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The Implications for Australia of Mabo V Queensland

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Northern Territory Criminal Lawyers Conference
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1. The Significance of the Decision

On 3 June 1992, the highest court of this land by a majority of 6-1 declared "the lands of this continent were not *terra nullius* or practically unoccupied in 1788"[1]. On that day, the Australian legal system came of age. Though the British Crown asserted sovereignty over those deemed to be barbarians in 1788, it is barbaric, as it was then, to presume sovereignty automatically wiped the slate clean of native land title. Though a court established by the sovereign has no power to canvass the validity of the assertion of sovereignty over new territory, it has the duty to ensure equal protection of the law for those holding property within the territory. When Eddie Mabo commenced his litigation in 1982, many Australians still saw land rights as a one-off special welfare measure. The defendant state's premier, Sir Joh Bjelke-Petersen, saw it as part "of a long range communist plan to alienate Aboriginal lands from the Australian nation so that a fragmented north could be used for subversive activities by other countries"[2]. Land rights is now legally classifiable as the restitution, recognition and compensation of property rights.

The High Court has placed its hands more firmly on the development of the Australian common law, which is now out of the clutches of the Privy Council. The High Court judges have declared, "Here rests the ultimate responsibility of declaring the law of the nation"[3]. This was the first time the judges of our highest court had the opportunity to rule on the unwritten law of the land. They have not done so in primitive isolation from developments in international law and the common law of others countries. Nor have they been unhistorical. Rather than inventing a legal fiction, they have simply destroyed one. Not only would it have

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[1](1992) 66 ALJR 408, 541
[2](1982) 287 QPD 5476
[3](1992) 66 ALJR 408, 416

been unseemly to drive indigenous occupiers of the Torres Straits into the sea upon the assertion of British sovereignty, it would have been unlawful.

Governor Phillip may have asserted British sovereignty over the eastern part of the Australian continent on 26 January 1788 but he did not thereby automatically increase unencumbered crown landholdings by another half continent. Native title to the lands continued until the new sovereign dealt with the lands in a manner inconsistent with the continuation of native title. Even after 205 years of unmitigated pastoral, colonial and mining expansion, there are still large areas of vacant crown land especially in Western Australia. It is traditional Aboriginal law which determines the Aboriginal titleholders of such land. Like international law, the traditional law or custom is not frozen as at the moment of establishment of a colony.

Terra nullius was clear and simple; it was also unjust and discriminatory. The law of the land is now more complex and more just. Though the High Court has ruled that there is no guaranteed right to compensation for extinguishment of native title by a State government, public servants and politicians will have to recognise native title as they would any other title to land. Wiping out native title without compensation will pass muster only if other title could be so extinguished in the same circumstances. Increasingly, developers, pastoralists and miners will have to deal with Aborigines on an equal footing. Governments will have to treat with them to effect the workable compromises for land use according to Aboriginal law and the common law.

The High Court has removed the legal basis for the continued dispossession of Aborigines retaining traditional affiliations with their lands. The Court has not undone the injustices of the past. It has set the foundations for just land dealings in the future. By recognising the existence of Aboriginal law and land rights, the Court has provided a jurisprudential basis for the calls by Aborigines for self-determination on their lands. Eddie Mabo's influence will be felt on the Australian mainland as much as it is now on Murray Island. He died before the court gave judgment. The judgment stands as a vindication of his rights and as a tribute to his stand.

2. The Legal Facts of the Case

Eddie Mabo was a member of the Meriam people, the traditional owners of Murray Island and surrounding islands and reefs in the Torres Strait. The islands in the strait were annexed as part of the colony of Queensland in 1879. In 1982, Mabo and four other Islanders commenced action in the High Court of Australia seeking a declaration of their traditional land rights. They claimed that the islands had been continuously inhabited and exclusively possessed by their people who lived in permanent settled communities with their own social and political organisation. They conceded that the British Crown became sovereign of the islands upon

annexation but claimed continued enjoyment of their land rights until those rights had been extinguished by the sovereign. Further they claimed that their rights had not been validly extinguished and that their continued rights were recognised by the Australian legal system.

