

Memoirs of **Mabo**

Nonie Sharp

Bryan Keon-Cohen, *Mabo in the Courts: Islander Tradition to Native Title* (Australian Scholarly Press, 2011)

I.
Here is a memoir spanning nearly thirty years of the author's life. It begins when a young lawyer, Bryan Keon-Cohen, answers a phone call from the late Ron Castan QC. It was November 1981. 'Delighted to help, Ronald', came Bryan's reply. And now in 2011, nearly a generation after the High Court of Australia's judgement, we have a great account of an historic case by a steadfast member of a legal team.

Bryan Keon-Cohen's account of the ten-year history of the case, given from the viewpoint of his clients, adheres closely to that objectivity for which the best of his profession is known and respected. 'Bearing in mind', as he says, that his clients won, he resolves to steer clear of 'boorish triumphalism' on the one hand, and 'false modesty' on the other. The author reminds the reader that this is a lawyer's account; a rather different perspective to say that of a poet, an eco-philosopher or an anthropologist.

Mabo in the Courts carries much of the élan of the ten-year battle—for battle it was, often quite nasty—a scholarly work about a legal contest of a lifetime. At the heart of his memoir, the author says simply, lie three lines of inquiry. First is a chronology of events over the decade to 1992. And this is supplemented by 'Facts', and 'Attacks'. As he writes, the seriousness of the latter is a measure of the fighting determination of the two defendants, the State of Queensland and the Commonwealth of Australia. Beginning with Queensland, the first defendant's move to strike out the plaintiffs' application in October 1982, there followed Queensland's parliamentary legislation of 2 April 1985 seeking to extinguish the title to land of the Meriam people retrospectively. Known as *The Coast Islands Declaratory Act 1985*, it was later declared unconstitutional by the High Court. Importantly, on 8 December 1986 the plaintiffs' demurrer to Queensland's amended defence based upon this Act was upheld and the legislation declared invalid under the *Racial Discrimination Act 1975* (Cwlth), itself landmark legislation.



Today, a generation since the High Court judgement, Bryan Keon-Cohen has given a fresh account of the trial, its outcomes, its historical background. He is in an excellent position to do so. Not only did he work constantly and to the limits of his strength as junior barrister from November 1981, right through the case and after. *Mabo in the Courts* is a new story of the case by an insider, a man who went on to take silk and years later to write this highly

readable, thoughtful and well documented account.

Mabo in the Courts is many-sided, yet like any account it has to be selective. Its special strength lies in a thorough analysis of the events in the decade of its history, the author's special attention to facts, both in legal terms and everyday usage. The result is a memoir of stature; an account of the ten-year story and of its legacy, with more than 2000 footnotes, twenty-five appendices and sundry notes that together comprise a second volume.

So rich and varied a work calls out a wide variety of responses. Some of them are central to the author's epic account of *Mabo's* legal history—its high points, the many sites and times of danger and distress right through from its beginning.

Perhaps above all the author takes the reader on his long human journey concerning 'the trials and tribulations of the plaintiffs, their families, and the Meriam People of the Murray islands'. The Foreword is written by Bonita Mabo, Eddie Mabo's widow, and their daughter Jessie. Nearly 600 pages later, the closing words reveal that one of Mabo's grandsons is named Bryan Edward, a 'precious honour' for the author. He closes with the words, 'Doubtless, as he grows, so too will the story of Mabo'.

A major strength of this lawyer's memoir lies in the way it manages to combine the legal history of this case—to show how it breaks important new ground—with an enduring sense of the complexities at the frontier of confrontation. Importantly, the actors are real people with conflicting perspectives and motivations.

The memoir begins with an opening to drama. A test case begins within the historical context for both the Meriam and the Defendants and takes stock of an unsuccessful land rights case known as *Milirrpum v. Nabalco Pty Ltd and the Commonwealth of Australia, 1971*. Chapter by chapter the author takes us through the stages of the Mabo case: the life of Eddie Mabo, the birth of the case at a Land

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Nonie Sharp's book *No Ordinary Judgement* (Aboriginal Studies Press, 1996) was shortlisted for the New South Wales Premier's Literary Awards and the Australian Cultural Studies Prize.

Rights Conference at James Cook University in August 1981, the formation of the legal team and a first search for funds.

Then there follows the lawyers' first visit to the island of Mer, 'The Statement of Facts', and 'Money Matters'. The story is a combination of hard slog with many disappointments sprinkled with small successes up to 1984. And then in 1985 there comes 'Queensland's King Hit'—its legal move to end the case before it began.

The story moves to the trial in its various phases and forms, all part of what came to be known as *Mabo* (No. 1). Some of it seems like fun, as in 'Applications and Argy Bargy'; some tough, as in 'Biting the Demurrer Bullet', and the successful bite by the plaintiffs. And so the case continues and we're now in the year 1988 and Edward Koiki Mabo is being cross-examined.

