Rewriting history 2

The wider significance of *Mabo v Queensland*

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The implications of Mabo for future land rights claims are explored and discussed.

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Gove Land Rights case

Twenty years ago, in 1972, the Whitlam Government was elected — tertiary education became free, conscription for Vietnam ended and a policy of Aboriginal self-determination was announced. Five years had passed since the Constitution was amended to give Aboriginal people the right to vote. This was also the year after the *Gove Land Rights case* was decided by Blackburn J in Alice Springs — *Milirrpum v Nabalco* (1971) 17 FLR 141.

That famous case involved an attempt by members of the Rirratjingu, Gumatj and Djapu clans to prevent Nabalco from mining parts of Arnhem Land on the Gove Peninsula. It was argued that the mineral leases in question were invalid because they violated the communal native title alleged by the clans. History shows that the Aboriginal parties failed that time around.

They were able to show that their ancestors had a recognisable system of law but could not prove that they had a relationship with the land which could properly be called a 'proprietary interest' under the white law. Blackburn J found that the doctrine of communal native title did not form and *never* before formed part of the law of Australia. Constitutionally, the colonies had been 'settled' rather than conquered or ceded.

The reasons for judgment in the *Gove Land Rights case* run to over 150 pages. In 1972, the *Gove Land Rights case* formed a focal point for much of the Legal History course at the Australian National University. The lecturer, Dr John Hookey, had been involved in the case and soon after produced the first critical analysis of Blackburn J's reasons.[1] Since then, lawyers and commentators have subjected the judgment to close scrutiny from every conceivable angle.[2] From a social justice point of view, the *Gove Land Rights case* was clearly wrong. Everybody knew that and even the judge said as much.

For this reason, the *Gove Land Rights case* made an impact on many students. One of them was Peter Garrett, now President of the Australian Conservation Foundation and lead singer for *Midnight Oil*. It may be hard to imagine now but, back in 1972, he was a long-haired surfie! With *Midnight Oil*, he went on to write and record many powerful land rights songs. Another student outraged by the result in the *Gove Land Rights case* was Warren Snowdon. He later worked with the Central Lands Council in Alice Springs and is now Labor member for the Northern Territory.

From a legal point of view, the *Gove Land Rights case* was far more complex. On the basis of earlier authority, the judge considered he had no option but to find that *communal native title* was unknown to the general law. That position had been decided constitutionally long before and cases from other jurisdictions continued to support it. Single judges have very little discretion; they are constrained by the law as it is, and not generally free to declare the law as they think it should be.

Terra nullius

The main problem was that Australia was taken to have been settled by whites, rather than conquered or ceded. Legal and constitutional writings going back well before 1788 were consistent with this being the case. If territory was settled rather than conquered, it meant that it was for legal purposes 'desert uninhabited' — the doctrine of *terra nullius*. The judge in the *Gove Land Rights case* felt that he could not, at that late stage, rewrite legal and constitutional history to reach some other result.

In law, Aboriginals were treated as if their culture and civilisation simply did not count. They were effectively non-persons, not considered far enough advanced to be recognised. It may be deceiving to look at the 18th century colony exclusively through 1990s eyes, but it took until 1967 before black people were even allowed to vote! The 25th anniversary of that event was celebrated only recently. But, with black deaths in custody and continuing injustice on a massive scale, it has a hollow ring. It has even been suggested that the 1967 constitutional amendments were proposed only to improve the prospects of other amendments being passed!

In Western Australia, it has always been difficult to reconcile *terra nullius* with historical fact. The white invasion of Aboriginal land began in 1829 when Captain Stirling landed on Nyungar. Almost immediately, it was necessary to establish a militia to protect the infant colony from attack by 'hostile native tribes'. Early in 1830, the first significant violent encounter took place near Lake Monger. So strong was the opposition that abandonment of the Swan River Colony was seriously considered. No declaration of war was ever made, but the reality of a continuing state of limited warfare was ever present.

By 1870, the Amangu peoples' defence of their coastal lands had been overcome. The Jandamarra Massacre at Windjana Gorge in 1894 was followed by other massacres at Horseshoe Creek (1901), Mistake Creek (1915) and Forrest River (1926). These brief details show that the legal position of *terra nullius* has always been at odds with history in WA. The 'oppressive legal lie of *terra nullius*' became a potent symbol for Aboriginal people over a whole range of issues. It has haunted political debate and distorted the processes for change, both within and outside the Council for Aboriginal Reconciliation, ever since.

