1992–1993

CABINET PAPERS REVEAL INTERNAL GOVERNMENT RESPONSE TO MABO

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This year Australia marks 25 years since the High Court's decision in *Mabo v Queensland (No 2)*[1] recognising the rights and interests of the Meriam people to Mer in the Torres Strait, Queensland. *Mabo* spurred the Commonwealth Parliament to develop the *Native Title Act 1993* (Cth) (the *Native Title Act*) which continues to govern the recognition of native title. On 1 January 2017, the National Archives released the 1992-1993 Cabinet Papers from confidence to reveal the workings of the Keating Cabinet as they considered their policy response to the *Mabo* decision.[2]

The newly released papers reveal the policy responses considered in light of the High Court's finding of common law native title in *Mabo*. The nine options were developed by an Inter-Departmental Committee made up of representatives from the Department of Prime Minister and Cabinet, the Attorney-General's Department, the Aboriginal and Torres Strait Islander Commission (ATSIC), and the Department of Primary Industry and Energy.

Ranked according to what the Committee considered to be least to most difficult, the options were:

Former Prime Minister Paul Keating speaks during Question Time in the House of Representatives, Parliament House, Canberra, March 1992. Credit: National Archives of Australia.

Above: A meeting of Aboriginal representatives, ministers and Former Prime Minister Paul Keating, 27 April 1993.
Credit: National Archives of Australia.

1. To leave the determination of native title cases to the courts
2. To establish a commission of inquiry
3. To establish a consultation process to explore the interests of parties to native title claims
4. To begin a Crown land acquisition process
5. To facilitate test cases to resolves gaps in common law native title
6. To begin a process of negotiated settlements
7. To establish a fact-finding tribunal
8. To create national or state-based native title legislation
9. To create a national document of reconciliation.[3]

In addition to the final options presented to Cabinet, the papers contained two other policies that were rejected early in the policy development process. The first of these was the option to entrench native title in the Australian Constitution; rejected because it would have put native title lands beyond the control of Parliament and subject to determinations of the High Court. The other was to create a policy to extinguish common law native title, which was rejected by Cabinet over concerns of domestic division and international condemnation.[4]

From the date of the *Mabo* judgment on 3 June 1992 of consideration of these nine options, extensive consultation, and the longest debate in the history of the Australian Senate to pass the *Native Title Act*.[5] The resulting form of the Act is one which reflects an attempt to balance the competing interests of Aboriginal and

Torres Strait Islanders, pastoralist and mining groups, the states and freehold landowners in the context of public and political uncertainty.

LEGAL PRESSURES

Despite the landmark recognition of rights, *Mabo* did not create a comprehensive system of common law native title. The decision did not fully determine how native title rights and interests were to be defined, or how they interacted with other interests in land such as pastoral and mining leases.[6] These uncertainties deterred the Keating Cabinet from leaving the development of native title law to the courts. Similarly, Cabinet was dissuaded from facilitating test cases as the Inter-Departmental Committee believed this would leave Parliament with little control over how native title law ultimately developed.[7]

Native title was brought within the purview of the Commonwealth's power to legislate by the operation of *Racial Discrimination Act 1975* (Cth), 'the race power' contained in section 51(xxvi) of the Australian Constitution, and section 109 of the Constitution, by which Commonwealth legislation overrides inconsistent state legislation.[8] A legislative response to *Mabo* was seen as desirable for giving Parliament the control over how native title was to be implemented that was lacking from other proposed policies.

POLITICAL PRESSURES

While reconciliation was a strong priority in the wake of the report of the Royal Commission into Aboriginal Deaths in Custody, the Keating Government's hold on power looked tenuous: promises of economic growth were not realised and discontent with the status quo was high after 10 years of Labor governments. The Cabinet Papers note that 'easier' policy responses should not be taken up because they were too passive or reflected an unwillingness to act at a time when the government needed to show leadership.

The Cabinet papers reveal that the Inter-Departmental Committee labelled native title rights and interests as 'inevitable and obviously legitimate',[9] but compromise was still required to build upon the *Mabo* decision and manage opposition from states, pastoral and mining interests, and a confused public fuelled by media reports that their 'backyards were at risk.'[10] The Managing Director of Western Mining was strongly opposed to native title, calling *Mabo* 'an exercise in the politics of guilt'.[11] The State of Western Australia in particular was hostile to the High Court's findings given that only seven per cent of its land was held as freehold title, leaving the remainder potentially subject to the uncertain scope of common law native title.[12] The Western Australian Parliament passed the *Land (Titles and Traditional Usage) Act* 1993 to extinguish all native title in WA and the WA Attorney-General called for a referendum on the issue in July 1992.[13] This placed pressure on the Keating government to ensure Commonwealth legislation was put into place quickly. While the Act was disallowed by the High Court because it was inconsistent with Commonwealth law under s 109 of the Constitution,[14] the WA Government's actions illustrate the differential treatment that Indigenous groups could have faced if the Keating Cabinet had chosen to leave native title to state legislatures.

Although ATSIC supported the government's choice of a national scheme as the fastest way to resolve claims; there was significant discord within the Aboriginal and Torres Strait Islander community about how native title should operate.[15] ATSIC preferred inalienable freehold title rather than a collection of rights and interests, called for the power of traditional owners to veto future acts on native title land, and opposed the suspension of the RDA in order to validate past extinguishing acts.[16] Others, such as Aboriginal activist Michael Mansell, believed *Mabo* offered too little in the way of land justice.[17] Reflecting on the development process, Paul Keating credits Lowitja O'Donoghue as chair of ATSIC for recognising that compromise was going to be needed to uphold the moral commitment to Indigenous Australians to implement native title.[18]

In October 1992, the Keating government launched a formal consultation process. By 10 December, Prime Minister Keating delivered the Redfern Park speech vowing to use *Mabo* as a turning point in the historical relationship between Indigenous and non-Indigenous Australians and urged listeners to ignore the hostility that had broken out in response to the *Mabo* decision.[19] The speech signified his intentions not to depart from establishing native title legislation should he be re-elected.

