Mabo v State of Queensland (No 2): a personal recollection

The Honourable Margaret White AO*

His Honour observed that whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind could no longer be accepted.

Warning: this paper contains names and images of deceased persons of Aboriginal and Torres Strait Islander descent.

I have no doubt at all that the decision of the High Court of Australia handed down on 3 June 1992 bearing the name *Mabo v State of Queensland (No 2)*,[1] is among a small number of legal decisions which has had a profound effect on this country. If, as one commentator put it, *Mabo* is just a case about three very small islands, then *Engineers* was just a case about a small industrial dispute in a Western Australian railway yard.[2]

Noel Pearson, launching *Mabo – What the High Court said*[3] in January 1994 observed:

> We don't have a strong tradition in this country of judgments of the High Court pervading, in a social sense, the fabric of the country. [But] we'll be talking about Mabo and its importance historically, for a long time to come.

The decision has generated a huge number of academic treatises and articles.

The National Library records 465 books about the *Mabo* decision and has digitised 1161 newspaper articles, as well as 2631 journal articles.

It occupies much of any Australian university course on land law and is commemorated each year with considerable festivity, particularly amongst Torres Strait Islanders in Townsville, which had been Eddie Mabo's home for most of his life.

By any measure, this is an important case.

Two films have been produced about the litigation: one in 1997, a documentary, and the other in 2012, a docu/biopic with well-known Australian actors playing the lead roles.[4]

The decision was much anticipated. When it was delivered, it created a tremendous rumpus and remained a major topic for popular discussion for months in newspapers and public affairs magazines. Every anniversary of its delivery is remembered somewhere in the popular press.

Dr Bryan Keon-Cohen QC, the lead counsel for the plaintiffs throughout the Trial of the Facts, has written his memoir entitled *Mabo in the Courts*.[5] He has deposited all of his papers relating to the litigation in the National Library of Australia which, together with the

Mabo Family Papers, has been inscribed on the UNESCO International Memory of the World Register as 'documents of unique and irreplaceable world significance.'

I quarrel with some of the detail and am a little wounded that Queensland counsel are described as 'operators', but the book is as exhaustive an account of the litigation as any but the most obsessive could want.

Since the passage of the *Native Title Act* in 1993 many Federal Court judges have become experts in the analysis of evidence about native title including an extensive exposure to anthropological evidence. I would not presume to enter that field.

My ambition this evening is more modest. I want to say something of the historical context and circumstances of the litigation, how it developed, how the evidence was gathered—for the actual evidence seems to have been rather lost in the clamour. I will discuss the reasoning of the High Court, consider the consequences of the decision, and, finally, make a few observations about the man whose name is forever perpetuated by this case.

Before doing so, let me briefly outline what the plaintiffs sought.

On 20 May 1982, Eddie Mabo, his aunt Celuia Mapo Salee, Sam Passi, Sam's brother the Reverend David Passi and James Rice initiated proceedings against the State of Queensland and the Commonwealth of Australia in the High Court's original jurisdiction. They brought the action on their own behalf 'and on behalf of the members of their respective family groups.' The second plaintiff, who was Eddie Mabo's aunt, died in 1985 before the remitter and, in the course of the hearing, Sam Passi withdrew from the proceedings largely because of the divisive nature of the litigation on Murray Islanders and some apprehension about costs if there was an adverse outcome. The Commonwealth was struck out as a defendant in 1989 essentially because the plaintiffs discontinued their claims to seas and reefs.

The plaintiffs contended that since time immemorial their ancestors, and, thus, they, had owned and had rights in particular areas of land on the Murray Islands, the surrounding sea and seabed and reefs in accordance with their laws, customs, traditions and practices and that the annexation of the islands by Queensland in 1879 was subject to the rights of their predecessors in title. They sought various declarations to that effect.

Importantly, the plaintiffs sought declarations in respect of particular plots of land or with respect to the seabed, seas and fringing reefs allegedly owned by those individuals and their family groups—ultimately 36 blocks were claimed by Eddie Mabo, one by Dave Passi and four by James Rice. They did not seek any declarations about their rights by virtue of any overall community interest in the land which had been the foundation of native title, where it existed, at common law.

On 27 February 1986 the Chief Justice, Sir Harry Gibbs, remitted to the Supreme Court of Queensland for hearing and determination all issues of fact raised by the pleadings which had been delivered in the action.[6]

The plaintiffs had sought remitter to the Federal Court but his Honour concluded that since the dispute was about land in Queensland and only the presence of the Commonwealth gave federal jurisdiction and since there were no more advantageous Rules in the Federal Court, the State Court was more appropriate.

