NAA: A14039, 7909

Series number: A14039

Control symbol: 7909

Barcode: 31750512

Number of pages: 15

Cabinet Memorandum 7909 - High Court case - Mabo versus Queensland - possible Commonwealth intervention on issues including recognition of indigenous land rights - Decision 15164

Copy No. 48

C A B I N E T M I N U T E

Canberra, 7 May 1991

No. 15164

Memorandum 7909 - High Court Case: Mabo v. Queensland: Possible Commonwealth Intervention on Issues Including Recognition of Indigenous Land Rights

The Cabinet agreed that the Commonwealth not intervene in the forthcoming hearing in the High Court of Mabo v. Queensland.

M. Codd

Secretary to Cabinet

CABINET-IN-CONFIDENCE

MEMORANDUM No. 7909

FOR CABINET

COPY No. 47

Title	**HIGH COURT CASE: MABO v. QUEENSLAND: POSSIBLE COMMONWEALTH INTERVENTION ON ISSUES INCLUDING RECOGNITION OF INDIGENOUS LAND RIGHTS**
Date	**2 May 1991**
Originating Department(s)	**Attorney-General's Department, Department of the Prime Minister and Cabinet, Aboriginal and Torres Strait Islander Commission.**
Cabinet or Ministerial Authority for Memorandum	**N/A**
Purpose of Memorandum	**To provide background information and consideration of issues involved. Instructions are required as a matter of urgency if the Commonwealth is to comply with a requirement to provide the High Court with an outline of its argument by 23 May 1991.**
Legislation	**Nil**
Consultation: . Departments consulted	**Department of Administrative Services, Department of the Arts, Sport, the Environment, Tourism and Territories, Department of Defence, Department of Employment, Education and Training, Department of Finance, Department of Foreign Affairs and Trade, Department of Primary Industries and Energy, and Department of Industry Technology and Commerce.**
. Is there agreement?	**No - see paragraph 32**
Cost: . This fiscal year . year 2 . year 3	**Not Applicable**

BACKGROUND

On 28 May 1991, the High Court will be invited by the plaintiffs in Mabo and Others v Queensland to hold that two of the plaintiff Murray Islanders have traditional legal rights to land that are recognised in Australian law.

2. The plaintiffs are expected to argue:

(a) the High Court was wrong in 1979 to hold that it was fundamental to the Australian legal system that the Australian colonies became British possessions by settlement rather than settled by conquest;

(b) that the plaintiffs have proprietary interests in plots of land on the Murray Islands based on "communal native title" or they have customary land rights in relation to that land. The former was expressly rejected by the Northern Territory Supreme Court in 1971 but the High Court regard it as an open question;

(c) that Queensland is under a fiduciary duty/trust to the plaintiffs and therefore bound not to act contrary to their interests;

(d) that the Commonwealth, not Queensland, has primary ownership of the Murray Islands; only the Commonwealth therefore has the constitutional power to affect the plaintiff's rights; the Commonwealth is bound under the Constitution to pay "just terms" where those rights have been affected by an "acquisition";

(e) that a number of Queensland laws relating to Aboriginals and Torres Strait Islanders are invalid as inconsistent with a number of Commonwealth Acts on the same subject.

Possible outcomes

3. The High Court is likely to be sympathetic to arguments in support of recognition of some form of land rights. However, the nature of that recognition is difficult to predict. In recent years, courts in Canada and the United States have acknowledged the existence of a form of native title, thereby recognising pre-existing rights to land. Those courts have also held that a fiduciary relationship may exist between the government and indigenous peoples in certain limited circumstances.

4. The extent of any potential impact beyond the particular case is also unclear. Traditional land tenure systems in the Torres

Strait islands, as was found in the judgement of the Queensland Supreme Court when considering the plaintiffs arguments on the facts of the Mabo case, have a number of similarities with European concepts of ownership and inheritance, unlike traditional Aboriginal relationships with land.

5. The plaintiff's arguments may have implications for land ownership, and possibly affect the powers of the Commonwealth, State and Territory Parliaments and the proprietary rights of Commonwealth, State and Territory governments (see paragraph 6). On the other hand, it is possible that the impact might be limited to unalienated Crown land. Even so, this could have implications for the exploitation of mineral, forestry and other resources of those lands.

6. A finding of some form of native title in the nature of a proprietary nature would oblige the Commonwealth to pay just terms for acquisition of Aboriginal traditional lands in the States but not in the Territories (section 51(xxxi) of the Constitution). However, a finding of native title in the nature of a non-proprietary right to use and occupy land (as has been found in the United States and Canada) would be unlikely to involve an obligation to pay just terms. In the United States, however, the taking of land to which Indians had native title does not require payment of just terms notwithstanding a similar constitutional guarantee.

