

Eddie Mabo

Human Rights Lecture

“Eddie Mabo Human Rights Lecture” in Wilson, John; Thomson, Jane; and McMahon, Anthony (eds) *The Australian Welfare State - Key Documents and Themes* Melbourne, MacMillan Education Australia Pty. Ltd., 1996, pp 140-148.

by Noel Pearson

James Cook University of North Queensland
17 May 1995

Mrs Mabo, Students and Teachers of James Cook University of North Queensland, Organisers of this Annual Eddie Mabo Human Rights Lecture and friends. No small privilege has been extended to me here today. I am indeed greatly honoured to have been invited to speak on this occasion in the presence of Mrs Mabo and at this particular university. Over the past 3 years I have had numerous opportunities to speak on aspects of the native title legacy which the late Eddie Mabo left for this country. Today I would like to take the opportunity to reflect on the dimension of his achievement and to make some observations about what I think Eddie Mabo left for all Australians.

Allow me first to tell you that it was at a conference at this university in July 1990, hosted by the Australian Institute of Aboriginal Studies on the subject of Remote Community Futures, that I met Eddie Mabo for the second time. I had previously briefly met him in Sydney. At this conference delegates from Cape York communities met together to resolve to convene a land conference to establish a land council for the traditional owners of Cape York Peninsula. The decision taken at the meeting out on the lawns of this campus was then taken to the Plenary Session of the conference. The formation of the Cape York Land Council was endorsed by a conference resolution moved by Eric Deeral, the first and only Indigenous

person to sit in the Queensland Parliament, and seconded by Eddie Mabo, who was then involved in a legal struggle with the government of Queensland.

Eddie spoke at the conference about the court case. As a law student at Sydney University, having read about the long-running case and developed an interest in the argument, I was particularly struck by how passionately he spoke to people who had little idea of what he was trying to do. He truly was a lone voice in the wilderness. Like John the Baptist he preached to an audience that didn't share the same faith or have the same vision. Thinking back on this time I often wonder where he found the determination to struggle when few understood, and even fewer people held out any prospect.

Believe me when I say that we treat Eddie Mabo's support for the establishment of the Cape York Land Council as divine endorsement.

Let me now take you back over the legal history of native title. Of the colonies which inherited the common law tradition of England and its concept of native title to land vesting in the Indigenous peoples of a colony, Australia was alone in its steadfast refusal, for 204 of its 207 years, to acknowledge that the recognition of traditional title to land formed part of the law which was brought to these shores on the shoulders of Englishmen. The Supreme Court of the United States had confirmed traditional title in 1823, in the famous decision of Chief Justice Marshall in *Johnson v. McIntosh*. Mr Justice Chapman's decision in *R v. Symonds*, confirmed aboriginal title in New Zealand as long ago as 1847. These cases formed part of a tradition of common law recognition of beneficial title vesting in aboriginal peoples subject to the radical power of the new sovereign, particularly in decisions of the Privy Council in Asian and African colonies. Despite

this, Australia tenaciously clung to the legal fiction of *terra nullius*: a land without owners.

Terra nullius underwrote the real property law of the country and informed the colonial relationship between the indigenes and colonists for two centuries. It not only had legal and political force, but it set a moral and psychological tone. It justified the theft of the land and the murder and mistreatment of its owners. It was indeed the imprimatur for dispossession.

This false doctrine was so embedded in the legal and constitutional foundations of the nation that even on the eve of the High Court's decision *terra nullius* held a moral force in our country that was still compelling. It was so much a foundation stone of the country's colonial identity, few in Australia would have anticipated that it could be overturned.

It was a foundation stone which Eddie Mabo refused to accept. A lone voice in a wilderness of faithlessness, the late Eddie Mabo succeeded in the destruction of *terra nullius* and laid the basis and the opportunity of a moral community in the Antipodes. It is true that no Australian has not heard of him, indeed many beyond Australia now have. But the true dimensions of Mabo's achievement in redeeming history is yet to be appreciated. He already stands as a heroic figure in the nation's history, but in my view his contribution will be the most significant of any Australian, past, present or future. For Mabo's was that rare achievement: he had confronted the colonial past, established the opportunity for Indigenous justice in the present, and laid for all Australians a new foundation for a society in the future.

