

## The Eddie Koiki Mabo Lecture 2012

# Mabo 20 years on. Did it change the nation?

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### Professor Henry Reynolds

It was 20 years ago tomorrow when the High Court in a six to one judgement declared in *Mabo v Queensland* that the Meriam people of the eastern Torres Strait had rights as against the whole world to possession, occupation, use and enjoyment of their land. They were wonderful words: rights as against the whole world to possession, occupation, use and enjoyment of their land. It was among the most potent, dramatic words in Australia's legal history and for many ways and for many people it was also unexpected. Could the court overthrow something that was so settled and had been settled for over 200 years? It was therefore, a legal revolution.

What I want to do today is firstly to look at what went before. That is, why the judgement was a legal revolution and then I want to consider what followed from the judgement.

So let's begin with the question of when, how and in what means that Australia became British. The British took four distinct grabs at Australia: eastern Australia settled in 1788; Western Australia 1829; South Australia and the Northern Territory in 1834; and the north of the Torres Strait including Murray Island in 1879. Now, as many of you will know there was no consultation, there were no treaties, and yet the continent became British and recognised by other countries in the world as an effective instrument of annexation.

But of course, also as we know, there were first nations who had occupied the continent for at least 50,000 years and there were maybe three-quarters of a million people all over the continent, from the southern-most point of Tasmania to Murray Island in rainforest, mangrove, mountain and desert there were Indigenous communities who had lived on their land and related to it for a long, long time. But when the British claimed sovereignty, they did more than claim the right to govern over Australia. They also insisted that the British Crown had also become the owner of all the land. That is, Australia was a terra nullius. They didn't for one moment argue that it was uninhabited, but the people in the continent had no right to property. So all the land in those four claims of sovereignty became the property of the British Crown.

This was truly an extraordinary claim. Many of the people in parts of Australia didn't see a European for 100 years and more, even in eastern Australia, and there were still people living in the 1950s and 60s who hadn't been in contact with Europeans. And yet, in one ceremony – a ceremony of annexation – the land had ceased to be the land belonging to the people who lived there and occupied and used the land. It had become the property of the British Crown, the imperial government.

So this was clearly an extraordinary event. But it was extraordinary even in global terms because in 1788 when the British arrived in Sydney and made their original claim, and it was on the 7<sup>th</sup> of February 1788 when they made this claim, there had already been 250 years of European colonisation in the new world, particularly in the Americas, and it was not normal in those circumstances to claim that the land was terra nullius. Neither the Spaniards in South America nor the British in North America in what became USA and

Canada claimed that the native people had no rights to property, and native title, as it was Indian or native title became a fixed part of the law in North America, and it was enunciated with great flair in the American Supreme Court in the 1880s. So there was no doubt that native title was a normal accepted way of proceeding and terra nullius was quite anomalous. Now, not only was this true about colonisation before Australia was settled, it was true also after Australia had been claimed. That is in New Zealand, and Fiji, and New Guinea there was the acceptance that the Indigenous people who were living on the land had rights to the land. So Australia was in a quite unique situation and there were also consequences of that unique situation.

In North America, in Canada and the United States, because the Indians were regarded as the landowners it was necessary to negotiate with them. It was necessary to learn their languages to try and understand how their societies worked and when it came to it to gain land either by making treaties or by outright purchase. And this is what happened in North America before and in New Zealand later. But in Australia there was no need to negotiate, no need to purchase, no need to learn the languages, no need to try and understand the society that existed here. The settlers were quite confident that they were moving out into vacant land that belonged to nobody. They were quite convinced that the Aboriginal people they met were trespassers on their land, and that when the Aboriginal people resisted this invasion bit by bit across the continent then they felt quite legitimate in treating them as thieves and trespassers and if necessary shooting them in the process.

So there were always difficulties and problems and conflict over this decision to not recognise the property rights of the Indigenous people, and as I say it was exceptional even in the bloody history of European colonisation.

But land rights became a modern political issue particularly in the 1950s and 60s. It had two sources. One was the civil rights movement in the cities, and by the late 1950s the Federal Council of Aborigines and Torres Strait Islanders had put land rights at the top of its agenda. But it also came from the remote parts of Australia. One of the first people who demanded that they should have the right to decide what happened on their land, were the Yolngu people of the Gove Peninsula who in the 1960s objected to part of their reserve being put aside for an aluminium mine smelter. They sent a famous bark petition to parliament demanding that their rights to their land be respected. When this was received and people thought what a wonderful pretty thing this was, but it made no change. So they took the first land rights case to court – to the Supreme Court of the Northern Territory – and they lost. The judge in that decision, the Gove land rights case, said ‘yes, I understand these people have always lived on their country. I understand that they have a close association with the land. I understand they have a system of laws. But the land owns them, they don’t own the land. So the attempt to prove through the courts that terra nullius was a fiction was defeated at its first attempt.

