ABORIGINAL IDENTITY – THE LEGAL DIMENSION

Chief Justice Robert French AC

The term 'identity' is used in a variety of discourses about Aboriginal people, their self-perceptions, their cultures, their lands, and their relationships with each other and with non-Indigenous society. Its overbroad deployment risks diffusing its meaning. Nevertheless, it has served, and no doubt continues to serve, a useful purpose as a gateway to reflection upon the complex, multi-dimensional and dynamic character of Australian Aboriginality.

Legal discourse in the courts is probably the least promising field in which to explore concepts of identity. It projects interrelated individual and communal realities on to a pointillist landscape of disputes and 'matters'. Statutory criteria of 'Aboriginality' must find a place somewhere between artificial precision and meaningless generality. Nevertheless, issues of identity and the related concept of 'recognition' have played a significant part in legislation and litigation involving Indigenous people in Australia. 2011 is the 20th anniversary of the Final Report of the Royal Commission into Aboriginal Deaths in Custody. 2012 will be the 20th anniversary of the decision of the High Court in *Mabo v Queensland (No 2)*,[1] when the common law for the first time gave formal recognition to an Indigenous culture and effect to rights derived from it. The statute to which that decision gave rise and the innumerable controversies, negotiations, agreements and judicial decisions which followed, focused the minds of many in the community upon notions of individual and communal Aboriginal identity. The extent, if any, to which the Royal Commission Report and *Mabo* and their sequelae led to a shift in the perceptions of Indigenous Australians by non-Indigenous Australians and vice versa is, no doubt, a suitable topic for inquiry by social scientists. The discussion that follows is not social science. It is a lawyer's largely descriptive reflection upon the interaction between identity and law in relation to Aboriginal people.

The relevant ordinary English meanings of the word 'identity' are 'individuality' and 'personality'.[2] They focus upon the single person. The individual's account of his or her identity, however, is likely to be expressed in terms that are relational. Important elements include name, date and place of birth, occupation, parents, siblings, extended family, nationality and ethnic origin. Membership of, and affiliation with, different communities or groups within the wider society, traditions and beliefs, spiritual, ceremonial and cultural practices, are all elements of self-definition. Many of these elements of identity are involuntary attributes. Some can be disclaimed. Some can be acquired by adoption. Some may be lost or abandoned and rediscovered.

The non-Indigenous comprehension of Aboriginal identity is limited. Complete definition is elusive. It is possible to speak of different kinds of Aboriginal identity representing the diversity of Indigenous histories, lifestyles and relationships of Indigenous people with each other, and with non-Indigenous society. For some, their identities as Aboriginal people will be defined in part by their places of conception and birth, by kinship, by membership of one or more Aboriginal societies, by the land and waters to which they belong, and their knowledge of the stories relating to them, and by their use of traditional language and skills. Some of these elements may be attenuated or missing because of the personal or family history of those who were removed from their parents or because of the disruption of particular Aboriginal societies by the impact of colonisation. The difficulty of pinning down any single concept of Aboriginal identity across this diversity is evident. Nevertheless, common threads of identity lie across it and are frequently expressed by Aboriginal leaders.

In a paper published in August 1993, less than a year after the *Mabo* decision and without reference to it, the Director of

the Aboriginal Research Institute at the University of South Australia wrote:

> An Aboriginal social identity is no longer an aspiration: it is now a reality, relevant to virtually all people of Aboriginal descent. Even though the content varies, there is a sufficient number of elements held in common by Aboriginal people to distinguish it.[3]

Courts of law are not good places to decide whether a particular person or group of people answer the description 'Aboriginal'. From the earliest days in which the question was litigated in Australian courts, there was an emphasis on descent. In *Muramats v Commonwealth Electoral Officer* (WA),[4] Justice Higgins treated the word 'Aboriginal' in the Electoral Act 1907 (WA) as '"aboriginal" in the vernacular meaning of the word as used in an Act addressed to inhabitants of Australia or Western Australia.' He asked the question: 'Whom would Australians treat as aboriginal natives of Australia'? and answered it – 'those are aboriginals (for Australian Acts) who are of the stock that inhabited the land at the time that Europeans came to it.'[5] His approach was endorsed in Ofu-Koloi v The Queen,[6] where the High Court observed that terms such as 'Aboriginal', when used in statutes, 'are used from the point of view of the people to whom they are addressed'.[7] So the Court foreshadowed what might be called statutory Aboriginality as a non-Indigenous social construct, tied to 'objective' concepts of descent.

