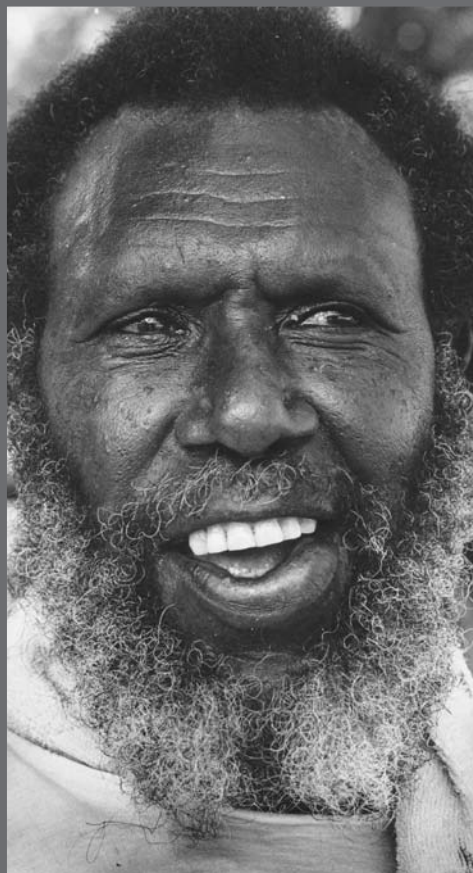


FINDING THE PROMISE OF MABO: Law and Social Justice for the First Australians

Mabo Oration 2007

Delivered by Professor Larissa Behrendt



*Presented by the Anti-Discrimination Commission Queensland
supported by the Queensland Performing Arts Centre.*



Professor Larissa Behrendt



This 2nd Mabo Oration continues to celebrate a great triumph. It is a tribute to a Torres Strait Island man whose achievements, some 15 years after the original decision, are beginning to be recognised.

Holding an Oration in honour of Mr Eddie Mabo is the Anti-Discrimination Commission Queensland's public commitment to the Aboriginal and Torres Strait Island peoples of Queensland.

The heart of the work of the Anti-Discrimination Commission Queensland is respecting the human rights of all

Queenslanders. Eddie Mabo's work showed that he too respected rights and the law. His unflinching belief in both ownership by the Miriam people of the land on Murray Island and his conviction that the common law would indeed recognise this, is remarkable.

His far sighted views that respected the human rights of his people by recognising their prior ownership of the land can never be diminished. It can however be forgotten. This Oration series seeks to ensure his contribution is remembered.

Our ideas about this Oration were shared with Mrs Bonita Mabo and her family. She enthusiastically supported an on-going Oration that honoured her husband's work and her family's sacrifice. She trusts that it will ensure that all Queenslanders and indeed all Australians better understand both the struggle and achievements in securing native title.

To commemorate his dreams, ideals and achievements the Anti-Discrimination Commission Queensland holds a biannual Mabo Oration in Eddie Mabo's honour.

This booklet is a copy of the speech from our second Orator, Professor Larissa Behrendt.

Our first orator, Mr Noel Pearson, demonstrated that the new generation of Indigenous leadership have taken up what Eddie Mabo started.

Larissa Behrendt's Oration shows why she is also part of the new generation of Indigenous leadership. The Oration is a crystal clear analysis of the reasons why, despite 15 years after the victory of Mabo, Indigenous inequality remains. It is a fitting tribute to a man who fought his life to address inequality.

Susan Booth

Commissioner

Anti-Discrimination Commission Queensland, June 2007

The Mabo Oration

FINDING THE PROMISE OF MABO

Law and Social Justice for the First Australians

Professor Larissa Behrendt

Eddie Mabo has left an extraordinary legacy. Like many of the great Aboriginal and Torres Strait Islanders leaders, he had a mix of street smarts and self education, an unwavering sense of justice and a profound understanding of his own history. The genesis of the fight that he would take all the way to the High Court came after he had worked at James Cook University as a gardener and where he would also sit in on lectures and read books in the library, particularly those written by anthropologists about his own people.

The folklore now says that, after speaking about his land back on Mer, or Murray Island, with Professors Noel Loos and Henry Reynolds, Mabo was surprised to learn that the land that he understood was his was actually Crown land. He reportedly said, “No way, it’s not theirs, it’s ours.” And so he began his long fight for land justice that would culminate in the 1992 decision that now bears his name.

While the courts would formulate a new form of land interest called “native title”, Mabo’s

fight to have the interest in land recognised by the white legal system was part of a longer tradition of land rights activism.

On Australia Day in 1938, a group of Aboriginal people protested in front of Australia Hall after they were moved off the Town Hall steps. This small protest was the culmination of decades of activism by Indigenous communities and their leaders in the south east of Australia such as William Cooper and Fred Maynard who had sought the same rights as all other Australians, especially in relation to their ability to own land, to access jobs and to access education and health services.

The protest was the beginning of the Indigenous rights movement and the long road to the search for equality under the legal system. The focus on citizenship rights as an important part of the campaign for Indigenous equality was a key platform in the activism of advocates like Cooper and Maynard and it influenced future generations.

