

## The Eddie Koiki Mabo Lecture 2008

# Beyond Mabo: Native title and closing the gap

---

## Jenny Macklin MP

First I acknowledge the traditional owners - the Wulgurukaba and Bindal people.

I also want to acknowledge the huge contribution being made by James Cook University in Indigenous education. I understand that last year nearly 400 Aboriginal and Torres Strait Island students were enrolled here in undergraduate courses. The University has pioneered many initiatives for Indigenous students – among them the School of Indigenous Australian Studies, the Remote Area Teacher Education Program and the Indigenous Health Unit.

I also want to commend the university's commitment to reconciliation reflected in the James Cook University Reconciliation Statement and the naming of the university library after Eddie Koiki Mabo.

I am honoured to be delivering this 2008 Mabo Lecture.

Today I want to first reflect on the Mabo legacy, outline the future direction of native title and its critical role in Indigenous economic development.

It is also an opportunity to pay tribute to Eddie Koiki Mabo, and his remarkable achievement. Eddie Koiki Mabo's genesis as an advocate and warrior began here at James Cook University where he worked as a gardener, sat in on lectures and read books on anthropology in the library - which as of just half an hour ago - bears his name.

It was on this campus, in a conversation with Professor Noel Loos and Henry Reynolds that he learned that the Murray land he thought was his was not – it belonged to the Crown. His reported response - “No way, it's not theirs, it's ours” – charted a crusade that ended with the historic High Court judgment in June 1992 just months after his death.

The Mabo judgment overturned the legal fiction of *terra nullius* finding that native title to land survived British colonisation and could form part of Australia's common law. It recognised a set of Indigenous rights at the same time affirming that government can validly extinguish these rights.

### **Beyond Mabo**

Delivering the inaugural 2005 Mabo Oration in Brisbane, Noel Pearson said the principles established by *Mabo* were *"the best opportunity for resolution of the colonial grievance between Indigenous and non-Indigenous Australians"*. He declared it the *"cornerstone for reconciliation legally, politically, historically and morally"* not *"simply a legal doctrine relating to real estate."* Mabo, he said, established an *"over-arching moral framework for reconciliation"*.

For Indigenous and non-Indigenous Australians alike, the Eddie Mabo story has become legendary. His crusade symbolises the determination of so many to overturn 200 years of accepted and seemingly entrenched legal precedent.

The great challenge for us, as a Government, is how we harness the symbolism and use the moral framework, to bring about the sweeping, practical change that can make a difference for Indigenous Australians. Eddie Mabo showed us that the pursuit of fairness and justice cannot succeed if confined to a narrow, prescriptive path.

Today, in the same way, we run the risk of becoming sidetracked by the tired old debate of ideology versus pragmatism. For the sake of a generation of Aboriginal and Torres Strait Islander children, this is quite simply an indulgence we cannot afford. We cannot allow the big issues of Indigenous policy to be hijacked by ideology. If we do that we risk being trapped in an intellectual straightjacket, limiting our ability to draw on the full diversity of ideas and options. Passionate but ultimately unproductive argument about rights versus the practical agenda simply fails to recognise that we can have both. They are not mutually exclusive.

You need only to look back over the last half century to see that approaches that are only ideologically based have failed Indigenous Australians. Ideological trial and error has not worked and we cannot repeat those mistakes of the past. Both the symbolic and the practical are integral to reconciliation, all the time acknowledging that there can never be real reconciliation while Indigenous communities are engulfed by poverty, violence and despair. Nowhere was the healing power of the symbolic gesture more apparent than in the

Prime Minister's apology to Indigenous Australians for past injustices and mistreatment. The national apology has built trust in the Government and means that Indigenous people are willing, for the first time in years, to work with the Government to develop solutions. That moment in the Australian Parliament gave us the national impetus to, in the words of the Prime Minister, *"deal with this unfinished business of the nation, remove a great stain from the nation's soul and in a true spirit of reconciliation open a new chapter in the history of this great nation."*

But now it is up to us, the policy makers, to harness the momentum of the apology and align it with Eddie Mabo's vision to create a new understanding between Indigenous and non-Indigenous Australians to build partnerships of mutual respect and responsibility. Just as Eddie Mabo did, we must marshal all our forces to cooperatively and effectively deliver the practical, structural change that's essential if the next generation of Indigenous Australians are to have a better future.