The interpretation of statutory Aboriginality has varied according to the context and purpose of the statute in question. That proposition reflects an approach taken to the word 'Indian' in United States statutes. In *Vialpando v State of Wyoming,*[8] the Supreme Court of Wyoming said that '[t]he definition of an "Indian" usually depends upon the purpose for which a distinction is made. As regards entitlements the definition of an Indian includes more people than for some other purposes.'[9]

In construing a testamentary gift 'for the benefit of Aboriginal women in Victoria', Lush J in *Re Bryning*[10] had regard to the testator's beneficial intention and rejected a proposition that beneficiaries could only be 'full-blood' Aboriginal women. His Honour said of the word 'Aboriginal': 'In this country it has certainly been used to describe persons in groups or societies irrespective of the question of mixture of blood.'[11]

The need for a flexible approach to statutory Aboriginality was recognised by Toohey J when construing the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*Land Rights Act*'). His Honour was dealing, in that Act, with a 'descent-based concept' of which he said:

> Membership of a race is something which is determined at birth and cannot, in a sense, be relinquished, nor can it be entered into by someone lacking the necessary racial origin. It is unnecessary and unwise to lay down rigid criteria in advance. As situations arise in which the Aboriginality of claimants is put in issue, these situations can be looked at.[12]

Prior to 1967 the Commonwealth Parliament had power, under section 51(xxvi) of the *Constitution,* to make laws with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.' The power was directed to the control, restriction, protection and possible repatriation of people of 'coloured races' living in Australia. The words 'other than the aboriginal race in any State' were deleted by the *Constitution Alteration (Aboriginals) Act 1967* (Cth) following a referendum under section 128 of the *Constitution.* The amendment was based on the assumption that Aboriginal people would fall within the category 'the people of any race'. The Commonwealth's power to legislate for Aboriginal people was thus tied to a constitutional concept of 'race'. There is little dispute that as a scientific or biological term, 'race' is a meaningless category. Genetic differences between so-called races are swamped by differences between individuals within races. Nevertheless, the idea of 'descent' as a criterion of racial membership retains its cultural power in the construction of 'race'.

One of the issues in the *Tasmanian Dam Case*[13] was whether laws for the protection of Aboriginal cultural heritage in Tasmania were within the constitutional meaning of laws with respect to 'the people of any race'. There was some limited discussion of that term in relation to Australian Aborigines. Justice Brennan said:

> Membership of a race imports a biological history or origin which is common to other members of the race … Actual proof of descent from ancestors who were acknowledged members of the race or actual proof of descent from ancestors none of whom were members of the race is admissible to prove or to contradict, as the case may be, an assertion of membership of the race. … [G]enetic inheritance is fixed at birth; the historic, religious, spiritual and cultural heritage

> are acquired and are susceptible to influences for which a law may provide.[14]

Justice Deane offered a broader concept, albeit still centred on descent:

> The phrase [people of any race] is, in my view, apposite to refer to all Australian Aboriginals collectively. … The phrase is also apposite to refer to any identifiable racial sub-group among Australian Aboriginals. By "Australian Aboriginal" I mean, in accordance with what I understand to be the conventional meaning of that term, a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.[15]

