TOWNSVILLE, THE UNIVERSITY AND THE MABO JUDGMENT

AN ESSAY BY

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In the years following the *Mabo* judgment in 1992 Murray Islanders wore a T-Shirt with a picture of Eddy above the following message: *Captain Cook stole our land, Koiki Mabo got it back.* The pride was understandable: the history was less assured. Cook had not included Murray and Darnley Islands in 1770 when he claimed Eastern Australia for the Crown. They were annexed by Queensland in 1879. That action involved the imposition of the Australian tradition of *terra nullius* which saw the Crown assume not just sovereignty but also the beneficial ownership of all the property as well.

Had the islands been incorporated in Papua, as they may well have been, as a result of the British annexation in 1884, the result would have been quite different. By then there was an Imperial tradition revivified by Sir Arthur Gordon in Fiji which gave full recognition to indigenous property rights. It was surely one of the ironies of history that Australia finally abandoned *terra nullius* as a result of a case concerning the ownership of land on islands of the eastern Torres Strait.

The epoch making nature of the *Mabo* judgment has been widely recognized both in Australia and overseas. But a question not often asked is why it took over 200 years to correct what the High Court recognized was a doctrine which had no secure mooring in either the common or international law? It also ran contrary to the well-established practice in North America, recognized by both the Imperial and United States governments, and re-enforced in 1840 with the British annexation of New Zealand and the signing of the Treaty of Waitangi. Given the wide gulf between the laws in the Australian colonies and those that operated elsewhere, and were assumed to have been incorporated in the common law, it is interesting to speculate on why there had been no legal challenges to the status quo.

The Aborigines had many sympathisers and advocates in colonial society. But it seems none of them decided to try defending their rights in the courts. This was perhaps hardest to explain in relation to the vast territories held under pastoral leases, a unique form of tenure imposed by the Colonial Office, which incorporated Aboriginal use rights. The continuing potency of these rights was not rediscovered until 1996 with the High Court's *Wik* judgment.

A much earlier land rights case may have failed in the colonial courts. But it is interesting to speculate what might have happened if a relevant case on that particular point had reached the Privy Council. In the 1889 case, *Cooper* v *Stewart*,[1] the Privy Council had determined that, in 1788, Australia had consisted of a 'tract of territory practically unoccupied without settled inhabitants.' Whether a case specifically about Aboriginal rights would have circumvented this serious obstacle is hard to judge.

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[1] (1889) 14 App Cas 291.

But these preliminary observations still leave us with the larger question. Why was the *Mabo* Case successful in 1992? Given the deeply entrenched status of *terra nullius* might reform have been delayed even longer, even indefinitely? In much of the literature on the case written since 1992 many of the attendant circumstances have been considered and can be summarised here.

The international environment was auspicious. There was growing interest during the 1980s in the rights of indigenous and tribal people. The ILO Convention 169 of 1989 had strongly supported indigenous land rights. The Canadian Courts were making important decisions re-affirming the vitality of native title. Australian law was finally freed from the shadow of the Privy Council as a result of the *Australia Act* in 1986. Australia signed the optional protocol of the International Covenant on Civil and Political Rights. The Mason Court was liberal, able and self-confident. Practically the whole advance of *Mabo* through the courts coincided with the ascendancy of the Hawke and Keating governments. Keating in particular took personal responsibility to drive the native title legislation through his own caucus and then the parliament in 1993.

But perhaps the most significant feature of the case was that it was about land on Murray Island which had characteristics unique to indigenous Australia. It was these which attracted the continuing support of capable jurists like Ron Castan, Bryan Keon-Cohen and Greg McIntyre. Meriam culture was much closer to that of Papua than to mainland Australia. The Islanders were gardeners who grew crops on individual family owned plots. Local law was still used because the islanders had been left alone to run their own affairs under an administrative regime somewhat like the indirect rule operating in parts of the British Empire. There were good records about Island customs because the London Missionary Society had arrived in 1871, years before Queensland officials. The pioneering Cambridge anthropological expeditions spent time on the island in 1888 and again in 1901 and published extensive records of their research.