Keating was returned to the Prime Ministership in 1993 by a narrow margin, taking this as a mandate to finalise *Native Title Act* negotiations.[20]

> *Mabo is an historic decision - we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians.*
>
> *The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians.*
>
> *There is everything to gain.*[26]

Keating still had to navigate hostile Council of Australian Governments (COAG) negotiations and the demands of Senate crossbenchers in order to pass the *Native Title Act*.[21] The Act received royal assent on 24 December 1993.

The contested nature of the *Native Title Act* was reaffirmed by its amendment upon the Liberal Party's return to power. John Howard's '10 Point Plan' brought in sweeping changes to the Act to protect pastoral interests, and significantly diminished the protection afforded to native title rights and interests.[22] Since then, Parliament has only amended the Act on three other occasions: those made in 2007 expanding the powers and functions of the National Native Title Tribunal with respect to mediation were reversed in 2009 to give primacy to the Federal Court in the pre-trial and trial stages of the claims process. Technical amendments were passed in 2010 to give effect to the COAG National Partnership Agreement on Remote Indigenous Housing. Parliament has sought to amend the Act on two further occasions. The amendments tabled in 2012 seeking to clarify the meaning of 'good faith' negotiating; enable parties to agree to disregard historical extinguishment of native title in areas such as parks and reserves; and streamline Indigenous Land Use Agreement (ILUA) processes were not passed into law.[23] The amendment Bill tabled in response to the recent *McGlade v Native Title Registrar*[24] decision affecting the authorisation of ILUAs was referred for inquiry to the Senate Legal and Constitutional Affairs Committee in March 2017.

Native title has grown from small beginnings on the island of Mer, now covering more than 30% of the Australian landmass, with around another 30% subject to registered native title claims.[25] Nevertheless, native title in Australia remains the contested space it was during the *Native Title Act* negotiations, inevitable due to the political compromise necessitated by competing interests.

1 [1992] HCA 23.

2 National Archives of Australia, *1992 and 1993 – Keating Government* (18 January 2017), <http://www.naa.gov.au/collection/explore/cabinet/by-year/1992-1993/index.aspx>.

3 Inter-Departmental Committee, Submission No 738 to Cabinet of Australia, *Cabinet in Confidence*, 9 October 1992, 23.

4 Ibid.

5 Parliament of Australia, *Bills debated for longer than 20 hours 1990-2016* (30 January 2017), <http://www.aph.gov.au/Parliamentary_Business/Statistics/Senate_StatsNet/legislation/longestdebate>.

6 Lisa Strelein, *Compromised Jurisprudence* (Aboriginal Studies Press, 2nd ed, 2009) 4.

7 Inter-Departmental Committee, Submission No 738 to Cabinet of Australia, *Cabinet in Confidence*, 9 October 1992, 23.

8 Ibid.

9 Ibid, 9.

10 Larissa Behrendt, 'The Long Path to Land Justice' (Speech delivered at the Eddie Koiki Mabo Lecture Series, James Cook University, 2006).

11 John, Gardiner-Garden, 'The Mabo Debate – A Chronology' (Background Paper No 23, Parliamentary Research Service, Parliament of Australia, 1993).

12 ABC, 'Judgement Day', Four Corners, 7 May 2012 (Richard Court), <http://www.abc.net.au/4corners/stories/2012/05/03/3494661.htm>.

13 John, Gardiner-Garden, 'The Mabo Debate – A Chronology' (Background Paper No 23, Parliamentary Research Service, Parliament of Australia, 1993).

14 Western Australia v Commonwealth [1995] HCA 47.

15 Paul Keating 'Time to revisit Native Title Laws' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012) 406, 407.

16 Lisa Strelein, and Toni Bauman 'Interview with Lisa Strelein: Reflections on the 20th Anniversary of Mabo' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications 2002) 396, 397.

17 Michael Mansell, 'The Court Gives an Inch but Takes Another Mile: The Aboriginal Government Assessment of the Mabo Case' (1992) 2(57) *Aboriginal Law Bulletin* 4.

18 John, Gardiner-Garden, 'The Mabo Debate – A Chronology' (Background Paper No 23, Parliamentary Research Service, Parliament of Australia, 1993) 2.

19 Paul Keating, 'Redfern Speech' (Speech delivered at the launch of Australia's celebration of the *1993 International Year of the World's Indigenous Peoples*, Redfern Park, 10 December 1992).

20 Richard Bartlett, 'Political and Legislative Responses to Mabo' (1993) 23 UWA Law Review 352, 356.

21 Bartlett, Richard (1993) 'Political and Legislative Responses to Mabo' *UWA Law Review*, vol. 23, 352.

22 Native Title Amendment Act 1998 (Cth).

23 Native Title Amendment Bill 2012 (Cth).

24 [2017] FCAFC 10.

25 National Native Title Tribunal, 'Maps' *Geospatial*, <http://www.nntt.gov.au/assistance/Geospatial/Pages/Maps.aspx>.

26 Former Prime Minister Paul Keating, 'Redfern Speech' (Speech delivered at the launch of Australia's celebration of the 1993 International Year of the World's Indigenous Peoples, Redfern Park, 10 December 1992), <http://primeministers.naa.gov.au/galleries/audio/transcript-m3983-749.aspx>.