Issues of law consequent upon the determination of the remitted issues of fact were reserved to the High Court.

There is a widespread misconception that the case was heard by the High Court in its appellate jurisdiction.

Counsel appeared before the senior puisne judge in Brisbane for allocation of a judge to hear what was then anticipated to be a very long trial of some four to six weeks' duration. His Honour ruminated upon the available judges and, such are the vagaries of life, he had three judges available—Justices Connolly, de Jersey and Moynihan. The plaintiffs' counsel objected to Justice de Jersey on the basis that as counsel he had been regularly briefed for the State Crown. Justice Martin Moynihan was selected.

The Murray Islands—Mer, Dauer and Waier—lie at the eastern end of the Torres Strait. It is a stretch of water containing hundreds of small islands, few of which are habitable—the shortage of potable water has been a constant problem. The islands of the Strait have tended to be classified into three groups, not just since the arrival of Europeans in the 17th century but reflected in their own distinct languages and habits. They are the Western Islands which include Thursday Island—for approximately 150 years, the administrative headquarters of the Torres Strait; the Central Islands built upon coral cays; and the Eastern Islands comprising Ugar (Stephen), Erub (Darnley) and Mer (Murray) with its two subsidiary islands.

Mer lies between the coast of Papua and Cape York at ten degrees latitude and 144 degrees longitude. If a line were notionally dropped from Mer, it would reach, approximately, west of Charleville in central Queensland. The Murray Islands lie close to the northern end of the Great Barrier Reef.

The Murray Islands are volcanic in composition with fertile soil, which allowed a strong gardening culture to develop unlike the other islands which depended almost solely on fishing, particularly dugong, for their sustenance. The main island of Mer has an area of just over $4km^2$ with its highest point the long extinct volcano, Gelam, rising 234m.

The history of the Murray Islands prior to annexation in 1879 was an important part of the trial process for the plaintiffs because they needed to prove that they had exclusively resided on the Murray Islands with rights to the land and the surrounding seas since well prior to annexation and had regulated their lives by a system of rules and practices none of which Queensland had extinguished. What follows is a very abbreviated account of what were seen as significant dates and events.[7]

The Torres Strait Islands were thought to have been first inhabited by people who migrated down via the Indonesian archipelago when the Papua New Guinea landmass was joined to the Australian continent.

It is likely that Chinese, Malay and Indonesian traders had visited the islands of the Torres Strait long before European explorers arrived looking for a means of passage between the Indian and Pacific Oceans. The first navigators recorded as visiting the Torres Strait were the Spaniard De Quiros and his second in command, De Torres, who sailed through in 1606. South Sea Islanders were recorded on the islands including the Murray Islands for some hundreds of years from the earliest history of European contact.

The language of the inhabitants of the Western and Central Islands is regarded by those who are expert in these things as related to the languages of the Aboriginal inhabitants of the mainland with some Melanesian influences. The language of the Eastern Islands is Meriam. It is quite distinct from the other languages of the Torres Strait and said to be a member of the Eastern Trans-Fly family of Papuan languages. It was and is still spoken on Mer, and there is much pride in its retention. The language of the Torres Strait generally is Torres Strait creole. For some older or more reticent witnesses interpreters were used particularly when the court sat on Murray Island.

As an aside, the manner of doing so tended to break most of the rules about the use of interpreters in court; for example, Del Passi, the daughter of Sam Passi who did speak good English but who preferred to give his evidence in Meriam, was sworn in as his interpreter.

Matthew Flinders sailed past in 1802 and had some cordial contact with the inhabitants of Murray Island. He estimated their number at about 700 but other later estimates are much lower. At no time is it thought they exceeded 1000.

In 1836 the colonial schooner *Isabella* had been sent to the Strait to find any survivors of the *Charles Eaton* which had foundered two years earlier. Captain Lewis retrieved two boys from the wreck who had been living safely on Murray Island and had learnt the language.

In something of a cultural twist, Captain Lewis recorded what the local Meriam thought of the outsiders: ‘They believe that white people live always in ships and possess no terrestrial home, and that they subsist on sharks, porpoises and dogs.’

He also recorded, in a passage relied on by the State of Queensland: ‘They acknowledge no chief each family being distinct and independent of each other. Quarrels frequently take place which, after a fight, are generally followed by a speedy reconciliation.’

The pearl shell and bêche-de-mer markets led to a great influx of traders into the Torres Strait in the 1860s from many countries—China, Japan, Micronesia and Europe.