What we need is a collective open mind and flexible approaches to the complex, cross-jurisdictional and cross-generational problems that are confronting us in Indigenous policy. It is going to take hard work – from all of us. It also demands an approach that stringently examines the facts and makes policy decisions based on 'what works'. To succeed, it is essential to develop an evidence base, which can deliver solutions across locations and across cultural difference.

### **Building on Mabo - Native Title**

Native title is critical to economic development.

While economic development for Aboriginal and Torres Strait Islander people is both complex and challenging, there is no doubt that properly structured property rights to land are a key component in expanding commercial and economic opportunities. As the Attorney-General Robert McClelland (who also has responsibility for native title issues) said in a recent speech setting out the way forward: native title is more than just delivering symbolic recognition. It can and should have practical benefits as well. A native title system that delivers real outcomes in a timely and efficient way can provide people with an important avenue for economic development.

Part of the argument put forward by Eddie Mabo, David Passi and James Rice in the Mabo case was based on the particularities of land tenure on Mer which involved quite specific boundaries delineating the ownership of particular areas and gardens by individuals and families. The level of specificity in relation to tenure varies within Indigenous societies, based on the specific forms of economic activity that is undertaken. The challenge for policy

makers is to build on traditional forms of tenure, to find ways to enable native title holders to engage with and form part of our broader economy.

Native title should reflect the changing needs and aspirations of Aboriginal and Torres Strait Islander people in a market economy. Almost 20 per cent of the Australian continent is owned or controlled by Aboriginal and Torres Strait Islander people – more than half of this derived from state and territory based land rights legislation. The balance is held under determinations under the Native Title Act (NTA) as native title.

Native title holders and claimants have access to significant economic and commercial leverage through the procedural rights set out in the Native Title Act. This has led to the negotiation of many agreements across Australia for a range of purposes, including more than 300 registered Indigenous land use agreements. It is clear that, since Mabo, there has been a major shift in the way the nation deals with Aboriginal and Torres Strait Islander people's prior ownership of their lands.

Aboriginal and Torres Strait Islander people now benefit from the knowledge that they are substantive players and stakeholders in the future development of the nation. The rest of Australia also realises that the views and aspirations of Indigenous people matter. There is now broad bipartisan acceptance that native title is here to stay.

After decades of opposition to Indigenous land rights, the resources industry has accepted the logic of the Mabo case. They accept and support the legitimate rights of Aboriginal and Torres Strait Islander peoples to have their pre-existing rights to land acknowledged and legally recognised. They are now enthusiastic and constructive supporters - engaging with Indigenous people just as they engage with other landholders. And Indigenous entities like the Kimberley Land Council are using the leverage available under the Native Title Act to build stronger Indigenous economic participation in partnership with industry.

It is clear that the resources sector, through its peak bodies including the Minerals Council of Australia and the Australian Petroleum Production and Exploration Association, and peak Indigenous groups want to make the native title system work to achieve economic and social objectives. This confluence of social and political attitudes along with the formal legal recognition of Indigenous rights is in large part due to the efforts of Eddie Koiki Mabo, David Passi and James Rice and their families. This is their legacy.

We owe it to them to build on it to make sure that Indigenous landowners manage this substantial asset in the national interest and for their economic, social and cultural benefit.

## **A new approach to Native Title**

The recognition of native title and the establishment of new institutional arrangements have brought huge gains but substantial challenges remain. With rights come responsibilities – for individuals, for corporations, for communities and for governments.

As a Government, it is our responsibility to make sure that the *Native Title Act* operates effectively and in the interests of the community. Fifteen years after the passage of this historic legislation, there is a need to look hard at the structures and institutions we have put in place, and make sure that they are working effectively for Aboriginal and Torres Strait Islander people and in the nation's interest. There are at least three areas which demand new approaches.

First, the processes in place to resolve outstanding native title claims are overly complex and exceedingly slow. The legal and anthropological processes in place defy comprehension. In many cases multiple external stakeholders are involved and scores of potential claimants. The claims can also revive internal Indigenous conflicts and disputes over traditional rights to land. The claims process can cost millions of dollars in claim preparation, mediation and litigation. The National Native Title Tribunal estimates that it will take at least thirty years to resolve the outstanding backlog of native title claims under current processes.

Second, those who framed the *Native Title Act* have not left the system with the best possible representation for native title claimants. Further thought needs to be given to the composition and nature of the Native Title Representative Bodies - and to the bodies that hold native title, the Prescribed Bodies Corporate. There is an inadequate statutory framework for these bodies, weak accountability arrangements and not enough funding to get the job done. Moreover, key stakeholders such as the Minerals Council and Native Title Representative Bodies themselves are calling for adequate resources for claim preparation and dispute resolution.

