The Mabo Case

From Terra Nullius to Native title

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About the author and text

This resource is relevant to VCE Legal Study Design 2024,

Unit 4 Area of Study 1.

Dr Bryan Keon-Cohen AM KC is a retired Melbourne barrister who practised for decades at the Victorian Bar, specialising in constitutional law, Indigenous rights, and civil liberties. He was counsel for the Tasmanian Wilderness Society in a pivotal constitutional and environmental case, and later, alongside Ron Castan QC, represented Eddie Mabo, Rev. Dave Passi, Celuia Mapo Salee and Sam Passi in the historic Mabo case. A widely published academic and lecturer, he was appointed a Member of the Order of Australia in 2012 for his service to the law and advancement of Indigenous rights.

This document is Dr Bryan Keon-Cohen's own account and perspective during his time as junior barrister in the case. Dr Bryan Keon-Cohen has written and referenced this resource.

An overview

Introduction

The Mabo case was initiated in the High Court in May 1982 and continued – on and off – for ten years. Five plaintiffs led by Eddie Mabo claimed to enjoy property rights recognised by Australian common law in specified areas on Murray Island in the eastern Torres Strait, two adjacent islands – Dawar and Waier - and several areas offshore[1].

The plaintiffs challenged the long-accepted legal principles concerning the British colonisation of Australia as applied in 1788 (the eastern seaboard), 1829 (WA), 1836 (SA then including the NT) and lastly, 1879 (the Torres Strait, including the Murray Islands.) These principles stated that Australia was 'terra nullius' – land belonging to nobody. The 'enlarged' version of this doctrine declared that Australia's Indigenous people were so 'uncivilised' that they lacked any form of recognisable government or laws. Thus, they enjoyed no property rights to their traditional lands and the new settlers could lawfully dispose communities, often with violence. In the High Court's final decision, Dean and Gaudron JJ, referred to:

'... the conflagration of oppression and conflict which ... over the ... century [from 1840] spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame.'[2]

1 For a more detailed, and legalistic, account of the litigation, see B A Keon-Cohen 'The Mabo Litigation: A Personal and Procedural Account' (2000) 24 (3) *Melbourne University Law Review*, 893; B. A. Keon-Cohen, *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, 2013).

2 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, at 104 ('*Mabo (No 2*').

This unjust and inhumane regime was applied to the Australian colony despite traditional land rights being recognised by the Supreme Courts of other countries also colonised by the British, with the introduction of British common law, namely the USA (1823)[3] and New Zealand (1847)[4] following the Treaty of Waitangi (1840). The recognition in Australian common law of Indigenous rights to land based, not on a crown grant but on custom and tradition still existing, despite the impact of colonis ation, had, however, been rejected by Australian courts, notably by the Northern Territory Supreme Court in the *Gove Case*[5] in 1971.

Mabo was the first time the High Court considered this question.

3 *Johnson v McIntosh* (1823) 8 Wheaton 543

4 *R v Symmonds* (1947) NZPCC 387.

5 *Milirrpum v Nabalco Pty. Ltd.* (1971) 17 FLR 141.

Motivations

What drove the plaintiffs to initiate their claim?

A national 'land rights' campaign during the 1960s – 1980s was one important factor. This was triggered by the walk-off in 1966 by Gurindji stockmen, domestic workers and their families to protest the poor working conditions and low wages at the Wave Hill station in the Northern Territory – a dispute that lasted seven years.

The 1963 bark petitions to federal parliament from the Yolgnu people of Yirrkala in Arnhem Land[6] and the Aboriginal tent embassy of January 1972 (still present) were significant elements in the campaign. Another cause was undoubtedly the repressive and racist Queensland laws[7] reaching back to Federation in 1901, administered during 1968-1987 by the Bjelke-Petersen National Party government. These statutes and community By-laws controlled the daily lives of Indigenous communities.