Descent also played a part in the interpretation of the term 'Aboriginals and Torres Strait Islanders' in the Letters Patent issued by the Governor-General to constitute the Royal Commission into Aboriginal Deaths in Custody. A question arose whether the Commissioner had authority, under the Letters Patent, to inquire into the death of a young man in Queensland who was partly of Aboriginal descent, but of European appearance. The Full Court, on which I sat, held that the Commissioner did have that authority.[16] Justice Spender said that non-trivial Aboriginal descent would identify a person as an 'Aboriginal' within the ordinary meaning of the word.[17] Neither self-recognition nor recognition by the Aboriginal community was a necessary integer. His Honour went further and said that the presence of either attribute or both was not sufficient to constitute a person an 'Aboriginal'.[18] Justice Jenkinson also held that descent was essential, but not always sufficient.[19] Both Judges held that in cases where Aboriginal descent is uncertain, or where the extent of Aboriginal descent might be regarded as insignificant, factors of self-recognition or recognition by persons who are accepted as being Aboriginals could have an evidentiary value in the resolution of the question.[20]

My view was that, for the purposes of the Letters Patent, Aboriginal descent was a sufficient criterion for classification as Aboriginal. The Commissioner nevertheless had the right to decline to inquire into a case where 'the Aboriginal genetic heritage [was] so small as to be trivial or of no real significance in relation to the overall purpose of the Commission.' It was an open question whether a person with no Aboriginal genetic heritage may be regarded as Aboriginal by reason of self-identification and communal affiliation.[21]

The story of the young man, Darren, the subject of that case, was a tragic reality which lay beneath the legal debate. Darren was born in 1969. His father was Dutch and his mother of Aboriginal descent. His uncle on his mother's side gave evidence that he was of Aboriginal descent, identified as Aboriginal and was accepted as such. Within two months of his birth Darren was placed in the care of welfare authorities in New South Wales. He spent time in and out of what were described as 'welfare homes'. His mother underwent psychiatric treatment from time to time. His father was killed in a motorcycle accident when Darren was two or three years old. His mother attempted to commit suicide on the same day and on a number of other occasions. She took him from a welfare home in New South Wales and went to Queensland for a time. There was evidence that during this time, when he was about four years old, he had extensive bruising on his body. There was also evidence that his mother was addicted to heroin. Eventually, Darren was made the subject of a care and protection order under the Queensland Department of Children's Services. He was then fostered by a family for about two-and-a-half years and, in 1984, placed in Boys Town, an institution operated by the De La Salle Order. He remained there until November 1985.

There was evidence from a social worker at Boys Town that Darren was 'struggling with his identity – with who he was and where he came from, where he fitted in'.[22] She noted he was mixing a lot more with Aboriginal boys at Boys Town and seeking them out. The Director of Boys Town remembered him as 'confused as to his ethnic identity'.[23] Conveying an image that I have never forgotten, the Director said: 'he made a boomerang and left it in his room and on occasions he could be seen standing while adopting a one-legged stance.'[24] He contemplated suicide on a number of occasions. At about age 12 or 13 he walked in front of a train, suffered severe internal injuries and lost a kidney. After leaving Boys Town he obtained casual employment and struck up a friendship with a part-time waitress at a kiosk where he worked. He told her that his mother was Aboriginal and his father Dutch. Her evidence was that she was surprised to hear this as 'he did not look like an Aboriginal'.[25]

Darren's death followed a party at the kiosk at which he worked. He drove away on a motorbike without using a helmet. He was stopped by police and given a breathalyser test. He was over the limit and was taken into custody. He was placed in a cell in the Brisbane Watchhouse. An hour later he was found dead, having apparently hanged himself.

The Royal Commission reported on his death. His story indicated that apart from the many tragic circumstances of his short life, confusion as to his identity must have played a role in the events that led to his death. What is surprising is that his Aboriginality was litigated.