The state of Queensland attempted to defeat the claim by the passage of the Queensland Coast Islands Declaratory Act 1985 which was 'to allay doubts that may exist concerning islands forming parts of Queensland'. The Act declared that, upon the islands being annexed, they were 'vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever'. It provided that no compensation would be paid for rights retrospectively taken away.

In 1988, the High Court ruled this Act was contrary to the Commonwealth's Racial Discrimination Act 1975[4]. On 3 June 1992, the High Court upheld the Islanders' claim to native title. The fiction of *terra nullius* had allowed the European community of nations to expand their colonial horizons with minimal concern for indigenous peoples. In the eighteenth century, the common law took its lead from international law. In Mabo, three judges acknowledging their law-making role said 'it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination'[5]. The court ruled that the crown's acquisition of sovereignty could not be challenged in Australian courts. Though the crown acquired a radical title to land within its territory, native title to land continued unaffected until it was extinguished by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.

3. The Implications

There are many Aboriginal groups who see the Mabo decision as a door which has been left slightly ajar by the High Court, now waiting to be prized open by a series of test cases and political agitation. There are miners and pastoralists who see it as a door to be firmly closed before further uncertainty is caused. The decision is more a window of opportunity which will remain open but within very strict confines buttressed by an Aboriginal land claims process in each jurisdiction of the Commonwealth. There is greater consistency with precedent and certainty of limitation in the decision than many commentators have indicated[6]. The skeleton of principle of the common law has been maintained at some cost to dispossessed Aborigines.

Sovereignty is non-justiciable; the classification of the Australian colonies as 'settled' is now beyond dispute in Australian courts. Compensation for

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[4]Mabo & anor. v. The Sate of Queensland & anor. (1988) 166 C.L.R.186.

[5]Id.422 (Brennan J, Mason CJ and McHugh J concurring)

[6]See F. Brennan, "Mabo and Its Implications for Aborigines and torres Strait Islanders" Mabo, A Judicial Revolution, University of Queensland Press 1993 Pages 23-47, M A Stevenson and S Ratnapala (ed.)

past dispossession, prior to the passage of the Racial Discrimination Act 1975, was payable only if the statutory scheme for dealing with wastelands and crown lands did not exclude it expressly or by implication, and could be sought only within the relevant Statute of Limitations periods. Extinguishment of native title by valid Crown grant of a state to other parties prior to 1975 did not, of itself, found an action for compensation.

Vacant crown land and public reserves may still be subject to native title. Native title holders will continue to enjoy the rights commensurate with their 'ownership', enjoying the twofold protection of the Constitution precluding acquisition of property on unjust terms and the Racial Discrimination Act, the latter rendering unlawful actions which discriminate against persons on the basis of their race thereby impairing the enjoyment of their human rights in any field of public life, including the right to own property in association with others, the right to inherit, and the right not to be arbitrarily deprived of property.

The Racial Discrimination Act overrides any offending state or territory legislation ensuring that the law since 1975 accords protection to native title holders equal to that of other title holders with similar rights of use and access, whatever their race. The High Court has shown no willingness to extend the concept of fiduciary duty beyond the bounds of the duty owed by the crown to a third party at arms length enjoying discrete legal rights to property. The Court has no intention of entertaining theories of sovereignty or classification of colonial beginnings which divide or diminish the sovereignty of national institutions established under the Constitution. While lawyers investigate the limits of fiduciary duty and compensation claims, it is imperative that governments set up claims processes in all jurisdictions so that native title holders may be granted a secure and certain statutory title to their lands without extinguishment of native title. It will be in the interests of miners and pastoralists, as well as Aborigines, that there be a notification procedure whereby claims to native title can be registered and in time determined.

4. Mabo and the Criminal Law

Having established the existence and continuation of traditional native land title, the majority of the High Court went on to enunciate the common law's recognition of traditional Aboriginal law for determining the owners of various lands. If the common law is to recognise Aboriginal land law, there is a strengthened argument for recognition by statutory or other means of other aspects of traditional Aboriginal law. An indigenous community living within the nation state and enjoying recognition of its legal system by the legal system of the nation is a community entitled to more than self-management. It is entitled to self-determination within the life of the nation.