A most important event in the life of the Torres Strait occurred in 1871 when the London Missionary Society began its work on Darnley Island before moving its headquarters to Murray Island in 1876. The arrival of the London Missionary Society, and its South Seas

Islander teachers, seems to have been welcomed in the Torres Strait—some of our informants endorsed the sentiment that it was the end of darkness and the law of the club—many of the islands' inhabitants were fierce warriors and head hunters. Ion Idriess's adventure story *The Drums of Mer* had been read by Eddie Mabo and plainly influenced some of his more colourful claims.

The arrival of the missionaries is celebrated each year on the first of July as a holiday in the Torres Strait and known as *The Coming of the Light.*

The distinguished anthropologist Dr Jeremy Beckett, who was called as a witness by the plaintiffs, observed, 'The Mission offered an end to the never ending cycle of feuding and raiding.'

It largely took responsibility for the law and order on the island.

When Captain Cook landed on Possession Island in 1770 and took possession of the whole of the eastern coast of Australia from above latitude 38 degrees to Possession Island at latitude 10 degrees in the name of King George III his declaration did not include Murray Island.

The British and Queensland authorities were concerned about the lawless behaviour of the black birders, the arrival of undesirable characters on the islands upsetting the native inhabitants, as well as regulating fishing in the Strait and passage through it. Accordingly, Letters Patent were issued by Queen Victoria in 1878 authorising the annexation of the islands in the Torres Strait by the Colony of Queensland. The islands became part of Queensland and subject to Queensland law from 1 August 1879. The judgments in the High Court in *Mabo* uniformly recognised that the acquisition of the islands of the Torres Strait was for purposes benign to the native inhabitants.

Prior to annexation some administrative activity had been imposed by the Police Magistrate on Thursday Island in 1878 when he advised the people of Darnley and Murray Islands to pick a chief and submit to his authority which would be supported.

The title 'Mamoose' was given to the person chosen on each of the islands. He was given a boat and six designated constables.

As a further measure of protection, in 1882 the Queensland Government reserved Murray Island 'for the native inhabitants'.

As a consequence, the London Missionary Society sought and obtained a two acre lease of the lands in which the mission stood from the Colonial Lands department and that portion of Murray Island was excluded from the declarations made in the High Court. This lease was regularly renewed and when the London Missionary Society left the Torres Strait for New Guinea, it handed over its lease and assets to the Anglican Diocese of Carpentaria which continues its occupation to today.

In 1888, by Letters Patent, British New Guinea, as it became known, became part of Queen Victoria's empire.

In 1892, a Scot, John Bruce, was appointed by the Queensland Government as a school teacher on Murray Island. He arrived with his extended family and remained for thirty years. He initiated and kept a register of births, marriages and deaths, participated in and kept the record of proceedings in the island court and generally was regarded as having a good influence on the people.

It became a central matter of contention in the litigation whether John Bruce merely facilitated a pre-colonial existing system for resolving disputes, particularly over land, or whether his administration *was* the system. In the event, this debate was largely irrelevant on the approach taken by the High Court.

An important source of information about pre-contact Meriam Society was the work of Professor Alfred Cort Haddon of Cambridge University in the late 19th century.

Professor Haddon was first in the Torres Strait as part of a zoological investigation for some five months in 1888 and 1889 and returned in 1898 with a team including musicians and linguists who recorded as much as possible about pre-contact life after 25 years of mission influence.

Volume VI of the *Report of the Anthropological Expedition to the Torres Strait* is devoted to the Eastern Islands.

One of his team, WHR Rivers, recorded genealogies of the families on Murray Island which, according to Dr Beckett, led to an increased interest amongst the island residents. Practically all the adults on Murray were by then professed Christians and all the younger ones had been to school. The oral tradition was, as Haddon observed, gradually disappearing as were the practices of the old Bomai-Malu religion. The creation myth founder of the island was Malo, an eight-tentacled octopus. The early division of Mer into eight tribes or families reflected this.

Colin Sheehan, former John Oxley librarian, brought the genealogical tables from Haddon up to date during the Trial of the Facts.

The extensive family trees were posted like a mural around the walls of Court 13 in the old Supreme Court and were viewed by Murray Islanders with much interest. The genealogies were of significance because the plaintiffs claimed their entitlement to particular plots of land through an inheritance chain of title.

Gradually some kind of self-governing system encouraged by the Queensland Government was devised and then refined throughout the Torres Strait communities.

From as early as 1913 purchases of land by the Queensland Government from Murray Islanders were recorded in the Island Court Record Books including for the erection of a jail, a court house and a recreation reserve. Subsequently, land was obtained for other public

purposes. There was a rather drawn out dispute about who was entitled to deal with the land which was sought to be acquired for the purposes of erecting a kindergarten and preschool. When an airstrip was proposed in the 1970s, there was much discussion about whose precious garden land should be surrendered, as the government did not intend to purchase it.

