NATIVE TITLE 20 YEARS ON

On the anniversary of the landmark court case, two insiders reflect on Mabo. Dr Bryan Keon-Cohen AM QC, who was a junior counsel in the litigation, reviews its impact, and Glenda McNaught, who worked with Ron Castan AM QC, gives a personal account of the 10 years they spent on the case.

In September 1981, Eddie Koiki Mabo and another Murray Islander, Father Dave Passi, took to the platform at a land rights conference at James Cook University in Townsville. They complained long and hard about what they, and many other delegates, saw as a grave injustice. Australian and Queensland law did not recognise, they said, their traditional rights and interests to their homelands, the three Murray Islands and surrounding seas, that they and their ancestors had occupied since time immemorial.

Since colonisation of the mainland and, a century later, of the Torres Strait in 1879, the introduced English common law, coupled with the law of Empire, had failed to recognise, as enforceable rights to country founded upon custom and tradition of Australia's prior occupiers, the Aboriginal and Islander peoples. Under these ethnocentric doctrines, as at the moment of proclaiming British sovereignty, the entire country became Crown land. Thereafter, the only rights that any citizen, Indigenous or otherwise, might enjoy were those granted of the Crown out of its "radical title".

Worse, the Queensland Bjelke-Petersen government was then threatening to replace the system of island reserves with a new form of land tenure - Deeds of Grant in Trust. These threatened to diminish traditional owners' control over their land in favour of local councils and, ultimately, the minister in faraway Brisbane. Eddie Mabo and his Meriam friends were not pleased.

At that conference, instructions were provided by Mabo and Passi to Greg McIntyre, then a solicitor at the Aboriginal Legal Service in Cairns, and Barbara Hocking of the Melbourne Bar. Thereafter, Ron Castan AM QC and I were retained. The Mabo proceedings were issued in the original jurisdiction of the High Court in May 1982 to challenge the above legal orthodoxy. The plaintiffs - then numbering five - brought a representative action "on their own behalf and on behalf of their respective family groups". They sought declarations, injunctions and damages.

Ten years, a constitutional challenge, a hard-fought trial, endless legal-aid hassles, the deaths of two plaintiffs and withdrawal of a third, and many traumas later, the High Court delivered its majority (6/1) decision in Mabo (No 2) on 3 June 1992. The offensive doctrine of terra nullius was rejected and native title rights were recognised, where they could be proven, as enforceable property rights in Australian common law. However, those rights were fragile. They were not indefeasible but were subject to impairment or extinguishment by valid acts of the relevant Crown, for example, the granting out from its radical title of various land interests to third parties.

Enter the Native Title Act 1993 (Cth) (NTA) which became operative on 1 January 1994 after 18 months of scaremongering, debate and negotiation. The NTA, plus complementary state and territory legislation, introduced a complex legal regime to "recognise and protect" native title; enable native title claims to be processed through the Federal Court and a new National Native Title Tribunal; validate the extinguishment of such rights by various "acts" of the Crown since colonisation with constitutionally mandated "just terms" compensation (but only in limited circumstances); and provide for negotiation and agreement to allow third parties access to and use of native title land be it under claim or determined. This scheme was substantially amended, contrary to the interests of native title claimants, by the Howard government's...
“Ten Point Plan” triggered by the Wik decision in 1998.

So, 20 years on, how is native title travelling? Has the potential of Mabo been realised? The short answer is it is a mixed bag revealing both gains and losses all along the way.

On the positive side, the national native title scheme is in place and is operating – albeit riddled with complexity, delay, expense and frustration on all sides. Statistics tell part of the story. As at 3 June 2012, 475 unresolved claims for a determination of native title had been filed with the Federal Court. Of these, 141 had succeeded in whole or in part (covering about 16 per cent of the continent), while 44 failed. Of more significance, perhaps, is that of the 141 successful claims, 70 per cent were resolved by agreement leading to a “consent determination” by the Federal Court. In addition, eight claims for compensation had been filed, but as at June 2012, none had succeeded.

Unquestionably, the scheme’s most successful aspect is its focus on agreement-making as an alternative to litigation when processing native title claims and in regard to third parties seeking to access and use claimed or determined land – the so-called “future act regime.” As to mediating claims, these too can cause serious disputes within and between claimant communities, and become divisive and protracted.

The Native Title Tribunal reports that the average time for claims determined by consent was 71 months (almost six years), while for litigated determinations, it was 84 months (seven years).

As to agreements regarding access to claimed land – Indigenous Land Use Agreements (ILUAs) – to 3 June 2012, “almost 600” ILUAs and “thousands more private deals with companies” had been finalised. Such agreements can deliver a range of benefits – financial or otherwise – to Indigenous communities, and establish “good neighbour” foundations for future co-operation and co-habitation.

