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Mabo 30 years on: some reflections

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This month marks 30 years since the High Court's decision in Mabo v Queensland (No 2) changed the common law of Australia by rejecting the legal fiction that Australia was terra nullius at the time of European settlement. Two members of the Commission's Ngara Yura Committee provide their personal reflections on the legacy of this landmark decision.

Joanne Selfe, Project Officer for the NSW Judicial Commission's Ngara Yura Program, suggested we write this paper together. We are grateful to her for the suggestion of collaboration. It allowed us to discuss how we could contribute something original to a topic that has been, and will be, much written about. Thus we thought that we should, while collaborating, give our own personal reflections from our different perspectives and backgrounds. We hope that undertaking such a personal expression is not misunderstood as self-indulgence. As we spoke with each other in preparation, we thought there may be insights worthy of being shared. We humbly hope that to be so.

James Allsop

In early June 1992, I was 39 and in my 11th year at the Bar practising mainly in commercial law. I knew of *Milirrpum v Nabalco Pty Ltd*[1] and the careful and resonating views of an empathetic and dutiful judge of great skill and reputation (Justice Blackburn) who found the Yirrkala people to have a subtle and elaborate system of laws and a stable order of society, such that it could be said, in employing the language of late 18th century American Constitutionalism used by John Adams: a government of laws and not of men. But he considered that the Privy Council decision of *Cooper v Stuart*[2] stood in the way. I also knew of the strength of the rejection of Paul Coe's arguments in the challenge to sovereignty in *Coe v Commonwealth.*[3] I had participated in cases concerning Commonwealth land rights legislation. But I was not aware, as most lawyers (at least of my milieu) no doubt were not, of the coming upheaval of common law, presaged by hints in *Coe* and *Gerhardy v Brown.*[4] and *Mabo (No 1).*[5] Yet, I was part of the Great Australian Silence to which Andrew refers.

When I came to read *Mabo v Queensland (No 2) (Mabo (No 2)*[6] shortly after its publication, I went first to the judgment of Justices Deane and Gaudron, both of whom I knew (though only professionally). I had a "young" lawyer's admiration for their humanity and depth of understanding of, and intuitive instinct for, the law (which, I may add, has only grown over the years into an "old" lawyer's deepest possible respect and admiration). When I read their judgment, especially section (x) "The dispossession of the original Inhabitants",[7] I understood how language can be a source of understanding and feeling, and so of law itself: how it assists to promote understanding. If justice is "legally organisable morality"[8] then

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I recognised instinctively and intuitively that Australia must change to address what two truly great justices of the High Court described as the "legacy of unutterable shame" from the "conflagration of oppression and conflict which ... [had] spread across the continent to dispossess, degrade and devastate the Aboriginal peoples".[9]

I was naïve enough, however, to think that such language, reflecting the reality of history as the foundation for the righting of such an appalling legal wrong, would be met with the deep, indeed commanding, respect that it deserved. I was shocked at the reaction: at the expression, sometimes in visceral, and highly personal, terms, inside and outside the legal community, of disagreement with not only the decision, but also with the recognition of the historical reality upon which it was based. For some people it seemed that the Court had betrayed history, the common law and legal technique. Such views could not recognise the deep intellectual power, rooted in the judicial technique of a living and just common law, found in the reasons, especially of Brennan J, Deane and Gaudron JJ and Toohey J. At that point, I understood the challenge for Australia as a nation to come to terms with its past and to become whole as an historical colonial, meaning colonising, society.

It was not until I joined the Federal Court in 2001 that my professional life brought me to re-read *Mabo (No 2)*. Much had occurred: the *Native Title Act* 1993 (Cth) had been passed, and the Court had been beginning to undertake the great task of dealing with this immensely important national legal challenge.