References to genetic heritage in the identification of Aboriginality have been criticised on a number of bases, set out in an interesting paper by de Plevitz and Croft, published in 2003. The authors draw attention to the absence of a genetic concept of race, significant diversity in the Aboriginal population, the difficulty of obtaining access to the genetic material of ancestors and the need to construct a DNA reference group based on '"pure blood" Aboriginal people covering all geographic groups in Australia.'[26]

The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) also threw up a statutory definition of an 'Aboriginal person' as 'a person of the Aboriginal race of Australia'.[27] The importation of the concept of 'race' led Drummond J in *Gibbs v Capewell*[28] to observe that:

> Parliament has used the expression 'Aboriginal race of Australia' to refer to the group of persons in the modern Australian population who are descended from the inhabitants of Australia immediately prior to European settlement. It follows that an 'Aboriginal person' is, for the purposes of this Act, one of those descendants.[29]

Justice Drummond held that some degree of descent was necessary but not of itself a sufficient condition of eligibility to be an Aboriginal person. A degree of Aboriginal descent coupled with genuine self-identification or with communal recognition would be sufficient to bring a person within the definition.[30] On the other hand, communal recognition as an Aboriginal person, given the difficulties of proof of Aboriginal descent, would often be the best evidence available to prove descent.[31] While Justice Drummond's approach allowed Aboriginal communal judgment as a basis for defining a person as Aboriginal, that judgment was not primary proof, but rather offered support for an inference of descent. Justice Merkel in *Shaw v Wolf*[32] was concerned with the same legislation. He held that descent alone was not a sufficient criterion for recognition as an Aboriginal. It was nevertheless a necessary requirement under the Act that an Aboriginal person have some aboriginal descent. Aboriginal descent could be established by genuine self-identification as an Aboriginal and communal recognition. He said: 'in truth, the notion of 'some' descent is a technical rather than a real criterion for identify, which after all in this day and age, is accepted as a social, rather than a genetic, construct.'[33]

Given the cultural significance of the idea of descent in constructing 'race', it is difficult to escape its involvement, directly or indirectly, in statutory provisions that define Aboriginality by reference, either explicitly or implicitly, to race.

In the recent decision of Bromberg J in the Federal Court in *Eatock v Bolt*,[34] a case brought under the racial vilification provisions of the *Racial Discrimination Act 1975* (Cth), the trial judge discussed the question of Aboriginal identity. The applicant had complained that certain newspaper articles conveyed offensive messages about her and people like her by saying that they were not genuinely Aboriginal and were pretending to be Aboriginal so that they could access benefits available to Aboriginal people.[35] The judge discussed the concept of Aboriginal identity. He reviewed the cases referred to in this paper and drew attention to the observation of the Australian Law Reform Commission in its 2003 report on the protection of human genetic information 'that there is no meaningful genetic or biological basis for the concept of "race".'[36] His Honour concluded:

> The authorities to which I have referred, make it clear that a person of mixed heritage but with some Aboriginal descent, who identifies as an Aboriginal person and has communal recognition as such, unquestionably satisfies what is conventionally understood to be an 'Aboriginal Australian'. For some legislative purposes and in the understanding of some people, compliance with one or two of the attributes of the three-part test may be regarded as sufficient. To some extent, including within the Aboriginal community, debate or controversy has occurred as to the necessary attributes for the recognition of the person as an Aboriginal. Those controversies have usually occurred in relation to whether a person meets the necessary criteria, rather than as to the criteria itself [sic]. Those controversies have however from time to time focused upon whether a person with no or no significant Aboriginal descent should be accepted as an Aboriginal person.[37]

It is not necessary for the purposes of this paper to make any further comment upon the reasoning and the decision in *Eatock v Bolt*. The case has been the subject of public controversy in relation to the racial vilification provisions of

the *Racial Discrimination Act*. However, insofar as it discussed the concept of Aboriginal identity as explored through the courts, the judgment summed up the relevant authorities.

If one broad conclusion can be drawn from this discussion, it is that statutory concepts of Aboriginality are always going to be troublesome in terms of the challenge they pose to courts interpreting them and the reduction of a complex, multi-dimensional human reality to words on paper in statutes or other legal texts. Nevertheless, words on paper have consequences and the courts must give effect to them as best they can, having regard to the purpose of the text in which the idea of Aboriginality is embedded. The subsuming of that idea in the term 'race' in the *Constitution* is undesirable. If section 51(xxvi) were amended to delete the reference to 'people of any race' and replace it with a reference to 'Aboriginal and Torres Strait Islander people', the problems would not go away, but the dead weight of an outdated concept would no longer burden the power.

