

Reflections on the legacy of Eddie Koiki Mabo - NATIVE TITLE

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Ten years on, Michael Gordon traces the history of a case that changed a nation.

HOW IT BEGAN

Nugget Coombs is the unsung hero of the Mabo decision. He chose the speakers for a land rights conference in Townsville, in late August, 1981. Two lawyers, Greg McIntyre and Barbara Hocking, delivered papers during a session, called A High Court Test Case?

Eddie Koiki Mabo was one of the other speakers. During the conference he met with McIntyre, Hocking, Coombs (who died in 1997) and others including the historian Henry Reynolds. Together, they resolved to push ahead with a claim for native title to the Murray Islands in the Torres Strait.

Mabo asked McIntyre to be the instructing solicitor. Hocking returned to Melbourne and asked the late Ron Castan, QC, to be the barrister. He, in turn, asked Bryan Keon-Cohen to be his junior counsel.

THE CASE

In May, 1982, Mabo and two other Murray Islanders - David Passi and James Rice - instituted proceedings against the the State of Queensland in the High Court. The Queensland Government responded by introducing legislation to extinguish retrospectively any native title on the islands. This was successfully challenged in the High Court on the grounds that it was inconsistent with the 1975 Racial Discrimination Act.

Mabo was an agitator for change whose occupations included working as a fisherman, cane cutter, fletcher on the railways, labourer and headmaster at Black Community School in Townsville. He succumbed to cancer in January, 1992.

THE DECISION

On June 3, 1992, the High Court accepted Mabo's argument that his people had occupied the island Mer, the most easterly and remote of the Torres Strait islands, for hundreds of years before the birth of Captain Cook.

Justice Gerard Brennan reflected the majority view when he said: "Whatever the

justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted." The legal fiction of terra nullius, that the land was owned by no one when white settlers arrived, had come to an end.

THE FALLOUT

While prime minister Paul Keating saw the decision as "the best chance we have ever had" for reconciliation, it prompted some extravagant land claims and alarmist rhetoric. Jeff Kennett, then Victorian premier, warned that suburban back yards were under threat from claims flowing from the court's decision.

Mining chief Hugh Morgan called on Australians to fight the decision and to force Keating to retreat from his plan to give it legislative effect. "It promises racial tension. It guarantees economic stagnation," he told the annual conference of the Victorian RSL in 1993.

THE NATIVE TITLE ACT

The Mabo legislation was passed four days before Christmas, 1993, after what was then the longest debate in the history of the Senate.

Effective from January 1, 1994, the Native Title Act provided for the recognition and protection of native title, the setting up of a National Native Title Tribunal to adjudicate on claims and the invalidating of past government acts that extinguished native title.

The then opposition leader, John Hewson, described the passage of the legislation as a "day of shame for the Australian people" and vowed the Coalition would make the "unjust, divisive and damaging Mabo legislation a major issue right up until the next election".

Significantly, the Coalition went into the next campaign (under John Howard) promising to amend the act, but in a manner consistent with the Mabo decision and the aspiration of reconciliation.

Although the Western Australian Government challenged the validity of the act, the High Court unanimously found it to be a valid exercise of the Commonwealth's power.

THE WIK DECISION

Almost six months before the Native Title Act was passed, a group of Aborigines known as the Wik people began action to claim about 28,000 square kilometres of their traditional land on the western side of the Cape York Peninsula. The claim overlapped with 10 pastoral leases and the traditional land of another group, the Thayorre people, who later joined the case.

Deliberately, the act had left open the question of whether pastoral leases

extinguished native title, although the preamble reflected the Keating government's advice that they did. To this day, the former prime minister insists he always considered there was a better-than-even chance of the High Court finding that native title survived on pastoral leases.

As he told *The Age* this week: "I always believed that, just as taking a job didn't extinguish traditional associations and rights, I didn't believe a cow trawling across the ground did either."

The High Court handed down its decision on Wik two days before Christmas, 1996, finding that the two forms of title could co-exist, but that where there was an inconsistency between the rights of the pastoralist and the native title user, the rights of the pastoralist prevailed.

'BUCKETFULS OF EXTINGUISHMENT'

Prime Minister John Howard announced his 10-point response to the decision early in May, 1997, and amended it one week later. Making it plain that his legislation would be about reducing indigenous rights, he said: "The fact is the Wik decision pushed the pendulum too far in the Aboriginal direction. The 10-Point Plan will return the pendulum to the centre."