The High Court in *Mabo (No 2)* did not deal with sovereignty and any challenge to the existing polity or its claim to sovereignty. It was not argued. *Coe v Commonwealth* had decided the issue. That decision can be understood from the position of the Court, as the highest judicial instrument of the polity itself; the Court's own existence, legitimacy and power being immanent within the polity's own existence, legitimacy and power. But the legal recognition of the reality of history that *Mabo (No 2)* embodied leaves sovereignty and the investigation of the reality of history, and the organisation of First Nations Peoples at the time of colonial claim and dispossession, by reference to international law in the 18th and 19th centuries, as a legitimate subject for consideration. Not perhaps in domestic legal tribunals, but as a legitimate foundation for social and political recognition of the rights of Peoples whose forbears were dispossessed of country after tens of thousands of years of physical and spiritual connection. The recognition of the historical and continuing reality of connection to country, law, and social order of First Nations Peoples leads in domestic law to the recognition by the common law of rights in and to land and country; but it also provides the foundation for the argument of the continental legal wrong by reference to 18th and 19th century international law wrought by the dispossessions of Peoples, as one aspect of the legitimacy of the call for political reconciliation.

Mabo (No 2), of course, was the impetus for, and the foundation of, the *Native Title Act* . The two cannot be seen as distinct. Whatever might be seen as the compromises, weaknesses and limitations in the *Native Title Act* and the jurisprudence,[10] the working through of the cases across the country has had an enormous impact upon Australia.

As the years have passed, and the visceral white reactions to *Mabo* and *Wik*[11] have subsided, the nation has become more comfortable with the process of the recognition of legitimate claims of First Nations Peoples to *their* country, to be enjoyed exclusively or non-exclusively as the case may be. That this is based on the reality of history has begun to affect the common understanding, and so the soul, of the nation. Truth-telling commissions and the continuation of historical work on the history of "settlement" and the general dissemination of this historical recognition of reality are and will be essential. It is the historical reality, unleashed upon the common law in *Mabo (No 2)* that must be understood; once the reality and truth of what colonisation meant to Peoples who had been here for tens of thousands of years sinks into the accepted consciousness of the nation, a true reconciliation is possible.

I saw this on the faces of pastoralists sitting before me at my first consent determination in far north Queensland.[12] In a tent (as the court on country), I described, in a brief oral judgment (although not fully transcribed) from the agreed historical and anthropological evidence, the history of the Western Yalanji People: their historical connection to the land, their initial peaceful coexistence with undemanding individual miners and timber cutters, their dispossession under the demanding white pastoralists for their land for the grazing of cattle, their resistance, their defeat in war, the banishment of the recalcitrant to Palm Island, and the collection of the others in missions and reserves. As I spoke, the faces of the claim group members showed no surprise. As many nodded silently, the faces of the white people present reflected a new and riveted understanding; an understanding of the justice of the recognition of what could, and should, be declared to belong, and always to have belonged, to the Yalanji People, even if the most that could be granted from declared rights was non-exclusive possession. Their faces did not exhibit the unutterable shame of which Justices Deane and Gaudron spoke; their faces recognised the justice in what they were participating in: what was 21st century society's response, through the law, to the reality of the past. In the faces of these people — the white pastoralist parties to the consent determination — one could *see* the sense and sentiment of just recognition of the Yalanji. A small part of non-Indigenous Australia could now actually understand and *feel* the present just claims of others to share the country, claims rooted in injustices of the past. They *felt* this not only from the reality of history speaking to them, but also from the reality of history embodied

in the Yalanji People sitting and standing beside them. This has, no doubt, occurred in many places across the country on such occasions.

That this has occurred through the *law*, the common law initially, is a lasting legacy of *Mabo (No 2)*, and of the remarkable group of judges responsible for it.

I have spent 16 of 21 years as a judge on the Federal Court. My experience in Native Title work (while not as great as many of my colleagues) has been revelatory of foundational jurisprudential concepts and truths. The first such matter is the essential trust and confidence of the litigants in the Court. In that sense the Federal Court in its daily work in Native Title, with its knowledgeable judges and deeply skilled cohort of registrars, has built and maintained the trust and confidence of First Nations People as their court, as much as it is the court of non-indigenous Australians. It has imbued a degree of confidence in the integrity of the legal process that can often be seen to be lacking in other interactions of First Nations Peoples with the "justice system". Reconciliation is not a legal concept, but it does involve a just confidence in the judicial determination of First Nations Peoples' claims.