Communal native title has been asserted and tested all over the colonial world with mixed results. Canadian cases gave some reason to doubt the main conclusions of Blackburn J, but the verdict of some legal and academic historians went the other way. Encouragement was given to re-opening the matter by the High Court back in 1979 when it said that the existence of communal native title constituted an 'arguable question if properly raised' — *Coe v The Commonwealth* (1979) 53 ALJR 403. Eight years later, in *Northern Land Council v The Commonwealth* (1987) 61 ALJR 616 at 620, the same court said it opened 'a question of fundamental importance'. When *Mabo v Queensland* first went to the High Court in 1988, three judges put the question the other way — 'whether traditional native title was extinguished' — perhaps obliquely revealing their thinking on the question.

Eddie Mabo

Eddie Mabo was from Murray Island, one of the Torres Strait Islands annexed by Queensland in 1879. Murray Islanders have lived there and cultivated the soil since time immemorial and have fully maintained their association with the land at all times. In 1982, Mabo challenged the 1879 annexation on the basis of communal native title. Three years later, the Queensland Government decided to settle the issue in its own way by passing the *Queensland Coast Islands Declaratory Act* 1985 which declared that the intention of the Queensland Government back in 1879 was not only to acquire sovereignty, but also to extinguish *any* land rights the Meriam people had.

The first time *Mabo v Queensland* went to the High Court was to determine this issue. By the narrowest of majorities, the High Court held the 1985 Act invalid as contravening s.10 of the *Racial Discrimination Act* 1975. That provision talks about people of a particular race being denied rights enjoyed by people of another race. One of those rights is the right to own property alone or in association with others. The reasoning of the majority was that, by taking traditional legal rights, the 1985 Act took away the immunity of the Meriam people from being deprived of their rights over the Murray Islands. This crucial finding set the scene for testing communal native title and the doctrine of *terra nullius*.

On 3 June 1992, the High Court rewrote history — (1992) 66 ALJR 408. However, it not only re-wrote legal history, it arguably has re-written the social and political history of Australia as well. This came almost exactly 500 years after the discovery of the New World by Columbus heralded the beginning of inevitable decline for indigenous populations everywhere. By a 6-1 majority, the court upheld the communal native title of the Murray Islanders and sent the doctrine of *terra nullius* to the scrapheap.

The important parts of the Order in *Mabo v Queensland* are that the 'Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands' but that the title of the Meriam people is subject to the power of the Queensland Parliament and the Governor-in-Council 'to extinguish that title by valid exercise' of powers. In other words, communal native title exists but can be validly taken away.

Skeleton of principle

The most important judgment is that of Brennan J (with whom Mason CJ and McHugh J agreed). Brennan J questioned the very fundamentals of colonial legal theory by posing the question — when the Crown assumed a sovereignty over Australia, did it become the absolute beneficial owner of all land? Judged by any civilised standard, he thought a law in these terms would be unjust. He said (at 416):

> In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.

What Brennan J appears to have meant by this is that legal history in effect can be re-written, but that there are important limitations on that process. The law can be modified to accord with modern notions of justice and human rights but not to the extent that it causes breakdown of the legal system itself. On *terra nullius*, he said (at 421) 'there is a choice of legal principle to be made'.

According to Brennan J (at 422):

> . . . 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 . . . The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.

There was, therefore, a sound basis for rejecting *terra nullius* but this could not be done if it meant fracturing the 'skeleton of principle'. Brennan J then went on to find that none of the technical grounds advanced for the Crown having absolute beneficial ownership of colonial land would lead to such a fracture. Communal native title could survive a proclamation of sovereignty.

Necessary evidence

What was necessary for this to happen? Brennan J said (at 430):

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence . . . However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.

Communal native title can exist, but it can also be lost when the necessary traditional connection with the land is broken, for example. Whether the connection can legally be broken by coercive means is another question. Communal native title can also be lost by surrender or purchase but, more importantly, it can validly be extinguished by the Crown in a variety of ways. This aspect of the case is examined in more detail by Mark Gregory in this issue.

Community reaction

Where does this leave Australia now and what is the wider significance of *Mabo v Queensland*? Many people, including the Minister for Aboriginal Affairs and various mining interests, have cautioned against attempting to predict consequences until all the intricacies of the judgments have been analysed. No doubt this is true but certain preliminary observations can be made. Geoffrey Ewing, a mining industry spokesman, is reported as saying that the decision should *not* be seen as a precedent because it concerns only Murray Island. This is clearly wrong, as the legal principles declared in *Mabo v Queensland* apply throughout Australia. So far as the mining industry is concerned, much will depend on whether the granting of their interests followed from a clear and plain intention to extinguish any communal native title.