Many of these features of the case are well known and have often been discussed. What is not generally understood is the importance of Townsville. That was where the case had its genesis. It emerged from quite distinctive features of the town which evolved from the late 1960s to the early 1980s. A good starting point is to to consider local conditions fifty years ago, around the time of the 1967 Referendum campaign.

The town was in the middle of a process of which might be termed indigenous re-urbanisation. In the late 19th and early 20th centuries Aborigines had lived in or near most rural towns and provincial cities in north Australia. They often had a night-time curfew imposed on them but during daylight hours they worked in the towns. But intolerance of the indigenous presence intensified and Aboriginal families were increasingly locked away on missions and reserves. It was in effect the internal application of the White Australia Policy. But, by the 1960s it was a policy under siege on all fronts. The Queensland government introduced new measures that made it much easier for Aboriginal families to leave the reserves and move into the towns. This was certainly true in the case of Palm Island and Townsville.

Other changes were producing similar results. The introduction of equal wages in the pastoral industry led to a shedding of Aboriginal labour and families increasingly moved from outback stations to towns and regional cities. The Torres Strait Islanders were also swept up in this process of internal migration. Right up until the middle years of the 20th century they had been prohibited from landing on mainland Australia without

rarely-granted official permission. But in the early 1960s young men were recruited to form a labour force to rebuild the rail line from Townsville to Mt Isa. Others worked as cane cutters in the sugar growing districts. Many of them did not return to the islands when they left the work gangs and settled on the mainland bringing wives and families to join them. This was particularly true of Townsville and Cairns where, for the first time, a Torres Strait diaspora became established in Australia's urban heartland.

They were dramatic and visible changes. They were accompanied by racial tension and violence. Fights and brawls were common in and around the town in the 1960s. Vigilantes attacked Aboriginal camps in the parks. Neighbours complained when indigenous families moved into often derelict houses. Mabo had personal experience of this racial hostility. But he also received a great deal of support which allowed him to become established in the community with work and a house for his growing family. He received his most practical assistance from the Trade Unions. To explain this it is necessary to examine another important aspect of Townsville at the time, one now largely forgotten.

The sixties saw the demise of what had been known as the red north. Up until then the Townsville workforce had been dominated by the unionised workers at the meatworks, the wharves and the railways. The Communist Party, led by a competent and dedicated cadre, held a majority of votes on the Trades and Labour Council and continued to play an important role in local politics. The Party had taken up the Aboriginal cause in the 1940s and continued to do so. With speed and prescience they appreciated that Mabo had leadership qualities although no one at the time foresaw the way in which he would most effectively employ them.

The establishment of the Townsville University College in 1962 was another development that quickly began to change the face of the town. It was one of the first regional universities which have had such a dramatic impact on the life Australia's large provincial towns. The College attracted men and women of high academic achievement who would never otherwise have settled in the north. Their families made an added contribution to the rapid emergence of a richer and more diverse society. They helped breach the hitherto high walls of local parochialism. This was particularly the case in relation to racial attitudes.

The local campaign for the 1967 referendum provided an apt illustration. The 'yes' case was promoted by a coalition of University staff and family members, the trade unions and prominent indigenous leaders, including Mabo. More significant were that the ties established during the campaign were preserved and a committee decided to hold a post-referendum seminar later in 1967 to discuss what follow up there should be. Mabo initiated the project and received significant practical support from the unions. As it turned out, the gathering at the Pimlico Campus of the university was one of the largest and most successful conferences held anywhere in Australia up to that time, with the largest indigenous component. It pushed Townsville to the forefront of national race politics.