The Federal Court has also been affected by the work in Native Title. Just as the white pastoralist respondents in the Western Yalanji determination could be seen to be affected by the reality (and the empathetic and emotional acceptance of the reality) of the history of the Yalanji People, so was I. It made the reality of the past *live* in the present: to be seen, felt and truly understood. These are not ordinary pieces of litigation. They are the embodiment of the past in the present for future generations. They deal with Nations, Peoples, their historical dispossession, struggle and survival. All this is *felt*, in inexpressible terms, in a physical understanding based upon experience, as well as upon knowledge of the abstract taken from the prosaic language of the statute.[13] It informs the understanding of the legal task, and of the spiritual and physical connection to country underpinning that task.

Mabo (No 2), and its recognition of historical reality, has also led to a process, through legal claims and cases, of the building of the record of the history of Australia. First Nations Peoples with an oral tradition may not need this. But white Australia, with its need for text, does. Each Native Title claim is a deep investigation of a claim group's history and connection, physical and spiritual, to country. The history of society upon this land and of Australia is to be found in the records of evidence. It is a body of history that may help to anchor and buttress the deep respect for First Nations Peoples and their law, history, and culture that Australia as a nation, to be whole, must have and exhibit. It may provide the foundation for other legal doctrine, not limited to property rights in land, reflecting, and giving voice to, the inseparable immanence of First Nations Peoples within the nation and the polity, drawn from historical reality and inexpressible connection.

Re-reading *Mabo (No 2)* for the purposes of this paper, I was struck, through the power of expression, even more forcefully than I had been in 1992, by the fusion of law, morality and the reality of history. Just as dispossession was recognised, so was its foundation and that of the law that justified it: racial discrimination. So, as Justice Brennan said, it was imperative that the common law not be frozen in an age of racial discrimination. The fiction of *terra nullius*, based on that discrimination, that the social order and rights of the original inhabitants were non-existent, has no place in our contemporary society and in our contemporary law.[14]

Text has its limits, but it also has its power. The language of the judges in *Mabo (No 2)* is the foundation for the recognition of the reality of history: of the truth of colonisation, and of the richness of the inheritance of First Nations Peoples discoverable to others by the examination of the reality of their connection to country and their legal, social and spiritual order, as the foundation of their legal rights. That legal foundation based on the reality of history can inform society as a whole, not just legally, but more broadly, in a nation coming to terms with its history and with the richness of the history and contemporary life and culture of First Nations Peoples.

Mabo (No 2) reveals the intertwining of law, morality and history. It demonstrates, in living form, the relationship between constancy and change, in the law and in life. It illustrates, in judicial technique, the movement of rules based on accepted and acceptable values capable of shaping a just society. It demonstrates that language, through the evocation it brings, is a source of law: because law is not just organised abstraction, it is also *felt* necessity and organised, accepted and acceptable morality. It sought to free the common law from racial discrimination. It brought the reality of history to the law, to govern the present and the future. In doing so, it helped cure a hobbled common law.

Andrew Smith

I confess, when I was asked to contribute to a joint article with Chief Justice Allsop, I was somewhat overawed by the thought of writing in the shadow of his characteristically erudite prose. When I read his contribution I was immediately struck and inspired by the viscosity and depth of the authenticity of his Honour's words.

When the High Court of Australia delivered their judgment and reasons for decision in *Mabo (No 2)*, I was 12 years old and attending a public high school in Western Sydney. While many within my mob (family) had heeded the words of Martin Luther King Jnr to always stand tall, as "a man can't ride your back unless it's bent", some members of my family living in Central West NSW in the 1940s and beyond, elected to adopt the "Maori myth" — that the family appearance was a product of a Maori princess who married into the family long ago — or to avoid identifying as First Nations People at all. I mean no criticism of the choices made by those of my family who came before me. They did so for reasons of pragmatism

and to avoid the impacts of the "Protection era" of Indigenous relations in Australia, and the oppression that era entailed. I cannot say with any conviction that, if I found myself in the same position as my ancestors, I would not have done the same. That is especially so when electing to identify as First Nations, rather than subscribe to the "Maori myth", would have resulted in members of my family being returned to missions with all the constraints upon ordinary freedoms that would entail — the right to movement, the right to work, to obtain health care, whom you married, etc — and the potential taking of children from family.