For Eddie Mabo, there were additional personal factors contributing to his rejection of Queensland's controlling regime. This includied his eviction from the island by the local Island Court for breach of the local By-laws; and his biological father, Robert Sambo,[8] being a leader of the Maritime Strikes of 1936 in the Strait, when beche-de-mer and pearl-shell fishermen objected to poor working conditions and payment regimes.

6 See Clare Wright, *Naku Dharuk: The Bark Petitions* (Text Publishing, 2024).

7 Eg, *Torres Strait Islanders Act 1981* (Qld). See G. Nettheim, *Victims of the Law: Black Queenslanders Today* (1981).

8 Mabo was adopted, islander-way shortly after his birth to his mother's brother Benny Mabo from whom he alleged to inherit, under custom and tradition, his claimed lands and seas. See Moynihan J, *Determination of Facts* (November 1990),

Mabo Hearing before Qld Sup Crt. Moynihan J, in Murray Island Council hall, May 1989:

Jack Wailu in witness chair; counsel and solicitors for Queensland and Plaintiffs; Judge's associate; transcription service.

See tables with cloths and flowers set up by the community for the hearing.

Triggers and context

Immediate triggers

By the mid-1970s, some legislative reforms had been introduced, notably in South Australia by the Dunstan labor government in 1966[9] and the Whitman government's *Aboriginal Land Rights (Northern Territory) Bill 1975*.

This fell with the Whitlam government's dismissal in November 1975, but was enacted with amendments by the Fraser liberal government in 1976.[10] However, no government, state or federal, proposed any further reforms, leading Indigenous leaders to search for alternative solutions.

Another significant 'trigger' was the Bjelke-Petersen government's proposal in 1982 to revoke the Islander reserves in the Strait and introduce DOGITS – ie, Deeds of Grant in Trust – to replace them, thus removing some protections and increasing the prospects of Ministerial control. [11] The *Mabo* plaintiffs, with many Islanders, opposed this scheme and sought injunctions in *Mabo* against a DOGIT being imposed on the Murray Island reserve.[12]

In all this, Eddie Mabo was undoubtedly the prime motivator and leader of the plaintiffs. He was notable for his intelligence, excellent English, deep knowledge of Meriam custom and tradition, and independence of mind, leading to outspoken criticism of Queensland's policies and laws and their administration through its Department of Aboriginal and Islander Affairs.[13] His independent and critical stance arose in large measure from when 18 years old. At his age, he was deported from Murray for a year by the Island Court for breach of the very paternalistic By-laws.

9 See *Aboriginal Land Trusts Act 1966* (S.A.).

10 See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwth).

11 See *Land Act 1962-1975* (Qld) ss. 334, 350.

12 By April 1991, DOGITS had been granted in respect of all Islander reserves in the Strait, except Murray Island.

13 Aka 'Killoran's Law' after the Department's long-serving Director, Paddy Killoran, who gave evidence for Queensland during the trial of facts.

He worked on fishing boats, with Queensland railways, and further jobs. He married Bonita Nehow of South Sea Islander heritage in 1959. They lived in Townsville, purchased a house, and raised several children, three adopted the Islander-way. Thus, he escaped the paternalistic control of the Queensland bureaucracy, became a community activist, and an outspoken critic of the Queensland Aboriginal and Islander regime. However, Mabo's absence from Mer and independent stance alienated him from some senior Meriam leaders who accepted Queensland's regime, some of whom gave evidence against the plaintiffs.

JCU Land Rights Conference

By 1981 with national land-rights campaigns continuing and no government willing to pursue legislative reform, the James Cook University Students Union and the Townsville Chapter of the Aboriginal Treaty Committee (co-chaired by Eddie Mabo and Professor Noel Loos), organised a land-rights conference at JCU in Townsville. Eddie Mabo and another plaintiff, Revd. Dave Passi, were amongst key speakers calling for action, along with members of the subsequent legal team, Greg McIntyre (solicitor, Cairns) and Barbara Hocking (junior barrister, Melbourne).