Along with such achievements, however, much criticism of the scheme has been repeatedly voiced for a decade, including from claimant communities, Indigenous leaders, judges, miners and many professionals advising and assisting various stakeholders. Since 1993, the NTJA has been amended in minor ways, especially providing for ILUAs and enhanced mediation procedures, but much frustration and disappointment remains. Indeed, the prior Victorian Labor government, to its credit, broke ranks and in 2010 introduced a new, parallel negotiation statutory scheme which substantially bypasses the NTJA – the Victorian Native Title Settlement Framework. This has delivered positive results – for example in East Gippsland with the Gunai Kurnai claim where traditional ownership to some 22,000 sq km has been recognised, with more negotiations in the pipeline.

Three areas of concern may be highlighted. First, the severe burden of proof required by critical provisions of the NTJA, further compounded by High Court decisions, means that many communities, especially but not limited to those located in densely colonised Australia, cannot access the benefits of the NTJA. Of these claimants who, arguably, deserve native title and/or compensation most are denied entirely. Second, and associated with the “onus of proof” problem is the crushing impact of the NTJA’s extinguishment regime, increased tenfold by the Howard government’s “Wik” amendments of 1998. Around the nation, a myriad of Crown grants are deemed, by force of the amended NTJA and complementary state legislation,
to extinguish, without compensation, much native title.

Reforms have been proposed, most notably by current High Court Chief Justice Robert French when he was a judge of the Federal Court. He proposed that the NTA be amended to introduce a presumption of continuance of native title to traditional country, vested in a claimant group since sovereignty. That presumption could be rebutted by evidence of extinguishment, achieved typically by showing that various interests inconsistent with native title rights (e.g., a fee simple title or commercial lease) have been granted since 1788 over the claimed area. Many others have supported this reverse onus initiative, including former prime minister Paul Keating, former Australian of the year, Lois O’Donoghue, Indigenous leader Noel Pearson and former

CEO of the Kimberley Land Council Wayne Bergman.

Further reforms have been proposed, notably by the Australian Greens by way of a Bill introduced into the Senate in 2011 which supported “reversing the onus”. Other measures included: allowing prior extinguishment of native title to be ignored, strengthening the requirement that parties to mediation exercise “good faith”, and clarifying that native title can include commercial rights.

After a Senate Committee recommended that the Senate reject the Bill, it appears to be going nowhere fast.

The federal Attorney-General Nicola Roxon has recently announced “incremental” reforms to the NTA designed to “improve the system’s efficiency” (tinyurl.com/7bbyr4y). She proposes legislation to outline the requirements of good faith negotiation; increase the flexibility of ILUAs; allow parties, by agreement, to ignore historical extinguishment in parks and reserves; and make payments to traditional owners arising from native title agreements by way of income and capital gains to be tax-exempt.

These reforms, should they ever eventuate, would be welcome. However, in my view they fall far short of the radical surgery required if Indigenous land justice and a firm foundation for reconciliation at large are to be achieved. They represent mere fiddling around the edges. One lives in hope but, absent further Mabo-type decisions from the High Court, history shows that our politicians of all persuasions avoid this hot potato, preferring to handball the issue to the courts – and then abuse the judges for doing their job. This harsh reality of Australian politics was one major factor in triggering Mabo in the first place.

LEGAL PIONEER HONOURED

A sardine catcher given to Bryan Keon-Cohen AM QC by the people of Murray Island was the centrepiece of a recent charity auction.

The auction was attended by more than 300 people who gathered to celebrate the legacy of Susan Campbell AM, who died in March 2011 aged 67, at the St Kilda Town Hall.

The former Monash University legal academic was a driving force behind the creation and development of the Monash law school clinical legal education program in 1975.

The program enables law students to gain course credit while working under professional supervision in community legal centres (CLCs).

Bendigo firm Arnold Dallas McPherson partner Ian Dallas pledged $17,500 for the sardine catcher. Mr Dallas, a student at Springvale CLC 25 years ago, then donated the so-called “Mabo sardine catcher” to the Monash Indigenous Centre.

Dr Keon-Cohen said he received the catcher in 1991 from the people of Murray Island as a gesture of gratitude when he visited with his family prior to judgment in Mabo.

Victorian Chief Justice Marilyn Warren launched the Susan Campbell AM Clinical Legal Education Visiting Fellowship and Future Fund on the night.

Professor’s Campbell’s former friend and colleague Simon Smith said the dinner, auction and future fund celebrated a contribution to professional life that went far beyond mainstream university law teaching.

“It is very fitting that she will be honoured in this way through a fellowship fund dedicated to something she was always so passionate about,” Dr Smith said.