Nevertheless, those decisions invariably impacted and delayed my own "conscious" spiritual awakening. I emphasise "conscious" because, even though my culture and ancestry were not something spoken of — rather it was shrouded in mystery — my "identity" was still informed by various existential factors, both positive and negative. Those included spending time with extended family who did identify, positive instances of inclusion when other First Nations People identified me as being one of them, those sympathetic to First Nations People identifying me, and the negative instances including both overt and covert racism directed at me and my family and the inevitable impacts of intergenerational trauma, including those manifested as a consequence of the shame derivative of an identity crisis. It was Kafka who said, identity "is a cage in search of a bird".[15] Nevertheless, the absence of a concrete sense of self, in part informed by a lack of sense of belonging, has the potential to have devastating effects.

It is against that background, that I come to address my first experiences of reading the decision of *Mabo (No 2)* in Property Law while undertaking my law degree and to humbly make three observations about what I consider to be some of the ongoing impacts of *Mabo* on First Nations People and Australia at large.

Having been raised and educated during the era of the "Great Australian Silence",[16] in which the narrative of Australian history had little or no room for the involvement of First Nations People, I had little to no knowledge of the history of colonialism in Australia. I was not aware of, among others, the gudyarra (Wiradjuri for war) that was the Wiradjuri resistance of the colonists moving west from the Blue Mountains between 1822 and 1824. Reading the judgment of *Mabo (No 2)* for the first time opened my eyes to many details, especially of the means by which First Nations People were dispossessed, that I had not previously known. It also stirred feelings within me, which I could not easily reconcile. Reading the decision of *Mabo (No 2)* was but one of many accelerants which fuelled the flames of my spiritual awakening. Which brings me to my first observation. While the decision of *Mabo (No 2)* stimulated my own spiritual awakening, it was also the impetus for a national awakening from a studied indifference within the Australian community to First Nations People and the "settlement" of Australia.

As was said by the then Prime Minister Paul Keating, in his Redfern Speech: "We need these practical building blocks of change. The *Mabo* judgment should be seen as one of these. By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, *Mabo* establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past."[17] It not only resulted in driving the political will to enact the *Native Title Act*, but with competing entitlements to interests in land in issue, it was the spark for deeper thought and consideration of historical records with content long known by First Nations People but long ignored by most, if not all, of Australia. That invigorated interest pierced the Great Australian Silence to an unprecedented depth and at an unprecedented speed as the "building of the record of the history of Australia" gained momentum through the prism of Native Title litigation that then permeated into the wider discourse of Australian society. For the avoidance of doubt, the reconciliation of the record of history with reality is a work in progress, in which much more needs to be done to bring about symmetry between the two. Nevertheless, without *Mabo (No 2)*, I humbly apprehend that the State of Australia and its relationship with First Nations People would not be as advanced as it is now.

I interpolate to observe that I was moved by the Chief Justice's description of the court on country at which he delivered an ex tempore judgment in respect of the Native Title of the Yalanji People, with First Nations People nodding silently showing no surprise juxtaposed with the white people present reflecting "a new and riveted understanding". His Honour's observation of asymmetry immediately resonated with me. Upon reflection, I realised that the resonance was a product of familiarity. I have been in many a room hearing others address — or for that matter myself addressing — the previously unspoken past, subconsciously nodding silently while others manifested an aghast affect. It is only through closing the gap between the reality of history and the national consciousness of that reality that meaningful, prolonged and sustained change to the plight of First Nations People can and will occur. Only then will we as a nation attain a state of yindyamarra winanghanha which translated from Wiradjuri to English means to live with respect in a world worth living in.

The second observation I would like to make is in respect of the inextricable impacts of the overlay of one normative system for administration of interests in land with another system. In reaching the compromises that were inevitable when enacting the *Native Title Act*, the system of governance of Native Title adopted was that of western heritage. That system of governance, largely foreign and in some respects inconsistent with First Nations systems of governance deeply rooted in many millennia of traditions, customs and lore, has resulted in various unintended consequences and, at times, detriment to First Nations People. The nature and detail of those challenges is not a matter for discussion in this article, but is a matter about which further

focus, including by the progression of treaty making, are necessary to resolve to ensure the purpose of *Mabo (No 2)* and the *Native Title Act* are given greatest effect.

