Mabo in the Courts

Entitled to be an agitator - Mabo in the Courts: Islander Tradition to Native Title - A Memoir
by Bryan Keon-Cohen AM QC

Bonita and Jessie Mabo describe Keon-Cohen’s book as “an important record of a significant... landmark along the journey towards justice.” In Mabo (No 2), the High Court declared that Indigenous people’s rights to their traditional lands, in accordance with their laws and customs, survived in part the acquisition of sovereignty by the Crown as a form of common law native title. Further, that the doctrine of terra nullius justifying acquisition of territory by occupation on behalf of the Sovereign did not apply to our shores.

The author recounts his experiences as junior barrister for the Murray Islander plaintiffs in a test case that culminated in the Mabo (No 2) decision. He draws upon personal recollections, private conversations and public records. The book’s narrative is carefully crafted and layered in a way that will appeal to mixed audiences. Peel the layers back slowly with a bamboo knife, however, and always at its core is the author. On memoir writing, William Zinsser states: “Be yourself, speak freely and think small.” The author has demonstrated his mastery of the craft. The book is written for the general public, and is peppered with humour (frequent allusions to “north of the Tweed”) and colourful idioms.

The litigation journey commenced in 1982 with proceedings instituted in the High Court. The plaintiffs sought declarations that they held native title over their respective lands. The matter was remitted to the Supreme Court of Queensland in 1986 for a trial of facts before Moynihan J. The hearing in Brisbane was subsequently adjourned to permit the full bench of the High Court in Canberra to hear a demurrer to establish whether the Queensland Coast Islands Declaration Act 1985 was valid and had legal effect. The Act declared that annexation of the Murray Islands in 1879 vested full rights in the Crown without encumbrances and created waste lands of the Crown in Queensland. In 1988 the High Court declared the Act invalid by virtue of the Racial Discrimination Act 1975 (Cth) and s 109 of the Constitution. The hearing of the remitter continued in Brisbane and on Murray Island in 1989 with Moynihan J delivering his determination under the terms of the remitter later that year. The High Court delivered its judgment in 1992.

The litigation is juxtaposed with accounts of the author’s personal life, including the upheaval of moving his family to Brisbane for the second part of the trial of facts before Moynihan J. These domestic interludes provide welcome relief to the gruelling 10-year saga. It also reminds us that this is not a battle of the Titans, but that of ordinary people. Overall, however, the book is forthright, engaging and highly readable.

Mabo was preceded by a case that raised similar issues before the Supreme Court of the Northern Territory twenty-one years earlier. In Millirрum v Nabalco Pty Ltd the Aboriginal plaintiffs contended that pre-existing rights under native law or custom survived annexation by the Crown and were capable of recognition at common law. Justice Blackburn disagreed. He found that an Aboriginal system of law existed but did not establish proprietary rights in the land. The case never went to appeal and the decision was widely criticised. This conclusion was subsequently overturned in Mabo No 2.

The impetus for the Mabo litigation came from diverse sources: the Torres Strait Islanders’ long history of discontent with the administration of their affairs by the Queensland authorities; Eddie Mabo, an Indigenous rights activist from Murray Island; and Australia-wide social and political foment for Indigenous land justice. It was also opportune that the old people on Murray Island were available to give evidence of their knowledge of laws and customs as the evidence of the younger ones may not have been adequate to satisfy the courts.

The calibre and dedication of the litigation team were integral to the Mabo success. The team also included barristers Ron Castan QC, Barbara Hocking (until 1986), and solicitor Greg McIntyre. Richard Bear assisted with research. Melissa Castan and Robert Lehrer assisted with preparing documents and witnesses. There were other supporters and contributors along the way.

The litigation, however, was beset with funding shortfalls from the inception of the claim in May 1982 to just days before the final hearing before the full bench of the High Court in June 1992. We share the author’s anxieties, frustrations and uncertainties, partly due to the Commonwealth’s administration of funding and partly due to the unpredictable nature of the litigation. The author refers to Ron Castan’s personal commitment and generosity as contributing to the Mabo success. McIntyre also appeared to play a crucial role in securing funding at different, often unforeseen, stages of the litigation.

What now after Mabo? Bonita and Jessie Mabo write that Mabo (No 2) delivered land rights, and restored pride amongst Indigenous peoples as the “First Australians.” The author, however, still describes the nation’s response to Mabo as “sadly inadequate.” This is perhaps because it will take some time before the Australian polity fully understands and respects the principles behind native title. Whatever the reason, the author leaves us with one certainty: the Mabo journey refuses to end.

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1 Justice Murphy in Neal v The Queen (1982) 149 CLR 305, 317.
3 Mabo v Queensland (No 2) (1992) 175 CLR 1, 2 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.
4 See the reasoning of Brennan J in 32-4.
6 Commonwealth of Australia Constitution Act 1900 (imp) 63 & 64 Vici, c 12.
7 (1971) 17 FLR 141, 149.
8 Ibid 143.
9 See Richard H Bartlett, Native Title in Australia (LexisNexis Butterworths, 2nd ed, 2006) 11-12.
10 Described by the author at page 71 as a “window of opportunity”, and reflecting its inherently fragile nature.
11 Above n 3, viii.
12 Above n 3, 4.
13 Above n 3, 3.