As Garth Nettheim correctly points out, grants of freehold and leases may be inconsistent with continuing communal native title, but lesser interests like authorities to prospect for minerals may not have that potential effect. Similarly, land set aside for national parks would not necessarily extinguish communal native title. Peter Jull, writing in the *Australian Financial Review*, said that the decision 'is not the threat some observers see it to be. It may even restore rationality to race relations'.[3] In the short term, at least, it may be doubted that this will be the result. The *Australian* has reported that the decision is seriously undermining negotiations on a land claim within and around Rudall River National Park in Western Australia. There may be a temptation in some quarters to cast doubt on land rights claims already made and, possibly, to seek legislation which would try to nullify the effect of *Mabo v Queensland*.

Under the provocative heading 'The Gathering Storm', the *West Australian* recently ran an article about an alleged recent appearance of skeletal remains in a cave on the Mitchell Plateau in the Kimberleys. The suggestion was that this was a deliberate ploy to bolster a land claim by false evidence. The WA Chamber of Mines and Energy is already mischievously referring to Kimberley claims as 'the revolutionary goal of a separate black sovereign state'. The *Australian* has reported that a Mt Isa City Council employee is charged in relation to a bomb placed in a local Aboriginal and Torres Strait Islander Commission office.

Business Review Weekly recently came out with the cover — 'Aboriginal Takeover' — hardly consistent with Robert Gottliebsen's plea inside that issue for rational debate. The feature article by Tim Treadgold concentrates on the economic effects of mining restrictions but uses the emotive term 'sovereignty' a number of times. Of course, successful land claims confer no more sovereignty on Aboriginals than does freehold grant to a farmer, as everyone knows. There is a need to restore rationality to race relations debate and to prevent distorted views *of Mabo v Queensland* being circulated for political gain.

The prospects for now establishing land right claims depend on — first, the evidence in the particular case. Here, the test proposed by Brennan J about maintaining traditional connections with the land will be critical. Secondly, there will be complex legal argument concerning the effect which various statutes granting different proprietary interests have on communal native title which otherwise survives. It is not a foregone conclusion, but a variety of lesser mining and other interests granted may well fail to displace communal native title.

If there are attempts to legislate against *Mabo v Queensland* applying, any laws so made would have to be carefully drafted so as not to violate either the Constitution or Commonwealth laws like the *Racial Discrimination Act* 1975. The Commonwealth could prevent this but whether it would legislate to do so is another matter. As Peter Jull has pointed out, the hope now provided by the High Court 'must not be dissipated by official sleight of hand'.[4]

Compensation issues

Some commentators have seen the decision in *Mabo v Queensland* as guaranteeing little for Aboriginal people because it fails to recognise a general right to compensation. This may be an unduly pessimistic approach. It is true that the High Court rejected a right to compensation by a 4-3 majority but the final position is not nearly as straightforward. Mason CJ and McHugh J said (at 410):

> The main difference between those members of the Court who constitute the majority is that, subject to the operation of the *Racial Discrimination Act* 1975, neither of us nor Brennan J agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provisions to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages.

This sentence has been constructed with a great deal of care. It follows from the judgment of Brennan J that the grant of an interest inconsistent with pre-existing communal native title and made with the clear intention of extinguishing that title is valid. The grant of an interest in these circumstances is not wrongful and no compensatory damages are payable.

However, it was common ground between six of the judges that the power to extinguish *communal native title* was to be exercised subject to the Constitution. This includes the guarantee that, at least when the Commonwealth acquires property, it must do so on 'just terms'. There is an argument that merely extinguishing property rights does not amount to acquisition (*Tasmanian Dams case* (1983) 158 CLR 1 at 145) and this point is being tested in proceedings brought by Western Mining Corporation in Melbourne.

Deane and Gaudron JJ said in *Mabo v Queensland* (at 452) that 'any legislative extinguishment of those rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purpose of s.51(xxxi)'. It is true that the constitutional guarantee does not apply to the States but that does not mean that litigation to establish more limited rights to compensation would necessarily fail. There are also unresolved questions about the application of various State statutes which regulate the acquisition of proprietary interests and provide for payment of compensation.

Dispossession may occur in ways other than by inconsistent Crown grant to a third party.There is nothing in the judgment of Brennan J which *must* lead to denial of compensation in all situa-

tions if a right in these terms would not fracture the 'skeleton of principle'. Compensation has been upheld in Canada and the United States, for example, without appreciable juristic chaos resulting. It may also be significant that Brennan J did not refer directly to compensation issues. As he found the interest of the Murray Islanders to have survived, strictly speaking, no finding on the compensation point was necessary. In future proceedings, it would be argued that nothing the High Court said in *Mabo v Queensland* prevents at least some rights to compensation being recognised. The result of litigation on compensation issues, however, cannot easily be predicted.

