

GLOSSARY

Annexation: The taking of territory

Biodiversity: species richness both of flora and fauna

Common law: the law of custom or law developed by Courts as distinct from Statute law which is made by parliaments

Crown: the symbol of State - Symbolic representation of the monarch as sovereign

Demesne: possession (of land)

Indigenous: original inhabitant, native to the country, originating in the country

Jurisdiction: authority to hear and settle disputes

Justiciable: capable of being settled or ruled on by a court

Lease: legal arrangement between a land holder and an occupier for a defined period usually for payment of rent

Leasehold: land held under a lease

Legislation: laws made by parliaments

Litigate: to contest in a court

Native Title: the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and traditional customs observed by, the indigenous inhabitants (*Mabo v Qld. No.2* (1992) 175 CLR 1 at 57).

Plaintiff: the party that commences court proceedings - the person or organisation that sues a defendant

Reconciliation: overcoming differences and meeting as equals

Royalty: compensation paid to owners for extraction of oil, minerals or other valuable resources from their land

Sovereignty: the exercise by a group of people of power or authority over territory and its citizens in the name of the people or a monarch or ruler

Tenure: the system of possessory rights to property

Terra Nullius: latin; literally it means *no one's land*; that was how it was first understood as a principle of law. Later its meaning was extended by lawyers to include land of *barbarians* to justify the dispossession of indigenous people who were treated as people with no culture or civilization.

Title: a legal right to the possession of property, usually land

Title, freehold: possessory right to property which can be sold, leased, dealt with, inherited and passed on to heirs

Title, good: legal right to possession which is good at law

Title, radical: root ultimate or foundational title vested in the Crown which gives it power to create interests in land by grant of tenure

Traditional title: native title

Treason: the crime of plotting or engaging in the overthrow of the legitimate ruling power of country or state

MABO: A SYMBOL OF SHARING

The High Court Judgment Examined

Commentary on
Native Title Act 1993 (Cth)
and a Section for Students
and Teachers

3rd edition

“Oh my home, my beautiful home”.

Torres Strait Islanders’ Song
[sung while exiled to mainland Australia]

SEÁN FLOOD

ACKNOWLEDGMENTS:

Mr. Eddie Mabo (decd.) Father Dave Passi and Mr James Rice who were the claimants who represented the Meriam people in the High Court of Australia, Judith Wright for permission to quote from her book *The Cry For The Dead*, Oodgeroo of the tribe Noonuccal (1920-1993), Custodian of the land Minjerribah, for three lines from her poem, Let Us Not Be Bitter, in *My People*, Jacaranda Wiley Ltd, also Max Keogh, Jenny Isaacs and Dr Bob Belleair for valuable assistance.

Cover photo by Jenny Isaacs - children playing, Tarntippi Beach Bathurst Island.

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INTRODUCTION

“Mabo is the way of tomorrow. It’s sharing, at a national level, a quality of understanding and a quality of acceptance, a quality of maintaining tolerance and a quality of identifying who we are as one nation. Mabo doesn’t divide people - it includes people. That is how I understand the law. It shouldn’t be a subject of division, it should be a subject of including. It doesn’t clarify hierarchies or initiate a class system. The contemporary law of Australia was set up to divide people and to exclude the original owners of this place. Mabo simply is beckoning for what is right for everyone as far as human beings are concerned”.

MANDAWUY YUNUPINGU

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Seán Flood has had a long involvement with the Aboriginal legal service. He became engaged in this work out of a deep sense of commitment to the rights of Aboriginal people. A barrister by profession, Seán Flood has had considerable experience as a legal advocate defending the rights of the Aboriginal people. In this publication, “Mabo: A Symbol of Sharing”, Flood’s sense of duty and responsibility towards our indigenous people resonates unmistakably. Flood expounds radical points of view in his work and without in any way endorsing or rejecting them - for it would not be appropriate for me to do so in this office - his work will undoubtedly stimulate further discussion on a matter of great contemporary interest.

Bill Hayden
28th September 1993

Foreword to the 2nd edition

MABO: A SYMBOL OF SHARING

Seán Flood

Member

National Native Title Tribunal

Now Public Defender (NSW)

DEDICATED TO MY ABORIGINAL FRIENDS
IN THE YEAR OF THE INDIGENOUS PEOPLE 1993

*Extinguishment of traditional title is extinguishment of
traditional culture.*

Noel Pearson, Sydney 21.4.92.

Where is the thicket? Gone.

Where is the eagle? Gone.

The end of the living and the beginning of survival.

Chief Seattle, 1854.

Away with bitterness, my own dark people

Come stand with me, look forward, not back,

For a new time has come for us.

Let Us Not Be Bitter

Oodgeroo of the tribe Noonuccal

A NEW TIME HAS COME

I have a special interest in this case¹: for the past 24 years I have campaigned for Aboriginal Land Rights and been critical of Government policy, the High Court of Australia, churches and institutionalized racism.

In the press, over those years, there have been many “letters to the editor”. I wrote one that summed up my views and also expressed a hope for the future that has now been realized in part:

The infamous *terra nullius* principle taints all non-Aboriginal Australians with racial prejudice.

On 29 October 1981 [Herald, Letters], I referred to my “hope for the future” for land rights, with the appointment to the Australian High Court of justice Brennan.

Six years later, my hope is not dimmed and I am encouraged by his pronouncement that “Aboriginal ownership [of land] is primarily a spiritual affair” [re Toohey, ex-parte Meneling Station].

As 1988 approaches, it is now possible to expect a new enlightened majority of the High Court to abandon racist and convenient falsehoods and rule that this nation was neither *terra nullius* nor peacefully settled.²

When Prime Minister Paul Keating opened the International Year of the World’s Indigenous People at Redfern Park in 1993, he said that *Mabo* should be seen as a practical building block of change and as an “historic turning point, the basis of a new relationship between Indigenous and Non-Aboriginal Australians”.

The sweep of *Mabo* is breathtaking. In the process, the High Court of Australia has created a new word and new symbolism. At the same time, Mr Eddie Mabo, who died before judgment, has been immortalised.

MABO - THE ISSUES

The plaintiffs in *Mabo* contended that they held traditional rights to the land known as the Murray Islands and that their traditional title was good against the whole world and continues to be good today. It was conceded that the islands had been annexed by the state of Queensland and ultimate title to the lands vested in the Crown.

The Murray Islanders, known as the Meriam people, did not dispute that the law the Crown brought with it was the common law and that at common law land is not the subject of absolute ownership other than by the Crown. Thus they accepted that upon annexation of the Murray Islands to Queensland the radical title to the lands vested in the Crown (ie, the Crown became the absolute owner) and such rights as the Meriam

¹ Eddie Mabo and Others v The State of Queensland (1992) 175 CLR 1. All page references will be from this report. Although I have throughout the text referred to this decision as *Mabo* it needs to be understood that it was the High Court of Australia which decided the issues involved.

² The Sydney Morning Herald, August 17, 1987.

people had derived from the Crown had amounted to something less than absolute ownership. The plaintiffs agreed that the traditional land rights they claimed could be extinguished at any time by the Crown, but only by clear and unequivocal action in the nature of specific legislation. The plaintiffs said that the Queensland Government had not validly extinguished their title and, by reason of s.109 of the *Constitution* and the *Racial Discrimination Act 1975* (Cth), they remained secure in their enjoyment of their traditional land rights.

The defendant, on the other hand, contended that upon annexation, the Crown became absolute owner of and was, in law, in possession of the islands, thus precluding any possessory title in the plaintiffs. The Crown's argument was that the plaintiffs had been permitted to occupy a reserve which had been created for their benefit by the state. The defendant said that the plaintiff's possession in those circumstances could not constitute good title against the state of Queensland.

JUSTICE FOR ALL

From a non-aboriginal viewpoint, we can be very thankful that the Torres Strait Islander plaintiffs were prepared to litigate in the Australian court system and make the concessions which were made by them to the Court. We should also understand that in abiding by the decision, the plaintiffs now have fewer rights than they enjoyed prior to 1788.

From the viewpoint of Torres Strait Islander peoples and Aboriginal people, seven non-aboriginal judges have defined the entitlement of original landowners to hold "mediately or immediately of the Crown" land they have "owned" for more than 50,000 years. The judges have decreed that the "title" is less than it was originally because some boat people with new technology arrived here 204 years ago.³ After the newcomers murdered and stole from the inhabitants and eventually outnumbered them, good order is now best achieved by acknowledging a form of "native" title that does not fracture the skeleton of Australian land laws.

THE SOURCE OF JURISDICTION

The *Mabo* decision is an example of the High Court of Australia exercising jurisdiction over both the state of Queensland and the Meriam people. The source of the Court's jurisdiction has been well stated by Justices Deane and Gaudron:

...once the establishment of the Colony was complete on 7 February 1788, the English common law, adapted to meet the circumstances of the new Colony, automatically applied throughout the whole of the Colony as the domestic law except to the extent (if at all) that the act of State establishing the Colony overrode it. Thereafter, within the Colony, both the Crown and its subjects, old and new, were bound by that common law.⁴

³ For an account of the first boat people and their technology, see *Archaeology of the Dreamtime*, Josephine Flood, Collins 1st edition 1983 Ch2 & epilogue.

