2002 Mayo Lecture

delivered by His Honour Justice K.A. Cullinane

at

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MABO, A RETROSPECT TEN YEARS ON

Two people, both of whom are closely linked to James Cook University are central to this afternoon's gathering and lecture.

The first is a person in whose honour this annual lecture is named i.e. Marilyn Mayo. Mrs. Mayo was the first teacher of law at James Cook University and as an associate professor was a member of the teaching staff until recently. She kept the flag flying for the teaching of law at this University during the long years when only a limited number of subjects were available and when not surprisingly the whole future of teaching of law at this University was under threat. But it is fitting that the James Cook University law students should have maintained this lecture honouring Mrs. Mayo and I hope that it will remain a permanent feature of the University's activities.

The second person is of course the late Eddie Koiki Mabo. Eddie Mabo was employed at this University as a gardener and he gave occasional lectures in Noel Loos's courses on Inter-race Relations in the Department of History. He was also for a period, a student here.

On 3rd June 1992, shortly after the Court assembled the High Court of Australia made a formal declaration in the following terms:

"*The Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands in the Murri Islands.*"

With these few words the legal history – and much more – of Australia is changed forever.

Today I would like to discuss the litigation which bears Eddie Mabo's name and which many consider the most important judgment delivered by the High Court in its history. It would, I think be a challenge to identify any other judgment delivered by the High Court since Federation which has had a greater impact on the community and on community attitudes and which has brought about such a change in the accepted legal position in the country.

The judgment of the High Court in *Mabo No. 2* was delivered on 2 June 1992. Obviously as the name suggests it was preceded by an earlier judgment *Mabo No. 1* which was delivered on 8 December 1988. Without succeeding in *Mabo No. 1*- a case won by the barest of majorities - there would never have been a *Mabo No. 2* and the legal history of Australia and the common law recognition of native title since European settlement would never have occurred except in the most unlikely event that a government of some persuasion would have had the political will to enact the legislation having that effect.

Whilst the central issues in the litigation are generally known it is I think important for the purposes of a retrospective assessment of the judgment a decade on to put it into its historic setting and to examine exactly what was an issue in the litigation and what was decided.

Amongst the by now vast quantity of material which has been published on this litigation I should mention two articles which I have found particularly helpful. They were written from very different perspectives. The first was the account of Brian Keon-Cohen who was junior counsel to the late Ron Castan QC for the plaintiffs. Keon-Cohen's account which is called *"The Mabo litigation: a personal and procedural account"* was published in volume 24 2000 Melbourne University Law Review. In it he gives a detailed personal account from the perspective of somebody of the very centre of the litigation from its commencement to its final outcome. The second is from a Scottish academic who subscribed a chapter on the case in the publication of *Roundhall and Sweet and Maxwell's Leading Cases of the Twentieth*

Century. His name is Tunney and he is from the University of Abertey in Dundee Scotland. His perspective is an international one and could not be further removed from the perspective of the insider which Keon-Cohen gives. I will touch on each of these in the course of my discussion today. In their different ways I have found them both particularly valuable accounts of the litigation and of its significance.

Tunney locates the *Mabo* litigation in the historical context of European colonialism generally and in the movements which emerged in the wake of post-colonialism in the latter part of the 20th century in support of indigenous rights throughout the post colonial world.

THE LAW BEFORE MABO

For the whole of the period of European settlement in Australia until 1992 there has been a constant and judicially accepted claim that upon European settlement title to all lands was vested in the Crown and that no other title and in particular no native title has survived. This is not the way in which matters developed in other British colonies such as New Zealand and Canada.

The difference between what happened in this country and what happened in other countries is explained by what Mr. Justice Murphy was to call “a convenient falsehood” in *Coe v The Commonwealth* (1979) 24 ALR 118 of terra nullius. This

principle, if that is what is should be called, applied to both the mainland and all of the offshore islands.