Inclusion through equal access to education, employment and the economy were seen as key ways of improving the situation of Aboriginal people. Men like Cooper and Maynard had worked on pastoral stations that they were prevented from owning. Like Eddie Mabo, they were self-taught men and they believed that if Aboriginal people were given the same opportunities as other Australians and could make the key decision about their communities, their families and their lives,

“Mabo’s fight to have the interest in land recognised by the white legal system was part of a longer tradition of land rights activism”

“The protest was the beginning of the Indigenous rights movement and the long road to the search for equality under the legal system.”

they would be able to find their own solutions to their problems. This notion of access and opportunity underpinned the desire for “citizenship rights” and with the claim for land and the desire for self-determination created the key platforms in the on-going Indigenous political agenda.

I. The Promise of the Mabo case

The *Mabo case*¹ entrenches two key principles into our legal system:

- That interests in land can, in some circumstances, survive colonisation in the form of native title, and,
- That the doctrine of *terra nullius* is no longer a principle of Australian law.

Both of these principles offered enormous hope for Aboriginal people when we first learnt of the decision. The finding that a right to land existed was a promise, finally, of land justice for Aboriginal people. And the overturning of the doctrine of *terra nullius* was the promise that finally, the historic place of Aboriginal people in Australia would be recognised. While the *Mabo case* still stands as testament to this high-watermark moment, over the fifteen years since the decision became part of Australian law, the promises it held have been usurped.

1 *Mabo et al v Queensland* (No. 2) 175 CLR 1

The majority in the *Mabo case* defined native title as a right that exists when an Indigenous community can show that there is a continuing association with the land, and no explicit act of the government, federal or state, has extinguished that title. Radical title was vested in the Crown of the ‘discovering’ nation - or the subsequent independent, once-colonial government – but the Indigenous people retained the right of occupancy although they could dispose of their land to the Crown. It is important to emphasize that the Court *recognised* rather than created native title. That is, native title had existed all along but had been unacknowledged.

The High Court held that native title exists in the manner in which it is defined by the Aboriginal laws and customs. It is those practices that will determine the parameters of the native title. Native title is held communally. It can be extinguished by legislation that has a clear and plain intent to do so.

There are several factors that help explain the High Court’s ability to recognise native title at this time in our history:

- In 1992 there was a changed political climate where there was a better understanding of the experiences of Indigenous people in Australia and a greater respect for the culture of Indigenous people by the dominant Australian culture.

“It is important to emphasize that the Court recognised rather than created native title. That is, native title had existed all along but had been unacknowledged.”

- The Court could frame the finding so that it was, in effect, a narrow concession.
- The Court ignored many serious questions that the recognition of native title raised, leaving those to be decided by future litigation. These included:
 - whether pastoral leases and mining leases extinguish native title (which was not raised as an issue)
 - whether the principles of native title in land extend to fishing rights (which was specifically excluded from the question posed to the Court by the applicant).

What was clear in the judgement was that the contemplation of Indigenous claims to land was something new to the High Court, a situation that becomes more clear when the decision in *the Mabo case* is compared to the principle case for Aboriginal title in Canada, the *Delgamuukw case*.²

In *Delgamuukw*, the Canadian Supreme Court considered the nature of Aboriginal and understood that, when Aboriginal people were asking for an interest in land, it inherently included a claim to be able to live off that land and to have a form of self-government over that land. This deeper understanding about the claim to land was a result of the jurisprudence that was generated from interpreting treaties. While the treaties themselves have their own

“What was clear in the judgement was that the contemplation of Indigenous claims to land was something new to the High Court”

² *Delgamuukw v. British Columbia* (1997) 3 SCR. 1010

miserable history of neglect and breach by successive Canadian governments, cases consistently came before the courts where First Nations people would invoke the treaty when they were caught hunting or fishing without a license and so judges came to understand the link between land and self sustainability in a way that Australian courts did not. While the *Mabo case* recognised a small interest in land, it would take other legal cases to test, with varying degrees of success, the extent to which that right could extend to hunting and fishing and rights over water.

II. The Elusive Promise of Land Justice

Native title, although often conceptualized as an “Indigenous right” is also a property right with parallels to many other property rights. In fact, in many ways native title is no different to already recognized, and uncontroversial, property rights such as easements. Its communal nature is also analogous to other property holdings such as property held by corporations. The co-existence of the interests is like many competing interests over a piece of property – mortgagors, landlords, lessors. But the characterisation of “native title” as an Indigenous right, rather than a property right, was perhaps an indication of the way in which it would eventually be eroded and undermined.

