The Legacy of the Mabo Case: Indigenous land justice in Australia

By Kylie Pearce

Marcia Langton speaks while Bryan Keon-Cohen listens on.

Before Mabo there was no place at the table for Aboriginal peoples; police and riot squads were simply sent in to break up protests. 20 years after the landmark *Mabo* decision, where are we now? And, how far have we come? In June, the Castan Centre hosted a public forum in recognition of the 20th anniversary of the *Mabo* case. The forum speakers were Professor Marcia Langton AM, Chair of Australian Indigenous Studies at the University of Melbourne, and Dr Bryan Keon-Cohen AM QC who is a practicing barrister specialising in native title and human rights, and holds a PhD from Monash University in the area of native title. Professor Langton's presentation focused on the economic outcomes of the Mabo case for Indigenous peoples, while Dr Keon-Cohen focused on the legal ramifications of the case.

Professor Langton explained that *Mabo* and the *Native Title Act*, forced the mining industry and the government to gain legal advice and to acknowledge that indigenous peoples rights could no longer be ignored. She referred to a speech delivered by Rio Tinto's Chairman, Mr Leon Davis, in which he announced that "acknowledged that the industry have to respect Aboriginal peoples and native title", Rio Tinto became the first company in history to include in its policy a reference of respect for Indigenous people. *The Native Title Act*, despite its complexities, forces companies to advertise their intentions, and to consult with Indigenous peoples, who now have a seat at the table. Professor Langton emphasised that native title has become more than a legal right, it has developed into an economic right. Professor Langton noted that 3000 Indigenous people and 50 small and medium Indigenous businesses now work in the mining industry. In conclusion, Professor Langton also acknowledged how important these developments had been in stamping out what she described as 'union run apartheid' in remote mining towns, which in the past prohibited Aboriginal peoples entering the mining towns after dark.

Dr Keon-Cohen began by acknowledging that many communities are disappointed and aggrieved that the current system is not delivering land justice. However, he then moved on to discuss some of the significant positive outcomes from the *Mabo* case. Dr Keon-Cohen emphasised that the regulatory and legislative scheme has at the very least forced serious players such as the government and mining industries to consider prospects for cohabitation and some concessions to achieve a compromise or settlement with Indigenous peoples. Despite the 1998 amendments to the *Native Title Act* (after the *Wik* decision) significantly winding back the entitlements of Indigenous peoples, Dr Keon-Cohen argued that the Indigenous land use agreements were a mechanism which established economic, cultural and social foundations for a claim of community. He said that recent statistics indicate that there have been 1974 native title applications made under the *Native Title Act*, and there have been 137 determinations of native title existence which has covered 15.8% of Australia's landmass. There have also been 588 agreements made, which included over 5,000 square kilometers of sea land.

Dr Keon-Cohen also commended the "Victorian solution" as a system which identifies the complexities and weaknesses of the *Native Title Act*. The Victorian solution enables communities to file an application for recognition and settlement packages, and has resulted in grants of Aboriginal title to ten historian parks and reserves, which are now jointly managed by government and Aboriginal parties. Dr Keon-Cohen, described these packages as a realistic means to overcome the huge evidentiary burden of proof on native title claimants and the reality that Indigenous peoples have only a slim chance of establishing a native title claim in the courts.

Dr Keon-Cohen finished by criticising the tendency for government lawyers to take overly aggressive approaches in native title litigation, explaining that a hard edged legalistic approach is at a disjuncture with how the government portrays its policy on native title and consultations with Indigenous peoples in the media. He discussed the 2007 recommendations which included reversing the onus of proof in the *Native Title Act*. This would have created an assumption of connection to the land by Indigenous peoples to be rebutted by the government. However, these recommendations have not since been taken on board by the Attorney-General's Department. While acknowledging that the approach would not be without its complexities, Dr Keon-Cohen suggested that a Constitutional amendment to entrench native title rights would be the better step toward future progress for Indigenous peoples and their land rights.

It was clear after the forum that some definite improvements have been achieved of the last 20 years in native title and land justice, but it was also obvious that much more work remains to be done.