Donations to the Susan Campbell fund can be made through preema.wong@monash.edu.au.

LESSONS FROM THE PAST: Bryan Keon-Cohen in front of some of the many Mabo files

DR BRYAN KEON-COHEN AM QC, Victorian Bar, was junior counsel in the Mabo litigation, 1982-1992. He is the author of Mabo in the Courts: Islander Tradition to Native Title: a Memoir.

PHOTO DAVID JOHNS
Glenda McNaught, retired barristers' clerk and former secretary to the late Ron Castan AM QC, looks back.

Those reading or viewing the coverage of the 20th anniversary of the 3 June 1992 Mabo decision, might be forgiven for assuming that this was a David and Goliath scenario, fought by one man, alone and without support.

It appears that the romance of the story has overtaken reality.

Eddie Mabo appeared as a litigant in person in the Supreme Court of Queensland before Justice Martin Moynihan in 1982. He did so courageously. He lost comprehensively. Indeed, every argument presented was dismissed.

By happenstance, Melbourne barrister Barbara Hocking attended a law conference in Far North Queensland where Eddie Mabo delivered a paper on native title as it related to Murray Island. Barbara brought the matter to the attention of the late Ron Castan AM QC, a highly respected Melbourne human rights and Aboriginal land rights lawyer.

For the next 10 years, Ron's attention was focused primarily on the Mabo litigation.

Ron engaged the services of Bryan Keon-Cohen, who had recently come to the Bar, as junior counsel. The role of the legal team was well documented in Bryan's recent memoir Mabo in the Courts. Clearly, Bryan's contribution was extensive.

As Ron's secretary, I typed the innumerable drafts of the original statement of claim, and subsequent amended statements of claim, on an IBM golf ball typewriter. As a result, my knowledge of the construction and working of fish traps on Murray Island was extensive.

When the matter came on for hearing in the Supreme Court of Queensland, Bryan relocated his wife and children to Brisbane for the duration of the trial.

In order to minimise costs, Ron made only intermittent appearances. However, his engagement on behalf of Mabo prompted the attendance of Gavan Griffith QC, then Solicitor-General for the Commonwealth.

There were numerous applications to the High Court during the course of the Queensland litigation. The High Court duly sent the matter back to the Supreme Court for a determination of facts.

Bryan ran the second phase of the trial in 1989 for several weeks with no chambers, limited secretarial or administrative support and (during some weeks) no instructing solicitor. He was assisted by Ron's elder daughter Melissa who had completed the first year of a law degree but had taken leave to pursue other interests.

Ron arranged for Melissa and her now husband, Robert, to live in a flat in Brisbane for three months to provide whatever support they could for Bryan. Melissa engaged a secretarial service which provided assistance with typing and photocopying. Ron paid the bills.

Legal aid funding was extremely limited and applications were time consuming and uncertain. Although I was responsible for paying the bills, Ron and I never discussed the subject of money.

The Murray Islanders called as witnesses had never flown in an aeroplane, never seen, let alone ridden, an escalator. Melissa and Rob not only organised flights, accommodation and meals but provided practical support.

There was one telephone on Murray Island. One needed to call and leave a message that a particular person should be found and brought to the phone. We would then call again when sufficient time had elapsed to find the person needed to take the call.

What might at first appear simple, boring tasks of photocopying documents were in fact difficult and time consuming. Records made by missionaries on Murray Island many years before were extremely fragile and needed to be handled with great care. Nothing, it seemed, was simple. We often worked late and on weekends in preparation for High Court appearances in Canberra.

So many times Mabo seemed like a hopeless case - a lost cause, but Ron battled on. On one occasion eight years into the case, I saw Ron approaching with the unmistakable Mabo file. I expressed my frustration. Ron smiled and responded with: "You know, if this case ever gets up, it will revolutionise this country".

As I prepared to respond in less than polite terms, I paused as the realisation of the correctness of that statement became apparent.

After working at the Bar for more than 36 years - 18 as Ron's secretary and eight as his clerk, I know of no other barrister prepared to dedicate 10 years of their working life to a single piece of litigation. Added to that was the contribution of his personal resources.

If one were to calculate what Ron Castan, a highly successful, respected commercial QC might have earned had he spent the equivalent time on "normal" briefs, it would run into hundreds of thousands of dollars.

Were it not for the legal team, Eddie Mabo and his case would have disappeared into oblivion. Ron's leadership, brilliant intellect and commitment to the cause of Aboriginal land rights ensured the case was brought to a successful conclusion.

Without question, Eddie Mabo deserves recognition and his contribution ought not to be diminished. Without Eddie Mabo, the case would never have been brought.

Without Ron Castan, the case would never have been won. 

PART OF A REVOLUTION: Glenda McNaught spent many hours on the details of the case.