In the 1930s, two Brisbane businessmen entered into a lease of Dauer Island to build and operate a sardine factory with the Queensland Government subject to 'the rights of the natives to use their lands for their gardens.' It was a short lived venture. The remains are still visible.

In 1936 a strike occurred amongst Torres Strait Islanders employed on Island Company fishing boats reflecting general dissatisfaction with conditions and payment. Importantly, the Queensland Parliament passed the *Torres Strait Islanders Act 1939* which charged each island community with responsibility for its own governance by establishing formally an Island Council and Court with the power to make bylaws for governance in accordance with island laws and customs.

Mr Patrick Killoran when the Deputy Director of Native Affairs submitted his report for 1958 writing:

> In the social and administrative organisation of Torres Strait, the people have a complete system of self-government, which gives to them home rule and a very definite control in the guidance of their destiny, as a race within the Commonwealth of Australia. It also preserves the dignity and traditions of the Torres Strait people and permits of the incorporation in their by-laws of self-government, many of the finer tribal laws and traditions, which policy is also the basis of British law and government as we know it …

Mr Killoran had lived for many years in the Torres Strait and gave evidence in the trial about the Meriam approach to adoption, a matter central to Eddie Mabo's claims to have inherited many parcels of land from his adoptive father, Benny Mabo.

Dr Beckett visited Murray Island extensively from 1958 and revisited the work of the Haddon Cambridge expedition to see how the Murray Island social system had responded to its contacts with the modern world. It is widely accepted that Dr Beckett left behind a copy of volume VI of the Haddon report. That it was read by certain of the islanders was quite apparent.

Marou, a very senior, influential figure in the 1940s and 1950s, left a collection of documents, which were produced to Justice Moynihan in the course of the hearing by his son. Those documents included direct transcriptions from volume VI of the Haddon report including the variant spellings introduced by Haddon and his linguist, Ray, to the story of Malo which featured so much as exemplifying the continuity of pre-European contact law about land tenure. The documents also contain extracts in Marou's handwriting from the genealogies contained in volume VI. In his finding of facts, Justice Moynihan reflected:

> The fact of the Malo story extracts is interesting because Marou seems to have been responsible for the dissemination of what came to be called in the course of the hearing 'Malo's laws' among the community. [p 61]

These laws in their application to life on a small island were sensible, and one can readily accept, necessary. In essence they expressed that one did not venture on anyone else's land or touch their property. If it were necessary to do so the trespasser would ask permission.

The Meriam expression '*Malo tag mauki mauki, Teter mauki, mauki*' was much recited on the plaintiffs' side of the record. It means Malo keeps his hands to himself; he does not touch what is not his. He does not permit his feet to carry him towards another man's property. Witnesses were asked what they would say if some unauthorised person came to their land and often, obligingly, responded with Malo's law. Not all were so conversant with its application to daily life. For example, a witness who 'owned' part of the waters between Mer and Dauer Island was asked what he would say if he saw a non-family member in a boat fishing there. He clearly knew his answer was import but, finally, defeated, he offered 'caught anything?'

It is worth pausing to note that in 1966 the South Australian Government passed the *Aboriginal Land Trust Act* legislating the first formal recognition that Indigenous people had rights in land based on traditional laws and customs that existed before white occupation. In the same year, Aboriginal stockmen walked off Wave Hill Station over pay and conditions. There was a certain restlessness about Aboriginal conditions on the reserves on mainland Australia and their petty by-laws.

Closer to the Torres Strait, in 1973 the Commonwealth of Australia and the Government of Papua New Guinea began negotiating the border between the two countries. Papua New Guinea achieved independence in 1974. On 18 December 1978 a treaty between Papua New Guinea and Australia was signed governing amongst other things traditional activities which took place on land and in the water. In March 1973 the Premier of Queensland, Mr Bjelke-Petersen, had presented a petition by Torres Strait Islanders concerning the border to the Queensland Parliament in which the petitioners, who pointed out that they were citizens of Queensland and Australia, did not wish the border between Queensland and Papua New Guinea to be altered. They asked the Queensland Parliament to help them to preserve their distinctive cultural language and political identity and to retain their rights to their islands, their ancestral home for generations.

The Prime Minister of Australia Mr Fraser met with 60 island councillors and Elders representing all Torres Strait people at Yam Island in November 1976 to discuss the border issue between Australia and New Guinea.