In terms of English common law colonies were acquired either by cession or conquest (none of which plainly enough applied in Australia) on the one hand or by settlement in the case of land which was terra nullius on the other. This principle, understandable enough in the case of land which was uninhabited was held to be equally applicable to land "practically unoccupied without settling inhabitants or laws" to use the language of the Privy Council in *Cooper v Stewart*.

This view of things is strongly at odds with judgments of international courts during this century.

In *Cooper v Stuart* this principle was asserted as being the legal position in Australia. It was reasserted again by the Northern Territory's Supreme Court in what has come to be known as the Gove case i.e. the case of *Millirrpum v Nabalco Pty. Ltd.* (1971) 17 FLR 141.

The effect of these and other cases was that upon settlement and the acquisition of sovereignty the unqualified and beneficial ownership of all lands vested in the Crown it is perhaps ironic or even appropriate given Australia's preoccupation with gambling that one of those cases concerned Randwick Racecourse. None of them except the

Gove case involved a claim of native title. That case failed on other grounds also it being held that the interest asserted was not a proprietary interest and thus would not have been recognised at common law.

This state of affairs which can be described as the settled law did not go unchallenged by indigenous Australians. However it was only in the Gove case and incidentally in *Coe v The Commonwealth of Australia* (1979) 24 ALR 118 that the issue was raised and it was not until the *Mabo* case that the issue fell squarely for determination by the High Court of Australia.

It is to be noted that there was no discussion of, let alone challenge to this state of affairs in the constitutional debates and although there had been some legislation conferring land rights upon indigenous people no Australian government had shown any inclination to address the issue of terra nullius or the general principle that native title survived settlement by the enactment of legislation. This is so even though the falsity of the claim of terra nullius had long been evident. It could hardly have been more evident than in the lands in the various islands of the Torres Strait including the land on Meriam which the subject of the litigation.

According to what has been written on the subject Eddie Mabo was working as a gardener and part-time lecturer or teacher at this University was amazed to find as a result of discussions with Professor Henry Reynolds that the doctrine in to which I have just referred denied to him and to his fellow islanders the title to land which had

always treated by them as their land and which had been occupied, delineated and cultivated in most instances for many generations. It seems that the immediate impulse to the institution of proceedings seeking to establish title on the part of a number of people from Mer was the conference held at this University in 1981 under the auspices of the Townsville Chapter of the Aboriginal Treaty Committee and James Cook University Students' Union. This is an important link with this University. Amongst the many speakers present including politicians, academics and public servants were a number of indigenous representatives including Eddie Mabo. It would seem that following the conference a private meeting was held between members of the indigenous communities at which Eddie Mabo made it clear that he wished to institute a legal challenge to the established doctrine.

One of those present at the conference was a solicitor from Cairns, Greg McIntyre, who subsequently played a central role as the solicitor and for a term, barrister in the litigation throughout its ten year life.

Keon-Cohen traces the various steps in the action which was formally instituted in May 1982. Proceedings were instituted on behalf of a number of individuals including of course, Eddie Mabo, but from the outset it was clear that the action was brought not only on their own behalf but also on behalf of family groups of which they were representatives. Ultimately as is well known the judgment which is given was a judgment in favour of the community of Merriam generally. It was necessary for proceedings to be amended at a very late stage to assess that it clearly embraces the

claim. This occurred in direct response to some questions raised by members of the High Court in the course of the argument in 1991.

The matter was instituted in the High Court of Australia with the State of Queensland and the Commonwealth of Australia the defendant. The Queensland Government sought to have the action struck out but ultimately this claim was not proceeded with. The complexities of pleading the case and the ultimately fruitless attempts to reach an agreed statement of facts so that the action might proceed more expeditiously are dealt with in some detail by Keon-Cohen.