Third, there is uncertainty about how payments flowing to native title holders and claimants should be allocated and administered. The number of agreements reached with native title parties to allow mining and other development to proceed is increasing, as are the income streams and other benefits that form part of those agreements.

There is the potential for millions of dollars to be harnessed for the economic and social advancement of native title holders, claimants and their communities. We must not allow this potential to go unrealised.

The resources boom is throwing up a range of largely unanticipated challenges and

opportunities in relation to payments to native title claimants and holders. Arrangements for payments to Indigenous landholders are largely left to the companies involved and the landholders themselves who may not have the assistance they need to weave through the legal and operational landscape of major development. While the history of agreements between the mining industry and Aboriginal groups has been patchy, it is clear that many industry players, including at the top end of the market, have worked to improve the standard of agreements. This trend must be continued.

One of the best recent agreements can be seen at Argyle in the East Kimberley. In 2005, RioTinto and the local Miriwung and Gidja peoples signed an agreement which recognises pre-existing Aboriginal relationships to the area, sets out ambitious employment targets which Rio is well on the way to meeting, and provides financial compensation to traditional landowners. This involves the payment of monies into two trusts. One is focused on the Aboriginal groups' longer term aspirations for education, community development and investment for their children. Another provides a shorter term income stream along with financial literacy training.

Agreements like this are win/win for the mining industry and local Indigenous people. For the mining companies, they have the potential to be the solution to the critical shortage of workers. For local people they mean jobs, security and a brighter future. Unfortunately, not all agreements in place are of this standard and there is little to guarantee high standards into the future. In fact, it's been described as "the great Australian paradox" - that the traditional owners of the land are the poorest people living on it.

Over the course of the next two decades, agreements between resource developers and Indigenous groups will lead to quite extraordinary amounts of money flowing into the Indigenous economic realm. This is particularly the case in the Pilbara, where some project agreements will transfer hundreds of millions of dollars into Indigenous trusts. The challenge here is to ensure that financial flows to native title holders – and indeed landholders under other land rights legislation – contribute positively to improving Indigenous economic status. To do this, these financial transfers must be structured to increase wealth and capital assets within Indigenous communities.

We – the policy makers, resource developers, and Indigenous leaders – must collectively create a mindset which structures the governance of these arrangements to ensure financial benefits create employment and educational opportunities for individuals and are invested for the long term benefit of communities. The benefits of the payments made over the coming decades must be made to last for generations.

Achieving these outcomes is not straightforward. The financial transfers will be characterised by some as outside the scope of appropriate policy – as not properly the subject of government interference or regulation. We say that the responsibility of government is to work with people to harness whatever resources are available.

There will be a need for innovative and far-sighted thinking on the part of government and industry. And, there will be a need for hard-headed leadership from Indigenous interests. It is not tenable for people to continue to live in overcrowded housing in dysfunctional, despairing communities while substantial funds, nominally allocated for their benefit, are either locked up in trusts or distributed as irregular windfalls to be frittered away with no long term good. The policy challenge is to both respect the rights of native title holders and claimants to make such agreements in relation to their land, and to make sure that the funds which flow are used to make a difference to their lives and to the lives of their children and grandchildren.

We would all have cause for shame if the huge proceeds expected to flow to Indigenous people from the mining boom, are not harnessed to help close the gap between Indigenous and non-Indigenous Australians.

### **Making native title work**

I am not the first person to identify these issues, and certainly not the only one looking for solutions. Many of the key stakeholders in the native title arena are already working to find ways through the native title maze. Critical to this is removing the expectation that resolution of native title claims lies exclusively with the courts.

Again as the Attorney-General points out we must put aside old attitudes and resolve issues through negotiation rather than always resorting to litigation. As he says, courts are being asked to resolve issues that are not well suited to the winner take all judicial process. In the meantime, tragically people are dying before claims are resolved. But there are signs that progress is being made.