The relationship of Aboriginal peoples to their land, which for many persists beyond historical displacement or removal, is a central theme in the affirmation of individual and group Aboriginal identities.

The long-standing campaign, which dates back to the first decade of Federation, to give the Commonwealth Parliament power to legislate with respect to Aborigines was, in part, focussed on civil and human rights and protection against discriminatory State laws. In 1963 however, land rights were thrown into focus with the presentation of the famous Bark Petition to the Commonwealth Parliament by the people of the Yirrkala in protest against the excision of 330 square kilometres of the Gove Peninsular Aboriginal Reserve for the grant of special mining leases for bauxite. The 1967 referendum, which amended section 51(xxvi) of the *Constitution*, paved the way for Commonwealth laws with respect to Aboriginal land. However, nearly a decade was to pass before the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*Land Rights Act*') which, being limited to the Northern Territory, did not require the support of the amended race power, it being a law authorised by section 122 of the *Constitution*.

The Northern Territory land rights legislation itself followed from litigation brought by the people of the Gove Peninsula seeking to set aside the grant of bauxite mining leases over their land on the basis of their common law native title. The action was dismissed by application of the historical fiction embedded in the common law by the decision of the Privy Council in *Cooper v Stuart*,[38] in which Lord Watson had said:

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. [39]

Applying *Cooper v Stuart* to the Northern Territory, Blackburn J in *Milirrpun v Nabalco Pty Ltd*[40] said:

> the question is one not of fact but of law. Whether or not the Australian aboriginals living in any part of New South Wales had in 1788 a system which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony.[41]

This followed a finding by his Honour of a 'subtle and elaborate system highly adapted to the country in which the people led their lives' characterised as 'a government of laws and not of men';[42] nonetheless, his Honour concluded that there were no rights arising under traditional laws and customs of the kind that could attract recognition at common law.

The *Milirrpum* case led to the establishment of the Woodward Royal Commission and the recommendations of that Commission and the enactment of the *Land Rights Act*. The importance of Aboriginal identity was embedded in the objectives of the system which Woodward proposed. Those objectives were as follows:

1. The doing of simple justice to a people who have been deprived of their land without their consent and without compensation.
2. The promotion of social harmony and stability within the wider Australian community by removing, so far as possible, the legitimate causes of complaint of an important minority group within that community.
3. The provision of land holdings as a first essential for people who are economically depressed and who have

at present no real opportunity of achieving a normal Australian standard of living.

4. The preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs.
5. The maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority.[43]

The essential process established by the *Land Rights Act* required an inquiry by an Aboriginal Lands Commissioner appointed under the Act, a recommendation to the relevant Commonwealth Minister, followed by a grant under the statute in fee simple. Although it may be said that the land rights legislation was underpinned by a principle of recognition, the rights granted under it were statutory constructs for which the Act did not create an entitlement. In some respects what it provided were grace and favour grants. As is well known, the *Land Rights Act* generated a significant amount of litigation, much of which found its way to the High Court.[44] The litigation may well have set the scene for a more ready acceptance of the concepts of traditional ownership according to custom and law and the capacity of the common law to recognise it.

Importantly, the decision of the High Court in *Mabo* involved the idea 'recognition' as an informing metaphor for the common law of native title. It was also a support for the expression of Aboriginal identity as a relational concept. In the decision of the Full Federal Court in *Northern Territory v Alyawarr*,[45] the Court said:

> The idea of recognition is central to the common law of native title and of the NT Act. The common law and the NT Act define the circumstances in which recognition will be accorded to native title rights and interests and the conditions upon which it will be withheld or withdrawn. It is a concept which operates in a universe of legal discourse. It derives from the human act by which one people recognises and thereby respects another. By the process, which it names, aspects of an indigenous society's relationship to land and waters are translated into a set of rights and interests existing under non-indigenous laws. The choice of the term 'recognition' links it to the normative framework established by the common law and by the Act itself as evidenced in the preamble. Recognition is not a process which has any transforming effect upon traditional laws and customs or the rights and interests to which, in their own terms, they give rise.[46]