The High Court remitted the matter to the Queensland Supreme Court to determine the factual issues which arose there not having been any agreement reached about these. Mr. Justice Moynihan of the Queensland Supreme Court heard evidence over the period from October 1986 until September 1989. He travelled to Mer for the purposes of discharging this task and heard evidence from many witnesses whilst there. His taking of evidence was interrupted by the introduction into the Queensland Parliament by the Queensland Government of Legislation which was intended to kill off the litigation. This legislation was the *Queensland Coast Islands Declaratory Act* in 1985. It consisted of just five sections the critical provisions being a declaration that upon the islands being annexed to and becoming part of the State of Queensland (something that had occurred in 1879) they were vested freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown. A further section went on to provide that no compensation was or was to be payable to any person by

reason of any provision of the Act or by reason of the annexation or in respect of any right, interest or claim alleged to have existed prior to the annexation.

The reach of the legislation is breathtaking. It not only purported to have an effect reaching back some 106 years but it also purported to extinguish any rights which might have otherwise existed and to do so without any compensation.

Immediately upon its enactment the State of Queensland amended its defence to plead that the Declaratory Act had defeated the plaintiffs' claim. The plaintiffs demurred to this and the matter was heard by the High Court on the 15th, 16th and 17th March 1988 and judgment was delivered on the 8th December of that year.

By a single majority of four to three the High Court held that the legislation offended the *Commonwealth Racial Discrimination Act* and was therefore invalid. Thus the claims survived but just.

At some time in the proceedings the Commonwealth ceased to be a party having reached agreement with the plaintiffs about certain matters which were proliferal to the litigation, the action then proceeded as between the plaintiffs and the State of Queensland. It is of course the case that the findings of fact made by Mr. Justice Moynihan precluded Eddie Mabo from succeeding in his personal claim. I do not intend to dwell on this aspect of the matter although I note in passing the reference in

many of the accounts including Noel Loos's publication, Eddie Mabo - His Life and Struggle for Land Rights and in Keon-Cohen's account to the personal hurt that this caused Eddie Mabo who always refused to accept those findings.

As we know Eddie Mabo did not live to see the judgment. One of the original plaintiffs withdrew, whilst another withdrew and later rejoined the litigation.

The matter came before the High Court and was argued in May 1991.

The parties gathered in Canberra for what was to be a momentous judgment on the 3rd June 1992. Keon-Cohen gives an account of how after the judgment was handed down the outcome was conveyed to Mer. He says that he went upstairs to a set of chambers on the sixth floor of the High Court building and he telephoned the only phone box on Murray Island located outside the general store. The phone was answered and the following conversation took place:

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Although the immediate response to the judgment was somewhat muted it was not long before a fierce debate was raging. It was characterised by many exaggerated claims made on all sides but particularly on behalf of interests which saw themselves as being

threatened by the judgment. Newsprint was consumed at an alarming rate as people raced to express their opinions about the judgment. The majority of the Court was subjected to criticism of a kind rarely seen in Australia before but which was to be outdone within a few years by commentary forming part of the hostile response to the Wik judgment.

There were five separate judgments. A joint judgment by Chief Justice Mason and Justice McHugh which in substance agreed with the judgment of Brennan J who wrote a lengthy and scholarly judgment which involved a detailed examination of the relevant authorities. Mr. Justice Deane and Justice Gaudron wrote a joint judgment and Justice Toohey delivered a judgment. All of these found in favour of the community on the primary issue but differed on other issues. Mr. Justice Dawson was the sole dissenter on the central question and would have rejected the claim that native title had survived.

WHAT PRECISELY DID THE CASE DECIDE AND WHAT DOES IT STAND AS AUTHORITY FOR?

Firstly the case rejected the doctrine of *terra nullius.* Secondly it held that provided it could be shown that the relevant community or group had maintained its links with the land, native title survived the acquisition of sovereignty and of radical title by the Crown and it was not necessary that any positive recognition be conferred for this to have occurred. These might be described as the positive findings in favour of the litigants and of indigenous people generally. They were however qualified by two

other findings. These were that native title could be extinguished by a valid exercise of sovereign right which was inconsistent with the native title, that is by either legislation or executive act or the issue of a title inconsistent with native title. The court also found by a majority that where native title had been extinguished compensation was not payable.

