

Native Title is Not Land Rights, and Reconciliation is Not Justice

by Gary Foley

Introduction

In 1992 the High Court of Australia handed down its decision in the celebrated *Mabo case*¹, and suddenly the oldest unresolved dispute in Australia became top of the political agenda again. In the immediate aftermath of the decision, a hapless Labor Government was besieged by every conceivable white vested interest group imaginable, all of whom were demanding action to protect their 'private property'. In the midst of the hysteria the Federal government hastily selected a small group of trusted Aboriginal bureaucrats and 'advisers' who then formed an indigenous team of 'negotiators'. The government then negotiated a 'deal' with this tiny group of hand-picked, unrepresentative Aboriginal and Islander people and 'presto!' A Native Title Act was proclaimed in 1994.

To many white Australians, the *Native Title Act 1994* is seen to be a great "Land Grab" by indigenous people who now are 'taking over Australia'. But to the vast majority of Aboriginal and Islander people who were not party to the rushed negotiations with government, the *Native Title Act 1994* is regarded as the greatest political setback of the past 50 years. This means public disquiet about native title continues to fester, spurred on by extremist statements and claims from vested interest groups such as the mining and pastoral industries, and more recently the perennial 'Boong-basher', Bruce Ruxton.

For some Aboriginal people these tensions exacerbate the problems and frustration's they encounter in trying to understand the process of preparing and lodging claims. Others have concerns with both the concept and implementation of native title. This essay seeks to examine some of the concerns that many Aboriginal groups have with a form of land tenure that is vastly inferior to the inalienable freehold title gained by Northern Territory groups under the *Aboriginal Land Rights (Northern Territory) Act 1976*. I will look at the

¹*Mabo and Orr v Queensland* (1992) High Court of Australia, CLR, p. 100.

Mabo decision of the High Court in 1992 and assess Koori activists claims that the finding was as significant an act of dispossession as occurred in 1788, and it will also consider the complexity and excessive legalise that obfuscate the *Native Title Act 1994*.

If Koori political activists are correct in their assertions that 'native title is not Land Rights', and that the Mabo decision was in fact a significant setback for an otherwise very successful historical and political struggle, it becomes easier to understand why even conservative Aboriginal leaders are becoming radicalised and are talking of actions at the Sydney Olympics. This essay examines whether the political process that created the Native Title Act resulted in flawed legislation that has frustrated the raised expectations of Aboriginal people and simultaneously generated a significant 'white backlash' which has seen the emergence of extremist views such as those of Pauline Hanson.

In the process of trying to unravel the truth in the Native Title debate, I hope to identify many of the myths and misconceptions that operate on both sides of the debate. This hopefully will reveal just who has what to lose and what to gain on both sides of the political divide. In then drawing conclusions I will explore ways in which a future Australian society might overcome the mutual suspicion and distrust generated by such a divisive debate to create a more tolerant, cohesive society in the future. The beginnings of such a society are in honest, guiltless appraisals of our past as a means to understanding today and knowing what needs to be changed for a better way tomorrow.

This essay is ultimately about a better understanding of ourselves through a better understanding of history. As such it is an attempt to generate knowledge. Knowledge is information, information empowers. Truth is an elusive creature, especially in history, as history has many vantage points. This essay is one vantage point.

Background History

In 1788, under British law and accepted international conventions held by western powers, there were three ways for a colonising nation to legally gain sovereignty over

new territories. The first was by conquest, in which case the colonising nation was obliged to negotiate full and just reparations and compensation to the indigenous population for ALL lands alienated. The second was by the Indigenous population to cede their sovereignty to the colonisers (as happened in Fiji), in which case the colonisers were again obliged to negotiate full and just reparation and compensation to the indigenes. The third way was to declare a land *terra nullius*, meaning the land was devoid of human inhabitation thereby removing the need to negotiate compensation with an indigenous population.

Bourke and Cox have stated, 'Aboriginal peoples of this country had well-developed systems of law long before the arrival of the First Fleet...Underpinning these systems was the relationship of the people to the land.'² But this did not deter the British colonisers from asserting their own sovereignty over the continent and its peoples by declaring the land *terra nullius*, the sole mechanism by which they could occupy the country without reference to the rights of the Indigenous inhabitants. Had the British acknowledged Aboriginal laws they would then have had to recognise Aboriginal sovereignty and negotiate with, and provide just compensation to, the Indigenous owners of the land.

