

CASE NOTE:
JONES V PUBLIC TRUSTEE OF
QUEENSLAND [2004] QCA 269
(6 AUGUST 2004) —
RECOGNITION OF ABORIGINAL
CUSTOMARY LAW AND THE
***MABO* PRINCIPLE**

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INTRODUCTION

Since the High Court's decision in *Mabo v Queensland (No 2)*,¹ some commentators have argued that, at common law, recognition of Aboriginal land rights entails recognition of other aspects of Aboriginal customary law.² Indeed, although there have been a number of post-*Mabo* decisions refusing to extend recognition of Aboriginal law, on the basis of the *Mabo* principle, beyond rights and interests in land,³ there is also judicial support

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¹ (1992) 175 CLR 1 ('*Mabo*').

² See, for example, A Lokan, 'From Recognition to Reconciliation: The Functions of Aboriginal Rights Law' (1999) 23(1) *Melbourne University Law Review* 65, 92–3; RD Lumb, 'The *Mabo* Case — Public Law Aspects' in MA Stephenson and S Ratnapala (eds), *Mabo: A Judicial Revolution — The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993), 21–2; KE Mulqueeny, 'Folk-law or Folklaw: When a Law is Not a Law. Or Is It?' in MA Stephenson and S Ratnapala (eds), *Mabo: A Judicial Revolution — The Aboriginal Land Rights Decision and Its Impact on Australian Law* (1993), 166; G Simpson, 'Mabo, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence' (1993) *Melbourne University Law Review* 195, 208–9 (from an international law perspective on aboriginal land rights and aboriginal customary law).

³ For example, in *Walker v New South Wales* (1994) 182 CLR 45, Sir Anthony Mason, the former Chief Justice of the High Court who had been part of the effective majority in *Mabo* (1992) 175 CLR 1, rejected (at 49) a claim that

for such an extension: the decision of Mr Gillies SM in *Colin James Goodsell v James Galarrwuy Yunupingu*⁴ falling within the latter category.

Aboriginal customary entitlements beyond those relating to land — for example, customs and practices relating to marriage, custody of children and crime and punishment — are undoubtedly as important as land rights from the perspective of the preservation of Aboriginal cultural identity. Nevertheless, the recent Queensland Court of Appeal's decision in *Jones v Public Trustee of Queensland*⁵ shows that the independent recognition of Aboriginal customary rights to land in *Mabo* is in no sense arbitrary: the Court observing that the appellant's non-land Aboriginal customary law submission 'appears to be based on a misconception of what was decided by the High Court in [*Mabo*].'⁶

Aboriginal law could be brought into account in any substantive way in determining the application of European-based criminal law to Aborigines. For a decision which did not concern a criminal prosecution, but in which the remarks of Mason CJ were applied, see *Turrbal People v Queensland* [2002] FCA 1082 (Spender J).

⁴ (1999) 4(2) *Australian Indigenous Law Reporter* 29 (Darwin Magistrates Court, Mr Gillies SM, 20 February 1998). In this case, Mr Yunupingu, a Yolngu elder and former Australian of the Year, was found not guilty of assault, damage to property and theft arising out of an incident in which a non-Aboriginal photographer had, without permission, taken photographs of Mr Yunupingu's extended family in breach of Yolngu law. The not guilty verdict was based, *inter alia*, on the finding that since Mr Yunupingu's actions were sanctioned by Yolngu law, they were 'done, made or caused in the exercise of a right recognised at law' and therefore authorised under s 26(1)(a) of the *Criminal Code Act 1997* (NT). For present purposes, the crucial part of the explanation of the reason for recognising the rights of Mr Yunupingu to enforce Yolngu law on Yolngu land was expressed by Gillies SM (at 37) in the following terms:

1. The source of the enforceability of native title ... is and is only 'as an applicable law or statute provides'. ... Kirby J in *Wik Peoples v Queensland* ...
2. Native title can be described as 'the possession, occupation, use and enjoyment of land by native people who have, for want of a better expression, a connection with the land': that is, a spiritual or religious relationship to the land.
3. *The use of land includes the enforcement of laws on that native land applicable to and accepted by the natives on that land who have a connection with that land; that is, the people who are part of the land.* (emphasis in original)

For further discussion, see S Gray, 'An Honest Claim of Right' (1998) 23(2) *Alternative Law Journal* 97; S Gray, 'One Country, Many Laws: Towards Recognition of Aboriginal Customary Law in the Northern Territory of Australia' (1999) *LAWASIA Journal* 65.

⁵ [2004] QCA 269 (6 August 2004).

⁶ *Ibid* [14], citing *Mabo* (1992) 175 CLR 1.

I The Facts

The question raised by this appeal was whether a claimed right, based upon traditional Aboriginal law or custom, to represent beneficiaries of a deceased estate, without their knowledge, in an action against the personal representative could be recognised. The appellant, John Dalungdalee Jones, claimed such a right as senior elder of the Dalungdalee people of Fraser Island in relation to the intestate estate of Mr Bennett, a member of the Dalungdalee people.