A private meeting was held, involving various senior people.[14] They emerged to announce that a High Court test-case would be pursued. Eddie Mabo and Dave Passi retained the lawyers present – Greg McIntrye and Barbara Hocking – to pursue their case. That's where the ten-year ordeal began.

By October 1981 the legal team was completed with the addition of the very senior and highly regarded human rights advocate, Ron Castan QC, plus me – then a very junior barrister - both practicing at the Victorian Bar.[15] Many others assisted the plaintiffs and their legal team including anthropologists,[16] law students,[17] and various family members.

Image of Dawar and Waier Islands, located close to Murray Island - Attribution: Torres Strait Island Regional Council.

14 Including Eddie Mabo, Dave Passi, Flow Kennedy, Henry Reynolds, Marcia Langton, Garth Nettheim, Nonie Sharp, Judith Wright, Noel Loos, Nugget Coombs.

15 I signed the Bar roll in September 1981, following three years working on the Australian Law Reform Commission's reference concerning the recognition of Aboriginal Customary Law within the Australian legal system. Thus, I knew a little about the relevant legal issues. See also Fnt 36.

16 Eg., Professor Jeremy Beckett (see below), and Dr. Nonie Sharp. See her *No Ordinary Judgment* (1996).

17 From Prof. Garth Nettheim's indigenous law class at the UNSW

Plaintiffs, Defendents and Claims

Who was involved?

The plaintiffs

Five plaintiffs were selected: Eddie Mabo, his deceased mother's sister Celuia Mapo Salee, former Council Chairman Sam Passi, his brother and ordained Anglican Minister, Revd. Dave Passi, and a retired school teacher James Rice. During the decade, three of the five plaintiffs died – Celuia Mapo Salee (May 1985), Sam Passi (October 1990) and Eddie Mabo (January 1992) – leaving two alive when judgement was delivered. When Ms. Salee died, Mabo assumed her many claims, meaning he claimed 35 areas in total – in the outcome, a disastrous move for him.

The claimed areas

By the end of the trial in 1990 after numerous amendments, cancellations, adjustments and consolidations, a total of about 45 specified areas were claimed – 35 by Mabo, five by each of Dave Passi and James Rice. These claims were to areas of garden or village land on Mer and adjacent Waier Island plus areas of offshore fishtraps, surrounding reefs and seas.

L to rt: James Rice, (Plaintiff) Bryan Keon-Cohen, Eddie Mabo, Greg McIntyre (solicitor for plaintiffs) Henry Kabere (witness for plaintiffs). Murray Island in the background, travelling to nearby Dawar Island. May 1989 during court visit.

The defendents

Two defendants – Queensland and the Commonwealth – were sued. Queensland, the controlling government, was the obvious and main defendant. The Bjelke-Petersen government to 1987 and subsequent short-lived National party governments (1987 – 89) fought the claim tooth and nail for seven years. So too did the following Labor government under Premier Wayne Goss (elected in December 1989) until the final decision of June 1992.

The Commonwealth was sued because it was the responsible government for the claimed seas located beyond Queensland's jurisdiction, which extends only three nautical miles offshore from the high-water mark. However, following a lack of compelling evidence to support these offshore claims, they were abandoned and, by agreement, the Commonwealth was dismissed from the proceedings in July 1989. Despite being advised of a constitutional issue[18] and entitled to appear, the Commonwealth (along with all other states and territories) did not seek to intervene during final argument before the High Court in May 1991.

One might ask: why? As shown by the often-vitriolic criticism from various conservative politicians following the High Court's decision, numerous governments expressed strong opposition and concern.

The legal claims

The statement of claim – amended several times during the decade including during the final High Court hearing – set out the legal claims. The critical allegations were that rights to land and sea areas based on Meriam custom and tradition had existed since time immemorial.