Since the decision in *Mabo*, very many Aboriginal peoples around Australia and people of the Torres Strait have brought claims in which they have asserted their identities as subsisting Aboriginal societies defined by their relationships to each other and to the land and waters with which they maintain in their connexions. The process has been far more burdensome and protracted than many might have anticipated. It has generated divisive debates within Aboriginal communities about identity and history. Despite those burdens and debates, the framework that the common law recognition of native title and the statute have provided for a public assertion of Aboriginal identity at a variety of levels, national, communal and individual, is an overwhelmingly positive outcome. Despite their sometimes formulaic character, the recognition of Aboriginal ownership at the beginning of public functions across Australia has marked something of a cultural shift in the perceptions of Aboriginal cultural heritage by non-Indigenous Australians. Their heritage is part of the heritage of all of us. It also informs our national identity. In the speech which I made upon being sworn in as Chief Justice I referred to the question of national identity in this context:

> The history of Australia's indigenous people dwarfs, in its temporal sweep, the history that gave rise to the Constitution under which this Court was created. Our awareness and recognition of that history is becoming, if it has not already become, part of our national identity.

As we all know, intractable disadvantage persists and 20 years after the Royal Commission Report, deaths in custody still occur. There is controversy in Aboriginal communities and the larger national discourse about the measures which should be taken to deal with these issues. I remain an optimist and believe that in the past 20 years the identity of Australia's Aboriginal and Torres Strait Islander people, defined in part by their cultures and their relationships to the land and waters of Australia, their art and the achievements of their increasingly articulate leaders, gives hope that much of what we lament now will be a distant and unhappy memory in another 20 years.

1 (1992) 175 CLR 1 ('*Mabo*').
2 'Identity', *The Shorter Oxford English Dictionary* (Clarendon Press, 3rd ed, 1974) vol I, 1016.
3 Eleanor Bourke, 'The First Australians: Kinship, Family and Identity' (1993) 35 *Family Matters* 4, 6.
4 (1923) 32 CLR 500, 506–7.
5 Ibid 507 (emphasis added).
6 (1956) 96 CLR 172.
7 Ibid 175 (Dixon CJ, Fullagar and Taylor JJ).
8 640 P 2d 77 (Wyo, 1982).
9 Ibid 79.
10 [1976] VR 100.
11 Ibid 103.
12 Justice John Toohey, *Finniss River Land Claim: Report by the Aboriginal Land Commissioner, Mr Justice Toohey, to the Minister for Aboriginal Affairs and to the Administrator of the Northern Territory* (1981) [120].
13 *Commonwealth v Tasmania* (1983) 158 CLR 1.
14 Ibid 244.
15 Ibid 274.
16 *Attorney-General (Cth) v Queensland* (1990) 25 FCR 125.
17 Ibid 133.
18 Ibid 132.
19 Ibid 128.
20 Ibid 127 (Jenkinson J), 132–3 (Spender J).
21 Ibid 148.
22 Ibid 137.
23 Ibid.
24 Ibid.
25 Ibid 138.
26 Loretta de Plevitz and Larry Croft, 'Aboriginality under the Microscope: The Biological Descent Test in Australian Law' (2003) 3 *Queensland University of Technology Law and Justice Journal* 104, 120.
27 *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 4(1).
28 (1995) 54 FCR 503.
29 Ibid 506.
30 Ibid 510–12.
31 Ibid 512.
32 (1998) 83 FCR 113.
33 Ibid 137.
34 [2011] FCA 1103.
35 Ibid [3].
36 Ibid [169], quoting Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) 922 [36.41].
37 *Eatock v Bolt* [2011] FCA 1103, [188].
38 [1889] 14 App Cas 286.
39 Ibid 291.
40 (1971) 17 FLR 141.
41 Ibid 244.
42 Ibid 267.
43 Aboriginal Land Rights Commission, *Second Report* (1974) [3] ('Woodward Report').
44 See Robert French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 *University of Western Australia Law Review* 129.
45 (2005) 145 FCR 442.
46 Ibid 461–2 [64].