After the argument of the first post-*Mabo* test case in the Federal Court, Pareroultja v Tickner, Senior Counsel for both parties were so outraged by the variety of disinformation and misinformation about the impact of the

Mabo decision that they wrote letters to the editor of the Sydney Morning Herald. Mr Allen Sullivan QC observed, "Mabo, properly understood, is extremely limited in scope." Ian Barker QC wrote, "Chicken Littles are running wild, but the sky is not really falling. Traditional Aboriginal titles in Australia's settled urban and rural areas, where land is largely alienated, have long gone. The High Court said so. Where land is unalienated, and where Aborigines and Aboriginal traditions endure, there must be room for compromise. Why the hysteria?"

Meanwhile Sydney criminal lawyers were trying their hand at *Mabo*. Mr Shaun Flood from the Public Defenders argued in The Crown v Leeton James Jacky that it was "not inappropriate in the light of *Mabo* and in the Year of the Indigenous People for a challenge to be made to the court's jurisdiction to try an Aboriginal man". Flood referred to various cases including Rex v Jack Congo Murrell[7] , Reg v Wedge [8], R v Archie Glass[9], R v Walker [10], and Mabo v Queensland.[11]

On 10 June 1993, Justice Campbell sentenced Jacky to 5 years imprisonment for manslaughter. He had no problem in rejecting the submission that the court had no jurisdiction to try Jacky in accordance with *Mabo* principles. However the High Court having acknowledged Aboriginal law as a part of the common law of Australia for the purposes of determining title to land, there is no reason in principle why Aboriginal law could not also inform the development of the common law in regard to criminal law and practice. This would not involve a challenge to the jurisdiction of the courts. Nor would Aboriginal law override substantive maxims of common law or statutory definitions of criminal offences. Such law could be considered in consideration of standards such as reasonableness.

5. The Calls for Commonwealth Action

Prior to the High Court decision, it was only in the interests of Aborigines and their supporters that there be a statutory system of Aboriginal land claims with a tribunal process. Since *Mabo*, it is in the interests of all miners and pastoralists seeking certainty and security that there be an efficient and fair system of Aboriginal land claim registration and determination. Former Liberal Attorney General, Senator Peter Durack QC has observed:

> It seems inevitable that there will be renewed calls for a national solution which itself will be divisive. Now that the High Court has recognised that existence of such a title at Common Law, the current state by state approaches will be harder to justify. The Commonwealth Parliament will be asked to ensure that there is at

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[7](1936) 1 Legge 1972

[8](1976) NSWLR 581

[9](Unreported, Sully, J22.1.93)

[10](1989) 2 Qd.R.79

[11](1992) 66 ALJR 408.

> least a common workable standard. Those who believe the new title is too weak, and those who want to abolish or restrict it, will have a common interest to promote a national, solution.[12]

Prior to COAG and on the first anniversary of the Mabo decision, the Department of the Prime Minister and Cabinet issued a discussion paper entitled "Mabo: The High Court Decision on Native Title". The paper, prepared by Commonwealth officials at the request of Ministers, concedes that "the Mabo issue has occasioned a renewed interest in the question of national land rights legislation. It has been suggested that this might take into account and build upon the principles of the Mabo decision and the need to provide land for dispossessed Aboriginal and Torres Strait Islander people who may not benefit from the Mabo case."[13]
The mining industry has been concerned since the *Mabo* decision that some mining tenements obtained after the passage of the *Racial Discrimination Act* might not only found actions for compensation payable to traditional title holders but that such tenements may be invalid. This view is supported by some legal advice obtained by mining companies. However none of the advice had been published or made subject to further scrutiny. The mining industry is adamant that there is an immediate need to render certain all existing mining interests and to expedite the grant of further interests, accommodating native title holders with minimal disruption to existing mining regimes. The resolution of these issues provides the first opportunity for a Keating Government elected in its own right to put its stamp on the recognition of Aboriginal claims and the reconciliation of conflicting rights and aspirations.