⁴ p. 80

WHAT DOES MABO DECIDE?

It was held by the Court that Australian common law recognises a form of native title. Where it has not been extinguished, this title reflects the entitlements of indigenous inhabitants to their traditional lands in *accordance with their laws or customs*.

The native title recognised by the High Court allows, where it is applicable, for a form of title but not as good as freehold title. For example:

The majority in *Mabo* held that extinguishment of native title did not give rise to a right of compensation.⁵

In the words of Frank Brennan, SJ, this leaves traditional owners without a remedy except in reliance on the *Racial Discrimination Act 1975* (Cth):

If the *Racial Discrimination Act* were to be repealed, four members of the Court (Mason CJ, Brennan, Dawson & McHugh JJ) would tolerate extinguishment of Aboriginal title without compensation provided that there was a clear statutory intent in the enabling legislation.⁶

TERRA NULLIUS

It is important to understand what *Mabo* has changed and, apart from its powerful symbolism, what has not changed. It was recognised by the Court that “the lands of this continent were not *terra nullius* or practically unoccupied in 1788”. Justice Brennan places at the forefront of his judgment the expectation of the international community:

If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be “so low in the scale of social organisation” that it is “idle to impute to such people some shadow of the rights known to our law” (*In re Southern Rhodesia* [1919] AC, at 233-234) can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.⁷

Later his Honour referred to Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights:

It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.⁸

⁵ See “*Mabo: A Judicial Revolution*”, Stephenson & Ratnapala, UQP 1993, per Noel Pearson at p.83.

⁶ *Ibid* at p.30

⁷ pp.41,42

⁸ p.42

Land laws have not been changed by this case. What has changed is the legal history of land acquisition with the court at long last facing up to the truth of history and ditching the insulting concept that there was nobody on the continent deserving of rights before the arrival of superior whites. The High Court did not create new law. It merely recognised the true legal position existing since the act of State establishing the colony on 7 February 1788, conveniently ignored by the early legislators and pastoralist in their grab for land. Few cared very much about this state of affairs until Aboriginal land rights were first acknowledged by the Whitlam Government. It is surprising that the High Court had not been asked seriously to consider and rule on the *terra nullius* principle prior to *Mabo*. In *Coe v Commonwealth of Australia*⁹, the court indicated only tentative positions and made no final ruling.

GENERAL APPLICATION OF THE DECISION

In a joint judgment Mason, CJ and McHugh, J have indicated that the formal declaration in *Mabo* did not deal with any land not the subject of this litigation. All judges however were consciously dealing with a concept of native title as it applies throughout Australia. For instance Toohey, J:

While this case concerns the Meriam people, the legal issues fall to be determined according to fundamental principles of common law and colonial constitutional law applicable throughout Australia...[No] basic distinction need be made, for the purposes of determining what interest exists in the ancestral land of indigenous peoples of Australia, between the Meriam people and those who occupied and occupy the Australian mainland. The relevant principles are the same.¹⁰

Brennan J:

Nor can the circumstances which might be thought to differentiate the Murray Islands from other parts of Australia be invoked as an acceptable ground for distinguishing the entitlement of the Meriam people from the entitlement of other indigenous inhabitants to the use and enjoyment of their traditional lands.¹¹

As well, Deane and Gaudron JJ:

...it seems to us to be simply not arguable that there was anything in the act of State establishing the Colony which constituted either an expropriation or extinguishment of any existing native interests in the vast areas of land in the new Colony or a negation or reversal of the strong assumption of the common law that such native interests were respected and protected under the law of the Colony after its establishment.¹²

⁹ (1978) 52 ALJR 334 and (1979) ALJR 403.

¹⁰ p.179

¹¹ p.26

¹² p.97

also Mason C.J. had this to say in *Coe v The Commonwealth*¹³:

Mabo [No 2] recognised that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown. The principles of law which led to that result apply to the Australian mainland as the judgments make clear.

If further confirmation was necessary it is provided in the judgment of all seven High Court judges who in *Western Australia v Commonwealth* (1995)¹⁴ confirmed the existence of Native Title on mainland Australia.

The strength of the High Court decisions is that traditional land owners now enjoy some of the rights that are enjoyed by other title holders. Anything less than this would be racist and discriminatory. The future mining of this country will have new players in those areas where traditional title exists. There could be no quarrel that the very existence of the Aboriginal and Torres Strait Islander inhabitants requires respect for their wishes when it comes to the establishment of invasive industries like mining and that their valuable property rights require non-discriminatory protection from trespass encroachment or extinguishment.

MABO DOES NOT THREATEN YOUR HOME OR YOUR PATCH

Justice Brennan expounds the concept that tenure is a basic doctrine of land law and it is a doctrine which could not be overturned without “fracturing the skeleton which gives our land law its shape and consistency”.¹⁵ This gives the lie to those who are endeavouring to generate fear in the general community that our farms and suburban blocks are now not as secure as they were before this decision. *Mabo*, by recognising a form of native title, did not overturn tenure.

Justice Brennan states the way native title is acknowledged by the common law:

By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown’s demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown’s purposes. But it is not a corollary of the Crown’s acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a *terra nullius*, the Crown would take an absolute beneficial title (an allodial title) to the land for the reason given by Stephen CJ in *Attorney-General v Brown* (see pp13-14 above; (1847) 1 Legge, at 317-318): there would be no other proprietor. But if the land were occupied by the indigenous inhabitants

¹³ (1993) 68ALJR 110

¹⁴ 128 A.R.L.1

¹⁵ p.45

and their rights and interests in the land are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land. Nor is it necessary to the structure of our legal system to refuse recognition to the rights and interests in land of the indigenous inhabitants.¹⁶

Traditional title where it has not been extinguished remains a burden on the Crown's title.¹⁷ *Mabo* affirmed that traditional title has been extinguished in every instance by the grant of freehold title across the length and breadth of Australia "but not necessarily by the grant of lesser interests [e.g., authorities to prospect for minerals]"¹⁸. Yet those who know how to exploit the symbolic and to whip up oppositional hysteria have wrongly stated all titles are threatened by *Mabo*, then they falsely assert this will lead to a diminution of mining investment and development.

DILUTING MABO

There have been many calls for Federal Government legislation to water down *Mabo*. If non-Aboriginal Australians are to live in future peace and harmony with Australia's indigenous people we should be working together to apply the principles of traditional land-ownership and facilitate its recognition. Then the privilege of sharing this nation will be more than worthwhile. That result will not be achieved by diminishing *Mabo*. If future land entitlements for Australia's Indigenous People could be achieved by legislation such as the Native Title Act 1993 (Cth.) and complimentary state native title acts and processes of law, we would achieve justice for all Australians and an enhanced international reputation. Those who talk about the superiority of white culture, fuel a false and divisive racist debate capable of spilling over into physical violence.

Hopefully, our image as people who give a fair go to those who are disadvantaged is real and withstands calls to greed and racism. All who use Torres Strait Islander peoples and Aboriginal peoples for political point scoring by pandering to base instincts of prejudice are un-Australian. They damage our character as well as our standing in the world scene.

While in the past I have been critical of the High Court of Australia, I now praise this decision, the work of seven great jurists. The dissenter, Justice Dawson, has now embraced and fully supports the majority view (see *State of Western Australia v The Commonwealth*, High Court - 16 March 1995).

The judgment is, however, flawed because the majority decided that extinguishment by inconsistent grant by the Crown does not give rise to a liability to pay compensatory damages. In this regard, the opinions of Deane, Gaudron and Toohey JJ are to be preferred and should be implemented by legislation and later incorporated in the Australian Constitution, perhaps at the commencement of the Australian

¹⁶ p.48 See also "Mabo: A Judicial Revolution", Stephenson and Ratnapala, UQP 1993, per Henry Reynolds at p.122 who argues that "In the mid 1830s, four leading legal figures strongly affirmed that native title was part of the common law of the Empire and that Australia was no different in that respect from any other colony."

¹⁷ See Deane and Gaudron JJ., p.109

¹⁸ See Brennan J., p.69

Republic. The approach taken by Toohey J was to regard extinguishment, had it occurred in the case at bar, as “a breach of fiduciary obligation owed by the Crown to the Meriam people.”¹⁹

If Australia is to be respected as a nation known for its human rights, it will benefit from the direction set by the High Court and take it further. As a multi-cultural society soon to declare its independence from Britain, we have the chance to alter our *Constitution*, acknowledge past wrongs and enshrine traditional title in the *Constitution of the Australian Republic*. I believe that Australian law, like all hybrids, is more resilient than British law and can adapt better to new concepts.

Rather than retreating from Mabo, Federal and State Governments should strive to make it work. The opinions stated in Mabo by the best legal minds in the nation could be ignored by our political leaders only at their peril and to the detriment of the international standing Australia strives for in this region. The passing of the Federal *Native Title Act 1993* and complimentary laws by the States and Territories is a good start. See appendix for commentary on the *Native Title Act 1993*.

