

## *MABO – 25 YEARS ON*

AN ESSAY BY

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In January 1992, a Torres Strait Islander man named Eddie Mabo was buried in Townsville. Five months later he became a household name in Australia, when the High Court handed down its decision on a ten-year legal case he brought against the State of Queensland.

Mabo challenged the principle of terra nullius and successfully argued that the Mer people had prior rights to the land and seas of Murray Island in the Torres Strait, rights the High Court called ‘native title’.

Under eighteenth-century international law, Britain could only claim outright ownership of territory if it was uninhabited. Obviously Australia was inhabited but Britain assumed the inhabitants didn’t claim ownership of the land. They saw nomads, who moved seemingly randomly over vast areas, living in unstructured societies with no civic or legal systems they could recognise. The British designated the Australian continent as terra nullius, ‘the land of no one’, a territory no nation had yet claimed sovereignty over.

The *Mabo* decision<sup>1</sup> put an end to the notion of Australia being terra nullius. It was the first time Australia’s first nations were recognised by the Australian Commonwealth.

The Labor Party had been in power for just under ten years when *Mabo* was handed down. Aboriginal people were disillusioned with Labor after years of overpromising and underdelivering. Labor had promised to deliver national, uniform land rights legislation based on the principles of freehold title for Aboriginal land, full legal protection of sacred sites, control over mining, access to royalties and compensation for land lost. These promises were abandoned after lobbying by the mining industry and Western Australian Labor Premier Brian Burke. A watered-down land rights model was also dropped.

In 1988, Hawke attended the Barunga Festival in the Northern Territory and was presented with the Barunga Statement, calling on the government to recognise traditional landowner rights and formalise a treaty. Hawke promised to enter into a treaty with Aboriginal people by 1990. The promise was never delivered. The Yothu Yindi song ‘Treaty’ was written in protest of Hawke’s broken promise.

But the High Court’s *Mabo* decision forced the Federal government to act or face a barrage of litigation. The impact of the decision was going to be messy. It would likely lead to an onslaught of legal challenges by the hundreds of traditional owner groups

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<sup>1</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (‘*Mabo*’).

across the continent. Mining projects would be subject to uncertainty and delays. There were also potential compensation claims by some traditional owner groups where native title had been extinguished.

There were calls for native title to be extinguished across the board. But this would have required suspending the *Racial Discrimination Act* and triggered massive compensation exposure under the Constitution's compulsory acquisition provisions. Doing nothing meant decades of legal challenges and didn't provide anything for those traditional owner groups who had lost native title and had no compensation rights.

After extensive consultation and negotiations with Aboriginal groups, the mining and pastoral industries and state and territory governments, the Federal government, under Prime Minister Paul Keating, passed the *Native Title Act* in 1993. The Act contained a system for managing native title claims and established an Indigenous Land Fund for those whose native title rights had been extinguished.

In November 1993, Keating addressed the nation:

When the High Court of Australia handed down the *Mabo* judgment last year, it set our generation of Australians a great challenge. The Court's decision was unquestionably just. It rejected a lie and acknowledged a truth. The lie was terra nullius – the convenient fiction that Australia had been a land of no one. The truth was native title – the fact that the land had once belonged to Aboriginal and Torres Strait Islander Australians and that in some places a legal right to it had survived the 200 years of European settlement.

So here was an issue the country could not ignore – either legally, or morally. There was another form of title that had to become part of the way we manage land in Australia. We owe it to Aboriginal Australians, to all Australians, we owe it to our fair and democratic traditions and to future generations of Australians – to recognise this native title.<sup>2</sup>

Keating went on to recap the background, why the government believed it should take action and what the legislation would achieve. He said the legislation would provide certainty and security for all landholders, that no one group would get all they wanted but the national interest would be served. He concluded that this was the only decent and practical option that would enable everyone to move on.

The Act was negotiated and passed in the face of a concerted – and at times vicious – campaign opposing the legislation by Western Australian Premier Richard Court, and mining and pastoral groups.

The campaign had been tough and, at times, nasty. On the three-year anniversary of the *Mabo* decision, Eddie Mabo's grave in Townsville was vandalised with swastikas and racial slurs and his tombstone partially destroyed. His body was moved and reburied on Mer Island in a position overlooking the Coral Sea, in the traditional burial ceremony of a Meriam king. It was the first such ceremony performed on the Island in over eighty years.

The Coalition opposition, led by John Howard, opposed the *Native Title Act*. But less than ten months after the Howard government was elected in 1996, the High Court handed down another important native title decision – the *Wik* decision, which held that pastoral leases didn't extinguish native title. This prompted Howard to bring in amendments to the *Native Title Act* in 1998, based on a '10-Point Plan'.