7. A finding of fiduciary duty might give rise to an obligation to pay compensation where that duty is breached. Recognition of native title would be a factor in establishing such a duty. Recognition of native land rights or of a fiduciary duty may therefore assist the Northern Land Council in its claim to set aside the 1978 Ranger Agreement in which the Council is claiming $200m in damages from the Commonwealth. Should the Council succeed, the miner has foreshadowed a claim by it against the Commonwealth of $800m.

8. A finding for the plaintiffs should not, as a matter of law, threaten the Crown's sovereignty over Australia. However, Aboriginal groups may rely on recognition of land rights by the "dominant power" to advance claims for self-determination, although recognition of indigenous land rights in the United States and Canada has not been regarded as supporting such claims.

9. If there is a recognition of native land rights by the Court, the nature and extent of rights exercisable by individuals or groups would of course have to be established by evidence in each case.

10. Subject to the Court's finding on fiduciary duty, Australian Parliaments should be able to overcome any perceived problems with recognition of native land rights. Further, any recognition would probably be limited to those indigenous rights exercised prior to European occupation.

OPTIONS

11. The options are:

(A) intervene to argue for the status quo;

(B) intervene to argue in support of some recognition of native land rights;

(C) intervene to argue some aspects of the status quo and some recognition of native land rights;

(D) do not intervene.

CONSIDERATION OF THE ISSUES

Option A - Intervention in support of status quo

12. Disposition of land in Australia has proceeded on the basis that Australia was settled, and that no native land rights or fiduciary duties/trusts exist. The Commonwealth has never claimed to be the original owner of land in any of the States as against the Crown in right of the State.

Arguments for:

13. The granting of land rights to Australia's indigenous peoples should be considered as a political decision for governments and legislatures and not for the courts to resolve. The sensitive political issues which necessarily arise from consideration of Aboriginal land rights are more appropriately dealt with in fora other than the courts.

14. The Commonwealth has provided a suitable regime for the granting of land rights in the Northern Territory through the Aboriginal Land Rights (Northern Territory) Act 1976. It has also legislated for a land grant in the Jervis Bay Territory and, at the request of the Victorian Government, for the grant of title to 2 small parcels of land in that State. Otherwise, legislating for land rights within States is under current policy a matter for the States. Arguing for the status quo is

therefore not inconsistent with a desire to provide for land rights but in a manner of the Government's choosing.

15. Arguing in support of the status quo would be consistent with the Commonwealth's defence in the Northern Land Council Case (see paragraph 7 above).

16. The risk of detriment to Commonwealth interests (see paragraphs 5-8 above) obliges the Commonwealth to take advantage of the opportunity of influencing the outcome of the Court's consideration of the issues.

Arguments against:

17. The Commonwealth has acted to implement, or to encourage the States to implement, land rights through legislative action. It has also acknowledged prior possession of land by Aboriginal and Torres Strait Islander people (in a motion moved by the Government in both Houses on 23 August 1988 and in the proposed Preamble to the 1989 ATSIC Bill) which were widely seen as a clear statement of the Government's acceptance of the concept of prior possession. For details, see Attachment A. Criticism of a decision to argue in favour of the status quo as indicating a lack of commitment to that position can be expected.

18. It would also have a negative impact on the process of Aboriginal reconciliation if the Government were to be seen as advancing a reconciliation process on the one hand and intervening to argue that the plaintiff's arguments are without substance. An outline of the reconciliation process is at Attachment B.

Option (B) - Intervention in support of some form of native land rights

Arguments for:

19. Commonwealth intervention in support of native land rights would be seen by Aboriginal and Torres Strait Islander people, and other people in the community sympathetic to their situation, as an indication of the Government's commitment to Aboriginal land rights and consistent with its actions referred to in paragraph 17 above. The Government has developed a framework for a process of Aboriginal reconciliation to be complemented by a renewed commitment to address Aboriginal disadvantage. Intervention would be perceived as complementary to the reconciliation process.

20. The most practicable course may be the Commonwealth to support recognition of land rights while at the same time seeking to safeguard Commonwealth and third party interests. For instance, it may be possible to argue for the recognition at common law of land rights but that those rights have been validly extinguished in respect of all land other than unalienated Crown land. Intervention would allow the Commonwealth to influence the development of the doctrine.

Arguments against:

21. Notwithstanding what is said in paragraph 20, it may not be possible to develop a coherent argument on land rights without addressing the settlement issue, or more importantly, to safeguard Commonwealth and third party interests without opposing the plaintiffs on fiduciary duty/trust.