So with a deliberate act of deceit, British officials conveniently ignored the fundamental rights of the Indigenous inhabitants of Australia and declared British sovereignty on the basis of the lie of *terra nullius*.³ This legal myth was to last for more than 200 years and have a devastating effect on the Aboriginal and Islander peoples of Australia, but it was always ultimately destined to be acknowledged as the lie that Koori people knew it to be. In June 1992, the High Court of Australia handed down its decision in the so-called Mabo case, and declared, 'The lands of this continent were not *terra nullius*'.⁴

It is worth observing at this point that one of the less discussed aspects of the Mabo decision of the High Court is that the subsequent national emphasis on the legal aspects

²Colin Bourke and Helen Cox, "Two Laws: One land", in C.Bourke, E. Bourke, B. Edwards, Aboriginal Australia, UQP, 1994, p. 49.

³Bourke and Cox, 1994, p.52.

⁴*Mabo and Orr v Queensland* (1992) High Court of Australia, CLR, p. 100.

of the Aboriginal land rights struggle has shifted the focus from the political battlefield to the legal battlefield. What was until 1992 an intense and successful five decade political battle on the part of Aboriginal peoples, was suddenly transformed into legal struggle where Aboriginal people were at the mercy of astronomically-priced QC's and Barristers, and a type of land title defined by the inheritors of colonial power. This shift in focus exists to this day and has put Aboriginal people at a disadvantage in their on-going struggle for justice. As David Roberts clearly shows in his excellent essay, *Self-Determination and the Struggle for Aboriginal Equality*, the Aboriginal political activist-led movement from the 1930s to the early 1980s achieved more profuse and profound gains for Indigenous people than has the lawyer led court battles of the 80s and 90s.⁵ One of the major reasons for this is the obfuscatory nature of the legal world and parliamentary legislation, in particular the *Native Title Act 1993*.

For this reason most people in Australia, including most Indigenous people, have little idea of the reality of the Mabo decision and the resultant native title legislation of 1993, and this, as much as anything else, is the reason for a flood of native title claims over the past few years. But the fact that no contested claim has yet been resolved (or even look like being resolved over the next five years) is in itself an indication of the complexity of making a claim under the present act.

Prelude to Mabo and native title

It is important to remember the historical/political context in which 'native title' replaced 'Land Rights' as the focal point in Aboriginal issues in this country. The whole process of 'negotiating' with Aboriginal 'representatives' and passage of the *Native Title Act 1993* was orchestrated by an ALP Federal Government that had come to power in 1983 making grand promises of 'national, uniform, Land Rights legislation'. As Roberts noted, 'The land rights movement, however, received a major setback when the Hawke Labor government withdrew its proposed national land rights legislation in 1986'.⁶ Around the

⁵ Roberts, 1994, pp. 212-235.

⁶ Roberts, 1994, p.218

same time the Report of the Committee of Review of Aboriginal Employment and Training Programs (the *Miller Report*) said that 71 per cent of national Aboriginal income was being provided by the government, whilst only 16 per cent of government funding was being spent on economic development. The *Miller Report* said that,

This clearly demonstrates that current Aboriginal advancement policy is not positively directed towards the long-term economic prospects of Aboriginal people.⁷

Furthermore, Roberts argues that the abandonment of national land rights legislation served to emphasise the dependant status and lack of power of Aboriginal people in relation to the Australian state and that,

This powerlessness is further illustrated by the Hawke government's amendments to the *Northern Territory Land Rights Act 1976*, which in effect enabled the government to allow mining on Aboriginal-owned land⁸

In addition, the 'steamroller' tactics of the Labor government to impose on Aboriginal people the unwanted and discredited Department of Aboriginal Affairs in a new guise, cosmetically reconstructed into an Aboriginal & Torres Strait Islander Commission (ATSIC), caused further dismay in Koori Australia. That dismay was reflected in the abysmal voter turnout for the first ATSIC election which saw less than 20 per cent of Aboriginal people participate.