Well then, a good deal happened subsequently as no doubt many of you will know. When the Whitlam Government came to power in 1972 it was committed to recognising land rights. The legislation to set up a procedure in the Northern Territory, the *Northern Territory Land Rights Act*, was left over after the dismissal and in 1976 it was Malcolm Fraser who passed the *Northern Territory Land Rights Act*.

But what about the rest of Australia? Well the Labor Party, as many of you will know, committed itself to establishing land rights in the whole of Australia, and if I remember rightly, Bob Hawke said that in one of his election speeches in Townsville under the city hall building. And so it looked as though the politicians were going to do the right thing. But as many of you will know a massive campaign by the mining industry and by Brian Burke in Western Australia meant that the Hawke Government decided that it was all too hard and so they gave up all attempt to put forward land rights. And so it appeared that the initial push for land rights had come to an end.

But unknown to most people in Australia there was a movement afoot that was going to be of dramatic importance, and that had begun in Townsville. And as we know Mabo, Rice and Passi were the three people

who eventually took the case to court. But it came very much out of the experience of Eddie Mabo in Townsville.

Now, many of you may not realise that he had been in North Queensland since the early 60s. Before that, islanders weren't allowed on mainland Australia. He came eventually to Townsville and established his family here and became very much involved in what could be called civil rights issues; that is, the position of Indigenous people in North Queensland, and particularly in Townsville. So he was concerned with discrimination - much of which he had experienced himself. He was concerned with housing, employment, education and the arts. So this was his initial passion: to achieve justice for Indigenous people in Australian society and in particular in Townsville.

But his attention turned back to his beloved Mer, Murray Island and this is a development which both Noel Loos and I were involved in. That is, when Eddie was working in the garden he used to come and talk to us over lunch and much of the discussion was about finding out from Eddie what it was like to grow up in the Torres Strait. It was a subject which he was intensely interested in. When he talked about his traditions and his culture and his history, his eyes shone and his face glowed. This was clearly something which he was passionately involved with. Several times I asked him, "What is going to happen with your children when you haven't been on the island for years, for ten years or more?" And it was this worry that led to him setting up the Black Community School.

But even more significantly was, in discussion he talked constantly about his land on Murray Island. Constantly. And so once I said to him, "How do you know that it will still be there? You haven't been on the island for more than ten years." He wasn't allowed to go back at this stage. "How do you know that it will still be there when you return?"

He said, "Everyone knows it's Mabo land. It's been Mabo land for generations and there's no doubt about it. When I return I'll simply take my land up again and that will be that." And suddenly I realised that despite his passionate engagement with the island and his close involvement with his own land he didn't realise the fundamental point that his traditional title, although known to everyone on the island, had no legal standing whatsoever. He was in the position of tribal and Indigenous people all over the world who don't have the piece of paper that says they have the right to their land. This was customary, traditional title and in Australian law it meant absolutely nothing. And Noel and I wondered whether we should tell him. Should we tell him this? And eventually we decided yes, he must know.

And so we said to him, "Look, you do realise do you, that you don't own your land at all? You have no rights to it whatsoever. Your family may have lived there for generations, (and I think he could trace his ancestors back many generations) that means nothing." And given the fact that Queensland governments were hillbilly governments at that stage, and a short time after passed a law to extinguish rights if they existed, this was a matter of great importance. And so this was undoubtedly the point at which Eddie's great activism and passion turned from the position of Indigenous people within Australian society to the question of traditional land.

And I did one other thing to help this along. I remembered vaguely from my undergraduate history that there had been famous cases in the Supreme Court in the United States which had defined the rights of Indians to their traditional lands, and I asked my then head of department, Professor Brian Dawkin who was an American historian and spent about an hour telling me about it, and I realised that yes, there was a very good chance that Eddie might be able to win a court case. So I said to him, "Look, I think you can win a court case, because after all you have a settled, village dwelling existence; you use the land for growing crops; it's well known the boundaries. I think this would be a very good case." I once, I'm sure said to him, "You'll be famous when you win your court case." I didn't for one moment imagine that things would lead where they did. And certainly after that, it was other people who become critical in this whole story.