*“While the **Mabo case** recognised a small interest in land, it would take other legal cases to test, with varying degrees of success, the extent to which that right could extend to hunting and fishing and rights over water.”*

I graduated from Law School the year of the *Mabo* case and was in the middle of my doctoral studies at the time of the *Wik* decision.³ What struck me at each of these points was the hostile public reaction to what amounted to conservative legal advancements in real terms and the ability of legislation to sweep away hard-fought rights recognition. I watched as the rights recognized by the High Court in the *Mabo* and *Wik* cases were extinguished, eroded and watered down by the legislature. The vulnerability of recognized Indigenous rights and interests and the willingness of Australian Governments to prevent the application of the *Racial Discrimination Act 1975* (Cth) from protecting those rights highlighted the fragility of Indigenous rights in Australia.

Overall, this trend can be characterised as a consistent attack on the intent of the *Mabo* decision and while native title rights have been eroded, we are asked to celebrate Indigenous Land Use Agreements as the primary outcome of the native title regime. While there is no doubt that some Aboriginal communities around the country, through their own savvy and tenacity, have achieved positive outcomes through the native title system but these results are ad hoc and do not create a consistent framework or benchmarks for other Indigenous communities. And while Indigenous Land Use Agreements may

3 *Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors.* (1996) 187 CLR 1

contain outcomes that include employment opportunities with those commercial interests seeking to use Aboriginal land, native title as it has now been formulated is not a vehicle for ensuring the self-sustainability of Aboriginal communities.

It is fair to characterise the developments since the *Mabo case* as a clawing back of native title. And this attack on the spirit of *Mabo* and its promise of land justice finds a parallel with the other consistent ways in which the federal government is seeking to open up Indigenous land to non-Indigenous interests, often in the guise of the Trojan horse of “economic development”.

From the Federal government’s policy approaches to Aboriginal land tenure show a concerted and systematic effort to undermine Indigenous land interests. They and the right wing think tanks that support their ideology have consistently pointed the finger at communal land ownership as a cause of Indigenous poverty, ill health and the lack of a police presence in remote communities.

There has been the proposals to privatise Aboriginal communal land, a move that has been proven to lead to the loss of land ownership from Aboriginal to non-Aboriginal hands in less than a generation. There have been the attempts to blackmail Aboriginal communities to sign land back to the federal government in exchange for basic services such as schools or home repairs. There have

*“It is fair to characterise the developments since the **Mabo case** as a clawing back of native title.”*

been changes to the Northern Territory Land Rights Act that further erodes Aboriginal claims to land. And there is the continuous reverence of home ownership as a way of purportedly increasing the wealth of Aboriginal people, a scheme which hides the fact that in most cases the houses that the poorest sector of the community is being asked to purchase are in places where there is no viable housing market and are therefore basically worthless, in the economic sense.

III. Overturning Terra Nullius

The other principle that the *Mabo case* stands for is the rejection of the notion of *terra nullius* as a principle within the Australian legal system. While effectively the case replaces the idea that Australia was vacant or without a sovereign with another fiction – that it was peacefully settled – there is no doubt that the overturning of the principle that was so repugnant to Aboriginal people was a welcome development. It was a development that symbolised the promise of a new era in which Aboriginal people’s history and place within Australia would be appropriately recognised. But, in ways as tenacious as the attacks on native title itself, this promise has also been usurped.

Modern Australia is a country that is built on the land of its Indigenous people, land that was stolen in sometimes vicious, illegal and deceitful actions, land that created wealth

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through pastoral and mining industries. It is no surprise that farmers and miners have been the most vehement opponents to the decision in the *Mabo case*.

Lobbyists and mining companies fed into this ignorance by warning the decision in the *Mabo case* could lead to the confiscation of private property (freehold), an underhanded lie easily dismissed by a cursory reading of the law. Self-interested groups have characterized the recognition of native title as the giving of Indigenous people an interest in land for free thus feeding in to the prejudices of sections of the Australian population who saw Indigenous claims as a threat.

Consider the following media coverage: On January 22, 1997 the front page of the *Sydney Morning Herald* ran a news story of a tragic fire in Melbourne. The photographs showed flames licking a house, charred bicycles and men fighting to save property. The loss of property was sympathetically emphasized in its human elements. On the left of the news of the fire was another news item. It was headed '*Aborigines set strong demands for Wik talks*'. At that time, the 'Wik talks' were the latest battleground in the fight by Aboriginal people for the recognition of their property rights by the laws, institutions and consciousness of the Australian people.

The media coverage of the Wik case itself was cloaked with a politically loaded perspective. The *Sydney Morning Herald* ran the headline

that the Wik decision was “*A decision for chaos.*” It printed a photograph of a farmer, a Mr. Fraser, looking forlornly down at his land under the headline “*Family’s land dream turns into nightmare.*” Although he claimed to be a strong supporter of the Aborigines and said he believed in reconciliation, Mr Fraser was ‘confused’ by the decision; his reaction was on of bewilderment:

“I can’t believe these judges made that decision. It’s not a decision. I can’t see that we have made very much progress. We are obviously going through another period of indecision and I am not sure how much of that sort of punishment people can take.”⁴

What these newspaper articles show are three *contemporary* perceptions about native title in particular and Indigenous land interests in general:

- When Aboriginal people lose a property right, it does not have a human aspect to it. The thought of farmers losing their land can evoke an emotive response but Aboriginal people can not;
- When Aboriginal people gain recognition of a right, they are seen as getting something for nothing rather than getting protection of something that

4 James Woodford. Family’s land dream turns into nightmare. *Sydney Morning Herald*. Tuesday December 24, 1996. At p.1.

already exists. They are seen as “special rights”; and

- When Aboriginal people have a right recognised, it is seen as threatening the interests of non-Aboriginal property owners in a way that means that the two interests cannot co-exist. In this context, native title is often portrayed as being “unAustralian”.