22. The Commonwealth could be required by the Court to comment on propositions which could lock the Government in at a time when the reconciliation process is just getting underway. Intervention could also raise expectations among Aborigines as to the outcome of the reconciliation process. It could also have the effect of encouraging opposition to the reconciliation process.

23. The argument referred to in paragraph 13 is also relevant. Support for native land rights could be expected to be criticised by State and Territory Governments.

24. If intervention was based on support of native land rights provided it did not involve alteration to existing proprietary or other legal rights, it could be regarded with scepticism and cynicism by Aboriginal and Torres Strait Islanders.

<u>Option (C) - Intervene to put aspects of options (A) and (B)</u>

25. It would be possible to intervene to argue, for example:

(a) Australia was settled, not conquered;

(b) the common law recognises native land rights. However, those rights have been extinguished with the possible exception of unalienated Crown land. (Arguments for, see paragraphs 19, 20; arguments against, see paragraphs 5-7, 15, 21-24);

(c) no fiduciary duty/trust exists. (Arguments for, see paragraphs 5-7; arguments against, paragraph 10);

(d) Queensland, not the Commonwealth, is the original owner of the Murray Islands;

(e)no submissions would be put to the Court on the inconsistency of Queensland laws issue.

It is possible that the Court would accept some of these argument, while rejecting others. It is also possible that an admission on the part of the Commonwealth of native land rights will lead to some form of fiduciary duty/trust.

Option (D) - No intervention

Arguments for:

26. As outlined above, intervention on any basis could be seen as contentious - the potential disadvantages for the Commonwealth in each case are outlined above. Moreover, it is not clear that intervention by the Commonwealth would affect the outcome.

27. By not intervening, the Commonwealth preserves its options for responding to the outcome and retains the flexibility to decide the manner of that response if it is considered necessary to do so.

28. If as appears to be the case, no other State or Territory government intervenes in support of Queensland, non-intervention by the Commonwealth should not be criticised given that the implications for those Governments are as great if not greater than for the Commonwealth.

Arguments against:

29. If the Commonwealth has a strong policy position on the issues, it should avail itself of the opportunity to influence the outcome of the Court's consideration of the issues.

CONCLUSION

30. It is necessary for an early decision to be made on whether the Commonwealth should intervene and on what grounds, because an outline of the Commonwealth's argument would have to be filed by 23 May 1991.

31. If option (B) or (C) is preferred, it is proposed to submit to the Prime Minister, the Attorney-General and the Minister for Aboriginal Affairs an outline of the proposed arguments for clearance as soon as possible.

COORDINATION

32. Full coordination comments are at Attachment C.

The Department of the Prime Minister and Cabinet favours option (D). ATSIC favours option (B).

ATTACHMENT A

RECOGNITION OF PRIOR POSSESSION OF LAND BY ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

In addition to implementing, or encouraging the States to implement, land rights through legislative action, the Commonwealth has been prepared to acknowledge prior possession of land by Aboriginal and Torres Strait Islander people. In particular:

(a) on 23 August 1988, as the first item of business in both Houses in the New Parliament House, the Government successfully moved a motion which acknowledged, not only Aboriginal and Torres Strait Islander prior occupation of Australia, but that they "suffered dispossession and dispersal upon acquisition of their traditional lands by the British Crown"; and

(b) the Government included a Preamble in the Aboriginal and Torres Strait Islander Commission Bill which stated, inter alia, that "the people whose descendants are now known as the Aboriginal and Torres Strait Islander peoples of Australia were the prior occupiers and original owners of this land", going on to note that "they were dispossessed by subsequent European occupation and have no recognised rights over land yet recognised by the Courts other than those granted or recognised by the Crown".

2. In introducing the 1989 ATSIC Bill (subsequently enacted) into the Senate, Senator Tate noted the comment of the Senate Select Committee on the Administration of Aboriginal Affairs that "a preamble is of no legal force by itself" but is "generally treated by the courts as an aid to ascertaining the intent of the Parliament in making a particular piece of legislation". Senator Tate also quoted from the speech of the then Minister, Mr Hand, in introducing the 1988 Bill (which had been overtaken by the 1989 Bill) in which he had stated that "The Government's intention has ... always been that the language of the Preamble would be neutral and have no consequences for present or future litigation in relation to

land claims. The language was, and is, in no way intended to recognise land rights claimed to exist, to create new rights for land or compensation or to remove or qualify rights under existing law. Nor was it, or is it, intended to restrict any future developments in the law.".