In 1993 the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr. Mick Dodson, in a devastating indictment of 10 years of Labor government administration of Aboriginal Affairs, said,

In 1993...Aboriginal and Torres Strait Islander peoples could 'boast' that we are the only peoples in Australia who live in communities lacking rudimentary housing, health care or water supplies. We held unique status as peoples who continued to be 'legally' removed, without compensation, from the lands we inherited from our ancestors...Only our people have the status of being twenty-six times more likely to be in custody than other Australians...We alone can see in our communities diseases such as leprosy which have long ago entered the books of medical history

⁷ Committee of Review of Aboriginal Employment and Training Programs, *Aboriginal Employment and Training Programs : Report of the Committee of Review*. Canberra, 1985, p. 40

⁸Roberts, 1994, p.223.

for the white population...Solely indigenous peoples can look forward to a life-span twenty years shorter than that of other Australians. And these facts about the lives of indigenous peoples in 1993 come after approximately 200 years of programmes, policies and services 'designed for the betterment of Aboriginal and Torres Strait Islander people'.⁹

So Aboriginal community disappointment and disillusionment with duplicity of the Labor government was well established by the time the High Court handed down the Mabo decision and thereby shifted not just the goal posts, but also the entire playing field (which incidentally had never been level).

The Mabo Decision

When the full bench of the High Court in the Mabo case found that *terra nullius* was now no longer a valid notion, the erstwhile judges decided that 'native title' existed in 1788, and therefore must 'survive' today in those parts of Australia where freehold title did not exist.¹⁰ This finding meant that in all the main populated areas of Australia where freehold title of land predominates, the Aboriginal people had been dispossessed, without compensation, and had little or no chance of succeeding in any native title claims. This aspect of the Mabo decision represents the greatest single act of dispossession in Australian history since 1788. The situation was summed up by Peter Poynton thus,

It is anomalous, but in theory native title may have existed over much of the continent and may have required large compensation payments for its extinction. However, the High Court magically extinguished it, where land has been freeholded, leased or used for some government purpose, by a vote of four to three, at the same time as they recognised its existence, six to one.¹¹

This occurred because the High Court was faced with a dilemma when it proclaimed that *terra nullius* was untenable as a legal justification of the acquisition of sovereignty of Australia. If the land had not been *terra nullius* in 1788, then the only two legal alternative means of acquisition available under British and International Law, were

⁹ Mick Dodson, "Towards the Exercise of Indigenous Rights: Policy Power and Self Determination", in *Race and Class*, Vol.35, no.4, April/June, 1994, pp. 65-66.

¹⁰ *Mabo and Orr v Queensland* (1992) High Court of Australia, CLR

¹¹ Peter Poynton, "Mabo: now you see it, now you don't!", *Race & Class*, 35, 4, 1994, p. 44.

conquest or cession. In either of these two cases the Crown would then have been obliged to negotiate with the Indigenous peoples with regard to compensation for the loss of their lands. So instead, according to Gerry Simpson, a lecturer in International Law at Melbourne University,

In *Mabo* the Court, having found that Australia was not *terra nullius*, balked at considering these two alternatives and instead invented a completely new category of acquisition - i.e. the occupation of already occupied territory (or occupation of land that is not *terra nullius*). The semantic impossibility of such a finding is matched by its apparent lack of authoritative support in international law.¹²

Yet another commentator, Garth Nettheim, says that a 'cogent argument' exists 'that the acquisition of British sovereignty over Australia without "the consent of the natives" was, even in the context of the time, *contrary to both international and British law*'¹³ (my italics). There are also those in Koori communities who argue that the High Court's ability to rule on native title was suspect from the moment the court declared *terra nullius* invalid. These groups argue that, if the validity and authority of the High Court was entirely dependant upon the myth of *terra nullius*, then did not that authority and validity instantly cease to exist at the moment they declared *terra nullius* invalid? If Aboriginal sovereignty prevailed, then the High Court, as of the instant they declared *terra nullius* null and void, had no authority to make any further pronouncements on the issue. The Australian government should then have been required to negotiate with Aboriginal representatives and discuss proper freehold title land grants and meaningful amounts of compensation, instead of imposing the inferior proposition of 'native title'.¹⁴

Whilst this may seem to be 'voice in the wilderness' argument to many, it should be remembered that Aboriginal activists have lived through many decades of court rulings and declarations that *terra nullius* would never be overturned. It cannot be said that the *Mabo* decision was met with universal applause from Aboriginal communities throughout

¹²Gerry Simpson, "Mabo, International Law, *terra nullius*, and the Stories of Settlement: An Unresolved Jurisprudence", *Melbourne University Law Review*, Vol. 19, June 1993, p.198.