18 *See Judiciary Act 1903* (Cwth) s 78 B

It had survived the arrival of the London Missionary Society in 1971 and colonisation in 1879 with the introductions of British common law, and had not been extinguished by legislation or conduct of the Queensland government since 1879, (e.g. by the creation and administration of 'Aboriginal reserves' over the three islands) or the Commonwealth government since 1901. These traditional rights, we pleaded, should be declared by the court as new,enforceable property rights vested in the plaintiffs, their families and (after last-minute amendments - see below) the whole Meriam community. The claim also sought damages for numerous breaches of these rights since 1879, and injunctions to restrain Queensland from introducing the threatened DOGITs to the Murray Islands.[19]

It should be noted that no issue of 'sovereignty' of any sort spiritual (as asserted in the Uluru Statement from the Heart)[20] or otherwise was claimed.[21] Our instructions did not include this aspect and we lawyers considered that pursuing legal recognition of native title posed enough challenges, especially given our limited resources.

Following a decision of the Canadian Supreme Court in 1984,[22] we amended the claim to add a further cause of action: that Australian governments owed the plaintiffs as traditional owners a fiduciary duty when dealing with their land. This was rejected, 4/3, by the Court.[23]

19 In the final upshot, no damages or injunctions were sought, due to lack of evidence.

20 The Statement reads, in part: '(Indigenous) sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown. '

21 A tactic criticised, along with the decision, by some indigenous leaders following the High Court decision. Activist Garry Foley stated he had 'no faith' om the decision, that 'it is a heap of shit. ... (it) needs to be fought as vigorously as ... terra nullius.' Breakfast Show, Radio 3CR, 26/1/1993.

22 *Guerin v R* [1984] 2 SCR 335 (S. Crt, Canada).

23 Toohey, Dean and Gaudron JJ supported this claim. Such a fiduciary duty is still not recognised in Australian law. See B A Keon-Cohen, 'Mabo's Unfinished Business: The Crown's Fiduciary Duty to Traditional Owners' (2024) 18 *Court of Conscience 71* (UNSW Law Society).

Trial of facts: Stage one

The trial begins

After four years of argy-bargy; a failed strike-out application and thereafter the delivery of Queensland's defence which denied everything; much research into relevant Australian and International law and Meriam custom and tradition; Queensland's refusal to agree facts as a basis to formulate ultimate legal questions for the High Court (and thus avoid a lengthy and expensive trial); numerous negotiations, argument and Directions Hearings before a High Court Judge; locating Meriam witnesses and recording their evidence; and numerous submissions for legal aid from the relevant Commonwealth agency, the parties and the High Court finally agreed to a two-stage process.

It would be a trial of facts-only before a Judge of the Queensland Supreme Court; and thereafter, assuming that the trial Judge determined a sound basis of fact, the critical legal questions to be argued before the High Court.

The first part of the Trial of Facts commenced in Brisbane in the Queensland Supreme Court before Justice Martin Moynihan on 13 October 1986. It adjourned, part-heard, on 17 November and did not resume until 2 May 1989. This first stage of the trial (set down for a ridiculously inadequate four weeks) met many obstacles, including illness suffered by the Judge and me; and hundreds of objections by Queensland's counsel that Mabo's evidence was inadmissible as hearsay or on other grounds.[24]

By the end of the allocated time, only one Meriam witness was completed, and Mabo was half-way through his evidence-in-chief. The trial was adjourned, part-heard, until February 1987 – but that re-commencement was delayed until May 1989 due to the need to deal with Queensland's 'King hit' to destroy Mabo – the *Declaratory Act* of 1985.

24 Queensland's counsel made 274 objections to the admissibility of Mabo's evidence, leading to much tedious argument and delay.

Image of Greg McIntyre, Eddie Mabo and Bryan Keon-Cohen - Sourced from Bryan Keon Cohen

Section 109 saves the case

The Queensland Declartory Act

In April 1985 the Queensland government decided that this Mabo nonsense must stop, and rushed legislation through the parliament to kill-off the case.

The Act – *Queensland Coast Islands Declaratory Act 1985* – stated in one page that any 'rights interests or claims of any kind whatsoever' (s. 3(a)) that may have existed at the time of colonisation (1879) were retrospectively extinguished without compensation. We *Mabo* lawyers – and our determined clients – decided to defer any immediate response and proceed with the trial of facts.