Mr George Mye, the Chairman of the Darnley Island Council, expressed the view, strongly, in 1987 that Torres Strait Islanders who had, since before European contact, dealt with the people of Papua by way of trade on equal terms were denied a place at the negotiating table about the border because the Torres Strait was not seen as independent.

Members of the profession may be interested to know that Mr Mye had been Mr Max Gore's 'runner' during the Second World War when Mr Gore had been posted to the Eastern Islands to look out for Japanese shipping and in particular submarines. The late Max Gore was a member of the Queensland Bar and father of an esteemed member of the Senior Bar.

The Queensland Parliament passed the *Land Act (Aboriginal & Islander Land Grants) Amendment Act* in 1982 and amended subsequently to provide for a Deed of Grant in Trust (colloquially known as DOGITS) in favour of the inhabitants of Aboriginal and Islander communities be granted. By the commencement of the litigation, Deeds of Grant in Trust had been made to all Torres Strait Islander communities except Murray Island.

Prior to those amendments, a survey of Torres Strait Islanders took place to ascertain their wishes. A number of possibilities were put to them including granting freehold title meaning islander ownership of islands which could be transferred to or sold if so desired and 'inalienable freehold' meaning 'islander ownership of islands which once owned could not be sold or transferred to anyone'. The findings showed that 95 per cent of Torres Strait Islanders and 99 per cent of Murray Islanders preferred inalienable freehold.

In 1970 the Yolgnu people of Arnhem Land had argued that the common law recognises pre-existing traditional rights to land founded upon the Indigenous community's prior occupation, customs and traditions which survived colonisation[8]. The catalyst for this litigation was the grant by the Commonwealth of an exclusive lease for some 12 years to mine bauxite in the lands of the claimants. They lost, broadly on two bases—that the common law did not recognise the survival after acquisition of pre-existing native title in the absence of specific agreement to do so, and, secondly, that a continuous relationship with the subject land from pre-1788 had not been established by the plaintiffs. The judgment is scholarly and respectful to the plaintiffs' claims but exemplifies the overwhelming difficulties in applying the tradition of one culture to another vastly different one—a difficulty acknowledged by Justice Moynihan. The majority in *Mabo* said Justice Blackburn was incorrect on the first point of legal principle. Justice Deane acknowledged that he had followed binding High Court and Privy Council authority. The decision was not appealed. It has now become known that Justice Blackburn wrote to the then Prime Minister, Mr Whitlam, and Leader of the Opposition, Mr Fraser, in 1972 urging recognition of traditional Indigenous land rights.[9] This led to the Commonwealth passing the *Aboriginal Land Rights (Northern Territory) Act 1976.* Some 50 per cent of the Northern Territory has been transferred to collective Indigenous ownership.

In 1978 there was an attempt to seek recognition of native title in the courts. It was legally inept. In an application to strike out the amended statement of claim in *Coe v The Commonwealth*[10] the Chief Justice, Sir Harry Gibbs, observed:

> The question what rights the Aboriginal people of this country have, or ought to have, in the lands of Australia is one which has become a matter of heated controversy. If there are serious legal questions to be decided as to the existence or nature of such rights, no doubt the sooner they are decided the better, but the resolution of such questions by the courts will not be assisted by imprecise, emotional

> or intemperate claims. In this, as in any other litigation, the claimants will be best served if their claims are put before the court dispassionately, lucidly in proper form.

That is what the plaintiffs, assisted by their lawyers, set out to do in *Mabo*.

The hearing of the remitter commenced on 13 October 1986 in the Supreme Court in Brisbane and concluded after addresses on 6 September 1989. The hearing was adjourned on 17 November 1986 in order for the High Court to deal with the demurrer to the state's amended defence brought by the plaintiffs. Queensland had passed the *Coast Islands Declaratory Act* in 1985 in effect, to remove doubt that if the Murray Islanders had any rights in the land of the islands they were extinguished on annexation and the lands of the islands became wastelands of the Crown.

The High Court by a 4–3 majority held the Act contrary to section 10 of the *Commonwealth Racial Discrimination Act* 1975.

The remitter resumed on 2 May 1989 following a number of directions hearings and continued until September. A view was taken on Murray Island and evidence given there and on Thursday Island. The newly erected community hall on Murray Island was used as a courtroom.

The plaintiffs' lawyers had insisted that counsel should fully robe for the hearings on Murray Island and on Thursday Island. A compromise was reached with those a little more familiar with the temperature and a slightly less warm tropical rig without bar jacket and wig was reached.