History tells us that 150 years ago there were those in the British Colonial Office and indeed administrators and individuals in the colonies who insisted that respect and recognition of traditional title was a legal fight of the Indigenous people of Australia, as subjects of the British Crown. This movement, called the First Land Rights Movement by Professor Henry Reynolds, eventually folded in the face of

the most cynical resistance and vehement insistence from the frontier that Indigenous peoples possessed the legal status of wildlife: without rights to their homelands and without rights to their livelihood and indeed without rights to their lives. The gap between the Law of England and the reality of the frontier left a tragic scar, described by Justices Deane and Gaudron of the High Court of Australia as 'a legacy of unutterable shame'.

Australia had justified the disparate treatment of its Indigenous peoples in respect of recognition of native title, for the same reasons advanced by the Privy Council in its 1919 decision in *Re Southern Rhodesia*. Speaking on behalf of the Council Lord Summer said:

The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights to property as we know them.

The unbridgeable gulf was the Social Darwinian concept of the evolutionary gap between civilised and uncivilised peoples, the fit and the unfit.

This reasoning became the philosophical justification of Australia's racism towards its Indigenous peoples. From frontier days until the recent death of the myth of *terra nullius*, the Aboriginal people of Australia, peculiar and astounding among the diverse peoples of the world, were said to be of a particularly backward nature. So-called scholars measured crania and exhumed graves. They opined that we had no civilisation and were simply not human enough to possess rights to land.

This racism was somewhat different to the racism which formed the anti-Asian White Australia Policy, which was also bipartisan policy throughout most of Australia's post-Federation

history. The prejudice against the 'teeming yellow hordes' and anxiety about Anglo-Celtic integrity was perhaps less based on ideas of evolutionary gulfs than on preserving economic opportunity and 'maintaining racial integrity'. Indeed Prime Minister Alfred Deakin once commented that it was not the bad qualities of the Japanese that justified the policy, but their good ones.

Racism towards the Indigenous peoples had been different. Not until the 1960s would the entrenched ideas about innate inferiority come to be questioned in Australian society.

The true history of the betrayal of English law was obfuscated for more than a century of historiography and popular belief. We have endured what, in 1968, the eminent anthropologist, Bill Stanner, called 'The Great Australian Silence'. Stanner observed that:

... inattention on such a scale, cannot possibly be explained by absent-mindedness. It is a structural matter, a view from a window which has been carefully placed to exclude a whole quadrant of the landscape. What may well have begun as a simple forgetting of other possible views turned under habit and over time into something like a cult of forgetfulness practised on a national scale ... the Great Australian Silence reigns; the story of the things we were unconsciously resolved not to discuss with them or treat with them about...

It was this silence and legal invisibility which confronted the people of Murray Island as they contemplated action to overturn *terra nullius*.

During this period of invisibility, Indigenous peoples, who were not citizens of the Commonwealth, fought in wars, worked as cheap labour in the colonial economy, suffered racial discrimination and were expected to eventually pass away.

The profound belief in innate inferiority had justified a longstanding policy of segregation and discrimination. Indigenous people were different and therefore unequal.

With the influence of post-war decolonisation, the Civil Rights Movement in the United States and the growing global movement for recognition of Indigenous peoples, ideas of racial superiority and inferiority came to be challenged here in Australia. The state of Queensland, in particular, was most reluctant to abandon the policy of difference and inequality.

Of course throughout the segregation period, there was the opportunity to overcome inequality by a process of eliminating difference: assimilation. For this to happen, in order to enjoy the fruits of equality, Indigenous people needed to advance beyond their backward state to become just like normal white Australians. Therefore the department which most closely governed my hometown mission and indeed the Meriam community of Murray Island was for a long time called the Queensland Department of Aboriginal and Islander Advancement.

By the early 1980s inequality on the basis of difference became untenable policy, even for Queensland, and the policy switched from inequality and difference to equality and sameness. Indigenous people were now no different from other Australians; they were, by decree, now equal and the same.

The common purpose of both policies was to deny the truth: that Indigenous peoples must be equal and different. For to concede difference to Indigenous peoples would be to concede that perhaps the origin of rights might be different and that there may be a difference in the historical reckoning of these peoples.

The consistent refrain of the architects of this policy was that it is unequal for one section of the Australian community to claim inherent and traditional rights to land which are different from the rights of the rest of the community. Difference according to this argument must always mean inequality.