Following the trial's adjournment in November 1986, we re-considered our response to this brutal legislation. If this was good law then *Mabo* was dead and the exhausting litigation was a waste of everybody's time (and money). So, after much anxious consideration and discussion with Eddie Mabo (the only plaintiff readily available by phone at his Townsville home), we decided to defer the re-commencement of the trial and challenge the constitutional validity of the *Declaratory Act* in the High Court.

After much paper-warfare and unsuccessful negotiations with Queensland's legal team, the validity of the Queensland law was argued before the full High Court of seven judges in March 1988. On 8 December 1988, the court ruled by the narrowest of margins – 4/3 – that the Queensland act was inconsistent with the Commonwealth's *Racial Discrimination Act 1975* and thus, under s 109 of the Constitution, was declared to be invalid.[25] The *Mabo* litigation could thus continue.

25 *Mabo v Queensland and the Commonwealth (No 1)* (1988) 166 CLR 186.

Trial of facts: Stage two

Back to the trial

On 2 May 1989 the hearing of the plaintiffs' evidence resumed before Justice Moynihan – with me leading Mabo through the remainder of his evidence-in-chief.

He was then cross-examined by Queensland's junior counsel, Margaret White, for seven days. Nobody survives such a process unscathed. After him, I led the plaintiffs Rev. Dave Passi (dressed in his clerical robes) and James Rice through their evidence, plus further Meriam witnesses – all of course cross-examined, and all flown to Brisbane, then back to Mer.

Between 22-25 May 1989, the Judge and his court staff, plus the lawyers, visited Murray Island to 'view' the areas claimed and take further evidence from eleven Meriam witnesses too old or frail to travel to Brisbane. Eight supported the plaintiffs, three Queensland – an indication of the community's attitudes to this claim. A further five witnesses were called at the Thursday Island Magistrate's Court: four by the plaintiffs and one by Queensland. In his *Determination,*[26] Justice Moynihan recorded that this visit greatly assisted his understanding of the evidence and of Meriam culture and traditions.

Back in Brisbane during the final weeks of the trial, another critical hurdle facing the plaintiffs – 'parked' for nearly three years – re-emerged. A week prior the trial's commencement in October 1986, without any discussion with their lawyers, the plaintiffs Dave Passi and Sam Passi instructed Cairns solicitors and withdrew from the case. This followed outrageous pressure (probably amounting to contempt of court) from their brother, George Passi, a long-serving Queensland government employee. He urged all the plaintiffs to withdraw, or face not just personal court costs, but loss of government funding and other services for the community. To their credit, Mabo, and Rice rejected this attack, but the two Passi brothers succumbed and withdrew.

26 See *Mabo v Queensland: Determination of Facts,* (Sup. Crt of Queensland, Moynihan J, 16/11/1990).

The High Court of Australia, located in Canberra - Shutterstock.

However, by 1989, Dave Passi wished to be re-admitted and after (the inevitable) opposition from Queensland, the trial Judge ordered on 5 June 1989 that he again become a plaintiff. Sam Passi – a leading elder and former Murray Island Council Chairman – did not rejoin, suffered a mild stroke, and gave limited evidence on Mer supporting the plaintiffs while also rejecting some of Mabo's claims. Dave Passi, however, gave valuable and extensive evidence in Brisbane. His re-admission proved critical, since his claims were considered by the Judge in his *Determination* the strongest example of continuing traditional land rights on Mer. Without Rev. Dave Passi, the entire case could have failed.

Queensland called substantial evidence in Brisbane including six Meriam people, and the Aboriginal and Islander Affairs Department's long-standing Director Paddy Killoran. The trial concluded with counsel's final submissions on 6 September 1989, when the Judge adjourned to consider a mass of material and write his decision.

The determination of facts

Was it all for nothing?

On 16 November 1990, the trial judge delivered his *Determination* – three thick volumes, limited (in contrast to a normal trial) to facts only.