3. The Preamble was deleted from the Bill by the Senate.

ATTACHMENT B

ABORIGINAL RECONCILIATION

In December 1990, the Government gave in-principle support to a process of reconciliation between Aboriginal and Torres Strait Islander people and the wider community.

2. The reconciliation process has two main components:

(a) a decade long commitment to raising the level of awareness of non-Aboriginal people about Aboriginal history, cultures, dispossession, continuing disadvantage and the need to address that disadvantage;

(b) wide consultation with Aboriginal and Torres Strait Islander people to get their views on whether they believe reconciliation would be advanced by a formal document or instrument of reconciliation, on the nature of that instrument and the process for concluding it.

3. The Government intends that the reconciliation process be accompanied by action to rebuild a national commitment from governments at all levels to cooperate in addressing the land, health, education, housing, infrastructure, employment and economic development needs of Aboriginal and Torres Strait Islander people in the decade leading to the centenary of Federation. This objective would be advanced through the self-determination mechanism of the Aboriginal and Torres Strait Islander Commission (ATSIC).

4. The Government's view is that a large measure of community support and cross-party political endorsement would be necessary to achieve an instrument of reconciliation or other formal document, but is confident that the reconciliation process can lead to this outcome. However the Government considers that the process of reconciliation may be as important as the final outcome and initial focus would be on the process rather than on a document.

ATTACHMENT B

5. In April 1991 the Government decided to proceed forthwith in drafting the legislation to establish a Council for Aboriginal Reconciliation. The Council will exist until 1 January 2001 and will consist of about 25 prominent Australians. About half the members will be Aboriginal or Torres Strait Islanders. Members will include church, business, trade union, ethnic and other community leaders and the Chairperson and Deputy Chairperson of ATSIC.

6. The legislation to establish the Council and commence the reconciliation process will simply establish the framework for the public awareness activities, the reconciliation initiatives and the consultation process on the need for a document. It will not determine the sort of document that may arise or on what ought or ought not be included in any final document, as this would pre-empt Aboriginal and wider community consultation.

7. The Council will be responsible to the Prime Minister through the Minister for Aboriginal Affairs, in his capacity as Minister Assisting the Prime Minister for Aboriginal Reconciliation, and will be supported by the Aboriginal Reconciliation Unit located within the Department of the Prime Minister and Cabinet.

ATTACHMENT C

COORDINATION COMMENTS

Department of Administrative Services

DAS notes that the memorandum mentions the impact a court decision in favour of the plaintiffs could have for the administration of unalienated Crown land. These lands are currently administered by DAS. The implications are potentially far reaching but not quantifiable before the Court reaches a finding.

Department of Employment, Education and Training

2. DEET wishes to make no coordination comment given that the issue does not relate to any direct DEET interests.

Department of Primary Industries and Energy

3. DPIE supports Option (D) - No intervention. DPIE agrees with the view that non-intervention would permit the Commonwealth to preserve its options for responding to any future decision by the High Court and minimises the risk of potential conflict with the position the Government is currently pursuing in relation to the Aboriginal reconciliation process.

Department of Defence

4. There are no specific Defence issues involved in this matter and the Department of Defence offers no comment on the question of intervention. However, it notes that Defence is a major occupier of Commonwealth-owned land and could be adversely affected by recognition of some form of native title or fiduciary duty. In addition, there is extensive Defence use of State and Territory Crown land for purposes of training exercises etc which could be constrained by such recognition.

ATTACHMENT C

Department of Foreign Affairs and Trade

5. From the perspective of its portfolio responsibilities the Department of Foreign Affairs and Trade sees no objections to the Commonwealth pursuing Option D on the ground that it best preserves the Commonwealth options in the longer term. The Australian Government has expressed support for the principle of land rights for indigenous peoples in international forums. However, the Department sees no clear advantage for the Commonwealth to intervene in support of the plaintiffs in the present case and it is the Department's view that the Commonwealth's policy objectives in this area are better achieved in other ways. At the same time we note that it would be open to the Commonwealth to welcome any decision by the High Court which was supportive of the Government's position on indigenous land rights.

Department of Finance

6. Finance notes the direct potential for large amounts from the Budget should there be a finding in favour of land rights. Finance therefore favours:

- Option A as the safest protection against such financial calls; or

- a cautious approach through Option C should the Commonwealth wish to pursue a measure of support for land rights.

ATTACHMENT C

Department of the Arts, Sport, the Environment, Tourism and Territories

7. Coordination comment to follow as corrigendum.

Department of Industry, Technology and Commerce

8. Any coordination comment to follow as corrigendum.