The lack of generosity is all the more curious and disturbing when it is remembered that native title is a very weak form of property interest. The *Wik* case, while recognising that native title could co-exist determined that it only survives if it is not inconsistent with any other interest and there has been no intention to extinguish it. Whenever there is a conflict in the interests between leaseholders and native title holders, the interest of the farmer will always triumph. While there was no change in the legal interests of the farmers as a result of the decision in *Wik*, the perception was that their interest in property rights had changed and this was not surprising given the government rhetoric that whipped up hysteria about that decision – just as it had after the *Mabo* case which perpetuated the myth that Aboriginal people could claim freehold land.

The *Wik* decision became a focus for the policy platform for the Howard government when it was elected in 1996. Senator Herron, the then Minister for Aboriginal Affairs, clearly stated his where his loyalty rest:

“Whenever there is a conflict in the interests between leaseholders and native title holders, the interest of the farmer will always triumph.”

“The backbone of this country, I’m proud to say, are the pastoralists. I have no doubt the wisdom they will bring to the judgment they deliver, in the development of policy, will be to the betterment of this country as a whole ... I’m quite proud of the fact there are so many pastoralists on our side, in both the Liberal Party and the National Party...”⁵

At a speech in Longreach, Queensland, Prime Minister John Howard, expressed his commitment to the his ideology of the “white man on the land”:

“... Although I was born in Sydney and I lived all my life in the urban parts of Australia, I have always had an immense affection for the bush. I say that because in all of my political life no charge would offend me more, than the suggestion that what I’ve done and what I’ve believe in has not taken proper account of the concerns of the Australian bush.”⁶

There is no such concern for Indigenous people who clearly do not fill this same sentimental, nationalistic ideology. Mr Howard then

5 Ibid.

6 Transcript of the Prime Minister, the Hon. John Howard MP, Address to Participants at the Longreach Community Meeting to Discuss the Wik 10 Point Plan, Longreach, Queensland. Reproduced in Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. *CERD and the Native Title Amendment Act 1998*. Parliament of the Commonwealth of Australia, 2000. At p.276.

proceeds to rank the rights of one over the rights of the other.

“...the plan the federal government has will deliver the security, and the guarantees to which the pastoralists of Australia are entitled...”⁷

He goes on to say:

“We knew the right to negotiate was a licence for people to come from nowhere and make a claim on your property Well let me say I regard that as repugnant, and I regard that as un-Australian and unacceptable and that is going to be removed by the amendments that are already in the federal parliament. You won’t have to put up with that anymore...”⁸

Views about the place and role of Aboriginal people in the national consciousness are not just philosophical or psychological matters. These distinctions translate into differences in legal status and in resource allocation. The nature of native title and the way in which it has been demonised and weakened from when it was first recognised in the *Mabo case* highlights how so-called “special laws” for Aboriginal And Torres Strait Islander people are actually laws for different and **lesser** protection. It is also evidence of the proposition that Indigenous conceptions of

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7 Howard. At p.276.

8 Howard. At p.278.

rights and political aspirations are tolerated only to the extent that they do not upset the power structures within the legal system.

Recently, Clive Hamilton, head of the Australian Institute, argued that the drought relief package was bad public policy and would only perpetuate bad farm management.⁹ He argued that Australian governments have a long history of bailing out farmers who do not adequately manage their land, thus perpetuating the effects of drought. He said:

“Droughts happen regularly in this country and there is a marked difference between how farmers prepare for drought ... some do it well, some do it badly and if the soil blows away that is a sign of bad farm management. It’s time we just faced up to the reality that much of the land currently farmed, shouldn’t be farmed and by repeatedly bailing out farmers through drought relief, which is erroneously called exceptional circumstances relief, we’re only making the problem worse.”¹⁰

Hamilton’s comments were met with outrage by politicians who declared his remarks to be “agrarian genocide” and “unAustralian”. John Cobb, the federal Member for Parkes said, “I can’t believe at a time like this a mob of

9 <http://www.abc.net.au/news/newsitems/200610/s1767292.htm>.

10 <http://www.abc.net.au/news/newsitems/200610/s1766495.htm>

left wing greenies like Clive Hamilton would suggest that farmers could be kicked off their land.”

Hamilton acknowledged that the decision to provide support for farmers is not based on simple economic factors but can be explained by the fact that they are such an important part of the Australian mythology. He said:

“I mean we love to imagine ourselves to be stoical Aussies out there battling against the elements and I think we in urban areas get a kick out of thinking those farmers are somehow representing our better selves.”