The then deputy prime minister, Tim Fischer, said the amendments represented a "winding back from an extremist, unpractical decision of the High Court" and provided "bucketfuls of extinguishment".

Debate on the Howard amendments broke the record set by the first debate on the Native Title Act and still stands as the longest in the history of the Senate.

On September 30, 1998, the amended Native Title Act commenced, introducing a registration test for claimant native title applications; a new relationship between the National Native Title Tribunal and the Federal Court of Australia; revision of the right to negotiate; and an expanded scheme for alternative state regimes. The effect was to legislate extinguishment, rather than leave it to the courts, and to make the task of applicants much more difficult.

THE LAND FUND

The second element of Keating's response to the Mabo decision was to provide a mechanism to return some land to Aborigines and Torres Strait Islanders. The aim, he made clear, was to help them "to protect and re-utilise their communities, their culture and their heritage".

The Indigenous Land Corporation began operating in 1996 and has purchased more than 150 properties, covering 5.3 million hectares. More than 100 properties have been granted to indigenous groups.

CASES TO WATCH

Two cases now before the High Court have a potentially profound impact on the

success rate of future applications for native title.

The first is the appeal by the Miriuwung and Gajerrong people in the case of *Ward v. Western Australia*. Among the issues at stake are whether purely spiritual or religious connections to country can be protected under native title and whether short-term grants that have long since expired do extinguish native title interests.

The second case is the appeal by the Yorta Yorta people to the decision by Justice Howard Olney that "the tide of history has washed away any real acknowledgement of their traditional laws and any real observance of their traditional customs".

The key questions are whether the capacity for traditional laws and customs to adapt with the times should be recognised and how much weight should be afforded to the oral evidence of witnesses.

The decision was a turning point for black and white Australians. Key players give their views.

PAUL KEATING

The Australian High Court, unlike the Supreme Court of the United States, never falls into two camps, the ayes or nays. Rather, a High Court judge here sits a bit like Rodin's Thinker, pondering his or her responsibilities, the state of the law and state of the world. This is what happened with *Mabo*.

What we saw was the overturning of the concept of *terra nullius*, but this justice expressed itself in half a dozen different ways and half a dozen different frameworks.

Barring Justices (William) Deane and (Mary) Gaudron, no two of the others were of a close cast of mind, other than that the majority of them thought that a native title of some kind had survived European settlement and grants of interest in land by representatives of the Crown.

Had the government I led chosen to not see the High Court judgment as an opportunity, but rather as a problem, and left it to a succession of courts and a succession of cases to clear the points of law, or to say what native title was or who had it, then we would still be going through those cases, and the most likely result would have been that a lot of the residual title would have been pre-emptorily extinguished; lost.

But I decided we would regard it as an opportunity, an opportunity to set up a body of property law for Aboriginal people and, in doing so, to begin anew and to find a new basis for a sincere reconciliation.

The end result was a process that took 18 months and strained the political system to its core. But in the course of it, we did deal with the indigenous people of this country as I believe no other government had chosen to deal with them before or since.

That was to empower them to the point where they could tell us what was best for

them, rather than us tell them what we thought was best for them.

One of the things I chided them over early on was that they did not know how to "negotiate", that they could not distinguish between their core interests, their vital interests and their peripheral interests. They used to always speak as though everything in their claims had the same priority and weight and, of course, it never did.

But they took up the invitation and they did negotiate and the result was the Native Title Act, a large piece of property and cultural law written from a clean sheet of paper.

From a much clearer set of judgments in Wik, the Howard Government took the opposite view. They decided, because philosophically they objected to the proposition that native title could co-exist with pastoral leases, to up-end the court's decision, including attacking the court and the justices themselves.

Where are we now? Well, there is the great amenity of the Native Title Act and the recognition of indigenous rights, which was very important in social terms. There was symbolic value to it and practical value.

Apart from the passage of the referendum in 1967, it was the first act of magnanimity by the Federal Parliament towards the Aboriginal and Torres Strait Islander people.

Altogether, I think we moved the debate on justice for Aborigines and reconciliation mightily. Has it moved it enough? Of course it hasn't. But even though the parliament didn't have to construct a sophisticated body of property law, it did.

The other thing it did was force a group of Aboriginal people to take responsibility for their own interests and we in turn treated (them) on equal terms. That negotiating experience is going to stick with them and, I hope, influence the next generation of Aboriginal leaders.