Any further legislative attempts to diminish *Mabo* would involve a return to past expressions of racial discrimination which have plagued Australia for 208 years. This time around, beggar the mining companies and the pastoralists: give the traditional land owners a say over the land which they own and have preserved.

Huge mining companies like CRA have declared a willingness to treat with traditional Australian Aboriginal and Torres Strait Islander land owners and acknowledged past wrong doing²⁰. Mining companies should utilize their vast resources to develop mining ventures in tune with the wishes of traditional land owners. Indeed, many Torres Strait Islander peoples and Aboriginal people wish to acquire an economic base through mining: all are not anti-development, eg., since *Mabo* the Jawoyn people and Zapopan NL have negotiated the claim over the Mt Todd Mine in the Northern Territory. The oil and gas industries have reached mature agreements with the indigenous people. Witness the deal with the Pitjantjatjarra in South Australia for large-scale exploration over their lands which was achieved in June 1993. Petroleum companies have negotiated arrangements with Western Arunta and Luritja people, including the payment of royalties thereby acknowledging traditional prior land ownership. The Palm Valley Gas and Mereenie Oil and Gas Fields in the Northern Territory are further examples. This approach by the petroleum industry is consistent with experience in North America and Canada with for instance the Navajo and the Inuit.

DETRACTORS

While *Mabo* has the capacity to bring to fruition many aspirations of Aboriginal and Torres Strait Islanders and their supporters, the usual opposition already has been vocal. Western Mining Chairman, Hugh Morgan, has been quoted as stating that the *Mabo* decision:

¹⁹ p.205

²⁰ The Australian 21 March 1995, The Australian Financial Review 4 Oct 1995

Has put at risk the whole legal framework of property rights throughout the whole community.²¹

Morgan appears chafed by mining venturers having to take account of traditional land-owners. The land that the miners so covet, once regarded as useless and fit only for the blacks, is now no longer up for grabs by the likes of the Lang Hancocks.

I find it appalling that commentators like retired National party Senator John Stone attack *Mabo* with comments such as:

[If] the rule of law is to prevail, those who preside over it must be respected. We are at the point where they no longer are.²²

Equally appalling, in my view, was the statement by Gerard Henderson that “the Court is now influenced by sources unknown”.²³ On a fair reading of the *Mabo* judgments, hardly could it be said that international covenants and the hundreds of references cited by the judges could ever be fairly branded as “sources unknown”.

As to Mr. Stone, most lawyers of my acquaintance regard the present High Court of Australia as the best in the world currently interpreting the British tradition. Although Geoffrey Blainey, who can usually be relied on for a comment, regards the High Court as “a quiet challenger to democracy.”²⁴ Meanwhile, Mr. Ian McLachlan, speaking at a forum of the H.R. Nicholls Society both wrongly asserted that the High Court had granted “a new right” (to Aborigines) and “that pre-*Mabo*, Aborigines had virtually the same rights as before European settlement.”²⁵ In a letter to the editor, Mr. McLachlan stated that he had said: “...apart from some mild impediments, Aborigines have had the same sorts of rights as they had before 1788.” He apparently does not regard the granting of pastoral leases that allow entry by Aborigines for their “traditional pursuits” as more than mild impediments.²⁶ His argument would find favour with traditional owners if it resulted in legal recognition that pastoral leases allowing such rights have not extinguished traditional title. Such leases are common in the Northern Territory, South Australia and Western Australia.

There has, however, been some shift in public attitudes. The new chief executive of CRA, Mr Leon Davis has expressed his satisfaction with the “central tenet of the Native Title Act 1993 (Cth)”. He also stated that Australia “has to be one of the best places in the world for a mining company like CRA to operate.”²⁷ So much for the critics of *Mabo* whose hysteria is still causing so much harm to legitimate business relationships with indigenous people.

SUPPORTERS

²¹ The Sydney Morning Herald, October 13, 1992

²² Stone, John, “*Upholding rule of law*”, Financial Review, October 22, 1992.

²³ Henderson, Gerard, “*March of the High Court Murphyites*”, Sydney Morning Herald, December 1, 1992, p.17.

²⁴ The Australian, April 19, 1993. p.3.

²⁵ The Weekend Australian, may 15-16 1993, p.5 and The Sydney Morning Herald, May 15, 1993, p.7.

²⁶ The Australian, May 25, 1993, p.10.

²⁷ The Australian, March 21, 1995

If we are going to retreat from past injustices, it is well to remember the speech made by Gough Whitlam in 1972.

We shall legislate to give Aboriginals land rights, not just because their case is beyond argument, but because all of us as Australians are diminished while the Aboriginals are denied their rightful place in this nation.²⁸

There are echoes of this in the judgment of Deane and Gaudron JJ:

Inevitably, one is compelled to acknowledge the role played, in the dispossession and oppression of the Aborigines, by the two propositions that the territory of New South Wales was, in 1788 *terra nullius* in the sense of unoccupied or uninhabited for legal purposes and that full legal and beneficial ownership of all the lands of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants. Those propositions provided a legal basis for the justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use. The official endorsement, by administrative practice and in judgments of the courts, of those two propositions provided the environment in which the Aboriginal people of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands...

The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices. In these circumstances, the Court is under a clear duty to re-examine the two propositions. For the reasons which we have explained, that re-examination compels their rejection. The lands of this continent were not *terra nullius* or “practically unoccupied” in 1788. The Crown’s property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the Colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.²⁹

Also, Paul Keating, delivering the Evatt memorial Lecture in Sydney on 28th April 1993:

Mabo presents us with a more substantial and binding basis for reconciliation (between white and black Australia).

Because land goes to the core of the dispossession, *Mabo* may have the potential to work the miracle.³⁰

Prime Minister Keating and his Ministers have shown the resolve of commitment to good policy and principle. They withstood the onslaught of the opposition to a proper

²⁸ The Australian, May 25, 1993, p.10.

²⁹ pp.108,109

³⁰ The Australian, April 19, 1993, p.2

legislative response to the High Court decision. The *Native Title Act 1993* although not perfect is a very good start. The provision of a land fund and future social justice plans offers real prospects for the 67% of Australia's indigenous people who live in urban areas: the people who are total dispossessed and possibly without redress under the High Court's *Mabo* judgment. This time around the Australian psyche has changed and I believe that all fair-minded Australians now accept and embrace the truth of history and will support the High Court and the Government's response.

When it comes to constitutional reform for the Australian republic, I am not in favour of the pragmatic minimalist approach. When we assert our independence from our British heritage, we should also divest ourselves of the racist underpinning of the Commonwealth of Australia Constitution Act 1900. Then the birth of the republic will be an act of reconciliation with the nation's indigenous people.

MABO AND THE CRIMINAL LAW

Recently I have argued in the case of *The Crown v Leeton James Jacky* (unreported) that it is not inappropriate in the light of *Mabo* and in the year of the indigenous people for a challenge to be made to the court's jurisdiction to try an Aborigine. The case was heard by Justice Campbell in Newcastle in 1993 and I referred to the following authorities:

- a) *Rex v Jack Congo Murrell* (1836) 1 Legge 72;
- b) *Reg v Wedge* (1976) NSWLR 581;
- c) *R v Archie Glass* (Unreported, Sully J 22.1.93);
- d) *R v Walker* (1989) 2 Qd.R. 79;
- e) *Aborigines and the Law* Essays in Memory of Elizabeth Eggleston, Edited by Peter Hanks and Bryan Keon-Cohen; George Allen & Unwin (Chapter 1 Settlement and Sovereignty); and
- f) *Mabo v Queensland* (1992) 66 ALJR 408.

The clear weight of authority was against the proposition that Australian courts do not have jurisdiction to try Torres Strait Islander peoples and Aboriginal people.

The only support for argument to the contrary was in a case decided by Willis J in 1841 involving a Mr Bonjon who had been accused of the murder of another Aborigine. In a judgment which was reported in the local press by a harassed newspaper reporter who claimed that the judgment "occupied nearly three hours in reading" Willis J concluded that Aborigines were not amendable to the jurisdiction of the Supreme Court for crimes of violence committed on each other.³¹

Justice Willis, a man ahead of his times on this issue, was later removed from office by Chief Justice Dowling. Willis was known as a vindictive erratic and biased judge who had earlier been removed from office as a Judge in Canada.³²

³¹ See *Aborigines and the Law* Essays in Memory of Elizabeth Eggleston. Edited by Peter Hanks and Bryan Keon-Cohen 4-5.