For the last year, right wing think tanks and some politicians have made the claim that remote Aboriginal communities are not financially viable with the suggestion that they should be closed down and that people who choose to continue to live there cannot expect continuing support from the government and the tax payers.¹¹ At the suggestion that these communities should be shut down for financial reasons we did not hear claims that this was “unAustralian” and we did not hear accusations of “genocide” since the policy

“At the suggestion that these communities should be shut down for financial reasons we did not hear claims that this was “unAustralian” and we did not hear accusations of “genocide” since the policy would effectively kill off a way of life.”

¹¹ Gary Johns. What is to become of Aborigines forced to move. <http://www.bennelong.com.au/articles/johnsozoct2006.php>. See discussion in Nicholas Rothwell. Remote Control. *The Australian*. September 30 2006. <http://www.theaustralian.news.com.au/story/0,20867,20499459-28737,00.html>. Jon Altman argues against the views of the right wing think tanks in The Indigenous Hybrid Economy . <http://www.fabian.org.au/1043.asp>

would effectively kill off a way of life. We did not hear any defence of the existence of Aboriginal communities as an important part of the national identity. Instead, we were fed constant news stories about how dysfunctional some Aboriginal communities were so that the general perception was that all Aboriginal communities were that way and little was said to defend their existence – whether on economic terms or otherwise.

By raising the contrast in how farmers compare to Aboriginal people as part of the Australian psyche I am not trying to press the claims of one over the other. I am merely trying to illustrate how two parts of the Australian story are treated so differently. And not only is the Aboriginal story treated differently, it is treated as a threat.

Aboriginal lawyer and academic Nicole Watson made the following observations about the difference between the place that the battler has in the hearts of Australians compared to the way in which Aboriginal people are treated. She uses the much loved Australian film *The Castle* to make the point that the film's hero, Darryl Kerrigan is one of the most loved characters of contemporary Australian cinema. He is a doting father and husband who took his fight for the family home all the way to the High Court. Watson asks: "Why don't Australians have the same affection for the real-life Darryl Kerrigans of Indigenous communities, whose love for their 'castles' saw them pursue battles

with tenacity and resourcefulness surpassing anything that could have been dreamt up in the Kerrigans' hallowed pool room?"

She makes the argument that the long struggles for land justice by Vincent Lingiari and Eddie Mabo do not seem to spark the imagination of Australians who claim that they love stories of the underdog. Watson writes: "Australian audiences could empathise with the forces that drove Darryl Kerrigan to the High Court but most are yet to comprehend what inspired individuals like Vincent Lingiari and Eddie Mabo."

These reflections highlight how far away Aboriginal people are from forming part of the national consciousness. Rather than being seen as part of the national story, we are often portrayed as a threat to it. It highlights our continual vulnerability as a nation while we continue to have a legal system that has no rights protection and continues to leave the rights of the most vulnerable exposed to the will of governments with no safety net or baseline standard.

But there have been times in our nations history when Australians did seem to open their hearts and minds to the plight of Aboriginal people. The bridge walks for reconciliation was one such moment. And we have just celebrated another when we commemorated the 40 year anniversary since the 1967 referendum. In a country that is historically sceptical of

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constitutional change (we have only had 8 successful referenda), over 90 per cent voted in what professed to be an opportunity to create a new era of equality for Aboriginal people.

IV. The Promises of the 1967 Referendum

Perhaps because of the focus on “citizenship rights” in the decades leading up to the referendum, and because the rhetoric of equality for Aboriginal people that was used in “yes” campaigns, it was inevitable that there would be a mistaken perception that the constitutional change allowed Aboriginal people to become citizens or attained the right to vote. The referendum did neither.

In reality, the 1967 referendum did two things:

- It allowed for Indigenous people to be included in the census, and
- It allowed the federal parliament the power to make laws in relation to Indigenous people.

Those who advocated a “yes” vote thought that the inclusion of Indigenous people in the census would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together and overcome an “us” and “them” mentality.

It was also thought by those who advocated for a “yes” vote that the changes to section

51(xxvi) (the “races power”) of the Constitution to allow the Federal Government to make laws for Indigenous people was going to herald in an era of non-discrimination for Indigenous people. There was an expectation that the granting of additional powers to the Federal Government to make laws for Indigenous people would see that power be used benevolently.

This has, however, not been the case and we can see just one example of this failure in the passing of the *Native Title Amendment Act 1998 (Cth)*, legislation that prevented the *Racial Discrimination Act 1975 (Cth)* from applying to certain sections of the *Native Title Act 1993 (Cth)*. In fact, consideration as to whether the races power can be used only for the benefit of Aboriginal people, as the proponents of the “yes” vote had intended, was given some residual attention by the High Court in *Kartinyeri v Commonwealth (the Hindmarsh Island Bridge case)*.¹² Only Justice Kirby argued that the “races power” did not extend to legislation that was detrimental to or discriminated against Aboriginal people. Justice Gaudron said that while there was much to recommend the idea that the “races power” could only be used beneficially, the proposition in those terms could not be sustained. Justices Gummow and Hayne held that the power could be used to withdraw

12 *Kartinyeri v. Commonwealth (the Hindmarsh Island Bridge case)* (1998) 195 CLR 337.

