On Australia Day 2013 Bonita Mabo, Eddie Mabo’s widow, was awarded the Order of Australia by the Governor-General of Australia. She is the widow of the late Mr H. Mabo, the first Torres Strait Islander to be honoured with this award. The Mabo decision, which was handed down by the High Court of Australia in 1992, was a landmark case in Australian law. The decision recognised the rights of Indigenous Australians to the lands and waters they traditionally occupied. This was a significant victory for Indigenous peoples in Australia, who had been fighting for recognition of their rights for many years. The Mabo decision opened the door to further recognition of Indigenous rights and was a key moment in the ongoing struggle for Indigenous rights and reconciliation in Australia.
Third are the Howard government’s 1998 NTA amendments, mentioned above. These damaged claimants’ interests and benefited those opposing the very notion of native title, many of whom still lurk, alive and vocal, in Australia’s community-trash can.18 These 1998 amendments, coupled with state complementary legislation, ‘validated’ additional extinguishment of native title by reason of tenures issued by governments, watered-down the ‘right to negotiate’ provisions by allowing states to introduce exemptions, and introduced a tougher ‘registration test’ being the gateway for claimants to achieve ‘rights to negotiate’. None of this has been corrected by subsequent governments. All of it was unnecessary, fuelled by exaggerated fears of ‘uncertainty’, and was contrary to the spirit of the original NTA.

In recent years, many have called for substantial reforms, including the Australian Human Rights Commission, Indigenous leaders, former Prime Minister Paul Keating who was responsible for the original NTA, the current Chief Justice of the High Court, Robert French, and the Greens. Perhaps the most important suggestion is the Chief Justice’s call, in effect, to reverse the onus of proof now required by the NTA and imposed by the Federal Court. Under these reform proposals, essentially, a rebuttable presumption that native title to the claimed area had continued to exist since 1788 would apply. To rebut that presumption, respondents (for example, governments) would bear the onus of proving, by evidence, significant disruption to that continuity.

Governments and those who elect them need not worry as 20 years of discharging this onus has left other serial respondents (such as governments and miners) both skilled and very experienced. Land Departments hold the relevant land-tenure information recording tens of thousands of grants made by the Crown to colonisers since 1788. Many of these grants (an example being a commercial lease) are now ‘deemed’ to extinguish native title by force of provisions of the original NTA and the 1998 amendments. As the last 20 years amply demonstrate, respondents, especially governments, happily use this information — the law allows them to do so — with devastating effect for claimants.

To their credit, the Greens introduced a Bill into the Senate in 2011 proposing worthy reforms (such as allowing prior extinguishment of native title rights to be ignored, strengthening the ‘good faith’ negotiation requirements, and clarifying that native title rights can include commercial rights).19 On 12 May 2011, the Bill was referred to the Senate Legal and Constitutional Affairs Committee. It reported in November 2011 recommending, for a variety of reasons — largely about concerns with substantial ‘architectural’ changes to the NTA and inadequate compensation — that ‘it was not persuaded that the Bill would achieve its stated objectives’ and that the Senate ‘not pass the Bill’.20 Back to square one.

In New Zealand, following the Treaty of Waitangi (1840), a Maori community’s land rights are assumed.

The only questions for the Waitangi Tribunal are: what historical acts of the Crown have extinguished or impaired that title? And how much compensation should be paid to today’s Maori traditional owners? That regime has not caused New Zealand to disappear beneath the Pacific Ocean nor implode, economically or otherwise. The basis of this scheme was established upon first settlement by the same imperial power — Great Britain — that sixty years previously had colonised Australia and adopted the now discredited doctrine of Terra nullius. No gongs for finding an explanation: might is right. The Maori mounted fierce, organised and violent campaigns of resistance, forcing the British to negotiate. Hence the Treaty of Waitangi (1840). Aboriginal Australia was no less sophisticated, resistive and courageous, but less successful at the only language the colonisers feared: armed conflict.

In Australia, 225 years after settlement, and 20 years and 3 days after Mabo (No 2), former Attorney-General Nicola Roxon announced at the most recent national native title conference that her government had decided to pursue several ‘incremental reforms’ designed to ‘improve the system’s efficiency’. These would introduce ‘requirements for good faith negotiation’; make ILUAs more flexible; allow parties to agree to ignore historical extinguishment to parks and reserves; and exempt payments made under native title agreements from income and capital gains tax.21 Nothing was said about a major review, or reversing the onus of proof.

Given the announced federal election in September 2013, one can anticipate that no further reforms will be announced in the life of this federal Parliament. Unhappily for all stakeholders, experience further suggests that it is unlikely native title reform will be a significant election issue — or an issue at all. Such issues are too hard, too divisive, risk triggering the ‘race card’ and (doubtless focus-group polling shows) there are no votes in it. Meanwhile, some gongs continue to be awarded, glitches continue to aggravate, and vast areas of the country remain ga-ga land — that is, un-clamiable, inaccessible or excluded as a source of compensation to current Indigenous owners due, simply, to government policy and legislation.

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