³² Reference from David Heilpern to Mr. Justice J.W. Willis by H.F. Behan ISBN 0959513604

The best part of the *Murrell* case is contained in the summary of the submissions made by Murrell's counsel:

This country was not originally desert, or peopled from the mother country, having had a population far more numerous than those that have since arrived from the mother country. Neither can it be called a conquered country, as Great Britain was never at war with the natives, nor a ceded country either; it, in fact, comes within neither of these, but was a country having a population which had manners and customs of their own, and we have come to reside among them; therefore in point of strictness and analogy to our law, we are bound to obey their laws, not they to obey ours. The reason why subjects of Great Britain are bound by the laws of their own country is, that they are protected by them: the natives are not protected by those laws, they are not admitted as witnesses in Courts of Justice, they cannot claim any civil rights, they cannot obtain recovery of, or compensation for, those lands which have been torn from them, and which they have probably held for centuries. They are not therefore bound by laws which afford them no protection.³³

This argument failed on appeal and the court held it had jurisdiction to try Murrell.

Justice Rath held in *Wedge* that:

- (1) The colony of New South Wales was founded by settlement, not conquest or cession. Upon settlement, there was, in the colony, only one sovereign, namely the King of England and only one law, namely English law; and, upon settlement, in consequence of instructions from the King to Governor Phillip, the Aboriginal people in the colony became the subjects of the King and, as such, were not only entitled to the protection of the law, but became liable for breach of the King's peace in accordance with the law.
- (2) From the foregoing, it follows (a) that the Aboriginal people of Australia are not a sovereign people, but are subject, in New South Wales, to New South Wales law; and (b) that the English law brought to Australia, including New South Wales, applies to all residents of New South Wales, and not only to British settlers.
- (3) The court, therefore, had jurisdiction to try the accused on the indictment preferred against him, whether he was an Aboriginal or not and whether the deceased named in the indictment was an Aboriginal or not. *R v Murrell* (1836) Legge 72 followed.³⁴

The *Glass* case involved an application for bail to Sully J. His Honour was most unimpressed and appears to have become somewhat excited:

Before leaving the case I should perhaps advert, however briefly, to what the applicant has been pleased to describe as a challenge to the jurisdiction of the court. It is based, as I have followed it, upon the notion that the recent decision of the High Court in the *Mabo* case entails by reason of that decision's rejection of the common law doctrine of *terra nullius*, that the courts of this country, and this court in particular, do not have jurisdiction over

³³ *Rex v Jack Congo Murrell* (1836), Legge 72.

³⁴ *Reg v Wedge* (1976) NSWLR 581, pp.80, 81

a person in the present position of the applicant. It is apparent from what the applicant has said in support of that challenge that he is as misinformed as a good many other people seem to be about what exactly the High Court has held in the *Mabo* case and about what exactly are the limits of the consequences that are entailed by that decision. I think that it needs to be said very plainly indeed that it would be a very great mistake for anybody in the position of this applicant to run away with the idea that the *Mabo* decision, taken at its highest point, entails somehow that there has been introduced into this country a differential system of law which creates classes of citizen to some of whom the law applies and to some of whom it does not apply. It is greatly to be hoped that politicians, some judges, academics, journalists and people of the [sic] kind understand before they speak the mischief that is likely to be caused in society by the promotion of the idea that the *Mabo* decision has somehow created classes of citizens to some of whom the ordinary laws of the land, and the duties and responsibilities inherent in them, do not apply. That is not the case, and it is time to say it plainly and clearly. Generalised appeals to the *Mabo* decision, to *terra nullius*, to undeclared states of war, to customary and tribal law and practice, to something said by Mr Justice Rath decades ago and, to the International Court of Justice at the Hague, will not sway this court, and I hope will not sway any other court, from the principles that all are equal before the law and that the law applies equally to all. The application is refused.³⁵

In 1988 Denis Walker was charged with the destruction of eight louvres, a meat locker and a hat stand. Upon his arraignment he pleaded that the court had no jurisdiction. A plea of not guilty was entered and he was tried and convicted. Walker appealed to the Queensland Court of Criminal Appeal where he argued the Court's lack of jurisdiction. He was unsuccessful. The Court held:

That even if Lt Cook had exceeded his duties and instructions, subsequent conduct consisting of occupying, settling and generally asserting and exercising powers of government over the continent demonstrated and His Majesty, his heirs and successors unequivocally ratified the allegedly unauthorised action of his agent.³⁶

JUSTICE CAMPBELL'S RULING

On 10 June 1993, Justice Campbell ruled that:

For the reasons stated by Rath J in *R v Wedge* (1976) 1 NSWRLR 581 at 586, I am bound by the decision in *Murrell* unless *Mabo* has expressly overruled that decision or, perhaps, the reasoning of the High Court clearly overrules the earlier decision.

³⁵ Unreported. On 19th May, 1993, Mr. Glass again challenged the jurisdiction of the District Court to try him. His Honour P.J. Phelan overruled the challenge and said he was bound by the decision of the Supreme Court in *Murrell*'s case.

³⁶ *R v Walker* (1989) 2 Qld.R. 79.

...It is common ground that *Mabo* does not expressly overrule *Murrell*, and I am of the view that the reasoning in the judgments does not impliedly do so.

...It is my opinion that I remain bound by *Murrell* to hold that this Court has jurisdiction to deal with the charge against the accused.³⁷

There can be no doubt that the High Court has not changed the rule of law for any inhabitants of Australia and, unless nation states evolve in the future, all inhabitants are justiciable by the civil and criminal courts.

Professor Henry Reynolds, speaking to The Australian states that Federalism is flexible enough to accommodate changes such as recognition of “small nations”.³⁸

Since the land grant of 1986, Wreck Bay Aboriginal Village, Jervis Bay Territory is a model for the evolution of such autonomous groups. The community operates through a corporate body. Pride in ownership and self-determination is evident in every aspect of village life.

SUMMARY

The *Mabo* decision can be summarised as follows:

Mabo held that Australian common law recognises “native” title. Where it has not been extinguished, this title reflects the entitlements of indigenous inhabitants to their traditional lands in accordance with their laws or customs.

Mabo ditched *terra nullius*, Latin for the insulting concept that there was nobody on this continent deserving of rights before the arrival of superior whites. Land laws have not been changed by this case. What has changed is the legal history of land acquisition. The High Court did not create new law.

Mabo shored up all *legal* titles granted by the Crown since 1788, including leasehold title.

Mabo did not “[fracture] the skeleton which gives our land law its shape and consistency.”³⁹

Mabo did not overturn tenure.

Mabo does not give any land to Aborigines it merely recognises existing traditional title where it has not been extinguished by adverse grant or by the loss of traditional connection with the land.⁴⁰

Mabo affirmed that traditional title has been extinguished in every instance by the grant of freehold title across the length and breadth of Australia “but not necessarily

³⁷ Regina v Leeton James Jacky, Aboriginal Law Bulletin, Vol.3 No.63 August 1993.

³⁸ The Australian, Thursday September 9, 1993, p.1

³⁹ p.45

⁴⁰ p.59

by the grant of lesser interests [e.g., authorities to prospect for minerals]”.⁴¹ In those instances where traditional title has been extinguished, it cannot be revived. When traditional title has been extinguished, the Crown becomes the absolute beneficial owner.

Mabo rejected any challenge to sovereignty.

Mabo confirmed that the Crown acquired a radical title to the land on the acquisition of sovereignty.

Mabo decided that where the Crown validly appropriates land for purposes inconsistent with traditional title rights native title is extinguished to the extent of the inconsistency. Appropriation for purposes that are not inconsistent with traditional rights, e.g., national parks, does not extinguish native title.

Mabo does not affect the jurisdiction of courts to decide civil cases involving Aborigines and Torres Strait Islands or to deal with criminal charges against Aboriginal and Torres Strait Islander Australians.

Native title is not defined by the court and should not be defined by legislation because it may possess characteristics presently not recognised by the common law. It should not be narrowly construed. Traditional title has its source in the special relationship existing between the indigenous people and the land according to their customs and usages. It may arise through the use of land or water for hunting and gathering food and/or for ceremonial purposes. It may be shared territory.⁴² The nature and extent of native title is a question of fact to be decided in each case according to the traditional laws and customs of the indigenous inhabitants.⁴³ The rights and privileges conferred by native title cannot be sold or transferred to persons who are not members of a group to whom alienation is permitted by traditional laws and customs. It may be voluntarily surrendered to the Crown.⁴⁴ Native title can be extinguished by the valid exercise of government power provided a clear and plain intention to do so is manifest and subject to the Racial Discrimination Act 1975 (Cth.) and the Native Title Act 1993 (Cth).

AUSTRALIA’S PEOPLE & PLACE

One of my personal regrets is that I was 35 years old before I had the good fortune to meet and get to know an Aboriginal person. It was in the heady days of Whitlam, when good things were happening, that I was introduced to Kate George, then a law student, now the first Aboriginal woman admitted to practise law in Western Australia. My world view changed from that time and I have since grown to love and trust the descendants of Australia’s original occupants and their country, my country.

It could be argued that the High Court does not go far enough. But it is certain that *Mabo* shows the way to a new respectful relationship between Aboriginal and Torres

⁴¹ p.69

⁴² p. 85-87, 187-190

⁴³ p.58, 70(6), 87, 88, 187, 188

⁴⁴ p.60,70(8), 88, 89, 110

Strait Islanders and non-Aboriginal people. If we trust Australia's indigenous people who are in a symbiotic relationship with their mother, the earth, further harm to our fragile environment can be avoided. The devastating NSW bushfires in January 1994 would have been alleviated if we had continued to use fire the way the original inhabitants had for millennia to maintain open forest and sweet pastures.