Paul Keating was prime minister of Australia from 1991 to 1996.

BRYAN KEON-COHEN

The Mabo decision delivered a type of national, common-law, land-rights scheme and delivered legally enforceable rights to traditional owners.

But the laws enacted to regulate these new property rights, and some court decisions interpreting them, have led to legal and administrative complexity, and tend to control and minimise the Mabo initiative rather than develop a national opportunity.

This difficult debate over the correct balance to be struck between the imperatives of economic development, and respect for indigenous rights, will continue.

For many areas of Australia, legal extinguishment has been achieved by the enactment of laws or by activities on the land - or both - and the evidential hurdles to prove native title (clarified over the decade) are, currently, simply too high for some

claimant groups.

But native title remains a valuable right for those that can access it, delivering worthwhile benefits to traditional owners.

Importantly, the community now better appreciates that native title need not threaten anybody.

Successfully claiming (or defending) native title, by court processes or mediation, remains a long, expensive and difficult task, which can take a great toll on the human and financial resources of all parties.

These difficulties are, however, now better understood, and the process, with experience, is becoming more streamlined, especially at the negotiation and mediation stages.

Over the next decade and beyond, those claims will be pursued, one hopes with increased expedition and outcomes satisfactory to all parties involved.

Bryan Keon-Cohen, QC, was junior counsel in the Mabo litigation, and is in practice at the Victorian Bar.

RICK FARLEY

I have been to the funerals of five Aboriginal people in the past few months - only one was over 51 and two had not turned 21.

On most social justice indicators, the position of indigenous people has improved little or gone backwards since the High Court's decision.

That is not to undermine the importance of Mabo, but to illustrate that the legal system cannot generate the urgency needed to combat the disintegration of many indigenous communities and families - the blows to culture from grog, drugs, domestic violence and sexual abuse. It took Eddie Mabo 10 years to get a decision on native title from the courts.

Today, it still takes years to get a determination of native title under the Native Title Act (NTA), largely due to opposition from the government. The social and financial costs can be enormous. The Yorta Yorta and Miriuwung Gajerrong cases together will cost more than \$100 million. It may also take years to register an agreement under the act in order for a development project to proceed.

There have been unforeseen consequences. The provisions of the NTA give greater rights to people who have managed to remain connected to their traditional country than those who have been forced to leave. That may result in considerable tensions.

There also is potential commercial advantage to be gained by indigenous families lodging a claim and securing its registration. In communities where resources are as scarce as hens' teeth, further tensions can be created.

The Mabo decision therefore needs to be kept in perspective. It had enormous moral significance, but the practical results have been less. It is only one component of a complex mosaic necessary to improve the wellbeing of indigenous communities.

Economic development, not aid, has to be the central objective. Native title plays a part by improving the negotiating position of some communities, but is not a universal panacea.

If indigenous cultural and social disintegration continues, pressure can only increase for some form of economic settlement that will short-circuit the long and costly rights agenda.

Rick Farley negotiated the passage of the NTA for the National Farmers' Federation and has been a prominent figure in the reconciliation movement since 1990.

MARCIA LANGTON

The Mabo decision needs to be seen from a historical perspective. When the British and other European imperial powers entered the New World, treaties and agreements with indigenous people ensued.

After the United States War of Independence, chief justice (John) Marshall of the US Supreme Court explored the dilemma of the conflicting rights of settlers and indigenous people and adopted the compromise known as native title at common law.

He declared that they were the rightful occupants of the soil, with legal and just claims to retain possession of it. This is a celebrated but not unusual instance of the recognition of indigenous peoples as the rightful occupants of the soil.

The New World's history of treaty making extended over 400 years for the British and French and over 500 for the Spanish, Dutch and Portuguese, with divergent outcomes throughout the colonies.

The High Court's decision came too late in Australia for many Aboriginal people. Some can expect outcomes from the Native Title Act, or the courts, because their native title has not been extinguished by grants of title by the Crown.

Despite this principal limitation of the High Court decision, the dismissal of terra nullius was a good outcome. The recognition of an underlying native title that preceded and survived annexation is another good outcome, though it should be weighed against the extinguishment problem and the extraordinary difficulty of obtaining compensation.

The most important outcome of Mabo 10 years on is that Aboriginal people are engaging with proponents of development on lands subject to applications, and hundreds of agreements between indigenous peoples and other parties have ensued.