When Aborigines lost their case in Milirrpum v Nabalco[14] in 1971, the Commonwealth Government set up a Royal Commission into Aboriginal land rights. That Commission presented two reports over a two year period. It then took another 3 years for the final legislation to be passed by the Commonwealth Parliament. When Torres Strait Islanders won their land rights case in Mabo v Queensland, there was no question of a Royal Commission being instituted. Prime Minister Keating announced a one year consultation process which is due to run until September 1993. However the pressure has been building from the State Premiers for principles to be determined at the forthcoming meeting of the Council of Australian Governments commencing on Tuesday. This pressure has come largely from Chief Minister Marshall Perron and Premier Goss both of whom are contemplating major mining projects within their jurisdictions on land which may be subject to native title. The threshold issue has been whether the grant of mining leases after 1975, with the passage of the Racial Discrimination Act, are valid in circumstances where

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[12] P Durack, "The Consequences of the Mabo Case," Mabo and After, Institute of Public Affairs, Perth, 1992, 1 at Page 9

[13] Mabo: The High Court Decision on Native Title, AGPS, June 1993, p. 88.

[14] (1971) 17 FLR 141

there has been no consideration or insufficient consideration for the rights of native title holders.

5. The Racial Discrimination Act

Section 10, Racial Discrimination Act 1975 operates so as to render non-discriminatory the application of state and territory enactments which otherwise would adversely discriminate against persons on the basis of their race. Ordinarily, the grant of a mining lease does not extinguish the title of a private land holder. Also the intending miner has to give formal written notice of the mining application to the landholder as well as the usual public notice. The land holder then an opportunity to put a case to government or to the mining warden. Compensation is then paid to the landholder for any disruption of enjoyment of existing land rights. Since 1975 there have been many dealings with land classed as vacant crown land with no consideration for the rights or interests of native titleholders. In the light of *Mabo* , the Government must ensure that it does not discriminate adversely against native titleholders in regard to procedural fairness, compensation, or extinguishment of title.

Does the failure to give formal written notice of an intention to apply for a mining lease to a native title holder invalidate any lease subsequently granted? Some lawyers comparing the situation of the native title holder with that of the registered proprietor have suggested that such a failure would invalidate a subsequent lease. The more appropriate comparison is with any other unregistered titleholder whose title is not contingent upon their race. For example, if my grandfather had left me an interest in land unknown to me, government, or a prospective miner, the miner's failure to give me formal written notice of an intended application would not invalidate a subsequent lease. Upon discovery of my title, I may later be able to agitate the question of compensation, but not of validity. In most jurisdictions (if not all) the Crown is entitled to resume privately owned land for mining purposes provided just compensation has been paid. Upon resumption, the privately owned land then becomes Crown land for the purposes of the relevant mining legislation. Such resumption is not automatic in all cases of mining on private land. The effect of *Mabo* is that native title is extinguished upon the grant of a mining lease when such a lease empowers the miner to exclude native titleholders from traditional access and use. This automatic extinguishment of native title is not racially discriminatory. It simply sets the limits of native title as enunciated by the High Court. Miners and their investors obviously want certainty. When questions about compensation, due process, and automatic extinguishment of native title could conceivably colour the grant of a mining lease in light of the Racial Discrimination Act, it is not surprising that the miners would seek validation of their titles. Unless a mining warden had denied traditional owners access to the court, in circumstances such that the native title holder's case being properly understood according to law would have resulted in a recommendation that a mining lease not be granted, the

subsequent mining lease would be valid leaving outstanding only the question of compensation.

6. McArthur River: Test Case or Distraction?

At McArthur River in the Northern Territory, the miners and Government were anxious to guarantee maximum security of the mining interests. The NT Government and the mining company finalised an agreement on 25 November 1992, whereupon the Northern Territory Parliament passed the McArthur River Project Agreement Ratification Act 1992. After doubts had been raised about the validity of the mining titles and the legislation under which the titles were granted, the Northern Territory Parliament then commenced consideration of the McArthur River Project Agreement Ratification Amendment Bill on 27 May 1993, the 26th Anniversary of the 1967 Referendum. Given that the Crown has the power to resume private land for particular mining projects when that is deemed to be in the public interest, the Northern Territory Parliament has power to pass site specific legislation extinguishing native title at McArthur River[15]. The only requirements are for due process and just compensation. The amendment bill provides a compensation regime for any native titleholders whose title may be extinguished by the grant of the mining leases. The Northern Territory and the miners obviously have some concerns about the application of the Racial Discrimination Act to the process followed for the granting of the mining leases. The amendment bill proposes a new section in the original Ratification Act providing:

> For the avoidance of doubt and notwithstanding any other law in force in the Territory, a mineral lease or exploration licence is validly and effectively granted by subsection (1) notwithstanding that an application has not been made nor any action that would be required before an equivalent lease or licence could be granted under the Mining Act (including the giving of any notices and a hearing by and recommendation of the Warden) has not been taken.[16]

In their discussion paper, the Commonwealth officials have indicated that "Commonwealth legislation would be possible to adjust or remove the procedural requirements". They claim this "would be consistent with Australia's obligations under the Racial Discrimination Convention".[17] Rather than pledging not to amend the Racial Discrimination Act, the

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15 During the Federal election campaign, the Northern Territory Government introduced its own Confirmation of Titles to Land (Request) Bill requesting the Commonwealth Government to legislate to extinguish all native title and to provide compensation. Fortunately the Commonwealth has indicated that this course "would be unnecessarily and inappropriately sweeping in the harm done to native title." (Mabo: The High Court Decision on Native Title, June 1993, p. 44).

16 Clause 6, McArthur River Project Agreement Ratification Amendment Bill 1993, Serial 253

17 Mabo: High Court Decision on Native Title, AGPS, June 1993, pp 48-9.

Commonwealth's Ministerial Committee on Mabo has said, "The integrity of the Racial Discrimination Act is to be maintained."[18]

After the *Mabo* decision, the miners agitated the question of validity of leases granted since 1975. The Commonwealth Attorney General's Department then had another look at the matter and agreed that there was some doubt and uncertainty. Aboriginal groups have now seen this doubt and uncertainty as their major bargaining chip for negotiating a just and proper settlement in the *Mabo* negotiations. Prime Minister Keating has appreciated that governments role is not only to implement faithfully the letter of *Mabo* but also to use the occasion of the decision as an opportunity for effecting a just and proper settlement regarding outstanding land claims of dispossessed Aboriginal groups. Most urban and fringe dwelling Aboriginal groups will have little prospect of establishing *Mabo* style claims. The focus will be on Western Australia where there are still large numbers of Aborigines living in remote areas classed as vacant Crown land. Many of these areas are thought to be mineral rich. Western Australia unlike the Northern Territory and Queensland has not legislated to date for an Aboriginal land claims process. Hopefully, the Mabo decision and the effects of the Racial Discrimination Act will dictate a different outcome in discussions between Prime Minister Keating and Premier Court than those between Prime Minister Hawke and Premier Burke in 1985-6.

7. Avoiding A Repitition of 1985-6

In February 1985 the Hawke Government circulated a preferred national land rights model. In August 1985, the Hawke cabinet endorsed the principles of the preferred model but made no commitment to legislation. The Minister for Aboriginal Affairs, Mr Clyde Holding, then made it clear that the government would proceed with further consultation, as a basis for possible Commonwealth legislation, but that the government's preferred position was "that land rights be implemented by state action broadly consistent with the Commonwealth's principles rather than by overriding Commonwealth legislation"[19]. During the State election in 1986 in Western Australia ALP Premier Brian Burke threatened to resign if national land rights legislation were introduced. In response, the then Prime Minister reassured the Western Australian electors that Mr Burke had nothing to fear. By March 1986 Holding had to admit defeat. In doing so, he all but blamed the Aborigines for the failure of the proposed land rights package:

> I had a specific direction from Cabinet to engage in discussions with the states to see what action could be taken on a state by state basis. That position was clear and uneqivocal and was well known to

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[18] Ibid 100.