Their performance for more than 50,000 years has been the right prescription for this delicate continent. Until the impact made by some pastoralist and mining ventures there was no die-back of natural vegetation, no salination of river systems, no escape and pollution of the environment by uranium, no pollution of the atmosphere, no weed infestation, no cane toads, rabbits, feral goats, cats, horses or buffalo; soil erosion was not a problem and native flora and fauna was abundant. Land degradation began with European farming methods.

The Aboriginal people and Torres Strait Islander peoples of Australia have had to endure a shocking and degrading rape of their mother, the earth.

It was a beautiful landscape which in this state from the Queensland border through central New South Wales to northern Victoria included

...vast stretches of gently undulating open grassy woodland.

White box trees (*Eucalyptus albens*) presided over an understorey alive with wildflowers, including kangaroo grass, yam daisies, lilies, orchids, buttercups, sundews and sweetly scented chocolate lilies.

This ecosystem once covered more than a million hectares of eastern Australia.

Now it is estimated that fewer than 50 hectares remain, clinging on in precarious pockets in cemeteries, railway sidings and, rarely, by the roadside or on stock routes that have escaped intensive grazing.

Dr Suzanne Prober, a post-doctoral research fellow with the CSIRO's Division of Plant Industry, said it would have been a "lovely" park-like landscape "similar to what the English try to emulate".⁴⁵

One of the worst things to happen to Australia was the introduction of sheep and cattle. Had we not come here with closed eyes and minds and attitudes of racial superiority, Australia would still be as beautiful as it was 200 years ago. We could have cornered the world market for kangaroo and emu meat and skins, exotic fruits, quandongs, lillipilli, bunya-bunya, nuts, seeds, berries, yams and tubas, bogong moths, witjutigrubs, mangrove worms and seafoods special to Aborigines like Balmain bugs. Who could resist emu egg pavlova with wattle seed and macadamia nuts?⁴⁶

⁴⁵ Sydney Morning Herald, April 24, 1993, p.9 by Catherine Armitage, Science Writer. Also see Sydney Morning Herald, May 10, 1993, p.3, "The land and language are gone, not the hope" by Asa Wahlquist, Rural Writer.

⁴⁶ For the recipe, The Bush Food Handbook, Cherikoff & Isaacs, Ti Tree Press p.102

I do not wish to suggest a return to Eden or that we have entirely missed the point in developments that have occurred since the invasion; but we should listen to Torres Strait Islander and Aboriginal people because they have accumulated vast knowledge of the environmental paradigm of this southern land. A land beautifully described by Judith Wright in *The Cry For The Dead* in prose of great lyricism where she paints a picture of Australia before the arrival of the white people. Here she describes a part of Australia adjacent to the Dawson Range in Queensland:

Perch Creek at that time ran clear and deep, and the fish which gave it its name lay at the bends where deep permanent water-holes stretched above clean sand. ... Mussels and crayfish tunnelled the banks, yams and annual grasses and herbage grew on the open flats and slopes where Aboriginal fires regularly controlled the growth of trees and shrubs. Kangaroos and wallabies grazed the grass, kept sweet by fires, and sheltered in tall open forest beyond the flats.⁴⁷

Later the story changes to this:

The country was already overburdened, and showing more and more marks of the years of depletion. In the west, thousands of trees had died in the drought years, and the graziers, discovering the value of those which could withstand the water-famine, had hacked down much of the edible scrib - yarran, bendee, wilga, myall and ironwood made good fodder. Much of the topsoil had blown away in those dust-storms of the eighties, and around the watering-points provided by the new artesian wells where sheep and cattle had crowded, the soil was compacted and worn. With the going of the trees, birds had grown few; marsupials had nearly disappeared, and now the pastoralists talked of the new threat of rabbits approaching the north along the Darling and its tributaries. They noted, too, that when the rain came and the herbage sprang again, there were few of those plants the sheep most favoured, and they were weak and scattered. And once again, depression threatened the colony's recovery from the years of drought. In 1888, unemployment was crowding the cities; those who wandered the outside tracks found little work. The beef export market had never recovered, and Lakes Creek was doing badly.⁴⁸

Finally Judith documents the drought years prior to Federation:

The pastoralists - many of them now pastoral companies based in England - gathered their forces to fight for a 21 year renewal of their leases. Otherwise British capital threatened to withdraw, and banks and finance companies to desert Queensland altogether.

The arguments were reinforced by the terrible drought, the speed of the advance of prickly-pear and noogoora burr and cattle-ticks, brigalow and wattle-scrubs. Once again there was bitter division in the colony between those who believed in sales of freehold and those who argued that to sell land was to betray future settlers and dispose of a national estate which belonged to generations to come.

⁴⁷ "The Cry for the Dead", Judith Wright, Oxford University Press 1981, p.94

⁴⁸ Ibid, p.262

Yet that “national estate” was depreciating fast.⁴⁹

Deane and Gaudron JJ made the same point:

A dramatic illustration of the effect upon them of the first 150 years of European settlement is provided by the contrast between what Cook wrote in the Endeavour’s Log Book in August 1770 and what Captain Wharton FRS wrote as editor of a transcription of the Log Book in 1893. Cook had written of the Aborigines (see *Captain Cook’s Journal*, op cit, p323):

They live in a Tranquillity which is not disturbed by the Inequality of Condition. The earth and Sea of their own accord furnishes them with all things necessary for Life ... they live in a Warm and fine Climate, and enjoy every wholesome Air, so that they have very little need for Cloathing; ... in short, they seem’d to set no Value upon anything we gave them; nor would they ever part with anything of their own... This, in my opinion Argues that they think themselves provided with all the necessarys of Life.

In his notes to that passage, Wharton was roundly condemnatory of the “native Australians” and their habits. For present purposes, however, the significance of his comments lies in his portrayal of the state of affairs, as regards the Aborigines and the land, which had developed by 1893 (at pp 323-324):

Their treachery, which is unsurpassed, is simply an outcome of their *savage ideas*, and in their eyes is a form of independence which resents any intrusion on *their* land, *their* wild animals, and *their* rights generally. In their untutored state they therefore consider that any method of getting rid of the invader is proper ... although treated by the coarser order of colonists as wild beasts to be extirpated, those who have studied them have formed favourable opinions of their intelligence. The more savage side of their disposition being, however, so very apparent, it is not astonishing that, brought into contact with white settlers, who equally consider that they have a right to settle, the aborigines are rapidly disappearing.

It should be stressed that the statement that “the coarser order of colonists” treated the Aborigines “as wild beasts to be extirpated” was written in 1893 and was obviously a reference to free settlers not to transported convicts (transportation of convicts to the Australian Colonies ended in 1868). What the extract makes plain is that the oppression and, in some areas of the continent, the obliteration or near obliteration of the Aborigines were the inevitable consequences of their being dispossessed of their traditional lands.⁵⁰

Dawson J documents the shameful relocation of large numbers of humans for economic purposes:

⁴⁹ Ibid, p.260
⁵⁰ pp.105, 106

Following recommendations made to the Queensland government in 1896 the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) was passed. It was pursuant to this Act that the natives were placed on government controlled reserves and were entirely isolated from contact with other races. The first of these reserves was set up in 1897 at Bogimbah Creek on Fraser Island and was initiated by the removal of about 50 natives from the Maryborough district. This was the beginning of a large-scale programme of removals (authorised under s 9 of the Act) to reserves at places such as Yarrabah, Durundur, Barambah, Taroom, Hull River, Woorabinda and Palm Island. By the end of the 1930s, reserves had also been gazetted in the north at Edward River, Lockhart River and Doomadgee. Concurrently, “country reserves” (often on the outskirts of rural towns) were set up to provide a source of aboriginal labour for pastoral areas (eg outside Herberton and Georgetown). (See generally Foxcroft, *Australian Native Policy*, (1941), pp 115-119; Anderson, “Queensland” in Peterson (ed), *Aboriginal Land Right: A Handbook*, (1981), pp 54-64; Singe, *The Torres Strait: People and History*, (1979), pp 214-215.)

Thus, whilst land was reserved in Queensland for Aborigines, those placed on the reserves did not necessarily have any traditional association with the land. Moreover, the land remained land owned by the Crown, the reserves could be revoked or altered by the Crown and the location and size of the reserves was largely dictated by the suitability of the land for settlement by the white population.⁵¹

⁵¹ p.150

INDIGENOUS PLACES

Finally, I, the son of an Irish migrant, am interested in the similarity found by Justice Brennan between the English occupations of Ireland and of Australia. In the case of Ireland the people were not dispossessed, although required to live under English law.

