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Paul Keating ignored advice to do nothing over Mabo

Paul Keating with indigenous leaders, including Marcia Langton, second from left, and her daughter Ruby, Noel Pearson, and Lowitja O'Donoghue, after reaching a breakthrough on native title negotiations in 1993. "It was the hardest thing I did as prime minister," Keating said. Source: National Archives of Australia

By Troy Bramston
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Paul Keating rejected public service advice to say nothing about the High Court's Mabo judgment until its implications could be carefully analysed and instead immediately seized upon developing land rights legislation as the government's primary response.

Although he was urged to take no immediate action, according to documents obtained by *The Weekend Australian* ahead of the release tomorrow by the National Archives of Australia of cabinet papers from 1992 and 1993, Mr Keating instructed his department to make new native title laws a priority to give practical expression to the judgment in commonwealth law.

At a meeting in the Prime Minister's Office days after the High Court ruling on June 3, 1992, which recognised a form of native title existed in common law, Mr Keating was given a document titled "Mabo Options", prepared by the Department of Prime Minister and Cabinet.

Among the 11 options were: “leave it to the courts”; instigate a “commission of inquiry”; develop a “document of reconciliation” such as a treaty; or establish a “fact-finding tribunal”.

Mr Keating thought these responses would look like the government was taking a “passive” stance or “ducking the issue”, notes taken by his adviser, Simon Balderstone, say. Instead, the prime minister decided to tackle the hardest option: a national land rights system to settle claims.

It was the first step towards achieving a national approach to native title and was an attempt to reconcile non-indigenous Australians with indigenous Australians by recognising their special connection to the land.

Mr Keating saw native title as inexorably linked with achieving lasting reconciliation.

On the eve of the Mabo judgment, the Department of Prime Minister and Cabinet had no idea what the court would decide or how extensive the decision would be, and little understanding of the consequences. A briefing paper for the PM’s office, also obtained by *The Weekend Australian*, “strongly” urged him to remain silent on the judgment until “careful analysis to determine and assess its full implications” could be undertaken. “There would seem no need for the prime minister to make comment on the decision,” the briefing advised. “The issues are immensely complex and a response which does not get into the substance of the issues is both appropriate and defensible.”

The day after the judgment was made, Mr Keating welcomed it. “With the Mabo decision, the Australian law has taken a major step away from this injustice and has finally entered the mainstream of world opinion,” he said.

The four-page briefing document, dated June 2, 1992, was prepared by the department’s legal and administrative review branch and had talking points for a response to a decision “supporting” or “rejecting” land rights.

If the court rejected the existence of land rights, Mr Keating was advised to say: “The decision that, as a matter of law in Australia, there is no surviving indigenous title to land is consistent with the government’s view that the historical and political development of Australia does not admit of a judicial solution to the question of indigenous land rights.”

The briefing paper recognised the “principal issue” before the High Court was whether the plaintiffs from the Murray Islands had legal rights to areas of land and whether those rights were recognised in Australian law. The department was not sure whether a wider ruling would be made on “terra nullius” — a legal falsity that Australia belonged to no one before the declaration of British sovereignty in 1788.

The department recognised the decision could “have implications for Aboriginal people’s land rights in other parts of Australia, land ownership generally ... and ownership of resource exploration rights”, but added that any wider “application” of the recognition of indigenous rights of Murray Islanders for the rest of Australia “is not certain”.

Mr Keating understood the Mabo judgment did not confer a new title to land but gave recognition to an ancient title. He was determined to develop national land

rights legislation rather than leave it to the courts or state governments, which would likely favour extinguishment.

Negotiations were long, arduous and often acrimonious, the hardest thing he did as prime minister, he said. “I was prepared to put the prime ministership on the line ... I was a conscript of history because of the High Court judgment, but I didn’t shirk it.”

The legislation was finally agreed to by cabinet on October 18, 1993, and passed by the Senate at two minutes before midnight on December 21, 1993.