These principles were expressed as being of general application throughout Australia. Although the manner in which sovereignty came to be exercised over the Torres Strait Islands was very different historically to the way in which it came to be exercised that the mainland of Australia and although conditions varied greatly between the Torres Strait Islands and the mainland and indeed between parts of the mainland and other parts the principles expounded were of universal application.

The government of the day moved to establish a legislative response to the judgment so as to give effect to its principles and to provide a framework within which the claims for native title could be processed. The legislation ultimately passed after a marathon sittings of the senate. The passage of the legislation was accompanied by a good deal of hyperbole and vituperation.

Two years later the debate erupted again with even greater fury when contrary to what by then had become a fairly broad expectation, the High Court held in the judgment which has come to be known as the Wik judgment that pastoral releases did not upon their issue extinguish native title over the areas to which were subject to them.

This led to a legislative response on the part of the by now changed government. The legislation which was introduced to some extent limited the common law rights recognised by the High Court in *Mabo* and *Wik*.

A national native title tribunal has been established to enable claims to be processed whilst in Queensland a land and resources tribunal has also been established which has jurisdiction in this area. The jurisdiction has been challenged and at present the tribunal is not dealing with these matters.

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I will for the sake of completeness refer to the few occasions that the High Court has had to consider the question of native title since *Mabo and Wik.*

There have been a number of cases in which the High Court has had to consider whether in specific circumstances native title has survived and it can be expected that instances will arise in the future in which it will be necessary for the High Court to further expound the principles as they apply to particular circumstances. In *Fejo v The Northern Territory of Australia* (1998) 115 CLR 996 it was held that consistent with Mabo a grant of fee simple irreversibly extinguishes native title. On the other hand in *Yanner v Eaton* (1999) 201? CLR 251 the High Court held that the native title right or incident to hunt crocodiles recognised by the common law of Australia had not been extinguished by the passage of the *Queensland Conservation Act*. In August this year the High Court delivered two judgements ?? in which the impact of certain types of leases on native title and whether, and if so to what extent the latter survived the grant

of the former, were delivered. One concerned Western Australian pastoral leases and the other concerned a New South Wales perpetual grazing list.

In the course of delivering judgment the High Court took the opportunity to affirm or re-affirm that it is now the legislation passed following the *Mabo* and *Wik* cases rather than the judgment in *Mabo* itself to which regard must primarily be had.

There have been important cases in the Federal Court such as the *Yorta Yorta* case and the *Yameer* case. In the former case the community's claim failed having been held or been washed away by the tide of history with annexes between the group and the land held to have been not continuously maintained because of what had in effect been a forcible removal from it. The matter is now before the High Court. **???** On the other hand in *Yameer* a number of aboriginal communities were held to possess communal title over the sea and sea beds in the claimed areas which rights were non-exclusive but included important rights such as the right to travel within fish and visit sacred sites in the area subject to commonwealth and state laws and crown leases.

We thus have now in the post-Mabo legal system tribunals within which claims to native title have been and are being processed. We are seeing cases involving specific issues remaining to be resolved post-Mabo finding their way to the Federal Court and to the High Court for the purposes of having the law clarified and settled. As will be understood there are a great number of titles issued throughout Australia over Crown lands which all have their own particularities and perculiarities. The relationship of

these to native title is still being tested. There have been some 30 determinations of native title, 23 by agreement and seven after trial in the Federal Court. There have been more than 3,000 agreements reached between indigenous groups and various interested parties such as pastoral groups, miners, and government relating to a variety of matters particularly in the area of land use.