My uncle Frank [Flood] was hanged for his opposition to the imposition of the rule Britannica in Ireland. He was captured in an ambush at Whitehall, Dublin, early in 1921 and was executed on 14th March 1921. He was only 19 and a second year engineering student. The court that tried him had no legitimacy. He was tried and sentenced to death by court martial for alleged treason. He was innocent. There was no right of appeal. And on the day he was hanged, with five others, 20,000 people prayed and wept outside Mountjoy Jail. There are Aboriginal people in Australia today who regard the occupation of this country as being on a par with the Irish position of the last century and the early 1920's.

Having completed this paper, I was discussing it with my children, Kate and Jessica, then primary school pupils when Jessi said "You might like some quotes from Chief Seattle's reply to the Great White Chief in Washington". She then gave me the following which I believe encapsulates the message of the world's indigenous peoples:

This shining water that moves in the streams and rivers is not just water but the blood of our ancestors.

If we sell you our land, you must remember that it is sacred, and you must teach your children that it is sacred and that each ghostly reflection in the clear waters of the lakes tells of events and memories in the life of my people.

The water's murmur is the voice of my father's father.

The rivers are our brothers, they quench our thirst. The rivers carry our canoes, and feed our children. If we sell you our land, you must remember and teach your children, that the rivers are our brothers, and yours, and you must henceforth give the rivers the kindness you would give any brother.

We know that the white man does not understand our ways. One portion of land is the same to him as the next, for he is a stranger who comes in the night and takes from the land whatever he needs.

The earth is not his brother, but his enemy, and when he has conquered it, he moves on.

He leaves his father's graves behind, and he does not care. He kidnaps the earth from his children, and he does not care.

His father's grave, and his children's birthright are forgotten. He treats his mother, the earth, and his brother, the sky, as things to be bought, plundered, sold like sheep or bright beads.

His appetite will devour the earth and leave behind only a desert.

I do not know. Our ways are different from your ways.

The sight of your cities pains the eyes of the red man. But perhaps it is because the red man is a savage and does not understand.

The clatter only seems to insult the ears. And what is there to life if a man cannot hear the lonely cry of the whippoorill or the arguments of the frogs around a pond at night? I am a red man and do not understand. What is man without the beasts? If all the beasts were gone, man would die from a great loneliness of spirit. For whatever happens to the beasts, soon happens to man. All things are connected.

Where is the thicket? Gone

Where is the eagle? Gone.

The end of living and the beginning of survival.⁵²

The last word, however, goes to Australia's indigenous people:

We do not wish to make refugees of those descendants of the invaders or those who will come to live here. We walk beside them in friendship and in good will, but we will not be subjugated to alien demands or greed. This is our world. We are prepared to share it, but not to give it away.⁵³

Away with bitterness, my own dark people
Come stand with me, look forward, not back,
For a new time has come for us.⁵⁴

Let Us Not Be Bitter
Oodgeroo of the tribe Noonuccal

⁵² Prologue: V17 (1985) pp.58-65 concludes that it is not proven that Chief Seattle spoke these words. See also Publishers Weekly V239 p.22(1) June 1, 1992 discussing Brother Eagle, Sister Sky: A Message from Chief Seattle (Dial) by Susan Jeffers

In an unsolicited statement offered to Dial championing the book and its message, Jewell Praying Wolf James (a lineal nephew of Seattle's) writes in part. "Brother Eagle, Sister Sky is another version of our famous chief's 1854 speech. We recognize there is controversy associated with different versions, but in the way of our people the importance is that the speech comes from the heart and people should hear it from the heart..."

⁵³ National Aboriginal Council, 1984.

⁵⁴ Let Us Not Be Bitter by Oodgeroo of the tribe Noonuccal (1920-1993) from My People, Jacaranda Wiley, Qld, 1990.

APPENDIX

Native Title Act 1993 (Cth)

Introduction

The *Native Title Act* was born on 22 December 1993 after long and difficult labour. Government and Democrat leaders in the Upper House, Senators Gareth Evans and Cheryl Kernot were good midwives. Green Senators Christable Chamarette and Dee Margetts, after earlier risking a still birth, helped deliver better law than was contained in the originating Bill.

At their insistence:

- (1) the *Native Title Act* was expressed to be subject to the *Racial Discrimination Act 1975* [s.7(1)];
- (2) Aboriginal persons *who reside on or who exercise access over land or waters covered by a pastoral lease* are protected from ejection in those situations where, under the *Native Title Act*, the native title has been validly extinguished [s.15(2)]; and
- (3) protection has been provided for non-commercial remnant traditional rights such as hunting, fishing or gathering for personal domestic needs as well as cultural or spiritual activity in exercise or enjoyment of native title rights and interests [s.211].

Ultimately, the Green Senators became part of a political process aligned against powerful vested interests who were determined to defeat law designed to preserve some heritage rights of an ancient cultural group.

Dr Hewson, Leader of the Opposition, tried to abort the Bill. He abandoned principle and previous Federal bi-partisan support for legislative enactments for the advancement of indigenous Australians. Liberal voters are entitled to feel cheated because they were denied the opportunity to help bring into existence the most important law passed since Federation. Coalition supporters, in the main, want justice for indigenous Australians and not further extinguishment of their culture and rights.

Ron Castan QC, house specialist, brought success to the operation by drafting a compromise amendment on pastoral leases which was acceptable to the Government, Democrats, Greens and the National Farmers Federation.

Prime Minister Paul Keating, father of the legislation, gives its true genesis as:

*derived from the traditional laws and customs of indigenous people...*¹

The outcome of the legislative process was good law, not perfect but it protects most of the rights of traditional land holders declared by the High Court. Consent

¹ House Hansard, 16 November 1993 p.2879 Second Reading Speech.

provisions to mining and development, or a veto, should have been granted by the Act, also profit share from mining ventures. Consensus is rarely, if ever, achieved in political democracies.

People like Lois O'Donoghue, Chairperson ATSIC, and Noel Pearson, the new articulate and tough negotiators for Australia's indigenous people, forged pragmatic agreements which saved the legislation and changed forever the role of Aboriginal and Torres Strait Islander Australians from victims to equal players in our political process. By refusing to listen to these leaders voices, Dr Hewson insulted their vast indigenous constituency.

Native title is here to stay. The validity of the original Native Title Act 1993 (Cth) was placed beyond doubt by the High Court, *The State of Western Australia v The Commonwealth* (unreported, 16 March 1995). The Court held (seven to nil) that the Act survived the challenges made to it by the West Australian Government, except for s.12 - an unnecessary section. Questions as to the constitution, procedure, findings or determinations of the National Native Title Tribunal did not arise for consideration.

The original legislation attempted to comply with Australia's international obligations, in particular, under the International Convention on the Elimination of All Forms of Racial Discrimination.

House of Representatives Second Reading Speech ²

The *Second Reading Speech* sets out the Government's intentions for the *Native Title Act*, in 1993 in part, the Prime Minister states:

The High Court has determined that Australian law should not, as Justice Brennan said, be "frozen in an era of racial discrimination". Its decision in the Mabo case ended the pernicious legal deceit of terra nullius for all of Australia - and for all time.

The Court described the situation faced by Aboriginal people after European settlement. The Court saw a "conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal people". They faced "deprivation of the religious, cultural and economic sustenance which the land provides" and were left as "intruders in their own homes".

To deny these basic facts would be to deny history and no self-respecting democracy can deny its history. To deny these facts would be to deny part of ourselves as Australians.

Mr Speaker, this has been a huge undertaking on a subject of immense complexity. The rewards for the nation of getting it right are also immense. To retreat from this challenge, to say that this opportunity is beyond our reach as a nation, beyond the limits of our collective intellect and goodwill, would

² House Hansard 16th November 1993 p.2877 ff

be to betray not just the indigenous people of Australia but ourselves, our traditions and our future.

Conclusion

For today, as a nation, we take a major step towards a new and better relationship between Aboriginal and non-Aboriginal Australians. We give the indigenous people of Australia, at last, the standing they are owed as the original occupants of this continent. The standing they are owed as seminal contributors to our national life and culture: as workers, soldiers, explorers, artists, sportsmen and women - as a defining element in the character of this nation. The standing they are owed as victims of grave injustices, as people who have survived the loss of their land and the shattering of their culture.

Mr Speaker, who can say that we would have survived these experiences as well as they have?"

The *Native Title Act* 1993 is complex because it deals with past and future acts alienating land as well as Federal State and Territory land laws. It also takes account of our international obligations and the complex culture of indigenous people developed over 50,000 and more years which involves a profound attachment to land and water. It is not just to extinguish native title because it is hard to accommodate. Australia will mature through the process of recognition and preservation of ancient cultural rights that have not already been lost.

The *Native Title Act* 1993 prevails over State legislation which to the extent of any inconsistency will be invalid (*Commonwealth of Australia Constitution Act* S51 (XXVI), s.109, *Racial Discrimination Act* 1975 (Cth), 10(1), Art 5(d)(v)(the right to own property alone as well as in association with others), 5(d)(vi)(the right to inherit) and 5(a) the right of equal treatment before the Tribunals and all other organs administering justice *International Convention on the Elimination of All Forms of Racial Discrimination*, (see also *Mabo [No 1]* (1988) 166 CLR at 217 and 229-230, *The Commonwealth v Tasmania, Tasmanian Dam Case (Franklin River)* 158 CLR 1 at 150, 158, 180, 202, 214, 215, 245, 273-274 and 319).

