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MABO: A JUDICIAL REVOLUTION

Edited by MA Stephenson and Suri Ratnapala

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NOT more writing on *Mabo*!! So far the media, politicans and vested interests have taken upon themselves to "inform" us of the import and ramifications of this High Court decision. All that has been achieved has been disinformation on a grand scale. Into this maelstrom of claims and counter claims has come *Mabo: A Judicial Revolution*. And the importance of this book is that it adds to our understanding of the case by providing scholarly and well articulated essays on the topic. As such the book should be commended and deserves to be widely read.

The book consists of eleven essays and is begun by a Foreword by Sir Harry Gibbs. This Foreword is of importance as it deals with the concept of *terra nullius* and explains that in law this expression does not mean that land is unoccupied but simply means that the land in question is not under

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"civilised" government. As his Honour points out the use of this legal term in non-legal contexts has been misleading and emotive.

The vast majority of legal texts concentrate on one particular area, such as torts, and examines countless cases in an exposition of that area. However, *Mabo: A Judicial Revolution* takes a different approach. One case is focussed upon and all the relevant areas that decision impacts upon are examined.

The international law aspects of *Mabo* are examined in the essay by Professor Lumb. This essay considers the changes the decision has brought with it regarding the legal effect of land acquired by cession and land acquired by settlement. Professor Lumb's essay also highlights the greater reliance being placed upon African, Indian, Canadian and New Zealand jurisprudence to reach legal conclusions. Clearly this represents a widening of the focus of Australian law and shows how many international jurisdictions are now contributing to the development of a unique Australian jurisprudence.

Another essay is contributed by one of the plaintiff's barristers, Mr Bryan Keon-Cohen. It deals with the fascinating evidentiary problem of how to prove native title, as there is a clash between an oral culture and a culture based on documents. The non-native reliance upon documents is reflected in the rule against hearsay. The clash between the two cultures is obvious in attempts to prove native title without infringing the hearsay rule. Keon-Cohen deals with this clash as it applied to the case upon remitter from the High Court to Moynihan J of the Queensland Supreme Court and gives an indication that a new exception to the hearsay rule may have been created.

Fundamentally *Mabo* involved real property and it is in this area that the major consequences of *Mabo* are alleged to be involved. Stephenson in her essay notes the changes which the case has brought to property law in general and the doctrine of tenure in particular. Pearson, also dealing with the property law aspects of the case, notes the interesting historical progression from an abstract moral claim to a rigid legal right as the basis of native claims to land. It is unfortunate that none of the essayists deal with the consequences of moving from a moral to a legal basis for natives to assert title to land except in a historical fashion. The essays implicitly treat the case as a major victory for the indigenous population. Indeed it can be suggested that *Mabo* represents the final capitulation of native resistance to the supremacy of non-native Australians. Further the case portrays the transition of the indigenous population's spiritual connection with the land

to a Western preception of land as an economic commodity. Finally the common law system has effectively subsumed this culture. Native title is now part of the Common Law system and is a subordinate interest in that structure.

The very real and subtantial limitations upon native title are pointed to in the essay by Stephenson. In no way does the native title recognised by the High Court possess the qualities of the fee simple. Following on from this point Dr O'Hair argues that in order that a true reconciliation be achieved between Aborigines and non-Aborigines native title should be based upon that property notion applicable to all; the fee simple. Likewise in his essay Dr Forbes also addresses the need for uniformity in property notions. Additionally Dr Forbes, while dealing mostly with the interaction of *Mabo* and mining in Queensland, introduces the fascinating idea that native title does not exist over the minerals, but may exist over the land required to access these minerals. The final essay which deals with property is by Professor Henry Reynolds who examines the question of Crown leases and comes to the conclusion that native title may not have been extinguished by the granting of such leases.

The essay by Mulqueeny introduces perhaps the most far reaching aspect of *Mabo* and that is the greater role that native law will play in the Australian legal system. It begins by observing that the High Court *recognised* title which came from native law and it did not create this title. The essayist then questions whether this decision indicates a greater judicial willingness to recognise explicitly native law as the authorisation of various conduct, particularly in the criminal law area. Father Frank Brennan SJ also comments that following *Mabo* other tribal customs and traditions may now be asserted as part of the common law and that the legal system may be forced to become more pluralistic. As an example of this Associate Professor Puri shows the significance of intellect property rights to the indigenous population and how the traditional economic focus of non-native intellectual property protection is inadequate with regard to natives. In line with Mulqueeny's observation that the High Court was simply recognising native law Puri proposes that *Mabo* could be the basis for using native customary law to protect native intellectual property.

The essay by Associate Professor Moens examines the jurisprudential aspect of *Mabo*. He undertakes the delicate task of looking at the case as an example of policy-making by the High Court. This step into overt political decision making concerns Moens because it calls into greater question the proper role of judges in this jurisdiction. Certainly the level of media

attention upon the judiciary since *Mabo* indicates that Moens' concern is shared by much of the community. However, his essay never really convincingly proves why this development is such a negative.

This book is a special edition of the *University of Queensland Law Journal.* It is necessary to grasp this fact in order to understand the limitations of this work. The first is the lack of an index, which is so often overlooked but is invaluable to the reader. The second limitation is that each author feels compelled to repeat the facts and findings of the case. If each essay is to stand by itself then this is understandable but when they have been complied into a book such a habit distracts the reader and unnecessarily lengthens the essays. Noting these very small limitations the book is to be welcomed as serving up a smorgasbord of the various areas of law which are touched by the High Court decision in *Mabo* and proves the truth of the observation that "*Mabo* raises just as many questios as it answers".