¹³ Garth Nettheim, "'The Consent of the Natives': Mabo and Indigenous Political Rights", in *Essays on the Mabo Decision*, The Law Book Company, 1993, p. 109.

¹⁴ These arguments summarise the general position of several groups including the Koori Information Centre, the Aboriginal Provision Government (APG) and others.

Australia. Indeed, to many Kooris there remains a significant question mark over the actual acquisition of sovereignty by the British. Although a few in the Aboriginal community, most notably Nth QLD lawyer Noel Pearson, were more receptive to the decision, and he tried to focus on what he perceived to be the positive aspects when he wrote in 1993,

...the High Court has now decreed that the common law of Australia recognises a native title which arises from traditions and customs of its indigenous people. This title existed at the time of white 'settlement' and survived the acquisition of sovereignty by the Crown. *This title has been extinguished in many areas but potentially remains intact in many remote areas of Australia*¹⁵...Australians are now confronted with the fact that land rights in the 1990s, in contrast with the 1970s, now proceed from the basis of indigenous rights still held...¹⁶

But even ATSIC, in its publication, the *ATSIC Information Kit on Native Title*, conceded that,

For Aboriginal and Torres Strait Islander people, native title may provide less security and fewer rights than a statutory title - such as the inalienable freehold title available to traditional owners under the provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976*.¹⁷

None of this was of concern to the Federal Labor government which was happy to switch the focus from the difficult terrain of having to deliver on uniform land rights legislation, to the new scenario, created by the courts, whereby the 'Aboriginal problem' might become a legal rather than a political issue.

The Native Title Act 1993

In 1993, the International Year of Indigenous Peoples, the Federal Government enacted legislation to create a mechanism to administer native title claims in the post-Mabo era. The legislation was called *The Native Title Act 1993*, and established the Native Title Tribunal, the task of which was to 'assist in the resolution of land claims, and to make

¹⁵ My italics

¹⁶Noel Pearson, "204 Years of Invisible Title", in M.A. Stephenson and S. Ratrapala (eds), Mabo: A Judicial Revolution. UQP, 1993, p.76.

recommendations to government on issues of use of contested lands.’¹⁸ The Act defined ‘native title’ as ‘the communal, group or individual interests of the Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land and waters; and
- c) The rights and interests are recognised by the common law of Australia.’(section 223).

Whilst it was said that native title could coexist with other interests, one of the ways it could be ‘extinguished’ was by ‘compulsory acquisition by the Crown’. What a remarkable coincidence that since 1788 actions by the British, State, Territory and Commonwealth governments have ‘extinguished’ native title in all the prime land, settled areas of Australia. This ‘extinguishment’ is without a single cent of compensation payable, despite the fact that vast wealth has been taken from the lands in question over the past 200 years.

Under the *Native Title Act*, land and groups eligible to apply for native title are subject to extensive limitations. Firstly, the only lands in Australia where native title may not have been extinguished (without compensation), are those land areas which, on 31st October 1975 (when *Anti-Discrimination Act 1975* was proclaimed) were :-

- * unallocated Crown land, or
- * Aboriginal reserved land, or
- * reserved for a use not inconsistent with native title, eg National parks in some instances, or
- * subject only to exploration tenements or other lessor forms of grant or appropriations¹⁹

¹⁷ ATSIC, “The Mabo Judgement”, ATSIC Information Kit on Native Title, ATSIC Office of Public Affairs, 1994, p. 7.

¹⁸ Morris, Cook, et al, Laying Down the Law 4th Edition, Butterworths, 1996, p. 40.

