution for the native title rights.

It is clear from Prime Minister Keating's statements during the passage of the *Native Title Act* through the Commonwealth Parliament that these provisions were intended to facilitate the financing of commercial operations on native title land. Prime Minister Keating said that:

> "[N]ative title holders may choose to surrender inalienable native title on terms acceptable to them, for example to exchange it for a statutory title. For example, native title holders may wish to lease the land for a tourism or other commercial venture."

6. CONCLUSION

The High Court's decision in *MABO [No 2]* and Commonwealth and State native title legislation impacts substantially on the banking industry and its legal advisers. Both financiers and their advisers must take full account of native title issues and their impact on any financing and security arrangements entered into with borrowers. Failure to do so may result in security provided for those arrangements either being inadequate or being nugatory because of the invalidity of the title granted over project or secured land.