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<sup>2</sup> Keating, The Hon PJ, MP, 'Mabo – An Address to the Nation, Canberra, 15 November 1993'. <http://www.keating.org.au/shop/item/mabo-an-address-to-the-nation---15-november-1993>.

Some have claimed these amendments severely weakened native title. In truth, most of the amendments as passed by the Senate were reasonable and ironed out some significant problems that became apparent in the first few years of the Act, including dealing with abuses of the system adversely impacting on traditional owner groups. Actually, what the 1998 amendments signified was a Coalition government accepting the *Native Title Act*.

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In 2003, I took the role of CEO of NTSCorp Limited, the New South Wales native title service provider. I wanted to expand the company's outlook and, in particular, take a more businesslike approach where native title was concerned. Native title rights aren't like other property rights. Native title holders have rights in respect of land but don't have freehold title over it. They don't have an outright power to control what happens on it or a veto. They get a seat at the table, influence and the attention of developers and other business interests. Handled the right way, this can open doors to great opportunities.

To me, the real benefit for Aboriginal people lay in the economic opportunity beyond land, native title and other rights. There were immense opportunities for commercial benefits – jobs, setting up businesses and all kinds of enterprise. I saw these as not just rights in themselves but also as a stepping stone to achieving economic benefits for Aboriginal people stemming from development on their lands – including in mining, agriculture, tourism, transport, property and infrastructure. To me, land was only the beginning, not an end in itself. What was vastly more important was what people did with land or native title after they obtained it.

This was radical thinking back in 2003. It was not part of the typical land rights or native title conversation and conflicted with the conventional viewpoints, particularly on the left of the political spectrum, where private ownership and commerce are regarded with suspicion even in mainstream political thought.

For most Australians, owning their own home is one of the most important things they ever do. And it had been transformative for my own family. But, if you are an Aboriginal person who is part of a first nation which has obtained land rights or native title over your traditional homelands, you don't own land. The land is communally owned and your right is to vote at the meetings of whatever statutory body administers the land on behalf of everyone who belongs to that nation.

People living on Aboriginal communally owned lands can't own their own homes or acquire real estate space for commercial use such as shops. No one can build retail space or housing for people to buy or rent. Housing built by people themselves, and public and Aboriginal housing in communities, are usually built without any separate title over the plot of land on which the building sits. There have been steps to change this situation in recent years. But back then it was unheard of.

The idea of opening up traditional lands for private and commercial use was considered a threat to the land rights and native title so hard won. It was thought this would mean the land would have to be sold off to developers and private owners and the communal land would become like Swiss cheese, peppered with holes of private title.

There was also a sense that land was sacred and had to be preserved and maintained. I understand this but our ancestors didn't just use land for ceremony or tradition and as sacred sites. They also used land as an economic asset – to harvest food and resources,

build housing, boats, tools, instruments and other useful items, and to trade, which was economic activity. It wasn't about choosing between one or the other.

By 2004 I'd actually been discussing these ideas for some time with Aboriginal people in different communities across Australia and it was something I could see a great deal of interest in.

So I decided put out a media release on how Aboriginal people could use their land as an asset to generate economic development, with a particular focus on the most basic building block that Australians have been using to build prosperity and self-sufficiency for centuries – private home ownership.

I picked Sunday 5 December 2004 for the media release. Sundays are usually a quiet day for the political media and a good time to get attention with political issues that aren't on the main political agenda.

At the time I was also a member of the Presidential Panel of the Australian Labor Party, serving as a national vice-president in 2004 and 2005 and as national president in 2006. I had also recently been appointed by Prime Minister John Howard as a member of his new National Indigenous Council, an advisory body to the federal government on Indigenous Affairs, which was due to have its first council meeting the following week.

So by putting out a media release I made this a national political issue.

It wasn't long before my phone started to melt with media wanting to know what I meant by taking a drastic look at the communal land system and needing to move away from communal land ownership and non-profit-making community-based businesses and take up home ownership, economic land development and profit-making businesses.

My Sunday memo had served its purpose and over the next twenty-four hours I had dozens of interviews, explaining my ideas.

I'd also become one of the most loathed people in Indigenous Affairs. Many Aboriginal leaders around the country were scathing. I was attacked from all sides of Aboriginal leadership at a level and depth of fury that, in my experience, was unprecedented.

Following my media release, I was invited to address the National Native Title Conference to be held in Coffs Harbour, in northern New South Wales, the following year, in June 2005.

My family strongly advised me not to go. My colleagues said the same. And I knew it would be hostile. But I've never shied away from a confrontation, and this was one of the most important speeches I'd ever give in my life. This would establish for all time and on the record a path that I believed was the answer to so many of the problems confronting Aboriginal communities.