Such restrictions and limitations on what land is able to be claimed, are further tightened when it comes to what Koori applicants are required to establish before their claims can be even considered. Professor Bartlett points out that,

An Aboriginal group seeking to establish native title at common law must "substantially maintain" its traditional connection with the land. If Aboriginal people fail to maintain such a connection they will not succeed in establishing native title...The traditional connection to the land may have been lost by forcible removal or expulsion from the land under the removal and confinement provisions of State legislation respecting Aboriginal people. In those circumstances, however unjust it may seem, an Aboriginal group will not be able to establish native title²⁰

Thus, the vast majority of Aboriginal people in Australia are now formally deemed to have been dispossessed without possibility of compensation. As Michael Mansell said of the Mabo decision of the High Court,

...the Court did not overturn anything of substance, but merely propounded white domination and superiority over Aborigines by recognising such a meagre Aboriginal form of rights over land. The judges did little more than ease their own conscience of the guilt they so correctly feel for maintaining white supremacy.²¹

The major reason behind widespread frustration in Koori communities was identified by David Roberts in 1944 when he observed that, 'Estimates vary as to how many Aboriginal people will directly benefit from native title, but it is likely that the number will be relatively small, no more than 5 per cent of the Aboriginal population'.²² Today the situation is that in the five years since the *Native Title Act 1994* was proclaimed, not a single contested native title claim has been resolved.

In Victoria, the recent failure of the first major Native Title claim by the Yorta Yorta people has shocked many indigenous activists, but has also served to underline the extreme difficulty in achieving success under the Labor Government's original Native Title Act. Furthermore, the Victorian region's Native Title coordinating body is said to

¹⁹ R.H. Bartlett, The Mabo Decision, Butterworths, 1993 p. xxv

²⁰ Ibid.

²¹ Michael Mansell, "The Mabo Case: The court gives an inch but takes a mile", APG Papers, Aboriginal Provisional Government, Vol. 1 July 1992. p44

have spent \$9million in three years (primarily on white legal professionals) without one successful claim being lodged, thus demonstrating how the Mabo decision has been of great financial benefit to certain non-indigenous groups. The original Native Title legislation seems to be as ineffective as Bob Hawke's *Aboriginal Heritage Protection Act 1984*, which in its 13 year existence only resulted in a single successful protection order.²³

Conclusion

In this essay I have tried to illustrate how both the *Mabo* decision and the subsequent *Native Title Act 1993* have functioned to further dispossess and disadvantage the majority of Aboriginal people on mainland Australia today. These two historical events have been hailed by one section of society as being tremendously beneficial to Indigenous Australians, and we are being told today that all Australians should 'defend' native title from the new attack on it by the Howard Government. But, as this essay has shown, to defend native title is to defend the fait accompli of the most extensive single act of dispossession since 1788, and to further impose colonial 'solutions' on indigenous people.

The dilemma for non-racist Australians is that they are asked to accept assertions by the ALP politicians who, along with their unrepresentative, highly-paid Indigenous 'advisers', created the *Native Title Act 1993*. The simple fact that in the five years since the Act was passed not one contested native title claim has been resolved should suggest two things to both the Koori and non-Koori communities. Firstly, it is apparent that the Act is already so complex and burdened with a lawyer-intensive process that compounds Aboriginal disadvantage, while an army of non-Aboriginal members of the legal profession are making personal fortunes out of the exercise. The second is that the people who were the architects of the Act have a vested interest in portraying their handiwork as

²²David Roberts, "Self-Determination and the Struggle for Aboriginal Equality", in C. Bourke et al (eds), *Aboriginal Australia*, UQP, 1994, p. 232.

²³Hon. Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Act 1984*, AC, 1996, pp. 4-5.

a positive development for Indigenous Australians, despite ample evidence to suggest that the opposite is true.

Is it any wonder that there is confusion in both Aboriginal and non-Aboriginal Australia regarding the importance of native title? Furthermore, given that the situation is such a farce, how can any indigenous person of any conscience be talking about 'reconciliation'. We are a long way from resolving the oldest historical dispute in this country so it is more than a little premature to be proposing 'reconciliation'. That would seem to me to be 'snatching defeat from the jaws of victory'.

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