



**Centre for International and Public Law
Faculty of Law
Australian National University**

MABO: TEN YEARS ON

Larissa Behrendt

Professor of Law and
Indigenous Studies,
Director of Jumbunna Indigenous
House of Learning,
University of Technology, Sydney
and Visiting Scholar, ANU

Occasional Paper

The Legacy of Mabo: A Ten Year Assessment

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MABO: TEN YEARS ON

I remember the day that the *Mabo* decision came down. I was at the Law School at the University of New South Wales. I remember the elation I felt on hearing that the doctrine of *terra nullius* had been overturned. This was the same law school where I was taught that Aboriginal people have no legal title to their land and where there was little mention of Indigenous issues unless in special electives that were rarely offered. I remember speaking with Garth Nettheim and we were saying that it would be remembered as *Mabo* day. I was thinking about that when I was putting my thoughts together for today for a couple of reasons. Indeed, we are celebrating the case as a milestone but I also remember the excitement of the day and I think about that in comparison to the emotions that the case brings up now and for me that is a good starting point for a quick discussion of how *Mabo* changed the legal and social landscape of Australia.

There is no doubt that the elation about the overturning of the doctrine of *terra nullius* was deserved in the sense that the case can be seen as an important legal, symbolic and psychological turning point. In that way, the *Mabo* case remains a solid reminder that historical wrongs can be righted, that courts can remedy legal fictions and those historically excluded can be brought back into the recognition and protection of the legal system.

However, in relation to the substantive benefits delivered by the case, the original excitement of what the case may bring have been sobering and the expectations of what can be delivered by the judgment have evaporated. The compromises made by Indigenous representatives to reach agreement on the *Native Title Act 1993* have been seriously undermined by the passing of the *Native Title Amendment Act 1998* which was implemented with no consultation with the Indigenous peoples whose interests were vulnerable under the amending legislation. Without getting into the practicalities and difficulties of mounting native title claims, it can be asserted that the regime is hard to navigate, costly and time consuming. It also offers little to many Indigenous people and has created divisions. It has created divisions between Indigenous people in the north west of Australia and in the south east of Australia. It has also created divisions within communities where native title holders are pitted against people who have lived in the community for generations but have their 'traditional' lands elsewhere.

There are several places where we can see that native title stands now that are far from the original promise or the expectation of the original promise. I want to just draw out three areas where I think there are questions about the effectiveness of the regime as it currently stands.

The first is the issue of what are the laws and customs of Indigenous people. In the *Mabo* case, native title was defined by the laws and customs of Indigenous people. This has been, by some commentators, celebrated as a recognition of customary law. On a superficial reading of the case, that is a fair assumption. But applying this principle through the adversarial court system gives strange results. Indigenous people give evidence like any other party. Despite their privileged position as the custodians, performers and guardians of their culture, laws, lore and religion, there is a process in giving evidence that sees that evidence measured and weighted against the evidence of non-Indigenous observers. In the face of presented facts and counter arguments, the judge, almost always a white man, will look at the evidence, weight it up, and make a pronouncement about the parameters of native title by judging the customs of Indigenous people. What is needed is the adoption of a more flexible approach to the hearing of evidence in native title cases that gives greater weight to the oral traditions of Indigenous people. There is precedent for this approach in the Canadian context.

In *Delgamuukw v British Columbia*,¹ one of the issues before the Supreme Court of Canada was the weight that should be placed on Aboriginal oral history in native title cases. The majority of the Court held that the factual findings of the trial judge could not stand because of his treatment of various kinds of oral history which ignored a rule developed in an earlier case of *R v Van der Peet*² where Chief Justice Lamer had stated:

a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in ... the courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform with the evidentiary standards that would be applied [in other areas of the law].³

In the *Delgamuukw* case, Chief Justice Lamer emphasised the need for flexibility when receiving evidence given by Aboriginal witnesses, especially in cases where rights are being asserted. He held that:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.⁴

This emphasis is in stark contrast to developments in Australia. Although the *Mabo* case defined native title as deriving from the customs of Indigenous Peoples, rules of evidence are applied in relation to evidence of these practices. Lower Court judges have discretion on how to deal with Aboriginal oral evidence, and while this may be done in a sensitive manner in some instances, this is not always the case. The High Court has not yet made a pronouncement on this matter in the same way that the Canadian Supreme Court has.

The second matter that has been disappointing is the erosion of native title as a property right. Nowhere is the vulnerability of native title more evident than in relation to the way in which it is the only form of property that does not give rise to compensation if it is extinguished.⁵ There is also a worrying trend in the federal court that the *Racial Discrimination Act 1975* may not apply to native title at all. The *Racial Discrimination Act 1975* is legislation that is designed to protect all Australian citizens from discriminatory legislation and discriminatory behaviour. It ensures that Aboriginal people can enjoy their property rights to the same extent as all other citizens.

Following the 1998 amendments to the *Native Title Act 1993*, it is now uncertain as to what extent the *Racial Discrimination Act* continues to protect native title. On one view of the matter, argued by the Commonwealth Attorney-General in *Central Queensland Land Council v Commonwealth Attorney-General*, the *Racial Discrimination Act* has been impliedly repealed insofar as it relates to native title and is only reserved to the extent that the *Native Title Act* relates to powers of the federal court or the Tribunal.