[19] C Holding, News Release, 13 August 1985

> Aboriginal leadership who in many cases rejected the proposed model.[20]

Mr Holding had expected Northern Territory Aborigines to trade their veto over mining on their land for a Commonwealth undertaking to consult with the states about Aboriginal land title in state jurisdictions. Presumably by September Mr Keating will set a bottom line for Aboriginal land claims in every jurisdiction throughout Australia. Once again the test will be Western Australia. If Premier Richard Court is willing to institute an Aboriginal Land Claims Tribunal with appropriate judicial propriety and with criteria sufficiently attractive to Aboriginal groups, there will be a reduced Commonwealth incentive for Commonwealth legislation. Commonwealth officials have willingly conceded that "land administration is primarily a State/Territory matter". However they have asserted that any tribunals "should operate within parameters acceptable to the Commonwealth to ensure a consistent national approach."[21] They have suggested that there be in each jurisdiction, "arrangements and procedures which meet certain required national standards including efficient notification and registration of claims, determination and recording of native title, involvement of appropriate expertise, including Aboriginal and Torres Strait Islander expertise, informal, quick, and economical procedures, a capacity for conciliation and provision of resources to Aboriginal and Torres Strait Islander claimants."[22] In setting the bottom line, the Commonwealth has shown no desire to extend to Aborigines in other jurisdictions the same control over mining on Aboriginal land as enjoyed by Aboriginal groups and land Councils in the Northern Territory. No matter what the strength of traditional attachment to land by Aborigines in the Kimberleys or Cape York, no government will accord them the same control and power over mining on their land as equivalent traditional owners enjoy in the Northern Territory. The Commonwealth officials have been very frank in their admission that any scheme allowing Aborigines a stake in industry, including a share in mining royalties, "would need to avoid problems perceived by industry with the statutory scheme under the Aboriginal Land Rights (Northern Territory) Act 1976".[23] The Commonwealth discussion paper concedes that the matter of negotiation and consent is not just a requirement of the Racial Discrimination Act but also a matter of simple justice. The discussion paper raises these critical questions:

> How valid and useful is the principle on non-discrimination in dealing with native title? Is native title to be regarded as containing an inherent legal right to consent? Even if it does not, should a new legal regime for land management provide

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[20](1986) 148 CPD 1473 (H of R)

[21] Mabo: The High Court Decision on Native Title, AGPS, June 1993, p. 3

[22] Ibid pp 32-3.

[23] Ibid p. 83

> for such a right? Would the right be absolute, and if not, how should the extent of the right be defined? Would a regime founded on consent and negotiation be consistent with efficient dealings in land, including for national economic development? Should rights of consent and/or negotiation apply in the exercise of validating existing grants of interests in land?[24]

8. Establishing Native Title

Vacant crown land which may be subject to ongoing native title will be claimable by owners provided they can satisfy the evidentiary requirements of continued association with the land. Even in the *Mabo* factfinding proceedings in the Supreme Court of Queensland Moynihan J was not prepared to conclude that Eddie Mabo himself had rights and interests in land. Mabo's claim had been based on a purported adoption by Benny and Maiga Mabo "with the consequence of his inheriting as the heir to either or both".[25] Eddie Mabo's mother died shortly after his birth and his father gave him into the care of his maternal uncle, Benny Mabo and wife Maiga who brought him up. Under Island custom, a child who had been adopted would become heir to the adopted parents. But there was a need to distinguish adoption from a mere placing in care. Patrick Killoran who had for many years had been director of the Queensland Department of Aboriginal and Islander Affairs was accepted in the *Mabo* proceedings as an expert, giving evidence of different classes of fostering and adoption in Island communities. Moynihan J formed the distinct impression that Eddie Mabo "was less than frank about his relations with his natural father from whom it now suits him to distance himself".[26] Moynihan J was not prepared to conclude that Eddie's father relinquished him to Benny and Maiga for the purpose of adoption.

Failing proof of adoption, Eddie had to establish that Benny Mabo during his lifetime had disposed of an interest in the land to him. Once again, the court was unwilling to accept Eddie Mabo's evidence. Eddie claimed that such a disposal had been made orally by Benny many years ago when Eddie was quite young. Moynihan J observed "there is great scope for selective recollection or conflabulation. There is reason to doubt whether such things could be spoken of to the young."[27] It also emerged during the proceedings that other Islanders who were more frequently resident on Murray Island made claims to some of the same blocks of land claimed by Eddie Mabo. In the light of these conflicting claims, Moynihan J observed that "it may be them and not him who have the right he seeks to assert against the defendant in respect of some same blocks".[28] Moynihan J