Despite the scaremongering by mining lobbyists the *Native Title Act* has not effected the credit quality of Australian mining companies according to Moody's Investors Service. Similar legislation in Canada had not had an adverse effect on ratings.³

On the 16th March 1995 the High Court of Australia ruled that the *Land (Titles and Traditional Usage) Act* 1993 (W.A) was invalid because it was inconsistent both with the *Racial Discrimination Act* 1975 (Cth) and the *Native Title Act* 1993 (Cth). Under s. 109 of The Constitution the two Commonwealth Statutes prevailed and the West Australian law being wholly inconsistent with them was held to be totally invalid. The attempt by the Richard Court Government to extinguish native title in a discriminatory fashion was struck down.

³ The Australian, January 31, 1994,p.17.

The High Court challenge by the state of Western Australia to the Native Title Act 1993 resulted in the seven judges deciding that the Native Title Act 1993 is a *special* law for the protection of indigenous people supported by S51 (xxvi) of The Constitution. Section 51 confers on the Parliament power to make laws with respect to -

(xxvi). The people of any race for whom it is deemed necessary to make special laws

The key provision of the Native Title Act 1993 (Cth) is s. 11(1):

Native title is not able to be extinguished contrary to this Act.

The High Court had no doubt that the security and enjoyment of native title by indigenous people was fundamental for the survival of the people, their culture and traditional life style. Justice Dean in the Tasmanian Dam Case (1983) 158 CLR 1 at 274-275 expressed it this way:

The relationship between the Aboriginal people and the lands which they occupy lies at the heart of traditional Aboriginal culture and traditional Aboriginal life.

The High Court declared that the Native Title Act 1993 (Cth) is a special measure and therefore constitutional (s. 51 xxvi). Any future State or Territory law which attempts to extinguish native title contrary to the Native Title Act 1993 (Cth) or the Racial Discrimination Act 1975 will be inoperative by reason of s.109 of The Constitution. Whether the Native Title Act as amended by the, so called, 10 point plan by the Howard Government is constitutional in all its provisions remains to be challenged and decided.

SUGGESTED LINES OF ENQUIRY FOR STUDENTS AND TEACHERS

Suggested Lines of Enquiry for Students

Who were the parties involved in the Mabo case?

Where did they come from?

What were the questions the High Court had to resolve?

In what ways did the High Court achieve justice for all Australians - indigenous and non-indigenous?

What is meant by Terra Nullius?

Comment on ... *nobody's land or land of nobodies*.

What is native title? Discuss its characteristics.

What are the two requirements that must be met to prove a native title?

Where does native title exist?

The largest areas that will be subjected to native title claims are so called vacant crown land. Identify these areas. ***Cth Land Tenure Map recommended as a class aide.***

What does the *Mabo* judgment mean for Australia's indigenous people?

Justice Brennan stated in *Gerhardy v. Brown* that the difference between land rights and Apartheid was the difference between a home and a prison. Comment/Class discussion or debate.

Were existing property rights affected by the Mabo decision?

Does the High Court decision *give* land to indigenous people?

Did the High Court fudge it? Was sovereignty acquired by settlement? What are other ways territory was acquired? What effect on local law flows from the way territory is obtained by an external power?

Write an essay on the topic *Welfare for Aboriginal and Torres Strait Islanders has missed the mark*.

What future direction is indicated by the High Court Mabo decision?

The High Court recognized the law of Indigenous People. In what way did it do so? Are there present and possible future parallels between Australia's Indigenous people and the Indian tribes of North America? Are there applications for the criminal law?

Native Title Act 1993 (Cth.)

Was it necessary? Why not leave any legislation, if required, up to the States? What effect did the Racial Discrimination Act 1975 have on the outcome of the High Court decision? In the House of Representatives, during the debate on the Native Title Bill, Daryl Melham, MP for Banks, described the RDA as *Our Bill of Rights*. Discuss this assertion and its effects and implications for Native Title. Should the RDA have been suspended to achieve an outcome more pleasing to the *Australian Mining Industry Council*?

In what way is native title different from other title systems? Do indigenous people have a special relationship to land? Should native title holders have a veto over mining and development on their land? Should they receive royalties for minerals taken from their land?

The Environment

Should we trust Australia's Indigenous People to advise on land and water care? By listening to Australia's Indigenous People how could we possibly conserve flora and fauna? Can we learn how to prevent disastrous bush fires? How did Aborigines use fire? What does the passage attributed to Chief Seattle tell us about care for the environment? How has the introduction of sheep and cattle degraded the land? What are the main causes of salination? How many hectares of ecosystem created by the Aboriginal occupiers of Eastern Australia have survived the effects of European farming methods and animals? *The CSIRO can assist your research*. What solutions are recommended by Landcare? (Contact the Departments of Land, Federal and State, to obtain resources). Develop recipes for Kangaroo and Emu and try them in your study group. Research bush tucker. Discuss biodiversity and its importance to Australia's ecology. *The Institute for Ecosystem Studies, New Hampshire, U.S.A. may assist for further information*.

General

Who are Indigenous People? How many Indigenous people are there world wide? Where do they live? Can the Indigenous populations of the world help the global community? *The Australian Museum, 6-8 College Street, Sydney can assist your research. Contact the Aboriginal Education officer on (02) 339 8266*. Aboriginal and Torres Strait Islanders regard the fact that the High Court recognized their laws and customs as the basis of Native Title as the most important aspect of the judgement. Discuss.

HSC QUESTIONS BOARD OF STUDIES NSW**1992 Aboriginal Studies 2 Unit**

Q1. Carefully read the words of the song “Treaty Now”, then answer all of the following questions:-

- (a) *‘Back in 1988 - all those talking politicians.’*
What were politicians talking about in 1988 that was important to Aboriginal people? 2 marks
- (b) *‘Words are easy, words are cheap Much cheaper than our priceless land’.*
What is meant by these lines? (lines 4 and 5) 2 marks
- (c) The song refers to the *‘planting of the Union Jack’*.
What is meant by this reference? (line 16) 2 marks
- (d) *‘Now two rivers run their course separated for so long.’*
Explain what the writer means by these two lines. (lines 18 and 19) 3 marks
- (e) The person who wrote this song chose to use an Aboriginal language. What is the importance of this? 3 marks
- (f) What attitudes to the land are expressed in this song? Include references from the song in your answer. 4 marks
- (g) The central theme of the song is the Treaty. Why is the question of a treaty important to Aboriginal Australians? 4 marks

Q5. Land Rights

- (a) What is generally understood by the term Terra Nullius? 3 marks
- (b) What evidence is there in Aboriginal history that Aboriginal people owned and occupied the land? 5 marks
- (c) How important are Land Rights for present and future developments within an Aboriginal community you have studied? 7 marks

Q10. Health and Medicine

- (a) List THREE effects European contact had on the diets of Aboriginal people 3 marks
- (b) Outline the way introduced diseases affected the Aboriginal population after 1788. 5 marks

- (c) What are some of the factors affecting the health of Aboriginal people today? How are Aboriginal communities working to improve the health of their people. 7 marks

Q11. Contact History

- (a) List THREE effects of dispossession on the health of Aboriginal people. 3 marks
- (b) Describe the effects, other than health, which dispossession has had on the lives of Aboriginal people. 5 marks
- (c) Explain how Aboriginal people have been instrumental in bringing about changes to their legal status 7 marks

Q13. Occupation

- (a) List THREE types of evidence which confirm the great length of Aboriginal occupation of Australia. 3 marks
- (b) In the region you have studied, where do the Aboriginal people come from? Under what circumstances have they come to this region? 5 marks
- (c) Discuss how research material has been used to support or oppose theories about the nature and history of Aboriginal occupation of Australia. 7 marks

Q16.

The song ‘Treaty Now’ by Yothu Yindi expresses a desire for reconciliation between Aboriginal and non-Aboriginal people.

What attitudes have been expressed by Aboriginal and non-Aboriginal people about reconciliation?

Do you think reconciliation is achievable? Give reasons for your answer.

OR

Q17.

‘Racism no longer exists in Australia. Today, Aboriginal people have the same opportunities as anyone else.’

Do you agree? In your answer, refer to at least ONE issue you have studied this year.

OR

25 marks

Q18.

Discuss the importance of Aboriginal contributions to Australian culture today.

1992 Legal Studies 2 Unit

Q33.

‘Although deemed to be British subjects, the Kooris were treated as if they were foreigners.’

With reference to the above statement and using your knowledge of the law, answer the following questions.