It is this failure to come to terms with the apparent paradox of equality and difference which has bedevilled Aboriginal policy in Australia for so long. In 1971 a single judge of

the Supreme Court of the Northern Territory, Mr Justice Blackburn, ruled in the first Australian case to consider the question of native title at common law that Australian law was not cognisant of traditional title to land. The Gove Case became the catalyst, along with a new assertive Indigenous political movement of the early 1970s, for recognition of Indigenous entitlement to land.

The philosophical foundation for the reforms that were made throughout the 1970s and the early 1980s was that: Indigenous people possessed no legal rights to land, therefore parliaments needed to create rights via legislation and presume to grant land to traditional owners. These measures which began in South Australia, followed by Commonwealth legislation creating a land claims regime for the Northern Territory in 1976, were dependent upon political willingness and therefore public support. It is true that as subsequent measures were taken in respect of the Pitjantjatjara and Maralinga lands of South Australia, in New South Wales in 1983 and in Queensland in 1991, that the increasing inadequacy of these measures matched the growing public disinterest in land rights throughout the 1980s. The abandonment by the Hawke Labor government of the proposed National Land Rights Model in 1986 confirmed the view that the wellspring of charity, which had driven land right legislation, was close to drying up.

This led the perceptive Tasmanian Aboriginal leader Michael Mansell to observe in early 1989 that no more would we see genuine efforts at land rights legislation in Australia. The time had passed. Australians felt they had given enough charity. It was in this context that Mansell asked whether the better prospects for Aboriginal people lay without the nation rather than within it.

The impetus for a new direction came with the High Court's decision on 3 June 1992. This decision establishes Aboriginal entitlement on the basis of right and not on charity. From then onward Aboriginal entitlement did not spring from public largesse but from the recognition by

the country's highest legal institution that this continent was once entirely owned by its native titleholders and indeed there may be instances where this entitlement survives to be enjoyed.

The court's decision struck what the Canadian legal scholar, now resident in Australia, Professor Richard Bartlett, called a 'pragmatic compromise' between the rights of the colonists and the rights of Indigenous peoples. Subject to the parcel by parcel alienation of land by the Crown, the High Court held that where no such alienation has occurred and Indigenous peoples have maintained a connection with the land in accordance with their laws and customs, there will be rights enforceable at law.

But there is in addition to the confirmation of entitlement to remnant rights another important dimension to the High Court's decision. Mabo represents a coming to terms with the colonial history of Australia and an admission as to its truths. The then Justice Brennan made a statement about the moral implications of this history when he said that the dispossession of the original inhabitants 'underwrote the development of the nation'. These facts cannot now be denied by the obscure view of history to which the nation was captive for so long.

The direction set by the High Court in its legal implications and by its moral guidance needed to be politically and socially institutionalised. The passage by the Commonwealth parliament of the native title legislation in 1993 achieved federal legislative protection of rights.

To be sure Mabo threw the country into a period of moral and psychological turbulence. But it is the turbulence we had to have. It is a turbulence which offered the country an opportunity: to achieve a lasting reconciliation between the old and new of this country based on respect for rights and justice.

For the nation to fully seize the opportunity which Mabo represents requires community leadership at all levels. For a proper working out of Mabo does not just have implications for the

resolution of historical grievance, but indeed provides the foundation for the continual process of incorporation and reconciliation between old and newer Australians, and indeed between new Australians themselves.

A proper working out of Mabo goes to the heart of the country's capacity to guarantee a society where its members can be diverse and yet equal. The struggle for Indigenous rights has made clear that national unity necessitates equality and diversity.

The same way in which old Anglo-Celtic Australians and Indigenous peoples have identified the foundation for peace - through the guarantee of equality and right to diversity and a mature and open hearted reconciliation of historical grievance - the same way in which the country will be able to forge a cohesive but diverse multicultural community.

There are three respects in which the position of Indigenous peoples is distinct, however. Firstly there is the grief and trauma of Australia's colonial history, which still lives in the present, and with which Indigenous peoples and the descendants of the old colonial Australia must necessarily contend. There is the imperative to never forget the past, but to provide the means for a reconciled engagement in the future.

Guilt need not have any place in dealing with the past, but it frequently does for those who insist on denial. The Prime Minister's Redfern Park Statement of December 1992 is a turning point, for here was acknowledgment of the truth of the past from the country's leadership, and a commitment to making Mabo the impetus for a better future.