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[24] Ibid p. 61

[25] Volume 3 of the Determination by the Supreme Court of Queensland of the Remitter from the High Court of Australia dated the 27th February 1986, p. 197

[26] Id. 151

[27] Id. 197

[28] Id. 197

thought these matters could be resolved by the Murray Island court but foresaw that there could be enormous problems given the complexity and number of claims. Mr Keon-Cohen, Counsel for Mabo, has made the observation that "on one view, only about 6 of 46 originally claimed portions of land were successful at trial" in the actual *Mabo* proceedings.[29]

9. Registering Native Title

There will be a need for a system of registration of native title. Also native titleholders should be given the opportunity to transform their native title into a statutory title. This should always remain a matter of choice given the concern of many Aborigines that their native title be respected as an ongoing right recognised by Australian law rather than a right granted or given by a Parliament or Government of the day. While advocating a scheme for the conversion of native title into statutory title, the Commonwealth discussion paper admits "it would be wrong to compel such an exchange".[30]

Having established the existence and continuation of traditional native land title, the majority of the High Court went on to enunciate the common law's recognition of traditional Aboriginal law for determining the owners of various lands. If the common law is to recognise Aboriginal land law, there is a strengthened argument for recognition by statutory or other means of other aspects of traditional Aboriginal law. An indigenous community living within the nation state and enjoying recognition of its legal system by the legal system of the nation is a community entitled to more than self-management. It is entitled to self-determination within the life of the nation.

10. From Land Management to Self-Determination

Since 1982, many indigenous groups have been pressing the UN Working Group on Indigenous Populations (WGIP) to recognise their entitlement to self-determination within the legal framework of the nation states built on their dispossession without consent nor compensation. The abiding concern of indigenous people in the international forum since the establishment of the WGIP has been the issue of self-determination. Both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights proclaim: 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

At the most recent meeting of the Working Group on Indigenous Populations held in Geneva in July 1992, the Australian Government delegation reaffirmed its support for the inclusion of self-determination

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[29] B A Keon-Cohen, "Some Problems of Proof: The Admissibility of Traditional Evidence," Mabo: A Judicial Revolution, 1993, UQP, M A Stevenson and S Ratnapala (ed.), 185, at 200

[30] Mabo: The High Court Decision on Native Title, AGPS, June 1993, p.5

language in the draft declaration. Considering that 'indigenous peoples are among those groups which may have to overcome barriers inhibiting their full democratic participation in the political process by which they are governed so that the full range of human rights are theirs to enjoy', the delegation thought 'specific recognition of the right of self-determination for indigenous peoples, as separate and distinct peoples, will assist them to overcome the barriers to full democratic participation'. [31] Though precluding choice of separate status as an independent state, the delegation thought there was scope for a collective entitlement to self-determination provided it did not impair the territorial integrity or political unity of existing sovereign states.

The implementation of *Mabo* will require that governments not simply negotiate amongst themselves principles for land management but also that they negotiate with Aboriginal groups, both native titleholders and those who have suffered most from two centuries of dispossession, for self-determination within the life of the Australian nation.

The rule of law and good management practice ultimately should contribute to the good life of all citizens within a pluralist democracy, seeking a special place of belonging for those indigenous people who are the proud inheritors of the only cultures which are unique to this land. As Australians of best practice we might then design what the Governor-General at the opening of the recent parliament described as "an effective partnership between Aboriginal and Torres Strait Islander peoples and other Australians" which is "fundamental to Australia's standing as a contemporary nation committed to human rights and social justice, and to the forging of a distinctive Australian identity."[32] "Mr Hayden was right when he said "the High Court Recognition of native title has profound consequences not just for land management but for contemporary issues of social justice and the process of reconciliation."[33] The 33 principles released by the Commonwealth Government yesterday could constitute a practical implementation of the land management aspects of the Mabo decision. However the process for the validation of those principles by Commonwealth and State Governments at the forthcoming COAG Meeting, regardless of and without the opportunity for Aboriginal groups to put their principles to a similar meeting, will jeopardize the prospects of the Mabo implementation contributing significantly to the process of reconciliation.