- (a) What was the legal position of Australian Aborigines as a consequence of white settlement? 6 marks
- (b) To what extent have Australian Aborigines changed their position since white settlement? 6 marks
- (c) Evaluate the effectiveness of the legal system in achieving justice for Australian Aborigines 8 marks

1993 Aboriginal Studies 2 unit**Either**

Q2. Land Rights

- (a) What does Terra Nullius mean? 3 marks
- (b) How does the relationship between Aboriginal people and the land differ from European concepts of land ownership? 5 marks
- (c) Discuss the importance of Land Rights to an Aboriginal community you have studied. Name the community.

OR

Q3. Religion

- (a) What is the purpose of initiation in Aboriginal societies? 3 marks
- (b) What importance do sacred sites have to an Aboriginal community you have studied? 5 marks
- (c) Discuss the effects that Christianity had on Aboriginal life 7 marks

OR

Q4. Land and Water Use

- (a) What is the effect of fire-stick farming? 3 marks
- (b) What land-management techniques have been used by an Aboriginal community you have studied? 5 marks
- (c) Discuss the ways in which current Australian environmental problems could be assisted by Aboriginal land-management practices. 7 marks

Q8. Contact Histories

- (a) List THREE ways in which Aboriginal people have been dispossessed. 3 marks
- (b) Outline ONE way in which Aboriginal people have resisted dispossession in a region you have studied. 5 marks
- (c) Discuss the effects on Aboriginal people of early policies which removed Aboriginal children from their families 7 marks

OR

Q9. Oral Histories

- (a) Describe THREE ways Aboriginal people recorded their lives before European occupation. 3 marks
- (b) How is the process of collecting oral histories affected by the age and gender of the interviewer? 5 marks
- (c) In what ways have Aboriginal oral traditions helped to maintain Aboriginal culture? Give examples from a region you have studied 7 marks

OR

Q10. Occupation

- (a) What is meant by the term ethnocentrism? 3 marks
- (b) Why would some Aboriginal people object to being studied? 5 marks
- (c) Discuss how the stereotyping of Aboriginal people in research can be overcome. 7 marks

OR

Q12. Law and Politics

- (a) what happened in 1967 that changed the legal status of Aboriginal people? 3 marks

- (b) How have non-Aboriginal people attempted to justify their claim to Aboriginal land? 5 marks
- (c) Discuss the need for an Aboriginal Legal service 7 marks

Q17.

From 1788 to present, Aboriginal people have been dispossessed.

Discuss how this dispossession affects Aboriginal communities 25 marks

1993 Legal Studies 2 Unit

Q 34.

“‘White justice’ has consistently failed Aborigines.”

With reference to the above statement and using your knowledge of law, answer the following questions:-

- (a) In what ways could it be considered that ‘white justice’ has failed Aborigines? 5 marks
- (b) To what extent are Aboriginal interests recognised by the Australian legal system? 7 marks
- (c) Evaluate the extent to which the legal system enables Aborigines to achieve justice before the courts. 8 marks

1994 Modern History 3 Unit (Additional)

Q7.

What have been the political and social consequences of the movement for Aboriginal rights in Australia since 1967?

25 marks

1994 Legal Studies 2/3 Unit (Common)

Q33.

‘To attain any measure of justice, the Commonwealth Government must be prepared to use its powers to redress the powerlessness of Aborigines in our society.’

With reference to the above statement and using your knowledge of the law, answer the following questions.

- (a) In what ways could Aboriginal people be seen to be powerless in Australian society? 5 marks
- (b) To what extent can Commonwealth law address conflicts between Aboriginal people and State authorities 6 marks
- (c) Discuss the extent to which the legal system allows Aboriginal people to exercise the power necessary to achieve justice in their daily lives 9 marks

OR

Q34.

“Without land rights Aboriginal people will never achieve justice.”

With reference to the above statement and using your knowledge of the law, answer the following questions.

- (a) Why do Aboriginal people claim land rights? 5 marks
- (b) To what extent could the Commonwealth exercise its constitutional power to override State laws on land rights? 6 marks
- (c) Discuss the extent to which the legal system recognises and enforces land rights and whether this achieves justice for Aboriginal people. 9 marks

1994 Modern History 2/3 Unit (Common)

Q 17.

- (a) Briefly describe Aboriginal attitudes to the land. 5 marks
- (b) In what ways did European views of the land differ from those of the Aboriginal peoples? 10 marks
- (c) To what extent was control of the land the sole cause of conflict between European settlers and the Aboriginal peoples during the nineteenth century? 10 marks

1994 Aboriginal Studies 2 Unit

Q7. Land and Water Use

- (a) What is meant by “Aboriginal land use”? 3 marks
- (b) Name an Aboriginal land or water management practice from a region you have studied. How has this practice changed? 5 marks
- (c) Discuss different views about Aboriginal land and water management and the effect on the environment. 7 marks

OR

Q8. Contact Histories

- (a) What is meant by “dispossession”? 3 marks
- (b) How were Aboriginal people dispossessed? 5 marks
- (c) What were the results of Aboriginal dispossession? Give examples from a region you have studied. 7 marks

Q10. Occupation

- (a) What is meant by “Aboriginal land occupation”? 3 marks
- (b) Briefly explain the 1993 (Federal) Parliamentary decision relating to Aboriginal land occupation. 5 marks
- (c) How does the decision in part (b) affect Aboriginal land occupation? 7 marks

Q 16.

Discuss the impact of the Native Title decision on ONE OR MORE of the following Australian industries:

- mining
- tourism
- farming

25 marks

OR

Q18.

Many issues affect Aboriginal families today as a result of invasion

Discuss the implications of ONE of these issues for Aboriginal families in today's society. 25 marks

1994 General Studies (NSW), 1 Unit

Q4.

Commenting on the Mabo decision, the Prime Minister, Paul Keating said:

‘We can make it a historic turning point. The basis of a new relationship between indigenous and non-Aboriginal Australians. The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian

social democracy to include indigenous Australians. There is everything to gain.’

Do you agree with this point of view? Give reasons for your answer.

All questions are of equal value.

1995 Aboriginal Studies 2 Unit

Q6. Land Rights

- (a) List FOUR ways in which Aboriginal people relate to land. 4 marks
- (b) Describe local Aboriginal Land Rights issues in a region you have studied. Name and refer to a specific region 6 marks
- (c) Discuss the implications of Native Title legislation for Aboriginal people. 10 marks

Q9.

Write an essay on AT LEAST ONE of the following issues: 20 marks

- Aboriginal languages
- farming and land management
- family separation
- deaths in custody
- High Court decision on Native Title
- mortality rates

In your essay, compare TWO Australian Aboriginal communities you have studied.

Give specific examples in your answer.

1995 Legal Studies 2/3 unit (Common)

Q32.

On the third of June 1992, the High Court of Australia reached a decision, known widely as the *Mabo* decision. This decision recognized that the Murray Island people of the Torres Strait were entitled ‘as against the whole world, to possession, occupation, use, and enjoyment of the lands of the Murray Islands’. The judgment made a fundamental change to the law of Australia by overturning the doctrine of *terra nullius*, that is, that the land of Australia belonged to no-one before European colonization.

Refer to the above statement and use your knowledge of the legal system to answer the following questions.

- (a) What is the traditional significance of land to Aboriginal and Torres Strait Islander peoples? 4 marks
- (b) Outline changes in government policy towards Aboriginal and Torres Strait Islander peoples between 1788 and 1992. 6 marks
- (c) Explain how Aboriginal and Torres Strait Islander land councils and trusts have tried to achieve justice for Aboriginal and Torres Strait Islander peoples. 8 marks
- (d) Evaluate the present and possible future effectiveness of the *Mabo* decision in achieving justice for Aboriginal and Torres Strait Islander peoples. 12 marks

1995 Legal Studies 3 unit (additional)

Q7. 25 marks

Let us go back 500 years to the period which saw the rise of the modern state, the beginnings of European colonial expansion, and the birth of modern international law...

Themes emerged then in discussions about the relationships between colonizers and indigenous peoples that continue to resound today. Satisfactory resolution seems as elusive today as it was then.

GARTH NETTHEIM, *International Law and Indigenous Political Rights: Yesterday, Today and Tomorrow*

Clearly identify, at the beginning of your answer, the TWO depth studies you will discuss.

Refer to the above statement and use examples drawn from the TWO depth studies you have identified to answer the following question.

To what extent does international law address issues faced by indigenous peoples?

RECOMMENDED READING

From Forest to Sea, Eric Rolls, U.Q.P.

Cry for the Dead, Judith Wright, Oxford University Press.

Archaeology of the Dreamtime, Josephine Flood, Collins.

Mabo: A Judicial Revolution, Stephenson & Ratnapala, U.Q.P. 1993.

Mabo, The Constitution and The Republic, Mark Brabazon (1993)1994) 11 Australian Bar Review 229.

Caught in the Draught, Veronica Brady, Angus & Robertson

One Land: Two Laws - Aboriginal Fire management, Camilla Hughes - Environmental & Planning Law Journal, February 1995, 37.

One Land, One Nation, Frank Brennan, University of Queensland Press.

This Whispering In Our Hearts, Henry Reynolds, Allen & Unwin, 1998.

Good luck!