¹ *Delgamuukw v British Columbia* (1997) 3 SCR 1010.

² *R v Van der Peet* (1996) 2 SCR 507.

³ *Ibid*, at para 68.

⁴ *Delgamuukw v British Columbia* (1997) 3 SCR 1010, para 87.

⁵ Compensation is only payable by virtue of a breach of the *Racial Discrimination Act 1975* not for extinguishment of native title *per se*.

If this is the case, then it would mean that far from being a special measure designed to protect Aboriginal people, the *Native Title Act* would have the draconian effect that Aboriginal and Torres Strait Islander people are the only people in Australia who do not enjoy the protection of the *Racial Discrimination Act* in relation to their property interests. Their property could be interfered with at any time in the future in a way which no other property holders would have to endure. Aboriginal people will not be ensured the same procedural rights in relation to their property that all other property holders enjoy. It is of high priority that the extent that native titleholders continue to have the protection of the *Racial Discrimination Act* is resolved.

The third area I would flag of concern under the current regime of native title is the status of procedural rights under the *Native Title Act*. The future act regime of the *Native Title Act* regulates the manner in which all future acts affect native title. It identifies separate categories of future acts and then identifies the manner in which the future can occur. For each category the procedural rights that native titleholders are entitled to. These variously include a right to notice, a right to comment, and in some cases the right to negotiate. In *Lardil, Yangkaal, Kaiadilt and Gangalidda Peoples v State of Queensland & Ors*, the Full Federal Court decided that in all cases, except the right to negotiate under subdivision P of the *Native Title Act*, regardless of whether the procedural rights are provided, the future act will be valid. Under the *Native Title Act* when an Act is valid it has full force act.

Up until that decision most people believed that if a government did not afford native titleholders the proper procedural rights before the act is done, then the act is invalid. This is because in relation to a number of categories of future act the *Native Title Act* specifies that the procedural rights ‘must’ be afforded to native titleholders before the act is done. The Full Federal Court decision has severe consequences for native titleholders. Not only is there no incentive for Governments to ensure the appropriate procedures are followed, it denies Aboriginal people any remedy for the wrongful doing of the act.⁶ If the full Federal Court’s decision is correct then it is possible that native titleholders can have their property compulsorily acquired without notice, and there will be no remedy except for the compensation which would have been payable anyway. No other property holder would be subject to such a draconian legislative regime. It is urgent that the *Lardil* decision be revisited in the near future and, if necessary, the issues need to be pursued in the High Court in an attempt to overturn the effect of that decision.

If the promise of the *Mabo* judgment has been truncated by the compromises of the *Native Title Amendment Act 1993* and the unilateral extinguishments in the *Native Title Amendment Act 1998*, the rejection of the legal fiction that denied Indigenous sovereignty, laws and social structure remains important to Indigenous people. The symbolism has altered the legal landscape and the case has sculpted the way in which Indigenous rights are perceived. Gone is the pre-*Mabo* confidence that no Indigenous rights exist under the common law. The assertions of any kind of Indigenous right – intellectual property, heritage protection, hunting, fishing, water – has varying weight in light of the majority view. Again, it will be useful when there is some clarity about the interpretation of the Act and this may come with a test case on the issue.

It has been one of the problems with the *Mabo* decision that it was in effect a very narrow decision. This was a result of the narrow pleadings from the case, a deliberate strategy by the litigation team. The effect of this was that the decision only dealt with native title on land. It meant that the extent to which

⁶ Compensation will still be payable for an act affecting native title but there will be no remedy available to undo the act because legislation specifies that it will have full force and effect.

native title includes hunting and fishing, water and sea rights and the way in which native title coexists with pastoral leases were questions that had to be answered with further litigation. It is an approach that stands in stark contrast with the approach taken by the Canadian Supreme Court in the *Delgamuukw* case. In that case, the Court seemed to understand that the claim to land was also a claim to economic self-sufficiency and a claim to self-governance. That is, it is a claim to sustain a way of life – which is what, I think, native title is all about from an Indigenous perspective. The ability for the Canadian court to conceptualise the rights of Indigenous people in this holistic way was assisted by the courts experience in adjudicating treaty cases. Through this experience, they were better able to understand the connection between land, economic self-sufficiency and governance in a way that our courts – and indeed our policy makers – seem unable to comprehend.

However, the judgment gave rise to a question mark on the contemporary legal landscape. With the overturning of the doctrine of *terra nullius*, there is now a legal fiction of ‘settlement’. The High Courts refusal to address the issue of the validity of British claims to sovereignty over Australia leaves open an issue that will continue to haunt, not just lawyers, but the whole of the Australian population, every time issues of our nationhood arise.

I have taught in first year courses in several Universities where the first case all law students read is the *Mabo* judgment. No longer are Indigenous issues on the periphery in the way they were prior to 1992. However, this change within the legal academy cannot be said to have been mirrored in broader society.