One was the student union who decided to have a conference in Townsville on land rights. Few student unions could have been so influential in an important historic development because this conference enabled

two things to happen. One, it enabled Eddie to talk to the almost the only people in Australia who knew anything about native title. Native title was American, Canadian law. People would have learned nothing about it in law school. They didn't think it could exist. But there were a few people who, largely because they had studied in Canada, knew about native title and these people improbably came to Townsville. So Eddie found the very people who could carry his case and the lawyers found the case that they were certain could carry the day in the High Court. And that is what happened. Not quickly, as many of you will know: it took 11 years. To the High Court, back to the Supreme Court of Queensland then to the High Court because Joh Bjelke-Peterson had passed a law extinguishing native title if it existed, which was only struck down by a narrow majority because of the *Race Discrimination Act*, and then back to the High Court and eventually the decision. So that is the background to the Mabo judgement.

Let me briefly summarise what I have said up to this date and then move on. I began by pointing out that the doctrine of terra nullius which was applied to all of Australia, was distinctive to Australia. It didn't happen in other parts of the world where European colonisers met Indigenous people. But it was so secure in Australian law it had been Australian settled law for 204 years. It also had the backing of the Privy Council in London, which up until 1986 was the Supreme Court for Australia as well as for Britain. The view was that the Aborigines in particular were too primitive to have any claim on their land. This led, as I pointed out, to a great deal of frontier conflict and then it became the subject of modern politics, both urban politics and movements coming from remote parts of Australia, from the land of the Yolngu and eventually from the land of the Meriam people.

Well, how did this affect Australia? Let me begin by arguing that one of the often overlooked consequences was the affect this had on Australia's international standing. By the 1960s, Australia carried two heavy burdens around the world. One was the White Australia Policy, which was only just beginning to change. The other was discrimination against the Aboriginal and Islander people, against the Indigenous people. And these two things were widely known and understood. In many ways, these were the only two things people knew about Australia – that it had a racial immigration policy, and that it ill-treated its Indigenous people.

Up to the 1930s this didn't matter all that much. Australia could sail along and not feel it needed to change. But by the 1960s it was a different story. The European empires had gone or were going. The whole idea of race had been profoundly discredited by the holocaust. Decolonisation meant that there were many, many new non-European countries, and these non-European countries by the 1960s had a majority in the United Nations General Assembly. But also, Australia was involved and had committed itself to the great documents of universal human rights. So Australia had to change or it was going to end up a pariah like South Africa.

So Australia's standing in the world was greatly influenced by the changes - the White Australia, but also certainly by the Mabo judgement. I can remember Gough Whitlam saying that when he was tramping around the world trying to get support for Australia to hold the Olympics in Sydney he said, "One of the most important things I was able to say was that we had now passed a law which recognises Aboriginal title in Australia." And he said that was very widely accepted and appreciated.

But in terms of international standing there was also an effect in what is known as the fourth world, that is the tribal and Indigenous people who live within nation states; who live uncomfortably within nation states; who are often in the situation of having no secure title to their land. The Mabo judgement was a beacon to many of these people, and they came to hear about it in all sorts of ways. I can tell you three stories to indicate this.

The first was when I met a group of leading Innu in Japan, and they knew about Mabo and this was important for them. I met an old leader of the Mapuche Chilean Indians in Santiago and when he talked about Mabo he had tears in his eyes. He couldn't imagine that Indigenous people could regain some of their land. And then there was the night when I was at a party and suddenly into the gathering came a group of people, black people, dressed in the most extraordinary way. They were dressed very formally at the top with suit coats and ties, and at the bottom was traditional dress - both men and women, young people. And they swept in, and of all the people I've ever met, you'd have to say these people had extraordinary charisma. And I thought, "Who are these people?". These were the Masai from Kenya who had come to Australia because

they knew about the Mabo judgement and they had come to Australia to see what they could learn about the Mabo judgement which they could take back and try and win their rights to their traditional lands.

So, that's my first point. The rest of the world did know about this, and it was important for Australia's standing in the world. But of course, the centre of the story is land. So let's consider land over the last 20 years since the judgement, because the Mabo judgement was just the beginning of the story. That is, because it was so revolutionary and because the judgement was regarded as so strong juridically, and because it was a six to one majority it carried great, great power and it was obvious that this was not going to be overturned.