“History provides us with many examples of where the legislature has overridden recognised human rights or has passed legislation that protects rights only to override them when there is political motivation to do so.”

a benefit previously granted to Aboriginal people and thus to impose a disadvantage.

When analysing the failure of the amendment of the races power to ensure benevolent and protective legislation as its proponents envisaged, one is reminded of the original intent of the framers to leave decisions about the rights to the legislature. History provides us with many examples of where the legislature has overridden recognised human rights or has passed legislation that protects rights only to override them when there is political motivation to do so. And the other lesson that can be learnt from the 1967 referendum is that the Federal Parliament cannot be relied upon to act in a way that is beneficial to Indigenous people.

The omission of Indigenous people both from the drafting process and from within the content of the Constitution is a reminder of the ideologies that shaped thinking around Indigenous people at that time. Most influential were the beliefs in white racial superiority and the idea that Aboriginal people were a dying race and that the most humane thing that could be done for them was to allow them to fade out with dignity. These ideologies are often cited as the main reason why Aboriginal people were excluded from the Constitution but the absence is also explained by considering the attitudes towards rights more generally within the founding document.

The framers of our Constitution believed that the decision-making about rights protections

– which ones we recognise and the extent to which we protect them – were matters for the Parliament. They discussed the inclusion of rights within the Constitution itself and rejected this option, preferring instead to leave our founding document silent on these matters.

A non-discrimination clause was discussed but was rejected because it was believed that entrenched rights provisions were unnecessary, and it was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

If one is aware of the intentions and the attitudes held by the drafters of the Constitution it explains why it is a document that offers no protection against racial discrimination today.

The 1997 High Court case of *Kruger v. The Commonwealth*¹³ assists in making this point. This was the first case to be heard in the High Court that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families. In *Kruger*, the plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory Ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed a series of human rights

13 *Kruger v. The commonwealth* (1997) 190 CLR 1

violations including the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in s.116 of the Constitution. They were unsuccessful on each count, a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, there was a disproportionately high impact on Indigenous people as a result of those silences.

What we can see in the *Kruger* case is the way that the issue of child removal – seen as a particularly Indigenous experience and a particularly Indigenous legal issue – can be expressed in language that explains what those harms are in terms of rights held by all other people – the right to due process before the law, equality before the law, freedom of movement and freedom of religion. *Kruger* also highlights how few of the rights that we would assume we inherent hold are actually protected by our legal system. It reminds us that there are silences in our Constitution about rights, that these silences were intended, and it gives us a practical example of the rights violations that can be the legacy of that silence.

“Kruger also highlights how few of the rights that we would assume we inherent hold are actually protected by our legal system.”

While the 67 referendum did not produce a new era of equality for Aboriginal people as its proponents had hoped. Instead, its most enduring, though perhaps unintended, consequence was the new relationship it created between federal and state and

territory governments. And rather than being a relationship of co-operation, it is one that has seen governments of both levels try to blame the other for the failure of Indigenous policy and to shift the responsibility and the cost away from themselves.

V. Structural Barriers to Achieving Social Justice for Aboriginal people

Today, Indigenous Australians still have a life expectancy that is 17 years less than that of their non-Indigenous counterparts. Statistics continue to show poorer health, education, housing and employment outcomes for Indigenous people.

The question that is asked honestly and genuinely is: with so much good will and so many resources spent on Indigenous affairs, why is there still such a disparity between the life chances of black and white Australians?

In recent negative media coverage in the Northern Territory that focused on the high incidence of sexual assault in some communities and gang violence in others, the response of the Federal Minister for Aboriginal Affairs, Mal Brough, and the Chief Minister for the Northern Territory, Clare Martin, was a textbook example of this process whereby the two levels of government try to shift the blame and shift the cost.

The first response from Federal Minister was to blame the Northern Territory Government for not putting police into communities where violence was endemic. And, while he was absolutely correct in asserting that any community of 2500 people with no police force would have law and order issues, there are many other factors that contribute to the cyclical poverty and despondency within some Aboriginal communities that create, over decades, the environment in which the social fabric unravels and violence, sexual abuse, substance abuse and other anti-social behaviour is rife. To this, the Chief Minister replied that the problem was a result of the failure to provide adequate housing – and health and education services – and she pointed the finger firmly and squarely at the Federal government.

Governments of all levels continue to underfund Aboriginal community on basic needs. Health services, educational facilities and adequate housing services have never been supported in these communities and instead of co-ordinating their efforts, governments engage in the slanging matches that occurred between the Federal Minister and the Chief Minister about who was at fault. The federal government continues to assert that it is a law and order issue; Martin says it was a housing issue and points to other areas of government neglect such as health. And both are right; both levels of government have been

“Governments of all levels continue to underfund Aboriginal community on basic needs.”

negligent. This attempt to shift the blame is referred to as “cost-shifting” and it is a feature of many issues within the Aboriginal Affairs portfolio where financial responsibility is shared between state/territory governments and the federal government. The attempt to avoid responsibility (or share responsibility) means that Aboriginal people are the losers.