The late Mr Bennett became the Australian bantam-weight boxing champion in 1948 and, during the course of his career, won considerable money. Because he was an Aboriginal, Mr Bennett's earnings were controlled by a public officer⁷ authorised to manage the property of Aboriginal persons. Mr Bennett died intestate on 10 December 1981 and, as a result of his investigations of Mr Bennett's affairs, the appellant formed the opinion that not all the money received on behalf of Mr Bennett had been accounted for: the amount unaccounted for estimated to be worth many millions of dollars according to current appreciated values. As an aspect of his duty as senior elder, therefore, the appellant instituted proceedings in the Supreme Court on 11 March 2003. His claim was made under the *Succession Act 1981 (Qld)*⁸ and the *Uniform Civil Procedure Rules 1999 (Qld)*.⁹

On 9 February 2004, White J refused the appellant's application to set the matter down for trial; her Honour making the order, *inter alia*, that '[o]ne or more of the intestacy beneficiaries of the estate of Mr ... Bennett be substituted as Plaintiff or Plaintiffs to this proceeding'.¹⁰ It is against White J's decision that the appellant appealed. On 7 April 2004, the three surviving intestacy beneficiaries were substituted as plaintiffs in the proceeding and each of them swore that they did not wish to be represented by the appellant.

⁷ Originally known as the Director of Native Affairs and appointed under the *Aboriginals Preservation and Protection Acts 1939–1946*. Under a later Act of 1965, this public officer became known as the Director of Aboriginal and Island Affairs: see *Jones v Public Trustee of Queensland* [1].

⁸ Section 52(2).

⁹ Rule 643(1), see also r 75(1).

¹⁰ *Jones v Public Trustee of Queensland* [5].

II THE QUEENSLAND COURT OF APPEAL'S DECISION

The Court unanimously concluded that the appeal should be dismissed.¹¹ In doing so, they found that there were two reasons why Uniform Civil Procedure Rule 75(1), providing for proceedings by the appellant in representative form, was not available or appropriate. First, the appellant did not share with the surviving intestacy beneficiaries the same interest needed to satisfy the terms of the rule: all three intestacy beneficiaries being children of the deceased and, therefore, invested by the *Succession Act* with the sole right as next of kin to share in what remained of their father's intestate estate.¹² Secondly, and for the Court more compelling, the intestacy beneficiaries had been joined as individual named plaintiffs and sought to be substituted as the appellants in the appeal, which they did not wish to prosecute.¹³

More importantly for present purposes, the Court also considered the appellant's submission that White J's decision was incorrect because it failed to take account of Aboriginal traditional or customary law on the subject: that is, in the interpretation of the Uniform Civil Procedure Rules and the appeal, the appellant's customary law duty and right to represent members of his people prevailed. The appellant advanced two reasons to support this submission: the provisions of the *Native Title Act 1993 (Cth)*¹⁴ and s 10 of the *Racial Discrimination Act 1975 (Cth)*.¹⁵

Although noting that the same conclusion prevailed if the question were determined under the *NTA* or the *RDA*,¹⁶ the Court held that the appellant's

¹¹ McPherson, Williams and Jerrad JJA.

¹² See *Jones v Public Trustee of Queensland* [11].

¹³ *Ibid.* Although the intestacy beneficiaries had, on 23 June 2003, entered into a deed with the appellant by which they agreed to assign to the appellant a "one sixth share ... of the estate, right, title, benefit and interest to which each of the beneficiaries is or may be entitled in and to the real and personal estate of the deceased in intestacy together with all income arising there [from] from the date of death" [at 6], the Court expressly stated that this deed did not purport to confer on the appellant an 'enduring power to act for them, nor anything in the nature of a power of attorney coupled with an interest that would or might be irrevocable' [at 11]. Thus, even if the intestacy beneficiaries had previously agreed to being represented by the appellant, they were 'not bound by that decision and were free to revoke their consent or instructions to him' [at 11].

¹⁴ Hereafter referred to as '*NTA*'. See *Jones v Public Trustee of Queensland* [12].

¹⁵ Hereafter referred to as '*RDA*'. See *Jones v Public Trustee of Queensland* [12].