The judge, lawyers and witnesses moved around the island with boundary markers and plots of lands being identified largely by Mr Mabo. The inspection occupied three days and four nights on Murray Island. The judge, his associate, the bailiff and two court reporters stayed in the medical aid post there being no other accommodation. The plaintiffs' lawyers stayed with the families of the plaintiffs while counsel and solicitors for the state and the Commonwealth plus an ABC radio reporter occupied the coastal vessel 'Doggai' and came to court each day by tinnie.

On the final day, a grand feast was prepared by the residents with a dance show.

The judge found that he had little difficulty in accepting that the people of the Murray Islands perceived themselves as having an enduring relationship with land on the islands and the seas and reefs surrounding them, but that relationship was not characterised by the spiritual or religious implications of the relationship between the land and Australian Aborigines as disclosed in *Milirrpum.*

His Honour concluded that pre-contact there may have been more rigid social organisations and implications for land ownership than when Wilkin, one of Haddon's, team recorded land dealings in 1898. The practice about inheritance was fairly fluid although the blood was preferred. Garden land was once more valuable than village land. Ownership of fish

traps was largely communal. His Honour felt able to conclude only that Meriam society pre-contact had a bias towards social order and social cohesion.

When his Honour came to the individual claims to portions of land he had no difficulty in concluding that no claims were made out to shrine land or adjacent reefs and fish traps. He concluded that while the outcome which might be drawn from the facts which he found might be determinative as between the plaintiffs and the State of Queensland, it did not necessarily have the same consequences as between the plaintiffs and other Murray Islanders.

In the course of the remitter it became apparent that many of the portions of land claimed by Eddie Mabo as his by inheritance from Benny Mabo were challenged by other islanders. The principal challenger was the preschool teacher on Murray Island, Caroline Modee. Furthermore the evidence of the plaintiff James Rice was perceived by his Honour to be not without controversy and the Reverend David Passi, the remaining Passi plaintiff, accepted that the head of the family, his older brother Sam, held the Passi lands on behalf of members of the extended family group.

Much of Eddie Mabo's evidence-in-chief was devoted to proving his entitlement to his 36 claimed portions, and, possibly to the surprise of his lawyers as well as himself, much of his cross-examination was spent contesting them. As we observed, rather darkly, to each other on the Queensland team, if it were a case of Eddie vs Caroline we had lost the case!

His Honour concluded that the individual claims should be settled on Murray Island by the processes available there including recourse to the Island Court.

But it was his findings about Eddie Mabo that were particularly stark. His Honour concluded that he was not prepared, on the evidence, to conclude that Eddie Mabo was adopted by Benny and Maiga Mabo with the consequence that his inheritance as the heir to either or both was not established. Nor was he prepared to conclude that Benny Mabo during his lifetime disposed of any of the lands to which he may have been entitled to Eddie Mabo.

In the event Eddie Mabo was separately represented in the hearing before the High Court and when it came time to tax the costs of the litigation no application was made for his costs.

The case was argued before the High Court over three days and a few hours into the next day from 28 to 31 May 1991.

Six judges concluded in a judgment delivered on 3 June 1992 that the common law of Australia recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the Indigenous inhabitants in accordance with their laws and customs, to their traditional lands and that the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved as native title under the law of Queensland.

Since the plaintiffs had sought declarations that each was the holder of traditional native title with respect to their individual portions of land and since Justice Moynihan had declined to make express findings about each plot of claimed land save for the negative conclusions about shrine land, reefs and all of Eddie Mabo's portions, there was some uneasiness on the part of the plaintiffs' lawyers. The judges intervened during argument drawing attention to this shortcoming. In essence, it became an invitation to the plaintiffs to consider amending their prayer for relief to seek a communal title declaration.

The plaintiffs' lawyers produced the amendments on the morning of the fourth day and included Eddie Mabo in the claims—they had undertaken earlier to Queensland to make no submissions on his behalf in light of Justice Moynihan's findings and he was separately represented. They thought, it seems, that while Eddie Mabo had failed as an individual claimant he could seek a declaration as a Murray Islander. After objections his name was withdrawn from the amendment. Counsel for Queensland objected overall that the declarations for 'the Meriam people, as a community' could not stand with Justice Moynihan's findings: 'There was apparently no concept of public or general community ownership among the people of the Murray Islands.'

But as Mr Castan QC in reply for the plaintiffs pointed out, Justice Moynihan had found that:

> It may be accepted on the evidence that Murray Islanders have a strong sense of relationship to their islands and the lands and seas of the islands which persists from the time of prior to European contact. They have no doubt that the Murray Islands are theirs.

That was adequate for the court's purposes. The plaintiffs' lawyers must have thought that a claim by individuals to portions of land was a surer step than claiming community or native title as occurred in *Milirrpum v Nabalco*.