The number of agreements concluded as a result of native title processes increases

exponentially each year, and the benefits for indigenous people include participation in the economy, jobs, contracting opportunities and many more.

For those who benefit the most from the recognition of native title, such as the Murray Islanders, a standard of justice has been achieved after more than two centuries.

Long term, because of the breach of human rights involved in the racial discrimination in the 1998 amendments to the Native Title Act, there's unfinished business. Aboriginal people have sought, and will continue to seek, redress for that injustice.

Professor Marcia Langton is the chairwoman of indigenous studies at the University of Melbourne. She attended the Townsville conference in 1981 that led to the Mabo test case.

FRED CHANEY

The Mabo decision has been described as a judicial revolution. So it was.

With 30 determinations of native title extending over 225,000 square kilometres and nearly 600 applications yet to be dealt with, a minority of indigenous people, mostly in remote areas, have seen their rights recognised.

But already throughout Australia there is a new culture of agreement-making. The mining industry has been prominent in this. New developments are seen as requiring the establishment of new relationships and long-term plans, which integrate indigenous people into the economic changes occurring on their land.

Governments, miners, pastoralists, local authorities and other land interests affected by native title are all involved. In South Australia, the government is even supporting the establishment of a whole-of-state Aboriginal negotiating unit in an endeavour to reach a statewide agreement on land use matters between the state, pastoralists, miners and native title applicants.

It is the recognition by Australian courts of rights that flow from indigenous law and custom, rather than rights granted by parliaments, that is the real significance of Mabo.

These rights derive from Aboriginal polities and must be respected like other property rights. This represents a critical shift in the relationship between indigenous and non-indigenous Australians and has the potential to provide opportunities for cultural, economic and political progress. Indigenous people come to negotiations as stakeholders rather than supplicants.

Fred Chaney is co-chairman of Reconciliation Australia and deputy president of the National Native Title Tribunal.

GALARRWUY YUNUPINGU

The Yolgnu battle for our traditional land in North East Arnhem land was temporarily stalled by Justice (Richard) Blackburn's famous terra nullius decision in the Northern Territory Supreme Court in 1971. While we lost the court case, we did get our land back through the NT Land Rights Act in 1976.

Twenty-one years later, the High Court threw out the offensive and ridiculous doctrine of terra nullius once and for all in its Mabo decision.

In the 10 years since that decision, there have been major changes in the way that Aboriginal rights are understood in non-Aboriginal society. I think we have made some major strides, at times very much in spite of government hostility and opposition.

The battles over the Native Title Act have been unfortunate and depressing. The bucket-loads of extinguishment that John Howard's Ten Point Plan delivered was definitely a step backwards. But nothing could hold back the undercurrent of change that has seen the development of the peoples' movement for reconciliation.

At a more practical level, the negotiation of genuine, beneficial agreements to recognise and protect our rights while advancing economic development has shown that the rhetoric can be translated into reality.

The Native Title Act, because of the political game-playing that has gone on, is not as strong a law as it should be, and it is not as strong as the NT Land Rights Act. But we are not waiting for the tide of the legal system to catch up this time.

We are getting on with the job of helping our constituents enjoy the benefits of their native title. This includes engaging in economic development, employment, and the management of land and sea resources.

We have negotiated successfully over the Darwin to Alice Springs Railway, some new suburban sub-divisions, a new port, and the area of the proposed liquid natural gas plant in Darwin. Throughout our region, native title holders have greater involvement in jobs on major projects.

If you do nothing, nothing happens. So we are doing something and making progress day by day. Philip Ruddock and other critics in the government who claim that our rights stand in the way of economic development need to open their eyes to this new world. Ten years after Mabo, we are getting on with our business.

Galarrwuy Yunupingu is chairman of the Northern Land Council. He was the interpreter for the Yolgnu people when they took their land rights claim to court in 1971.

NOEL PEARSON

The High Court in Mabo provided the basis of compromise. The compromise confirmed the rights of the New Australians to all they had accumulated over the previous 204 years. It also provided for Old Australians to be entitled to the land that was left over. And in the Wik Case, the compromise included a third principle: that

native title and Crown titles co-existed on pastoral leases and national parks.

If the terms of this compromise were faithfully implemented and put into effect, then the spirit of Mabo and its legal meaning would have delivered justice and reconciliation. This has not happened in the past 10 years.