Access Economics estimated at the time of the last election that the basic health needs on Indigenous Australians are under-funded by \$450 million and in a year of record budget surpluses, this pressing need was not addressed. Data from the COAG trial in Wadeye highlighted that less is spent on the education of an Aboriginal student than a non-Aboriginal student (47c for every \$1). When a shared responsibility agreement was signed in that area and the children all turned up to school, there was not enough classrooms or teachers highlighting the under-investment in infrastructure.

But one of the first responses of the Federal government in light of the spotlight being turned on issues of Aboriginal violence was to say “we are not going to throw any more money at the problem.”

One sure sign that governments were not going to take any responsibility for fixing the problems that they were so happy to chest beat about was the quick assertion that the issue didn’t need any money thrown at it. This was a clear indication that they were uninterested in

addressing their neglect of basic services and infrastructure – the root causes of the problem – and were instead going to grandstand about what everyone else should do.

Underspensing on essential matters – and it is hard to think of anything more essential than basic health services – lack of investment in infrastructure and human capital are far from conducive to breaking cycles of desperate poverty. In fact, it is a breeding ground for it. And against this back drop, ad hoc measures like shared responsibility agreements and home ownership schemes are not going to solve institutionalised and systemic failings.

There is another factor that emerges in response to the situation of violence in Aboriginal communities that explains a key barrier in achieving social justice for Aboriginal people and that is the prevalence of racism in Australian society. Studies increasingly show that Australians are resistant to the notion that they are a racist society and resent the use of the term “racism” to describe their attitudes and actions to any sector of the community, including Aboriginal and Torres Strait Islanders.

But it explains why it is that the government can loosely and misleadingly assert that “they are not going to throw any more money at the situation” many Australians agree. The notion that “too much money” has been spent on Aboriginal people and communities feeds into the prevalent negative stereotype that

“ad hoc measures like shared responsibility agreements and home ownership schemes are not going to solve institutionalised and systemic failings.”

Aboriginal people are dole-bludgers, shiftless, indolent and lazy.

The prevalence of this stereotype means that governments are not scrutinised and questioned to the extent that they should be. When the government says it has increased funding on Indigenous issues and points to almost \$3 billion, it does not elaborate that the figure includes the large amount of money that is spent on running the National Native Title Tribunal and the parts of the Attorney-General's Department that is spent defending and defeating native title claims. It includes spending such as \$100 million on the new Shared Responsibility Agreements of which \$75 million went on administration and only \$25 million made its way into Aboriginal communities. It includes amounts set aside for home ownership schemes that no-one has taken up.

The easy acceptance of Aboriginal people as welfare dependant and as getting too many handouts has crippled the capacity of Australians – including the media – to question blind and misleading assertions made by government that mask their neglect of Indigenous communities and hidden their ill-conceived and ineffective policies.

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VI. A New Promise

The real tragedy of these negative stereotypes is that they not only stop our clear thinking on Indigenous issues, they blind us from what actually works to stop Indigenous disadvantage.

Overcoming Indigenous disadvantage means governments at all levels have to take responsibility for the provision of three things as a matter of right:

- adequate standards of essential services
- adequate provision of infrastructure, and
- investment in human capital.

This is a simple formula and it as been shown in numerous reports into issues such as the high levels of sexual assault within Indigenous communities that dysfunction in Indigenous communities is the result of decades of neglect where underfunding on essential services and infrastructure, and no investment in human capital, compound to create dysfunction in some communities as the social fabric unravels.

In addition to these three goals, Indigenous policy needs to move away from its current drivers – the ideologies of assimilation and mainstreaming. The ideologies of assimilation and mainstreaming have re-entered the approach to Aboriginal issues at the national level. The pursuit of these ideologies has

seen the agenda to dismantle the national representative structure that was part of the Aboriginal and Torres Strait Islander Commission (ATSIC) and it has seen the major programs for Aboriginal people shifted from Aboriginal and Torres Strait Islander Services into mainstream departments. No doubt these moves will appease the constituency who has always resented the attention to Aboriginal issues and has interpreted the need for targeted programs as “welfare bludging” or “getting something for nothing”.

But the real danger with the move is that the ideologies of “mainstreaming” and “assimilation” have failed in the past to shift the poorer health, lower levels of education, higher levels of unemployment and poorer standard of housing that Aboriginal communities have experienced. These ideologies have not offered ways to protect Aboriginal cultural heritage, interest in land, language. And they have not offered a way in which Aboriginal people can play the central role in making decisions that will impact on their families and communities.

In the past, the failure of mainstreaming has stemmed from its inability to target specific issues that arise in Aboriginal communities in relation to health, education, housing and employment. This is because mainstream services need to develop specific mechanisms and strategies for Aboriginal clients and they have to do this with stretched resources.