While there was lengthy reference to the historical records, as discussed above, in fact, none of that was particularly central because the fundamental finding, not in dispute at all, was that the Murray Islanders had been in occupation of the land prior to annexation and were shown to have traditional connection to that land which continued to the present.

It was the law which required some dexterous reasoning.

Justice Brennan's reasons have come to be accepted as those best reflecting the outcome. Chief Justice Mason and Justice McHugh agreed with him. Justices Deane and Gaudron wrote a joint judgment and Justice Dawson dissented on the facts of extinguishment.

There was a body of early, hitherto binding, authority which had concluded that New South Wales and hence the rest of Australia, including the islands of the Torres Strait, was a settled colony of occupied territory but whose inhabitants had no known or knowable system of laws such that no proprietary rights needed to be considered still less recognised by the British Crown.

Justice Blackburn in *Milirrpum* had spoken of the subtle rules which governed the relationship of Australian Aborigines with their land but being essentially uncommercial or of no utility in the understood agricultural sense did fall to be considered as proprietary.

Justice Brennan said:

> As the Indigenous inhabitants of a settled colony were regarded as 'low in the scale of social organisation', they and their occupancy of colonial land were ignored in considering entitlement to land in a settled colony. Ignoring those rights and interests, the Crown's sovereignty over a territory which had been acquired under the enlarged notion of terra nullius was equated with Crown's ownership of the lands therein, because, … there was 'no other proprietor of such lands'.

His Honour continued:

> The theory that the Indigenous inhabitants of a 'settled' colony had no proprietary interest in the land thus depended on a discriminatory denigration of Indigenous inhabitants their social organisation and customs.

In the pivotal part of his Honour's judgment he continued:

> As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This court can either apply the existing authorities and proceed to enquire whether the Meriam people are higher 'in the scale of social organisation' than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities or the Court can overhaul the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not.

His Honour said that the fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which no longer had a place in the contemporary law of Australia. The justification, historically, for treating Indigenous inhabitants in this way was the need for the development of commerce and Christianity. His Honour observed that whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind could no longer be accepted.

He said, 'The expectations of the international community accord in this respect with the contemporary values of Australian people.' His Honour observed:

> A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards into the fundamental values of our common law to entrench a discriminatory law which, because of the supposed position on the scale of social organisation of the Indigenous habitants of a settled colony, denies them a right to occupy their traditional lands.

While the rejection of the concept of terra nullius would clear away an impediment to the recognition of Indigenous rights and interests in colonial land, it would be impossible for the common law to recognise such rights and interests if the basic doctrines of the common law were inconsistent with their recognition. Justice Brennan was able to find that they were not inconsistent by applying the concept of land tenure within the common law. When the Crown assumed sovereignty over land, it acquired a fundamental or radical title.

The common law recognised that the Crown, in the exercise of its sovereign power, could grant an interest in land to another to be held of the Crown, or could acquire the land for the Crown's sole use.

Thus the concept of an underlying radical title enabled the Crown to become 'Paramount Lord' of all who held a tenure granted by the Crown or to become absolute beneficial owner of unalienated land required for the Crown's purposes. His honour reasoned that if the land were truly desert and uninhabited, the Crown would take an absolute beneficial title as well as holding the ultimate radical title because there was no other proprietor. But if the land were occupied by the Indigenous inhabitants and their rights and interests were recognised by the common law, the radical title by which sovereignty had been acquired could not be taken to confer an absolute beneficial title to the occupied land. Thus, where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there was no reason to deny recognition to that title as a burden on the Crown's radical title when the Crown acquired sovereignty over that territory.[11]

Finally, his Honour turned to the argument that the subject native title to continue after the acquisition of sovereignty was required to be expressly recognised. Where native title had been recognised by the common law in occupied territories acquired by the Crown cases from the colonial era supported the conclusion that private rights continued until expressly extinguished.

Justice Brennan's ultimate conclusion was that:

> It is sufficient to state that, in my opinion, the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the Indigenous inhabitants of the territory survived the change in its sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown.[12]

The High Court's orders declared that the land on the Murray Islands was not Crown land within section 5 of the *Land Act 1962–1988* (Qld)*,* and

> The Meriam people are entitled as against the whole world to possession occupation use and enjoyment of the island of Mer except for that parcel of land leased to the trustees of the Australian Board of Missions and those parcels of land if any which have been validly appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment and rights and privileges of Meriam people under native title, and the title of the Meriam people is subject to the power of the parliament of Queensland and the power of the governor in council of Queensland to extinguish that title by valid exercise of their respective powers provided any exercise of those powers is not inconsistent with the laws of the Commonwealth.