Most importantly we are seeing the native title claims are in the main being resolved without the need for litigation with many grants being made by consent with the help of mediation. I note that this university is in the process of establishing a native title unit at Cairns which will have a broad function including the provision of advice to parties to native title claims and a general educational role in the area of native title. The unit will provide expert advice and assistance to parties.

One of the by-products of the litigation is the development of a new and growing area of legal practice. Not everybody might regard this as a positive spin-off but this audience which I take it is largely constituted by lawyers or law students will, I am sure, see the positive aspect of this development.

There have been, it must be recognised, delays and disappointments. Many complain that the process is too slow and too complicated. Whilst there is undoubtedly some truth in this it can hardly be expected that the changes brought about by *Mabo*, revolutionary as they were in their scope, can be absorbed and accommodated simply or immediately.

WHAT CHANGES DID MABO BRING ABOUT?

I think from the vantage point of 10 years down the track, it can be said that the nation has by and large taken the momentous changes effected in our legal system by *Mabo* in its stride. Native title is now a fact of life.

The most obvious change is that the recognition of native title has resulted in the empowerment of indigenous people who now come to the bargaining table as equal partners and are recognised as such. There is what has been described as a new culture of negotiation and agreement making in which indigenous people are full and equal partners holding interest which cannot be ignored and must be respected.

This represents part of a broader change in the climate of opinion in the community post-Mabo. The widespread acceptance of native title is to be contrasted with attitudes pre-Mabo. I ask that those of you who can remember, cast your mind back ten years or more. I recognise that many of the persons present today who are students would have been in primary school at that time and no doubt had other more pressing preoccupations than concerns about cases in the courts, even cases as important as this one.

Hostility towards land rights was widespread amongst some sections of the community including governments and powerful interests. Extinguishment was spoken of before

and in the immediate aftermath of the *Mabo* and *Wik* judgments. The climate has changed completely in the course of the ten years that has elapsed. The issue now is not whether native title should be recognised or extinguished – it is part of our social and legal fabric. The emphasis is rather upon the resolution of the practical issues arising from the fact of native title.

What are the other consequences? The doctrine of *terra nullius* the lie which lay at the centre of our nation's history has been put to rest. The relationship between this doctrine and the manner and extent of the dispossession of the native occupants of their lands is obvious and it was to this that Mr Justice Deane and Justice Gaudron in their joint judgment referred in a couple of passages which have been much quoted and which have been the subject of considerable controversy. It was in this context that Their Honours referred to the legacy of unutterable shame and the darkest aspect of our national history.

In the epilogue to the article by Tunney that I have referred to the author addresses the question of why *Mabo* should be regarded as one of the great cases of the 20th century. He answers it in this way and I will conclude by adopting what he says:

"It has become known widely, it's swept aside a long line of precedent and reasoning and was thus of significance actually and symbolically. It provoked outrage. It contributed to the definition of national identity. It provokes great debates about what law itself is. Thus it is an affirmation of law and of the sovereignty of law and of its ability to construct a consensus of competing constituencies which of all the modes of human behaviour has the potential to provide a roof over us built on firm foundations tempered in the fires of cultural awareness. It challenges this generation and the next to produce a new crop of legal thinkers who can deal with the great issues that we do and will face with powers of creativity, integration and imagination as well as the presently overprized mechanistic mind. Mabo *was part of a move towards justice*

which like the truth may emerge very slowly sometimes. It is strong medicine. With increased globalisation and the gradual erasure of the elusory line between people's law and legal systems it might be better to talk of justice in the international legal environment."

Although Eddie Mabo failed in his personal claim and although the rejection of his evidence was a matter of deep, personal hurt, the great judgment to which he gave his name stands as his personal legacy and monument. As Australia is a nation built on the rule of law can I think be proud of the fact that though belatedly and because of the time that had passed in a way that is far from complete, a great historic injustice was put to right. Eddie Mabo provided the nation with the opportunity for that to occur.

I should also add that this University should be proud of its links with the late Eddie Mabo and the litigation that bears his name.