It was my chance to put my vision out there about how Aboriginal people could gain prosperity and enrich their culture and their economy. Instead of being dependent on handouts from paternalistic state, territory and federal governments, this was a way of raising our communities up and being full participants in all that Australian society had to offer; instead of being fringe-dwellers with their hands perpetually held out for assistance.

As I was invited to the podium, all eyes were on me, because they knew from my media appearances and comments over the past six months that I was going to tell them things they probably didn't want to hear.

I looked at the audience and recognised many people who I knew personally, senior members of traditional owner groups around Australia and land and native title organisations. From up there on the podium, it was a sea of heads. There were hundreds and hundreds of people in the audience. As I started to speak, you could have cut the atmosphere with a knife. The coldness towards me in the room felt intense.

As I spoke, I was booed, shouted at, threatened and interrupted. People stood and shook their fists at me. But I kept speaking. As I continued, the room went quiet and people gave up heckling and started listening. After the speech, there were many, many questions and comments from the floor, most against my ideas. Some were polite, some were aggressive, and some were even outright racist, accusing me of being a white man's lapdog.

It continued after I stepped down from the podium, with people haranguing me one on one. In private, some said that, while they disagreed with me, I'd made them think. I was pleased. You have to stir things up and get people talking, to hope to change hearts and minds – even if at first they shout at you.

The 2005 Native Title Report<sup>3</sup> opened with a detailed discussion of the “Communal Lands Debate” started by my media release calling for changes to Indigenous land tenure to enable increased home ownership and business development.

Ultimately, I started a discussion that has never stopped. The views I expressed in my speech are no longer controversial. In fact, a number of Aboriginal groups across the country are actively working to implement private home ownership and commercial leasing on their traditional lands. Making it happen has been a slower process. But the demand for it now is coming from the grassroots.

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The *Mabo* decision has also opened up the opportunity for treaties between governments and traditional owners. I use the plural ‘treaties’ quite deliberately. Typically, in Australian politics people talk about a treaty between Aboriginal people as a whole and the Australian government. Any work to pursue this idea has never got anywhere and never will. Because there isn't anyone who speaks for Aboriginal and Torres Strait Islander people as a single group. Even if the government offered a treaty and identified some people to sign it, no first nation would recognise it. To have any meaning, a treaty has to be between Australia and each first nation of Australia.

I've proposed the Australian government offer each first nation a treaty recognising them as the traditional owners of their land and sea and settling their native title claim over those areas. By and large the traditional owner areas are well documented and known and it should not be difficult to do this in most cases. There would be an established governing body for each nation, and individuals would have to establish membership of the first nation to participate in its governance and the treaty.

Although this may seem controversial, it's actually only a few steps beyond what is happening anyway. Native title groups already enter into agreements with governments, organisations and/or others regarding their native title and other matters. Once registered, those agreements bind all native title holders in the agreement area, even

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<sup>3</sup> Human Rights and Equal Opportunity Commission, *Report of the Aboriginal & Torres Strait Islander Social Justice Commissioner to the Attorney-General as required by section 209 Native Title Act 1993 (Native Title Report 2005)* (2005). <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/native-title-report-2005>.

those who didn't personally sign it. When signed with a government, they are, in a sense, a form of treaty. What's more, we don't need a Constitutional amendment to implement it. Governments can do it now.

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Back in 1992, before the *Mabo* decision, there was a lot of restlessness within the land rights movement and among Aboriginal people generally. The Labor government had given Aboriginal people so much hope. Ten years on those hopes had been dashed. I could feel the tension and growing anger. It was like a great big steamer pot, the inside getting hotter and hotter, the pressure building, and you could feel that any moment it might blow.

I had been involved in the campaign for the New South Wales Land Rights Act in the 1980s and served on the Interim Council of the New South Wales Aboriginal Land Council. By 1992 I had moved to regional New South Wales and was no longer directly involved with the frontline activists. But I read and heard about things that suggested activists were looking at more extreme ways to get their point across. Tasmanian Aboriginal activist Michael Mansell reportedly attended a conference in 1987 for revolutionary groups sponsored by the dictator leader of Libya, Colonel Gaddafi. Mansell claimed he and a delegation visited Libya in 1988 on Aboriginal passports.

When the *Mabo* decision was handed down, it was like someone opened the valve of the steamer pot and released all that pent-up steam. I noticed an almost immediate shift in mood, a relaxation of the tension.

And after all the initial fear and controversy subsided, the greatest opponents of native title are now among its greatest advocates. Including the mining industry. Today the Coalition accepts and endorses native title and regards it as a vehicle for Aboriginal economic participation.

The work of Eddie Mabo and the decision of the High Court delivered something no government had managed to achieve.

Mabo changed everything.