The latter words were a clear reference to the *Racial Discrimination Act 1975*.

Although there were many anguished and angry commentators who believed that the Australian way of life would be jeopardised by the decision and those who argued that the

High Court had overstepped its permissible boundaries into the legislative arena, the sky did not fall and the long period of the litigation through every variant of political power showed that the several governments had no appetite for stepping in to resolve the issue legislatively or reach a settlement with the plaintiffs.

The following year in 1993 the Commonwealth Government introduced the *Native Title Act* that set up a regime, which has subsequently been amended and modified whereby Indigenous claimants can seek declarations of entitlement to hold native title to specific lands. Thousands of square kilometres of mainland Australia over the ensuing years have been determined to be subject to native title, some exclusive and some non-exclusive and other claims have failed.

Subsequently, the claims to Dauer and Waier Islands, which Justice Moynihan had rejected, were recognised by consent determinations granted by Chief Justice Michael Black present on those islands. The occasion was celebrated joyfully and with the participation of the Queensland Government.[13]

More recently, the claims to the seas, reefs and surrounding waters of the Murray Islands were recognised in a claim which included, broadly, the waters of the Torres Strait pertaining to all the other islands of the Strait.[14]

Just last year the High Court revisited *Mabo* in *Queensland v Cognoo.*[15] That case concerned a claim by the Bar-Barrum People of Atherton to a determination that their interests in certain land and waters of significant spiritual value had not been extinguished. By executive orders during the Second World War, the Commonwealth had acquired exclusive possession of the subject land for defence purposes. The state argued that any rights which the claimant people had, had perished as the executive acts were inconsistent with the continuance of native title.

In a joint judgment, Chief Justice French and Justice Keane observed:

> The clear and plain intention and standard for extinguishment formulated in Mabo [No 2] is an important normalising principle in forming the selection of criterion for determining whether a legislative or executive act should be taken by the common law to have extinguished native title. That standard has not been displaced by any subsequent decision of this Court …" [16]

Some measure of the enduring significance of the Mabo decision can be seen in the observation of Justice John Mansfield on the occasion of his retirement from the Federal Court in July this year. He had presided over more than 120 native title determinations. He said:

> I have observed, to the great credit of the Australian community, a very significant attitude change on the part of the wider Australian community towards Indigenous Australians. It would not be unfair to say that, amongst some sections of our community, there was considerable consternation when the Native Title Act was first introduced in 1993. It is now common place for determinations by consent to be made recognising the traditional rights and interests of Indigenous Australians in their country … pastoralists, local government, mining interests and others … they attend the consent determinations and share the joy of them. It is a wonderful advance.

And what of the man whose name is forever remembered by this decision? That he was a flawed character is not doubted. For example, his personal grandiosity claiming absurdly to be the 'Aiet of Mer' when it was shown to be the personal name of men of the Modee and Passi families and that the Meriam had no memory of a single leader was distracting for his claims. But there is no doubt that without Eddie Mabo the case would have faltered. It is very doubtful if the other plaintiffs would have had the stamina, drive or strong belief in the cause to persevere over the ten long years of the litigation with uncertain funding and great personal cost. He rightly deserves the place which the history of our country will accord him.

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1 Mabo v Queensland (No 2) [1992] HCA 23.

2 Crispin Hull, *The Canberra Times*, 3 September 1993, 13.

3 31 January 1994. Professor Peter Butt and Robert Eggleston, *Mabo: What the High Court Said* (The Federation Press, 1994). The second edition entitled *Mabo: What the High Court Said and What the Government Did* (1996) includes a guide to the *Native Title Act 1993* (Cwlth) and the proposed amendments.

4 *Mabo: Life of an Island Man* (1997) Film Australia and the Australian Broadcasting Corporation; and *Mabo: A Story of Love, Passion and Justice* (2012) Australian Broadcasting Corporation and Blackfella Films.

5 *Mabo in the Courts: Islander Tradition to Native Title A Memoir (*Chancery Bold, 2011) . Renamed and revised as *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, 2013).

6 *Mabo v Queensland* (No 2) [1986] HCA 8.

7 The facts hereafter are as found in Justice Moynihan's Determination pursuant to the reference from the High Court. Further additional historical facts were referred to by members of the High Court since the court was sitting in its original jurisdiction.

8 *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141.

9 National Archives of Australia released 31 December 2001.

10 [1979] HCA 68.

11 Para 53.

12 Para 62.

13 *Passi v Queensland* [2001] FCA 697.

14 *Akiba v Queensland* (No 2) [2010] FCA 643.

15 [2015] HCA 17.

16 Para 34.