In Cape York recently, I had extremely constructive discussions with the Cape York Land Council regarding new negotiated approaches to resolving outstanding land and economic development issues in the Cape aimed at resolving outstanding claims more quickly. Following my discussions with the Cape York Land Council in March this year, the Cairns Indigenous Coordination Centre has been working with Kowanyama Aboriginal Shire Council, traditional owners, the Attorney-General's department and Queensland government agencies to fast-track land dealings. And in Victoria and South Australia discussions have started between Indigenous interests and the respective state governments to cut through

the imbroglio of native title claims to make real and tangible progress on a range of social, economic and environmental fronts. Yesterday, on Groote Eylandt I signed a landmark Regional Partnership Agreement with the Anandilyakwa Land Council incorporating a comprehensive range of program and service arrangements along with an associated agreement to enter into a township lease for a period of 40 plus 40 years. This is the first Regional Partnership Agreement to be signed in the Northern Territory. It is groundbreaking for a number of reasons.

It has been driven by the priorities and aspirations of the local Groote Eylandt communities. It crosses agency and portfolio silos, and includes the Northern Territory and Australian Governments. It is truly a whole of government initiative, encompassing housing, economic development, health, law and order and leadership and governance. It is also groundbreaking because the communities on Groote, and particularly their far sighted leaders, have recognised that reforming land tenure will underpin their future, and the future life chances of their children. While they recognised the importance of land tenure reform, the Groote leaders were unwilling to sign up to a one-size fits all 99 year lease. Their decision to agree to a 40 year term with a 40 year option to renew over the three townships on Groote reflects their own assessment balancing their competing aspirations.

I will shortly be introducing a Bill to amend the Northern Territory Aboriginal Land Rights Act to allow township leases such as at Groote Eylandt to be granted for period of less than 99 years and more than 40 years. The essential point here is for traditional owners to ensure that the term of the lease granted is long enough to provide security for the assets they envisage will be constructed. Security of tenure is directly related to the effective economic lifespan of the assets covered by the lease. I pay tribute to Tony Wurramarrba, the Chair of the Anandilyakwa Land Council and his Executive Committee for their vision and leadership in negotiating this agreement. It is clear that negotiated settlements in a range of native title and land related contexts are already happening.

Our policy challenge is to make sure we facilitate and support the aspirations of Indigenous landowners and claimants to guide and fast track the momentum that clearly exists. This requires a new approach.

Over the next six months the Australian Government will work up a reform package in tandem with the development of the Indigenous Economic Development Strategy. We want to actively explore the scope to encourage the negotiation of comprehensive settlements as an alternative to the convoluted claims processes currently in place. Such settlements might relate solely to native title, or might roll up a range of associated benefits and land acquisitions. They would involve cooperative effort by governments, Aboriginal and Torres



Strait Islander interests and industry. But they would remain entirely focused on finally resolving outstanding and potential claims within the regions or areas that are the subject of the negotiations.

So, for example, in the Cape, a comprehensive settlement would resolve outstanding claims, but might add in a range of other land acquisitions, agreements for joint management, and perhaps even include the negotiation of a regional partnership agreement similar to that which we signed yesterday at Groote.

The reform package will need to include proposals for strengthening the resourcing and statutory basis of the existing Native Title Representative Body structures, including their role in resolving disputes within and between claimant groups. We will need to look at encouraging stakeholders to change the ways payments are negotiated and structured to improve accountability and provide greater assurance to Indigenous interests. The payments that flow to Indigenous companies and trusts must be distributed and invested equitably and effectively in the interests of both current and future generations. Direct payments to individuals should be minimised in favour of payments that create ongoing benefits for the whole community. This will involve a range of extraordinarily difficult issues and I am extremely conscious that the devil is in the detail.

Accordingly, the Attorney-General and I propose to convene a small informal group of key players involved in native title issues to work through these issues over the next few months. We have already asked Marcia Langton and Ian Williams to be part of this group. We will also be talking to the National Native Title Council.

The long-term consequences of inaction are too important to ignore, and I plan to make this one of the key agenda issues of my tenure as Minister with responsibility for Indigenous Affairs.

## **Conclusion**

It would, I think, please Eddie Koiki Mabo that the *Mabo* judgment continues to define the path to real reconciliation. That those who have followed him can use his great achievement to build a better life for Indigenous Australians.

The passage of the Native Title Act prefaced a new chapter in our national history. In the same way that the national apology allows us to lay claim to a future that embraces all Australians.

But there is no room for complacency. Native title is a right which must be used. Used as a tool to bring about positive change. For social purposes. For cultural purposes. And for economic purposes.

It must be used as part of our armoury to close the gap between Indigenous and non-Indigenous Australians.

It must be used to take us forward – so that Aboriginal and Torres Strait islanders and the nation as a whole can make the most of the opportunity we have.

Eddie Mabo would have expected no less.