Mabo v Queensland represents a turning point for the High Court and adoption of a more American-style approach. This approach, usually called 'judicial activism' gives judges a much freer hand to adapt law to changing norms, circumstances and needs in society, subject to appropriate safeguards. Much depends, then, on the views and values of the judges who constitute the court at any particular time. When a court in these circumstances is dominated by conservative judges, there is a risk that past progress can be reversed or undone. We are now seeing this happen with the US Supreme Court.

The wider significance of Mabo

In years to come, *Mabo v Queensland* will be seen as one of the real milestones in the High Court's evolutionary development. This might seem an academic point, but it may have important practical implications for further development of the law on communal native title, particularly on compensation issues. What this means is that *Mabo v Queensland* is not the end of the line. There is significant room for further development consistent with basic principles established in that case and perhaps along North American lines.

There is also now a mandate (if not a moral duty) for the Commonwealth to introduce the uniform land rights legislation it retreated from in 1986. Just as the *Gove Land Rights case* led to the *Aboriginal Land Rights (Northern Territory) Act* 1976, *Mabo v Queensland* calls for national legislation. Other issues, like the *Makarrata* and giving Aboriginal groups the right to veto mineral development on their land, are once again on the agenda. Writing in the *Australian*, David Solomon said that *Mabo v Queensland* has 'important symbolic significance but will have comparatively little practical impact'.[5]

This approach tends to read the High Court judgments too narrowly and does not pay enough attention either to future prospects or the processes by which the High Court develops law. The door is now open for a majority of the High Court to declare at least limited rights to compensation. These might be supported by cases from other jurisdictions, developing principles in the field of international law and, perhaps, the coming *Universal Declaration on Indigenous Rights* being drafted by the UN Working Group. As Garth Nettheim has written, the High Court judgments 'provide a baseline for further judicial development'.[6]

The Kimberley claims by Wunambul, Worora and Ngarinyn people might produce a test case to establish rights to compensation for extinguishment of communal native title. But, questions concerning management of those claims make the direction of their future conduct uncertain. Before the compensation issue could arise, the test of traditional connection with the land would need to be satisfied. Also, pastoral leases already granted would need to defeat the claim on the basis that they showed a clear and plain intention to extinguish communal native title. It is possible that both these conditions could be met for some claims, but a more suitable vehicle for a test case may emerge from elsewhere. Over half of WA is unalienated Crown land.

Mabo v Queensland is not simply the most important case since 1972 for Aboriginal people. It is the most important pronouncement on race relations since white people landed in the colony of New South Wales 204 years ago. While it is correct that it will take some time for the full legal implications of the decision to be known, the decision should operate on a political level to permit Aboriginal people to negotiate from a more equal position. As Bryan Keon-Cohen (who appeared as counsel in *Mabo*) says, the High Court 'has presented all governments with an awesome challenge which they will avoid at their peril'.[7]

After the Noonkanbah Dispute in 1980, former Premier Sir Charles Court said:[8]

> The land of Western Australia does not belong to the Aborigines. The idea that Aborigines, because of their having lived in this land before the days of white settlement, have some prior title to the land which gives them a perpetual right to demand tribute from all others who may inhibit it, is not consistent with any idea of fairness or common humanity. In fact, it is as crudely selfish and racist a notion as one can imagine. Nor is it an idea which has ever accorded with the law of this nation . . .

On the contrary — it is precisely the ideas of fairness and common humanity which now make communal native title part of the law of Australia. That law is not, to use the words of Brennan J, 'frozen in an age of racial discrimination'.

References

1. Hookey, John, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia, (1972) 5 *Fed. Law Rev.* 85.
2. Cullen, Richard, 'Mabo v Queensland', (1990) 20 *UWALR* 190 at 194 lists some of them.
3. Jull, Peter, *Australian Financial Review* 10.6.92, p.12.
4. Jull, Peter, above.
5. Solomon, David, *Australian* 4.6.92, p.2.
6. Nettheim, Garth, (1992) *Aust.Law News* July, 9 at 12.
7. Keon-Cohen, Bryan,'Eddie Mabo and Ors v The State of Queensland',(1992) 56 *Aboriginal Law Bulletin* 22.
8. Letter to D.W. McLeod, 3 November 1980, quoted by Bartlett, Richard, in 'Aboriginal Land Claims at Common Law', (1983) 15 *UWALR* 293.

CORRECTION

'Whingeing poms and whining lawyers' by Roger Smith, (1992) 17(3) *Alt.LJ* 127.

You may have been surprised to see the conversions of pounds to dollars we inserted in this article in our last issue. With apologies to Roger Smith, the figures translated in the right direction should have been:

£680	$1428
£110	$231
£140	$294
£1billion	$2.1billion
£24	$50

(exchange rate used $2.1 to £1)