REVIEW

Mabo, Wik & Native Title

Peter Butt and Robert Eagleson
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One of the most intense political debates in Australian history was inaugurated by the *Mabo (No 2)* judgments. As words flew about; as politicians, various industry spokespersons, lawyers, academics (across a wide range of disciplines) journalists and such Aboriginal and Torres Strait Islander people who gained a voice in the media, lauded or abused the decision, opined and dined on it, wrote and spoke and argued its "meaning"; as some of Australia's best loved talk-back hosts rooted out truffles of racial vilification from the rich repository of Australian colonialism, a growing public interest in the case has given publishers a promising market niche. The law, especially the law as it is spoken in the highest courts, is for the peoples of Australia in many ways. Being understandable is *not* amongst them.

Mabo, Wik & Native Title originally appeared under the title *Mabo: What the High Court Said.* The second edition added a chapter - or rather four pages - on the Native Title Act. This third edition adds two more chapters, one (11 pages) on *Wik*, "The Wik decision - 1996: what the High Court really decided", the other (6 pages) on the 1998 amendments to the Native Title Act. The bulk of the book thus remains the re-writing of sections of the *Mabo (No 2)* judgments in "plain English". On this enterprise the authors say:

> We have not added any interpretation or commentary of our own. We are concerned that the discussion in the community on the *Mabo* case

> should proceed on the basis of a clear and factual understanding of the High Court judgment. We have sought to simply set out what the judges say (7).

Given three editions of the book within five years; it must be supposed that these efforts have found market support. Blurb citations of reviews of the first edition laud them as enabling all Australians to understand the reasoning of the Court. Several reservations must be entered against this success and its justification.

In the first place, any re-writing that involves selection of passages to be re-written involves judgment and interpretation. If a "clear and factual understanding" is offered by this volume, it can only be of the High Court judgments as re-written by its authors. This re-writing claims to present what is "essential for the judges' central reasoning" (6). Given significant differences of opinion between the judges, a further more substantial interpretive exercise is involved here. The second point attaches to this. In order to present this "essence", the authors compile the various judgments within an organon of "issues", such as *terra nullius*, Crown sovereignty and ownership of land, extinguishment etc. The determination of issues is a mainstay of legal analysis. It is essentially contestable. Richard Bartlett, for example, has argued that *terra nullius* was not in issue in the decision.[1] More generally, use of this organon, particularly under the rubric of providing a factual understanding, assumes that the conceptual framework within which "the facts" of what the High Court said are constructed, is one that is based on professional legal practices of pleading and argument. Reasoned judgment, in a common law system where doctrines of precedent confer authoritative status on judicial opinion, is a further constitutive practice in the production and reproduction of legal knowledge. Clearly judges respond to pleading and argument, but they add a further, distinctive component of legal discourse. Among other things, judges compete - with each other and with the bar - to establish the meaning of the pleas and arguments in support of them, as the law of native title in Australia. The third point now is that legal analysis in terms of issues determined by the commentator, overrides the internal structure of a judgment. Reasoning involves inference. Analysis in terms of issues, in the interests of clarity, draws sharp lines where an inferential relation between concepts is actually part of the reasons for judgment. Should such analyses be considered the work of the legal scientist, or perhaps, to update this jurisprudence from its

[1] Richard H Bartlett, *The Mabo Decision*, Butterworths, Sydney, 1993, p ix.

early century context, the legal executive? The latter designation is preferable. The idea of science involves understanding and what is questionable here is the methodological adequacy of an organon of issues and 'plain English' to the task of understanding "what the judges said" in *Mabo (No 2).*

The deficit sketched above concerns legal reasoning. It might be thought that little is lost, to the layperson, by the schematic reduction of the judgments that is involved. Reasons for judgment are commonly seen as after the fact rationalisations of decisions reached by other means. The legal professional will need to be able to play this particular game as part of his or her calling but the layperson is not asked to play the game; on the contrary she is excluded from it as a constitutive condition of professional identity. The executive task then is simply to communicate what was said by the judges in plain and comprehensible terms. Plain English is there for the former task and the executive's determination of the issues on a need to know basis is the particular skill that accomplishes comprehensibility. But what is the business in which our executives are employed?