His Honour rejected all of Mabo's claims, inherited under custom and tradition from his adoptive father. However, he recorded reasonably firm findings concerning continuing traditional rights to two or three land areas claimed by Dave Passi and James Rice. Thus, of the 45 areas claimed (35 by Mabo), we lawyers, after careful review, concluded that we had achieved sufficient factual rulings concerning Passi and Rice to provide a basis for legal argument about the ultimate legal issues before the High Court. Queensland disagreed, submitting to that court on the first morning that Moynihan's findings were unclear and inadequate and the case should be rejected, forthwith, without further argument. Fortunately, that submission failed.

We advised the surviving plaintiffs – a devastated Eddie Mabo, James Rice and Dave Passi – that (a) no appeal of Moynihan J's rejection of Mabo's claims should be launched; and (b) we should proceed to the High Court for final argument relying upon the 'success' of Passi and Rice. To their credit – especially Eddie Mabo – this advice was accepted.

Final arguement: Full High Court

The last chance

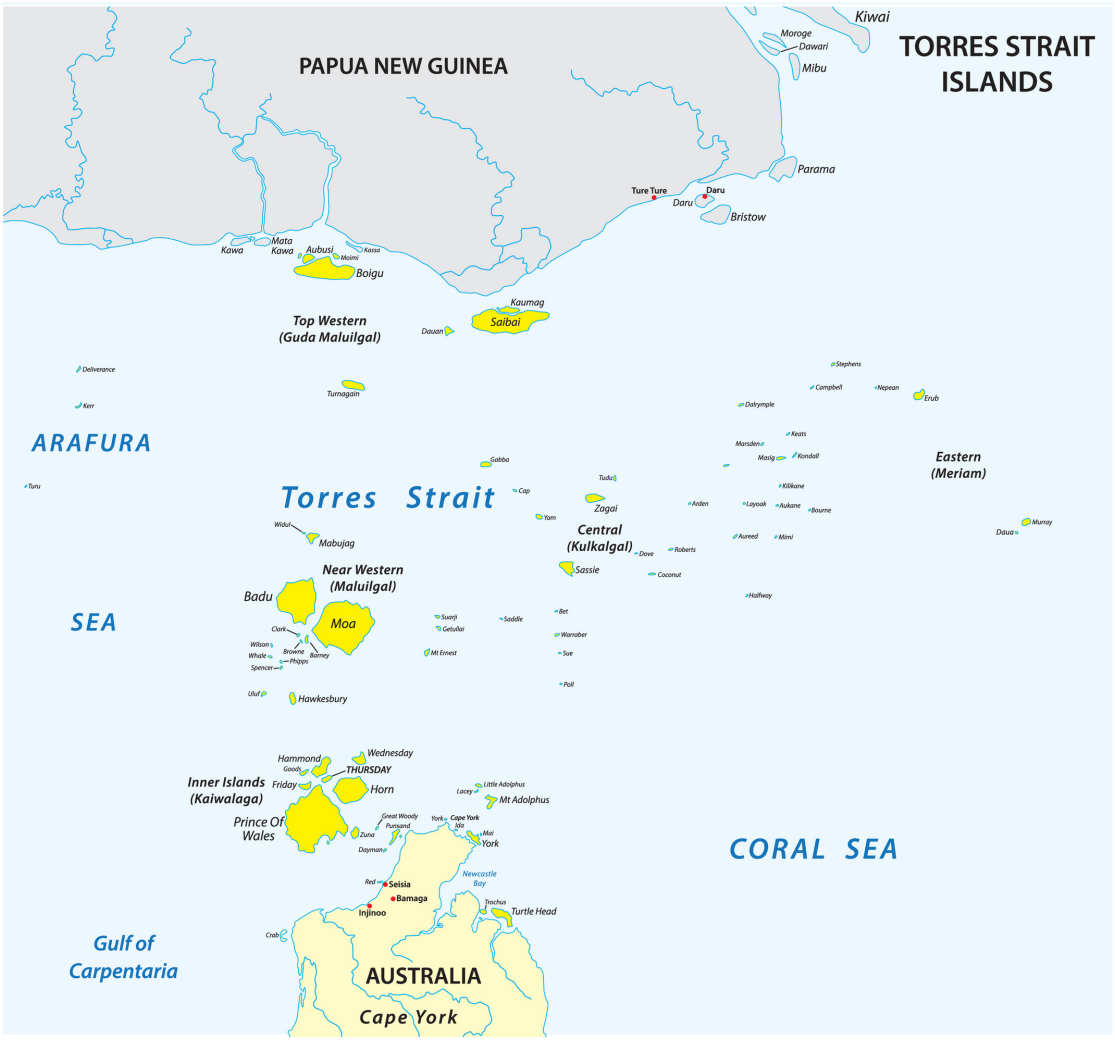
Thus, during 28-31 May 1991 – nine years to the day since the issue of the proceedings on 30 May 1982 – argument occurred on the critical legal issues in the High Court in Canberra before Mason CJ plus his six judicial colleagues.