Following Mabo there were many, many more court cases endeavouring to define exactly what native title meant in the Federal Court and in the High Court. The Wik judgement in 1996 which recognised a continuing Aboriginal interest over pastoral leases was even more controversial than the Mabo judgement but could only have happened following the Mabo judgement. And then, many of you will recall, the *Native Title Act* of 1993 passed on Christmas Eve as a result of fierce opposition and criticism from the Liberal and National parties and I must say a great deal of unease amongst the Labor Party, and there's no doubt that it was Keating's determination which allowed the Labor Party to push ahead and do what they did. The legislation was followed by the setting up of the National Native Title Tribunal in 1994.

So, in a way we've got now 18 years from 1994 to the present so let's consider what actually has happened with Indigenous land over that period.

As you will gather from Les Malezer's comment today, there is a good deal of disappointment and there are some obvious problems with the whole process. One is that it all takes so long. The average for a settlement is six years and there are some settlements which have taken more than ten. So in a way Eddie Mabo's battle for 11 years has prefigured what has happened all over Australia and it's meant that many of the old people who started the campaign were dead before a decision was made. It also means there is a very large backlog – there are 214 outstanding cases before the National Native Title Tribunal. There's also an understanding that it is far easier to prove native title in the remote parts of Australia, and people there where there is only Crown land have got settlements in their favour and are being given exclusive right, native title to that land. But there are many Aboriginal people who were moved off their land and have had great difficulty in trying to establish their traditional links, because you have to be able to prove your traditional links with the country and in many parts of long-settled Australia that has proved very difficult. The Yorta Yorta people of the Murray Valley were the classic case where the judge said, where in three court cases it was determined that the tides of history had washed away their links with their land, although they subsequently have had a settlement with the Victorian Government. There also, of course, was no suggestion that there should be any compensation or reparation for land that had been taken wrongfully - as several of the judges said – wrongfully (they didn't say illegally, but wrongfully – Dean Gordon said again and again it was wrong), and of course native title is not freehold, it is a quite different form of tenure.

All of those things, I think are true but nonetheless it shouldn't hide from us what has been achieved in the 18 years. There have been 134 determinations recognising native title, covering 15 per cent of the continent. This is a huge area we are talking about. It has been much easier in places like Torres Strait, Arnhem Land, Cape York, the Kimberley and the central deserts to establish native title and this is where many of the successful cases have been. Elsewhere the native title is recognised but they are not given exclusive right because there are other people who have claims over the same land. But still, despite all that there are many, many Aboriginal communities who still want to establish their native title before the tribunal, and there are still hundreds of applications awaiting processing.

When I began to do some research to catch up to give this lecture, what I found was the most surprising thing was the extent of agreements that had been made that haven't gone to court that are called Indigenous Land Use Agreements. At last month, there had been 628 Indigenous Land Use Agreements around Australia and Queensland is the standout state – 355 land use agreements. These are agreements which are reached by negotiation and are registered with the National Native Title Tribunal and have the force of law. This negotiation isn't just talk because it does establish legally binding agreements and all over Australia local

Aboriginal groups or nations, if you will, have negotiated with local government, state and federal governments, with mining, fishing, tourist industries, with the Wet Tropics Authority, with GBRMPA, with energy companies and with pastoralists. Each one has been different and distinctive. Some have been quick, some have taken years, some have taken many, many meetings because there are so many other stakeholders but nonetheless these agreements have been reached. I think this represents some important issues.

Firstly, there's no doubt that these land use agreements (remember 600 of them), does indicate a widespread acceptance of native title. So many of these agreements aren't in the cities, aren't in the liberal leafy suburbs, but out there in regional and remote Australia. So there has been a widespread acceptance of the existence of native title: a recognition that people indeed are the original owners of the land; respect for those people as people of the first nations; and an understanding that their ancestry reaches back for hundreds of generations.

I think even more importantly is this point about recognition. At last, people are respected and recognised as the traditional owners of their country, even if the negotiation ends up with them only having some say on the way that country is changed and developed and above all it meant that all over Australia Aboriginal people for the first time could sit down with government, with industry, with all the other players as equals, as someone who had something to bring to the negotiating table. They were not there to receive charity. They were not there to receive a gift from the white fellow. They were there because they had their native title, either accepted or presumptive which they could put on the table and negotiate with. And that, I think, has been a very, very important development.

I'll just summarise again briefly and then conclude.