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In addition to these challenges, Aboriginal people claim that they are often subjected to racism within those mainstream services. Those claims of racism, particularly in relation to the delivery of health services, were well documented in the Royal Commission into Aboriginal Deaths in Custody.

There is no evidence to show that the ideologies of mainstreaming and assimilation that failed so dismally in the past will work now. This new shift in the delivery of Aboriginal policy and programs does not offer any new insights or any promise of more effective policy-making and program delivery. The approach to Indigenous policy should not be ideologically led. It must be directed by research-based policy so we are not the perpetual guinea pigs for government.

The focus on the ideological has blinded us to what we can learn from the many successes that go unnoticed. In the face of government neglect and failed policy, many Indigenous communities continue to flourish, creating successful and viable institutions and continuing to keep their cultural values strong and their children safe. We could learn much from what it is that successful organisations do to ensure their effectiveness and viability in this climate and use that information as a basis for developing similar conditions in the communities that fail.

And we can look at research in Australia and North America that has detailed that better

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socio-economic outcomes are achieved when Indigenous people are involved in the setting of priorities within their community, the development of policy, the delivery of services and the implementation of programs.

I have long advocated that we cannot judge our society, our institutions, our laws, and our constitution on whether it is adequate at providing protection for the middle-class members of the dominant culture. The true test has to be how well they work for the poor, the marginalised and the disadvantaged within our community. It is our treatment of this sector of our community that must be our benchmark and test.

The Mabo case and the legacy of Eddie Mabo himself remind us that there are times in our nations history where the tide turns and Australians begin to understand that the fates of Aboriginal and other Australians are tied. It is also a testament to the fact that Aboriginla and Torres Strait Islanders have weathered under resourcing, human rights abuses and government neglect and yet remained unwavering in both their tenacity to maintain our cultural identity and are rights. Even if it takes decades. And even if we, like Eddie Mabo, have to continue to wait patiently for the rest of Australia to see the inherent justness in our cause.

Appendix

Mabo Day commemorates the anniversary of the 1992 High Court decision which changed Australia's political and legal landscape. The decision reversed the notion of *terra nullius* (no one's land) which had been effect since the time of white settlement.

(The idea of *terra nullius* meant that under British law all the land of Australia became Crown land. Aboriginal property rights were ignored as the land belonged to whomever the Crown granted or sold it to.)

A bit of history

Eddie Mabo's ancestors lived for centuries on a group of three islands in the Torres Strait, near Cape York, known as the Murray Islands. The islands were annexed by the Queensland Government in 1879 and so became part of Australia. This meant that white rule was absolute and the traditional elders had little power.

Little changed, however, in the way of life of the Murray Islanders as a result of this –people continued to live in their settled communities; they maintained their traditional beliefs and customs; there was a clear way of passing on their plots of land, and ways of settling disputes about legal matters. It was into this lifestyle that Eddie Mabo was born.

Eddie Mabo

Edward Koiki Mabo was born in 1936 on Mer Island (or Murray Island) and, after his mother's death, was given to his mother's brother and his wife to raise.

From an early age, Koiki was taught about his family's land.

"...it was handed down from generation to generation, they knew by the boundary lines and markers. There was a certain tree, or stones, heaps of rocks, different trees. They knew exactly where the place was."

At the age of twenty-three he married Bonita Neehow and went on to raise ten children with her.

1974 proved to be a turning point for Eddie Mabo. During a conversation about his land on Murray Island, he was told that he didn't own that land, and that it was Crown land. His response was "No way, it's not theirs, it's ours."

As a result, he and others decided to challenge the claim of *terra nullius* in the High Court. Central to his argument was the belief that the land had been stolen in the first place. He believed he could achieve justice through the courts.

Eddie Mabo claimed that he was the rightful heir and owner of the land owned by his father on Murray Island.

The decision

It would take ten years, and Eddie Mabo would not live to see or hear the result, but in 1992, the High Court brought down its decision. This decision included the words:

...the Meriam people were entitled as against the rest of the world to the possession, occupation, use and enjoyment of (most of) the land of the Murray Islands in the Torres Strait. In reaching this conclusion a majority of the Court held that the common law of Australia recognises a form of native title; where those people have maintained their connection with the land; and where the title has not been extinguished by acts of Imperial, Colonial, State, Territory or Commonwealth governments.

In essence, the High Court recognised that Australia was occupied prior to white settlement, and that Aboriginal and Torres Strait Islander peoples had native title to these lands.

Native Title

‘Native title’ is the term used to describe the common law rights and interests of Aboriginal and Torres Strait Islander people in land according to their traditions, laws and customs. The 1992 decision for the first time recognised the common law rights in land of Australia’s Indigenous peoples.

Native title isn't a new type of land grant, but a common law right that predates white settlement of Australia. The common law, originally founded on custom and tradition, is the British system of judge-made law, based on precedent, and is over 800 years old.

(Acknowledgement to Film Australia, 'Mabo – Life of an Island Man' study guide 1997 for some of the information used in this article

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