This is because the country - the New Australians particularly - have not embraced the compromise of Mabo, and given full faith and credit to it. Too many Australians begrudge Aboriginal people their entitlements under the terms of the compromise. Their governments and political leaders (including the Liberal/National Federal Government and state Labor governments such as New South Wales) have failed to be just and fair to Aboriginal people.

In fact, it is likely that native title would have been extinguished, in most part, if the state and territory governments could have had their way at various times over the past 10 years. The opportunity of Mabo to underpin the settlement of historic grievance and to effect reconciliation would have been lost.

Thank Christ for Paul Keating's Native Title Act of 1993. It preserved the opportunity of Mabo by providing federal legislative protection to the native titles of Aboriginal people. This legislation has withstood concerted attempts to throw Mabo down the drain of history. While the 1998 Howard Government amendments eroded some parts of native title - and critically, suspended the 1975 Racial Discrimination Act, therefore breaching the International Convention on the Elimination of All Forms of Racial Discrimination - the architecture of the 1993 act has survived.

In the next 10 years, will we, as a country, see with new eyes and embrace the opportunity of Mabo and deliver on its promise by returning land title to those who have long awaited it? Or will we continue to be obscurantist and miserable, and insist on losing the unique opportunity we have because we cannot see it for what it truly is?

Noel Pearson is the team leader of Cape York Partnerships. In 1993, he played a key role in negotiations on the Native Title Act.

PHILIP RUDDOCK

The 1992 Mabo decision was a milestone in the nation's march towards reconciliation.

Like the 1967 referendum, the 1976 Northern Territory Aboriginal Land Rights Act, the 1989 ATSIC Act and the opening ceremony of the 2000 Olympics, the Mabo decision was a turning point in relations between black and white Australia. It rewrote Australian property law, recognising indigenous rights to land as part of our common law.

But without statutory reinforcement in the form of the Native Title Act, the potential of Mabo could have been eroded. We are now seeing the benefits. There have now been 41 determinations of native title, 30 of them in the past two years. Today there are 44 Indigenous Land Use Agreements registered with the National Native Title

Tribunal - something that's only been possible since the 1998 amendments.

However, native title itself is only one means of providing land to indigenous Australians. As a result of the 1976 NT Aboriginal Land Rights Act, for example, about 50 per cent of the NT is now under indigenous ownership.

Governments have been purchasing land for indigenous Australians since the early 1970s. The Indigenous Land Corporation, for example, has acquired more than 120 properties in the past seven years. The states, too, have transferred such areas as the Pitjantjatjara lands in South Australia.

Indeed, largely as a result of these pre-Mabo and non-native title programs, more than 15 per cent of Australia's land mass is Aboriginal-owned today.

As with previous milestones, however, some of the expectations generated by Mabo were appropriate and some unrealistic. Some disappointment was therefore inevitable. Land can be important for cultural and spiritual reasons but, as experience here and abroad demonstrates, land alone does not guarantee freedom from poverty and disadvantage. Indeed, for most people, that requires a job.

Ten years after Mabo is an appropriate time to look at how we can deliver better economic outcomes for indigenous Australians. That means better utilising existing indigenous land and looking to other and better sources of economic empowerment.

Philip Ruddock is Minister for Immigration and Multicultural and Indigenous Affairs.

TITLE DEEDS - SOME VITAL STATISTICS

- In the decade since the Mabo decision, there have been 30 determinations that native title continues to exist - 24 of those were reached through negotiation rather than litigation.
- There are 591 active claimant native title applications before the National Native Title Tribunal - almost half are in mediation.
- There have been 541 native title agreements involving mediation by the Native Title Tribunal. Agreements about specific activities such as mining or roads can be reached between native title claimants and other agencies (private and public) before a formal determination of native title is reached.
- To gain the "right to negotiate", each application for native title must (since 1998) pass test conditions to ensure the application has a sound basis and has been properly prepared. Most claim applications made since then have satisfied the registration test conditions. The number of registration test decisions made is 710.

The Keating government set up the Indigenous Land Corporation to buy property for indigenous people who could not benefit from native title claims because they were unable to establish a connection with traditional land.

Since its establishment in 1996, the corporation has spent \$135.4 million to buy 151 properties (5,315,662ha), of which 105 properties (2,792,228ha) have been granted to indigenous groups.

Not all land and water within the shaded areas may be claimed.

For example, the applications exclude privately held freehold land within any claim boundary.