11. From Land Rights to Constitutional Rights

The *Mabo* decision belatedly acknowledges the unwritten law of the land. Our approach as a nation to its implementation will determine the unwritten rules for living together respectful of each other's cultures,

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[31] C. Milner, Statement on Behalf of the Australian Delegation, Working Group on Indigenous Populations, Tenth Session, 24 July 1992, 3.

[32] (1993) CPD 22 (H of R); 4 May 1993

[33] Ibid

sharing the country through mutual understanding and respect. As we contemplate the implementation of the High Court's *Mabo* decision, the greatest tragedy would be if its implementation were viewed as a process in which government arbitrated the conflicting claims between the chief stakeholders namely Aborigines, miners and pastoralists. The community generally must play a role in determining how that balance is struck.

If as a nation we succeed in according due protection of law to native titleholders and their relationship with land and also provide just compensation to those suffering the effects of ongoing dispossession, we will then be in a position to accord Aborigines and Torres Strait Islanders their place in the nation under a constitution reflective of Aboriginal entitlements. The preamble of a revised constitution should provide:

> Whereas the territory of Australia has long been occupied by Aborigines and Torres Strait Islanders whose ancestors inhabited Australia for thousands of years before British settlement:
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> And Whereas many Aborigines and Torres Strait Islanders suffered dispossession and dispersal upon exclusion from their traditional lands by the authority of the Crown:
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> And Whereas the people of Australia now include Aborigines, Torres Strait Islanders, migrants and refugees from many nations, and their descendants seeking peace, freedom, equality and good government for all citizens under the law:
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> And Whereas the people of Australia drawn from diverse cultures and races have agreed to live in one indissoluble Federal Commonwealth under the Constitution established a century ago and approved with amendment by the will of the people of Australia: Be it therefore enacted:

In the body of the Constitution, there should be a clause recognising and affirming the existing rights of Aborigines and Torres Strait Islanders. The Commonwealth, in cooperation with the states and territories, should then provide for a tribunal to determine disputes between Aborigines and government when Aborigines are dissatisfied with government's attempts to accord them self-determination.

Self-management and self-determination are not terms of legal precision. They are however aspirations of local Aboriginal communities wanting more control over their lives, culture and heritage. When Commonwealth Attorney General, Mr R J Ellicott QC, referred the question of Aboriginal customary law to the Law Reform Commission, he took into account 'the right of Aborigines to retain their racial identity and traditional lifestyle or, where they so desire, to adopt partially or wholly a

European lifestyle'[34]. Though this right might never become an enforceable legal right under local law, it should be viewed as what Justice Deane calls 'a moral entitlement to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights'[35].

Aboriginal communities cheated of their moral entitlements need to be able to bring government to account in ways other than through swaying public opinion in the media or affecting government policy by political action. The principles of self-management and self-determination should be governing principles applied with due discretion and ranked in priority with other social objectives reviewable by an arbiter.

The first centenary of Australian Federation with a government committed to creating a nation in its own image provides the ideal opportunity for indigenous people to belong on their own terms within the limits of what people can agree to be fair and reasonable. This will never mean drawing the line and forgetting our past, but it could mean making a new beginning and going forward with the satisfaction of a legal regime which reflects and embodies the aspirations of contemporary indigenous Australians wanting to be included in the body politic while at times enjoying the splendid isolation of their own law, culture and traditions within their own communities. The immediate test will be the Keating government's response to the implementation of *Mabo* particularly in view of the demands from industry groups for the extinguishment of native title so as to render mining interests more certain. Such certainty would be bought at too high a price. In the lπ onger term the test will be striking the balance between individual and collective rights of those who are Aboriginal, those seeking the fullest protection of Australian and international legal processes for their rights and freedoms, while living as members of communities committed to preserving, maintaining and adapting the world's oldest living cultures. *Mabo* provides us with the ideal opportunity to move beyond earlier *terra nullius* mindsets and procedures, recognising in law the just claims of Aborigines to land and culture.

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[34]Australian Law Reform Commission, Aboriginal Customary Law, No.31, Volume 1, Page XXXV (terms of reference, 9 February 1977)

[35]Mabo v Queensland (1988) 83 ALR 14,