Which brings me to my third and final observation. While I agree that "Mabo is an historic decision — [which can be and is] an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians",[18] it is a stepping stone on a path which ought properly include the desires expressed in the Uluru Statement from the Heart, including truth telling and sovereignty, albeit that is properly a matter for social and political action. Irrespective, *Mabo (No 2)* was an apposite example of the common law, within the confines of judicial authority, being the protagonist for substantial change and advancement of justice for all Australians. For that, we as a profession ought to be proud of *Mabo (No 2)* and its consequences, while remaining agile, ready, willing and able to participate in further reform both through jurisprudence and as citizens.

Endnotes

* Chief Justice, Federal Court of Australia.

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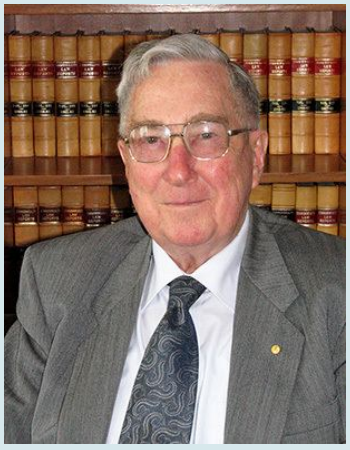
1 (1971) 17 FLR 141.
2 (1889) 14 App Cas 286.
3 [1979] HCA 68.
4 (1985) 159 CLR 70.
5 *Mabo v Queensland* (1988) 166 CLR 186.
6 (1992) 175 CLR 1.
7 ibid at p 104.
8 BH Levy, *Cardozo and frontiers of legal thinking*, OUP, 1938, p 75.
9 *Mabo v Queensland (No 2)* , above n 6, at 104 (Deane and Gaudron JJ).
10 L Strelein, *Compromised jurisprudence: Native Title cases since Mabo*, Aboriginal Studies Press, 2006. See for example, the perhaps narrow view of "traditional" in *Yorta Yorta* (2002) 214 CLR 222.
11 *Wik Peoples v Queensland* (1996) 187 CLR 1.
12 *Riley v State of Queensland* [2006] FCA 72.
13 *Native Title Act* 1993 (Cth).
14 *Mabo v Queensland (No 2)*, above n 6, at 41–42.
15 F Kafka, "The Zürau Aphorisms", 1931.
16 Professor WEH Stanner, "After the Dreaming", Boyer Lecture, Sydney, 1968.
17 P Keating, "Redfern Speech (Year for the World's Indigenous People)" speech delivered in Redfern Park by Prime Minister Paul Keating, Sydney, 10 December 1992.
18 ibid.

Vale the Honourable Sir Gerard Brennan AC KBE QC



One of the giants of the Australian judiciary, the Honourable Sir Gerard Brennan AC KBE QC, has died. As noted in the lead article of this Bulletin, Sir Gerard delivered the leading judgment in the landmark *Mabo v Queensland (No 2)* decision[1] 30 years ago this month.

Sir Gerard served as the inaugural President of the Administrative Appeals Tribunal 1976–1979. He then served as a judge of the Federal Court until his appointment as a justice of the High Court in 1981, following the retirement of Sir Garfield Barwick. He succeeded Sir Anthony Mason AC KBE CBE QC as Chief Justice of the High Court in 1995 until his retirement in 1998.

While Sir Gerard had a strong belief in a limited judicial role,[2] in *Mabo*[3] he rejected the common law doctrine of terra nullius as:

> "an unjust and discriminatory doctrine [that] can no longer be accepted … 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 and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."

As has been observed, Sir Gerard's "overarching concern for the dignity of the individual and for equality before the law lay at the heart of [Mabo his] most significant … judgment and also the most controversial".[4]

1 (1992) 175 CLR 1.
2 G Brennan, "Limits on the use of judges" (1978) 9 *FL Rev* 1.
3 Above n 1 at 42.
4 B Baker and S Gageler, "Brennan, (Francis) Gerard" in Blackshield, Coper & Williams (eds), *The Oxford Companion to the High Court of Australia*, 2001.