Modern Australia is a country that is built on the land of its Indigenous people, land that made the country rich through pastoral and mining industries. Advocates for mining and pastoral interests have resorted to scare tactics that have maliciously misled and unnecessarily frightened Australians. By stating that the High Court’s decision made freehold land vulnerable to native title claims lobbyists and mining companies fed, contributed to and exploited an ignorant fear amongst the general public by warning that the *Mabo* decision could lead to the confiscation of private property. This was an underhanded untruth easily dismissed by a cursory reading of the law.

From the beginning Prime Minister John Howard’s government made it clear where their loyalties lay on the issue of native title; they had no interest in preserving the property interests of a vulnerable minority. The Howard government’s response to the *Wik* case was laid out in their proposal to implement a ‘ten-point plan’. The Federal Government tried to gain popular support for its ten-point plan by portraying pastoral leases as small, family run farms, evoking the image of the farmer battling on the land. The Prime Minister continued to push an approach informed by the ideologies of white Australian nationalism and a psychological *terra nullius*, playing into ‘settlement’ myths of Australia’s land being tamed by brave men who struggled to make a living off the land. In a speech reported in *The Age* on 1 December 1997 Howard stated:

Australia’s farmers, of course, have always occupied a very special place in our heart... They often endure the heart break of drought, the disappointment of bad international prices after a hard-worked season and quite frankly I find it impossible to imagine the Australia I love, without a strong and vibrant farming sector.⁷

This is an emotive response that in no way mirrors the way Mr. Howard feels about Aboriginal Australians. They take up no such romanticised, nationalistic ideals in his heart, consciousness, or image of Australia. The government’s approach also ignored the fact that what the *Mabo* and *Wik* cases

⁷ *The Age*, ‘The sooner we get this debate over the better for all of us’, 1 December 1997.

found was that a legitimate property right vested in Indigenous peoples; and Howard's rhetoric brushed over the historical context in which dispossession took place. Howard used the rhetoric of equal laws for all Australians to justify his political stance claiming that there should not be special laws for one section of the Australian public:

We have clung tenaciously to the principle that no group in the Australian community should have rights that are not enjoyed by another group.⁸

This rhetoric ignored the fact that property laws in Australia had not been applied equally to all Australians: this 'equal law' had facilitated the dispossession of indigenous Australians, something that *Mabo* and *Wik* were seeking to rectify.

In fact, Howard attempted to block any objection to his decontextualised reasoning by raising the alarm that talk of the historical context is only the 'politics of guilt':

Australians of this generation should not be required to accept the guilt and blame for the past actions and policies over which they had no control.⁹

Howard's rhetorical approach to indigenous property rights in Australia shows how institutional discrimination is married to a psychological *terra nullius* rooted in a particular, romanticised version of history. His lack of historical context – massacres, dispossession, government policies of assimilation and removal of children – allow him to view recognition of native title in a vacuum. It is not that he is without any appreciation of history.

In fact, conversely, while unlocking native title from the historic events that have failed to recognise and respect those rights, Howard claims that any historic wrongs are historic; they should not affect our contemporary thinking and policy making. And Howard's rhetoric highlights the same three *contemporary* perceptions in the public consciousness that I identified earlier:

- That when Aboriginal people lose a property right it does not have a human aspect to it. Farmers can evoke an emotive response; aborigines cannot.
- Aboriginal people, in getting recognition of a property right, are seen as gaining something rather than having recognised something that already exists and should be protected. Aboriginal property interests are seen as a 'special right'.
- Aboriginal property interests are seen as threatening the interests of white property owners. The two cannot coexist.

These recent developments concerning Aboriginal property rights in Australia have been frustrating for the Aboriginal community and the advocates and supporters working to protect those rights. Each incremental and piecemeal gain made within the judicial system has been truncated or extinguished by a legislature. For indigenous peoples, the legacy of *terra nullius* may have been overturned by the *Mabo* case but another ideological enemy remains: while Australia has a dominant group who embraces a psychological *terra nullius*, any legal advances are vulnerable to legislative extinguishment. This psychological *terra nullius* allows Australians, like John Howard, to separate the property rights of Indigenous Australians from those of all other Australians. It is a distinction which devalues legitimate and recognised Indigenous property rights.

⁸ *The Sydney Morning Herald*, 'Racing towards an election', 11 April 1998.

⁹ *The Sydney Morning Herald*, 'Mr. Howard unreconciled', 27 May 1997.

Perhaps the greatest message that can be learnt from the *Mabo* case is that episodic court victories are not a sustainable sole strategy for the recognition and protection of Indigenous rights. As was pointed out in both the National Report of the Royal Commission into Aboriginal Deaths in Custody and the *Bringing Them Home* Report, the necessary response to remedy the legacies of colonisation and to achieve the aspirations of the Indigenous communities is necessarily a holistic one. It will require a legal system that recognises Indigenous rights, a legislature that seeks to strengthen and protect those rights (not truncate and erode them), a bureaucracy that can develop responsive and effective policies to deal with Indigenous issues and a public that has overcome its psychological *terra nullius*. It is easy to feel daunted by how far we are from achieving those things. But in working towards things that seem impossible, we will find the spirit of Eddie Mabo.