This section, you'll remember, began with the situation that followed the Mabo judgement, that this was important for Australia's international standing both in the world generally, but also among the people of the fourth world. But Mabo itself was just the beginning, there had to be legislation, the establishment of a tribunal and numerous court cases all over Australia. Many people have been disappointed with the results but there have been many success stories among those who have received their native title, it's been accepted, and because there have been all of these land use agreements.

What would Eddie 'Koiki' Mabo think about all of this? I'm probably not the person to say, but let's try.

There's no doubt, he would have been delighted by the success. I think he was always confident that it would be successful. He was so convinced himself of the justice of his case. He felt that justice must prevail. And in a way that was the most extraordinary vote of confidence in the Australian legal system. Many Indigenous people said, "No, it's no use. They will never change." But Eddie said, "No, our court is just and eventually it will prevail."

And so not only now do the Meriam people have native title over their islands, all the Torres Strait Islands are recognised under the native title, both populated and uninhabited, there are non-exclusive sea rights over many parts of the off-shore territory around Australia but particularly in the Torres Strait between Cape York and Papua.

Eddie would have wanted to go much farther. He wanted to push sea rights but they said "No, no, no. Just stick to the land for the time being." He also always believed that the Torres Strait should be self-governing and autonomous and I often discussed with him the situation of Norfolk Island, Christmas Island, Cocos Islands. These are territories. They do not belong to the state and therefore they have a degree of self-government that doesn't exist for people living within the state boundaries. Norfolk Island was given self-government in 1969 by the Fraser Government and the whole parliament agreed they should govern themselves because they had a valuable way of life that must be preserved.

Now, it is that pattern that I think Eddie was wanting and expecting and I notice, although these things don't get reported in the far south, that at a recent meeting while there was still a Labor Government in Queensland Premier Bligh and the Cabinet was in the Torres Strait and she promised that she would pursue the matter of self-government and the territorial rights of the Torres Strait Islanders and wrote to the Prime Minister suggesting that this should happen and that a referendum should be held. So Eddie would be delighted with what has been achieved, but he would still have wanted more.

Let me finish by returning to my role as a historian and consider two historical issues. Let's remind you that the Murray Islands were not part of Australia until 1879 when Queensland pushed its border north. Now let's suppose either that Queensland did not push its border so far, or that it did not annex to north the Torres Strait at all. Well then a few years later in 1884 when the British Government annexed Papua it is quite likely that the Torres Strait Islands would have been included in that annexation. They would have become part of Papua. In a way, the Murray Islands had two hands reaching out for them in those years. The hand of Queensland from the south, where there'd be no recognition whatever of Indigenous land rights, and the British hand reaching out towards Torres Strait from Fiji where land rights had always been recognised.

So it's just possible, had things been slightly different that Eddie would have grown up as a Papuan. His land rights would have been absolutely secure. But I'm quite sure that he would have been one of the young nationalists who were pushing for independence and he may well have ended up being a prominent politician in the new nation.

Let me finish by considering, given that this is above all the overturning of terra nullius, just to remind you the terrible cost of terra nullius. All of these negotiated agreements, the 600 negotiated agreements of the last 18 years, are agreements that could have been reached in earlier times. They are the sorts of agreements that were reached in Canada with the Indians, and with the Maoris in New Zealand because the legal situation was different.

So let's just look at two settlement stories: one with terra nullius, the other with recognition of native rights. And my two settlement stories relate to western Canada and Queensland, that is Canada between the Great Lakes and the Rocky Mountains. These two places were settled at much the same time, between 1860 and 1890. Similar people: i.e. British immigrants and old colonists from the more settled parts. They had the same sort of government. They had the same sort of laws. It would be hard to find two societies closer together in so many ways.

And yet the settlement of western Canada took place as a result of signing treaties. They're called the numbered treaties and there was no violence at all. There was a rebellion of the Metis, but that's another story. There was no violence in the process of settling the western plains, it was done by treaty and those treaties still exist.

With Queensland, when there was no recognition of native title there was great violence. Possibly 20,000 deaths and more resulted from the conflict on the frontier. Now there's no doubt in my mind that wasn't because the settlers in Queensland were all that different from the settlers in Canada, it was the very nature of the legal system and above all the terrible cost of terra nullius.

Mabo, Passi and Rice took on the mammoth task of changing a law which appeared beyond the reach of amendment or appeal; a law which had been central to the Australian legal system for 200 years with terrible consequences. So their struggle was not just for justice for the Meriam people, but for all tribal and traditional people all around the world. In achieving their extraordinary task of discrediting and rejecting terra nullius they saved Australia from itself.