Then comes 'The Great Northern Expedition to Mer', Eddie Mabo's homeland. It is May 1989 and the Supreme Court of Queensland sits at Mer and Justice Martin Moynihan hears the Islanders' evidence. The author recalls a court room decorated with flowers, a mural by a Meriam artist the backdrop to the judge's presidium. The air has changed, and with the author we feel the beauty of the morning on the isle of Mer. We are able to share the élan of the occasion and the Meriam people, the spirit and the beauty of Koiki Mabo's place, its people, their landscape and seascape.

And so the case continues with a move back to Brisbane and Canberra: through the Supreme Court of Queensland and the Determination of Issues of Fact which are not so good for Eddie Mabo. The Commonwealth is then

struck out as a contender, for the sea claim—viz. all lands below high-water mark—are abandoned.

Then finally we reach the High Court at last in *Mabo* No. 2: the days of judgement; the death of Eddie Koiki Mabo 'before victory' and on to judgment day on 3 June 1992, and reactions to it. 'Tell him he's a hero!' This was Judith Wright's message to Eddie Mabo as he lay dying and victorious. 'Aftermath and Afterthought'; Mabo's enduring legacy delivered as the question for another book.

II

Reflecting on Beginnings

'Beginnings' has two layers of meaning. For different reasons each is hidden from our view. The first concerns the story of the moves that took place during a conference on land rights and race relations at James Cook University in Townsville in August 1981. Our first steps there were so shrouded in secrecy that even the main organisers of the Townsville branch of the Aboriginal Treaty Committee remained unaware of our conversation behind a closed door. Bryan Keon-Cohen gives an accurate account of an 'in camera meeting held during the conference'. There it was argued and accepted by those present—Dr Nugget Coombs, Chairman of the Aboriginal Treaty Committee, Eddie Mabo, Rev. Dave Passi (who became a plaintiff), Professor Garth Nettheim, Flo Kennedy and me—that the Meriam had an especially strong case to put to a court. To this day, the organisers of the conference may still believe we were just having another workshop.

If this sounds like a conspiratorial drama, well, that's because it was. Today it may be difficult for anyone who wasn't part of that story to imagine or comprehend just how strict was our secrecy; or the very good reasons for it. The early *Mabo* story has the quality of conspiratorial drama: with 'all those plots and counter-plots', as Judith Wright, an active participant in the conference, wrote to me with zest. Even after the legal action was launched, there was a firm belief by the senior QC and others, that if the State of Queensland got wind of the legal moves they would use their considerable resources to put a stop to the Islanders' action. So when at the request of senior counsel Ron Castan QC in February 1982 I found Court records at Mer of sales of land by their Murray Island owners in 1913, I took them to Thursday Island and placed these precious records under a mattress at the home of Torres Strait Islander Flo Kennedy (an early and passionate advocate of a land case) for safekeeping before bringing them to the barristers in Melbourne. After all, I thought, sale of land by traditional owners to the government could seem like dynamite to the defendant, the State of Queensland. You can only buy something from people who own it!

Very early in the conference in August 1981, 'the *Mabo* move' came to take precedence over another

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At the end of 1978, and after older Islanders had told me about the events of 1936 and 1937, I began searching for these files. Much of this story had been hidden in Departmental files labelled 'Refusal of Natives to work boats' ...

plan for a claim by a mainland group, already known and supported by leading members of the Aboriginal Treaty Committee and by barrister Barbara Hocking. Her pioneering work on the continuity of Aboriginal law in Australia was recognised and applauded there. As Keon-Cohen writes, the wheels were already turning at that conference. Here at James Cook University was a 'meeting of minds', in the words of Gregory McIntyre, who in a matter of hours became instructing solicitor in the nascent case. And Barbara Hocking became the first barrister to be briefed. It just so happened that the *Mabo* option rose up like a little volcano out of the sea like the isle of Mer itself and took over. Eddie Mabo wasn't just being opportunist, as the author believes. The prospects of a land case with him at the centre were already in train.

Where minds meet as at the Townsville conference, each offers something—and my contribution was not wholly in the public domain. Bryan Keon-Cohen mentions that I had a lot to do with the beginnings of the case, but does not fill in the detail. I have told some of it before in instalments. Here is the final one.

I wrote this piece of the story for the first time with the title 'Learning to Listen' in *Meanjin* vol.6, no.3, 2007. The relevant part is about talks I had with Eddie Mabo in Townsville in December 1980, and then with constitutional lawyer the late Professor Colin Howard early in 1981. He had written an insightful essay on the unsuccessful land case brought by Yolngu plaintiffs known as *Milirrpum and Others v. Nabalco and Others and the Commonwealth of Australia* 1971. In that case, Justice Blackburn had argued that as an itinerant people, the Yolngu plaintiffs could not show to his satisfaction that the land they were claiming was the same land as that occupied by their forebears in 1788. 'Neat', he said, when I'd explained that the Meriam were a sedentary people. Thrilled with his reply, I wanted to sing.