This hearing coincided with the Court's so-called 'activist' period when the judges were not so influenced by prior legal decisions of the High Court or British courts; were more open to relevant decisions of other former British colonies (eg, USA, New Zealand and Canada); and were more concerned, as the final court of appeal to develop Australian law to deliver just outcomes in a changing society.

One example of this reformist judicial philosophy occurred on the third (and supposedly last) day of the hearing. The Chief Justice, Sir Anthony Mason, invited Ron Castan QC and I to consider seeking orders not just for the 'individual' plaintiffs – Passi and Rice – concerning their particular areas, but also for the entire Meriam community represented by those two plaintiffs in relation to, not just their two or three specified blocks, but the whole of the island. Castan agreed, and the court thereupon adjourned for an additional previously unscheduled hearing of one hour the next morning.

That night in our hotel room we drafted frantically and the next morning handed up to the Judges – against Queensland's opposition – final amendments to the claim's 'Prayer for Relief.' We sought for the first time declarations that the 'Meriam community' enjoyed traditional rights at common law to the whole of Murray Island. The court adjourned to consider its decision.

Needless to say, we were encouraged by this unexpected, literally last-minutes, development.



Map of Torres Strait Islands (See Meriam Islands/Murray Island on Far Right) - Shutterstock

Death before victory

A commendation

A commendation to a man who spent his final years championing for others future.

During 1991, Mabo's health deteriorated. He was admitted to Royal Brisbane Hospital suffering cancer in December 1991 and died on 21 January 1992 in the arms of his ever-loving wife, Bonita. His funeral, attended by several hundred people, occurred in Townsville on 1st February 1992. Amongst many speeches, I said:

'Above all I remember his deep commitment to correcting historical wrongs, some very personal, and to achieving recognition of traditional land rights of his family, and his people. He was in the best sense a fighter for equal rights, a rebel, a free-thinker, a restless spirit, a reformer who saw far into the future, and far into the past.'[27]

I adhere to all the above. Without him, there would be no case. Equally, if only for him, the case was lost given the rejection at the trial of all of his many claims.

27 See for an account of his life, Noel Loos & Koiki Mabo, *Edward Koiki Mabo: His Life and Struggle for Land Rights* (1996).

The final judgement and aftermath

A historic event

The High Court judges delivered their written decisions on 3 June 1992.

My leader, Ron Castan QC, was overseas. In summary, by a 6/1 majority,[28] the court declared that the Meriam people enjoyed native title to the whole of Murray Island – not including the two adjacent islands, nor any seas,[29] and not referring to any particular areas. The court rejected the terra nullius doctrine as a fiction, unacceptable in current times. Deane and Gaudron JJ, in a joint judgement, stated:

'The acts and events by which ... dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, these past injustices. In these circumstances, the Court is under a duty to re-examine the [legal theory].'[30]

The Court held that Australian common law, since its introduction upon colonisation, recognised that Indigenous traditional owners enjoyed enforceable property rights – aka native title – to their traditional lands. These rights were based not on Crown grants but on their continuing customs and traditions. While the Crown as the sovereign retained the 'radical' or underlying title to all land and seas within its jurisdiction, a new property right was thus introduced into Australian law. These new legal principles applied throughout Australia, not merely to the Meriam people or Torres Strait Islanders, since variations in customs and traditions between Indigenous communities did not affect the content or application of these fundamental legal principles.