With the additions of this edition, the book does give an overview of judicial and legislative contributions to the establishment of a native title industry in Australia. What it does not give is any indication of this contextual aspect of law and of law's functions within this context. In particular, law's technical function as creator of property forms needed by capital and its markets is nowhere in view. On the other hand, far from dispensing with the legitimative function of the aspects of legal reasoning excised, legitimacy is assumed and transmitted by reference to fairness, certainty and above all practicality as guiding principles of native title law. This at least is true to the rhetoric of justice, equality and non-discrimination that the *Mabo (No 2)* judgments and the preamble to the Native Title Act 1993 engaged in. So it might be supposed, in answer to the question posed above, that the business is Legal Justice Inc.

Principles however must be allowed to do their structuring work on pain of becoming vacuous. When that work is done by an organon of issues, legitimation by principle becomes transparently threadbare. In a remarkable concluding paragraph on the relationship of the Native Title Act to the Racial Discrimination Act, the authors state:

> The amendments make it clear that nothing in the *Native Title Act* is intended to affect the operation of the *Racial Discrimination Act.* The

> protections under that Act are to remain. As a practical matter, however, the *Native Title Act* permits the government to by-pass aspects of the *Racial Discrimination Act*, for it allows native title rights and interests to be dealt within in the ways specified in the *Native Title Act*, even though the consequences may be to affect those rights and interest differently to the way other rights and interests are affected (117)

Nothing in the *Native Title Act* as amended is to affect the operation of the *Racial Discrimination Act*, except that the former Act permits government to deal with native title interests in a way affects them, not in a racially discriminatory way but, "differently to the way other rights and interests are affected". Perhaps what our plain speaking authors had in mind here was that the *Native Title Act* is not to be taken as effecting a general repeal of the *Racial Discrimination Act* because it authorises dealings with native title in breach of the latter Act. Perhaps also "plain English" and "practical matters" are being put to the task of putting the corporate mission of the native title industry into the frame of Legal Justice Inc.

What is more troubling than either the possibility of inept or euphemistic formulation is a third possibility, namely, that the author's genuinely believe that the legislative by-pass of racially discriminatory acts in respect to native title is not racial discrimination. This belief cannot be justified by defining racial discrimination as unlawful racial discrimination within a positivist understanding of law because the *Race Discrimination Act* itself defines racial discrimination. If this definition is modified by the *Native Title Act* the first sentence of the paragraph is false. What is at stake here goes well beyond the schools of jurisprudence - unless corporatist methodology and ideology has already established itself as one such school. It is the raising of pragmatic favouring of particular interest groups, not merely to the level of excuse, but to that of epistemic and ethical justification. This is not new to the 1998 amendments to the Native Title Act. *Mabo (No 2)* is a racially discriminatory decision and the 1993 Native Title Act is racially discriminatory legislation. That is not because these legal events establish a form of title to land that can be held only by aboriginal peoples. It is not even because the High Court in *Mabo (No 2)* made biological descent a necessary condition of membership of the class. It is because the common law has arrogated to itself the power to determine who is aboriginal. The various iterations of this failure of recognition, such as the subordination of aboriginal law to common law, and of native title to titles deriving from Crown grant are only

unrecognisable as racially discriminatory by thought that is itself engaged in this ongoing constitution of Australian racism.

The phrase "As a practical matter, however,..." signals this. Yet this text, with its reproduction of aboriginal art on its cover, presents itself as bringing to the community a law that is for the benefit of aboriginal people. I can suppose the authors to be as innocent as the law itself as to their and its function in the ongoing legal construction of Aboriginal peoples as an inferior "race" with inferior rights. That is no reason to forebear from the conclusion that the presentation suggests either a total lack of self-consciousness on the part of authors and publisher as to their own location within the native title industry and its markets or an uncritical taking up of the pickings on offer.