Further innovation followed. Kindergarten Headstart, founded in 1967, was the first indigenous pre-school in Australia. In the face of fierce opposition Mabo established his own innovative Black Community School. The university's fledgling history department became a major centre for the transformation of indigenous history that, in

turn, revolutionised Australian historiography. The 1970 Master's Qualifying Thesis of Noel Loos on frontier conflict in the Bowen hinterland, based largely on the surviving files of the *Port Denison Times*, was an important forerunner of the revisionist history that followed. In 1972 Henry Reynolds brought out his pioneering documentary collection *Aborigines and Settlers* and followed up with *The Other Side of the Frontier* which was published locally in 1981. Loos and Reynolds worked with Mabo collecting oral history around Townsville and that was the starting point for what eventually became the notable James Cook black oral history collection. Students were encouraged to work on North Queensland history and a course in international race relations was introduced.

It was therefore not surprising then that the conversations of Mabo, Loos and Reynolds at the university provided the initial impetus to Mabo's legal crusade. They proved to be what his fellow litigant James Rice called the spark that kindled the flame. The story is by now well- known but bears repeating.

Over cut lunches Mabo told related engaging stories about growing up on Murray Island. Many things shone through. He was an intense Meriam patriot. His homeland was ever in his mind. He often talked about his family's land. When he was asked if it would always be there for him despite his long, involuntary absence he replied with complete assurance that everyone knew it was Mabo land. The critical point was that while he had been aware of early stirring of the Aboriginal land rights movement and supported it he did not think it applied to him.

And that is very likely true of most Islanders at the time. Their history since European settlement differed greatly from that of most Aboriginal nations. They lived on remote islands. They largely ran their own affairs. Europeans had shown interest in exploiting Islander labour but not their land. Few white men had ever lived on Murray Island. There was little to show that the whole Meriam homeland was Crown land over which the Islanders had no legal title.

So, when Mabo heard the awful truth he was shocked. It was so unexpected. But he trusted Reynolds and Loos who were in concert on the question and concluded that what they were telling him was the truth. For him it was a moment of epiphany the aftermath of which came to dominate his life. It is probable that he may never have taken up the cause if he had remained living on Murray Island.

But there were several further fruitful developments. After thinking about Mabo's predicament Reynolds told Mabo about the possibility of legal action. Two quite different thoughts were involved. It appeared that the nature of both traditional tenure and land use on Murray Island would give a legal case brought by the Islanders a great advantage over Aboriginal nations whose cause had been rebuffed in the so-called Gove Land Rights case decided in the Supreme Court of the Northern Territory in 1971. Faint memories of undergraduate American history and the Supreme Court's doctrine of Indian Title were confirmed by consultation with the Head of the History Department, Professor BJ Dalton, who taught American history. So strengthened, Reynolds returned to Mabo with not altogether justifiable confidence, assuring him that he would have a good chance to win a legal battle over his ancestral land. In passing, he added that such a victory would make him famous.

But it is doubtful if anyone in North Queensland had the necessary knowledge or experience to advise Mabo about how he might proceed. It was eventually provided as

the result of a conference, 'Land Rights and the Future of Australian Race Relations', organised by the James Cook Students Union in August 1981. It brought to Townsville a number of the key advocates of land rights including Barbara Hocking, Garth Nettheim and Greg McIntyre. It was a well-chosen group. At the time few Australian jurists had much understanding of native title which to many appeared to be an exotic doctrine with little local relevance. Intense conversations on the sidelines of the conference brought a double realisation. Mabo and his supporters saw how they might proceed; the lawyers quickly grasped that here was the best possible case to bring forward in the campaign against *terra nullius*. Hocking and McIntyre took up the challenge and a few weeks later Mabo was in touch with Ron Castan and Bryan Keon-Cohen. And so the fraught decade-long journey through the courts began.

In 1992, after Mabo's premature death, the Court declared in the imperishable lines: 'the Meriam people are entitled against the whole world to possession, use and enjoyment of the lands of the Murray Islands.'