28 Dawson J, formerly a Victorian Solicitor General, dissenting,

29 Claims to those two areas, lost in *Mabo*, were subsequently, and successfully, pursued in two further claims under the *Native Title Act 1993* (Cth), ie, *Passi v Queensland* [2001] FCA 697 (Black CJ) to the adjacent islands; and *Akiba v The Commonwealth* ((2013) 250 CLR 209 to the surrounding seas. Thus the Meriam people's native title claims took 31 years.

30 *Mabo (No 2)* 109.

However, those traditional rights were subject to proof and subject also to impairment or extinguishment by Crown action, eg, grant of a conflicting interest in land to others, such as an estate in fee simple. The judgements meant that these new traditional rights were 'fragile,' capable of being over-ridden and extinguished by the Crown since colonisation - in the Torres Strait, 1879. The claim for the existence of a protective fiduciary duty to traditional owners, imposed on the crown when dealing with their native title, was rejected by a majority.

The decision triggered extensive, sometimes alarmist and vitriolic, debate in the community, especially in legal, industry and political sectors. The Keating federal government, however, accepted the decision and following much negotiation with Indigenous, mining, pastoralist, other community groups, and opposition parties, enacted the *Native Title Act 1993* in December 1993.

The regime it established, amended by the Howard government's 'Ten Point Plan' in 1988[31] mostly against Indigenous interests,[32] continues today as the major legislative scheme (along with various state enactments and other programs) whereby traditional owner groups can claim native title in the Federal Court.

Therein lies another and still contentious story. Suffice to say that as at March 2025, the Federal Court has made 527 'Determinations' that native title exists over more than 50% of Australia's land, plus areas offshore. Numerous claims have reached the High Court, with important rulings clarifying and developing the legislation, sometimes against Indigenous interests,[33] sometimes in favor.[34]

The scheme has been long criticised by Indigenous leaders, senior lawyers, and others for numerous failings, especially its legalistic and complex requirements, including the very burdensome onus of proof set out in NTA s 223(1). The Australian Law Reform Commission delivered a report to the federal government in 2015[35] recommending substantial reforms, including to the onus of proof, but no government has to date grasped this nettle.

Perhaps it's time – again – for Indigenous leaders to abandon election-obsessed politicians and return to the High Court. That too might be another story.

31 Triggered by the High Court's 'Wik' decision which held that a Queensland pastoral lease did not extinguish native title to the lease area; that the two sets of property rights continued; but that if conflict arose, the pastoralist's rights (eg, to construct a shearing shed on a sacred site) would prevail. See *Wik Peoples v Queensland,* (1996) 187 CLR 1.

32 The 'Plan', however, also introduced Indigenous Land Use Agreements, enabling many traditional owner groups to negotiate terms and conditions to allow eg., mining companies to enter their land to prospect and/or extract minerals, 1,506 ILUAs have been concluded around Australia as registered with the NNTT to 14 March 2025.

33 See eg, *Yorta Yorta v Victoria* (2002) 214 CLR 422 where the court added to the onus of proof by requiring proof of a 'normative society' – a term not used in the NTA.

34 See, eg, *Akiba* (above note 30); and most recently, *Commonwealth v Yunupingu* [2025] HCA 6, discussed at M. Langton & J. Lowe, 'Native Title Not So Fragile After All,' *The Australian*, 15-16/3/2025, p. 23.

35 See *Connection to Country: Review of the Native Title Act 1993* (ALRC, Report 126, 2015).

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