When the conference began at James Cook University in August 1981 I sought out Dr Nugget Coombs and explained rather passionately why I believed the Meriam and Eddie Mabo had a particularly strong case to put to a court. The in-camera meeting followed our corridor conversation.

'Beginnings' has a second layer of meaning. In an important sense one may trace the spiritual beginnings of the case to

about the time Eddie Mabo was born, in 1937. This deeper sense of beginnings concerns its historical setting, and in particular the contentious matter of cultural continuity. The belief among scholars and administrators that the culture of the Torres Strait Islanders had long since faded was upheld by the imposition and the taking on of new ways. Among administrators these certitudes were often accompanied by a cultural arrogance combined with political might.

Acceptance of this position was taken for granted by the authorities in Brisbane until the Meriam plaintiffs filed their claim: 'This position was accepted until a small group of Murray Islanders commenced an action in the High Court of Australia on 20 May 1982'. So ran the words of W. Gunn, Deputy Premier of Queensland, in introducing the second reading of the Coasts Islands Declaratory Bill into the Queensland Legislative Assembly in 1985.

Those attitudes have an important political background in the Torres Strait Islands, and Keon-Cohen draws attention to events in 1936 when the men on the luggers known as Company Boats, owned by the Islanders and controlled by the Protector, went on strike; not for better wages, but for the Islanders' right to control their own boats, their own earnings and their lives. That strike for home rule led to a partial freedom, and this was reflected in the *Torres Strait Islanders Act 1939*, which incorporated major elements of self-rule. *Mabo in the Courts* gives some coverage to those events and, importantly, to the way the Act was amended and made subject to by-laws over the years that curtailed the rights the Islanders had won in 1936.

Until 1982 the rather telling and impressive story of that move for home rule and its outcomes was locked up by the Department. At the end of 1978, and after older Islanders had told me about the events of 1936 and 1937, I began searching for these files. Much of this story had been hidden in Departmental files labelled 'Refusal of Natives to work boats' and marked 'Away B'. In response to my enquiries, P. J. Killoran, Director of the Department of Aboriginal and Islanders Advancement (DAIA), had written to me on 17 May 1979 (see Acting Police Commissioner, 11 November 1981): 'I must point out ... that ... all records, other than those held by State Archives ... are considered to be confidential and therefore inaccessible'.

What was it that the Department did not want the Islanders, the outside world or me to know?

Strangely, it might seem, these 'Away B' secret reports on the events of 1936 and 1937 were flushed out by the *Mabo* action, and assembled in the Affidavit of P. J. Killoran. The reasons for secrecy were transparent in the missing reports: the Department and its officers then and now did not want the world to know that the Islanders had confronted them and had a major success. According to the reports, the strike, as it was called, never finished at Murray Island. The men's

‘altered outlook’ ruled out direct subordination. In 1980, a leading Torres Strait Islander, the late George Mye, recalled to me the words of the Protector Mr Con O’Leary on his retirement in Brisbane in the mid-1960s. In answering a question on his strongest memory of that time, he recalled: ‘The day in January 1936 when the Murray Islanders refused to be recruited for work on their boats and jumped through the windows, saying “We will never sign back!”’ And they did not.

In its wake the question arose: Had the local Protector ‘granted them too much freedom?’ as Chief Protector J. W. Bleakley wrote. After all, The Torres Strait Islanders Act 1939 incorporated provisions of self-rule which were absent from the *Aboriginals Preservation and Protection Act 1939*.



When Eddie Koiki Mabo talked with me at the Black Community School in Townsville in 1980, I found him a man with assuredness of intent, of understanding of his situation, of pride in his Piadram clan—and, above all, of an utter fearlessness. He spoke of his early life on Mer, of his land and sea territory, and his recent history. When some white teachers had turned their backs on him at a meeting in Townsville in the 1960s, ‘I got up and did my dance. Everyone stood on their feet and I walked out.’ And after that the Black Community School began. He was a man with the spiritual resources to follow his dream, and he never faltered.

As the years of the case went by I looked in wonder at the breaking forth of seemingly hidden memory—like the sparkles of waves in the sea moving strongly towards the shore, a simple metaphor for the strength of the sea people of the Murray Islands.

Perhaps it is not fanciful to imagine that Bryan Keon-Cohen, who devoted years of his life to the sea people of Mer in their courageous action, has chosen to live and compose this special memoir within sound and sight of another vibrant area—the reef-strewn seas of Port Philip Heads. In sharing a sense of resounding beauty and strength in that region of southern Victoria, I often call to mind the Meriam sea people who dwell close to the tempestuous seas and reefs of the far north of Australia.

Mabo in the Courts concerns a life-changing experience. It is wistful, strong, legal and political. A lawyer’s memoir? Yes. But also a trek across frontiers on a journey across cultures by him and the team. A work that relates with spirit a major episode in the Meriam people’s history, in all our history and in his own life. **a**

*A shorter version of this article was published on the *Meanjin* website <www.meanjin.com.au>

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