The second distinction is that Mabo necessarily means that Aboriginal people have inherent and pre-existing rights to their traditional homelands. The source of their entitlement is different from other members of the Australian community.

The third is that the concept of native title, recognised at common law, means that there is

now recognition of Indigenous law and custom as a source of law in Australia. And this law does not just determine the relationship between people and the land, but between the Indigenous people who hold title to the land. The logic of native title comprehends an internal jurisdiction, which the recognition of customary law necessarily entails.

In this respect therefore the political and legal developments on the rights of Indigenous peoples, particularly the development of the International Declaration of the Rights of Indigenous Peoples, will make self-determination and jurisdictional rights of Aboriginal groups living on their traditional homelands a dimension of Mabo in the future.

Australia is going through an important period both for its Indigenous peoples and for the nation as a whole. The finding of native title in our legal system has come late in the day in Australia. Much dispossession, murder and indeed the annihilation and diaspora of Indigenous peoples has taken place in its absence. Much has been lost.

One could take the view that coming as late in the day as it has, after the parcel by parcel alienation process has left few lands available to native title, that Mabo has not been enough. The enactment by the federal government of legislation creating the Indigenous Land Fund is acknowledgment that the native title process will not yield land for dispossessed peoples.

However, one observation about this belated recognition is that it comes at an opportune time in the history of the country and indeed in the history of the struggle for the rights of Indigenous peoples globally. It means that the rights that we find, and the commitments we make here in Australia post-Mabo, cannot be retreated from as so many findings and commitments were in North America and indeed New Zealand. Infidelity to rights and compromises that have plagued the histories of other jurisdictions is something that lies ahead of us and which we can avoid. For the broken treaties and the dishonoured promises of other

jurisdictions are not part of our legacy. At least not yet.

I hold great hope that Australia will work through Mabo and the developments which it has spurred more maturely than it has ever been capable of in the past. My optimism lies in the belief that there is a commitment to Mabo in the Australian community, and a growing consensus that the new directions are the correct ones. Australia's determination in this regard needs to be bolstered and indeed guided by international standards. It is after all international standards in relation to racial discrimination that have been instrumental in the change here in Australia.

In conclusion, Mabo confronts and puts to rest two fantasies. Firstly, it puts to rest the fantasy that the Indigenous peoples of this country were not and are not here. *Terra nullius* is gone. Secondly, it puts to rest the fantasy that the non-Indigenous peoples of this country are going to leave.

Instead it provides a compromise which requires all Australians to make the symbols of native title, reconciliation and social justice actually work for people on the ground, so that it delivers substantive justice and equality to those living under the tin humpies and under the bridges. So that it improves the quality and duration of their lives. Mabo and the native title legislation provides the opportunity, which the country needs to work through to achieve just outcomes.

Let me conclude with one last anecdote. In the afternoon of the 3rd of June 1992 I was walking the dusty streets of my home town, when my cousin, then a student of Professor Henry Reynolds, came screaming tearfully out of the community office saying 'He's won, Koiki's won the case'. As she grabbed me and hugged me and carried on, I soon learnt that she was talking about the High Court's decision in the Mabo Case. She told me that Professor Reynolds was on the telephone and Henry then read out to me the text of the court's judgement. The words still echo in my mind:

'The Meriam People are entitled as against the whole world to possession, occupation, use and enjoyment of the Murray Islands'.

Paul Lyneham from the 7.30 Report spoke to me about a response. I was at least 400 km from the nearest television studio but this was hardly an opportunity to pass up. I arrived at the Cairns office of the Land Council to find the text of the High Court's judgement streaming through the fax machine. It was never ending. We frantically scanned the text to get a sense of the decision. Some of us felt, surely this can't be right. A legal colleague expressed reservations about whether we could confidently say anything about the decision until we had properly considered it. So it was with this in mind that I read through sections of the text and nervously travelled to the studio for the interview.

But I was convinced that this was a real victory and I said on the program that night that the High Court's decision in what would become known as the Mabo Case was the most important court decision in the history of Australia. On the eve of the third anniversary of Eddie Mabo's victory, I don't believe that my optimism was misplaced. The achievement of Mabo and his people has been the most profound achievement in the history of our country. Because Mabo did not just deal with the past and lay prescriptions for the present. It constructed a foundation for the country's future. Not just for Indigenous people. But for all of us.