¹⁶ That is, the Court observed that since s 211 of the *NTA* is expressed to apply only to native title rights and interests 'in relation to land or waters' and s 223(1) of the *NTA* defines 'native title' and 'native title rights and interests' as 'communal, group or individual rights and interests of Aboriginal peoples ... in

submission based on Aboriginal customary law failed on the ground that there was '[no] evidence of the alleged traditional or customary law relied on or its precise content'.¹⁷ That is, the submission did not satisfy the fourth prerequisite for recognising a traditional law or custom identified by Kirby P in *Mason v Tritton*:¹⁸ namely, 'that the right claimed is sought to be relied on in the exercise of traditional Aboriginal laws and customs'.¹⁹ In this context, McPherson JA observed that:

Apart altogether from the other three requirements, [the appellant's] claim fails at this hurdle. There is no evidence that among the Dalungdalee people of Fraser Island there was or is a continuing custom that the eldest member is entitled to insist on representing individuals, whether in or out of litigation, without their consent and in spite of their expressed wish that he should not do so; and no evidence that the intestacy beneficiaries are here seeking to exercise any such right.²⁰

Although this ground alone was sufficient to dismiss the appellant's submission based on Aboriginal customary law, the Court offered two further reasons, by way of obiter, for rejecting the Aboriginal customary law submission. Crucially, both these reasons were based upon the High Court's decision in *Mabo*. First, it was suggested that even if there were evidence that the appellant had a customary law duty and right to represent members of his people which extended to proceedings in a court of law, it was not established that:

in consequence the intestacy beneficiaries lack or are deprived of authority to decide for themselves whether it will be he or someone else who will act on their behalf in this proceeding. To find that Aboriginal customary law denies

relation to land or waters', the appellant's submission failed because '[t]here is nothing ... to link with land or water the traditional right or duty asserted by [the appellant] of representing members of the Dalungdalee people, or that constitutes a "connection" with any land or water': *Jones v Public Trustee of Queensland* [16].

In the context of considering whether any of the relevant provisions of the *Succession Act 1981* (Qld) were invalidated by the *RDA*, the Court noted that:

In the application of its provisions to a distribution on intestacy, Part 3 of the *Succession Act* makes no distinction between peoples of any race or origin. Its provisions apply equally to all people including Aborigines. If there are in fact traditional rights to inherit property special to Aboriginal people which Part 3 of the *Succession Act* restricts or with which it interferes, those traditional rights have not been established in this case, and s 10(1) of the [*RDA*] is therefore not shown to be attracted to them

— *Jones v Public Trustee of Queensland* [19]; see also [17], [18], [20].

¹⁷ See *Jones v Public Trustee of Queensland* [13].

¹⁸ (1994) 34 NSWLR 572, 584.

¹⁹ See *Jones v Public Trustee of Queensland* [13].

²⁰ *Ibid.*

them as individuals such a right of choice might well suggest that it is unreasonable or inconsistent with the common law, and therefore not capable of being recognised under the law of Queensland or Australia: [*Mabo*] ...²¹

For present purposes, however, the second reason suggested in obiter for denying the Aboriginal customary law submission is crucial. McPherson JA observed that:

It may, in any event, be added that it appears to be based on a misconception of what was decided by the High Court in [*Mabo*] ... What [*Mabo*] decided was ... that the act of state of acquiring territorial sovereignty or 'radical title' does not, without more, itself extinguish Aboriginal or native rights or title in or to land and waters, which, on the contrary, continue to be recognised by the common law until effectively extinguished. ... The right or duty of [the appellant] to represent his people or some of them is not shown to be related to customary Aboriginal rights in land or title to waters either at all or in any way that is recognised by the common law in Australia ...²²

Thus, McPherson JA clearly acknowledged that the High Court's recognition of native title in *Mabo* was expressly limited to one particular aspect of Aboriginal customary rights: their rights and interests in land and waters.

III CONCLUSION

The Queensland Court of Appeal's decision in *Jones v Public Trustee of Queensland* has made it clear that, although Aboriginal law or custom can be a valid source of legal rights if it satisfies a number of requirements,²³ recognition of Aboriginal customary laws, beyond those relating to land, cannot be based upon the *Mabo* rationale. Indeed, in *Mabo*, when Brennan J, as he then was, observed that the preferable rule, namely, that a 'mere change in sovereignty does not extinguish native title to land,'²⁴ 'equates the indigenous inhabitants of a settled colony with the inhabitants of a *conquered* colony in respect of their rights and interests in *land*,'²⁵ his Honour expressly limited his analogy to one particular aspect of the rights of the inhabitants of a conquered colony: their rights and interests in land. Thus, the *Mabo* decision only equates the *land* rights of aboriginal inhabitants of a settled colony with the *land* rights of the inhabitants of a conquered colony. This is crucial: by explaining why the non-land rights

²¹ Ibid, citing *Mabo* (1992) 175 CLR 1.

²² *Jones v Public Trustee of Queensland* [14], citing *Mabo* (1992) 175 CLR 1.

²³ See text accompanying above nn 18–19.

²⁴ *Mabo* (1992) 175 CLR 1, 157; See also *Mabo* 54–7, 82, 183; *Western Australia v Commonwealth* (1995) 183 CLR 373, 422.

²⁵ *Mabo* (1992) 175 CLR 1, 157 (Brennan J, emphasis added).

of aboriginal inhabitants in a settled colony remain different from the non-land rights of the inhabitants of conquered colonies, the distinction between 'settled' and 'conquered or ceded' territories is preserved.