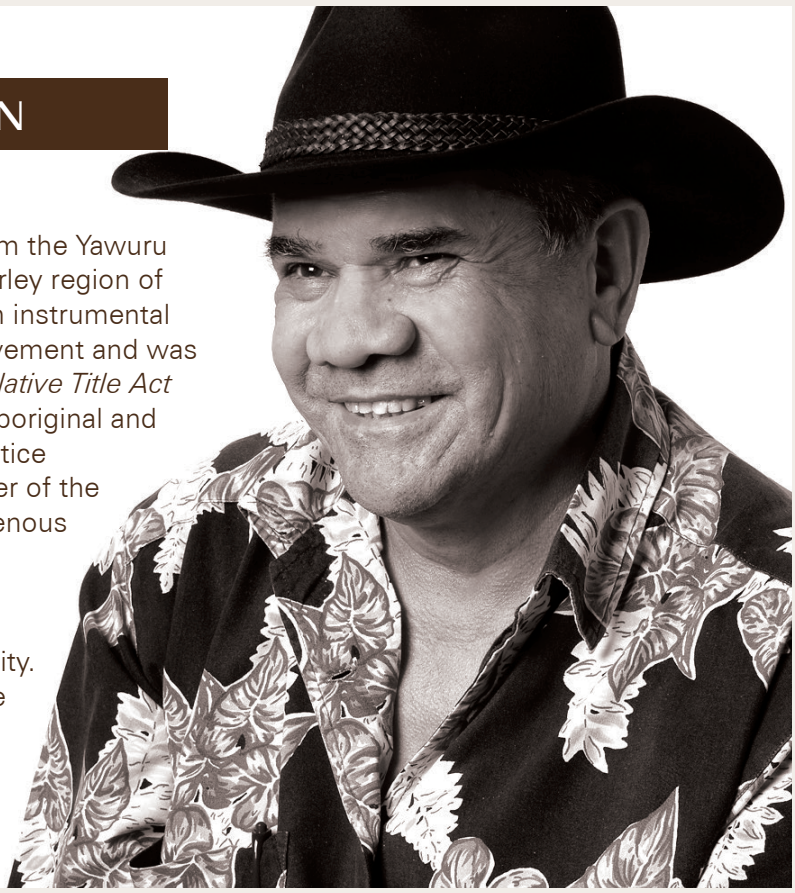
AN INTERVIEW WITH MICK DODSON



by Robert McCreery

Mick Dodson is descended from the Yawuru peoples of the southern Kimberley region of Western Australia. He has been instrumental in Australia's reconciliation movement and was involved in the drafting of the *Native Title Act 1993* (Cth). He has served as Aboriginal and Torres Strait Islander Social Justice Commissioner and as a member of the UN Permanent Forum on Indigenous Issues. In 2009, he was named Australian of the Year for his leadership and work with the Australian Indigenous community. Mick is currently Director of the National Centre for Indigenous Studies and a Professor of Law at The Australian National University (ANU).

You've said before that the 'recognition of native title was more than a recognition of Indigenous property interests'. What do you mean by that statement?

Well it's not just about property, it's about Indigenous societies, it's about Indigenous culture, it's about social justice, it's about economic development and it's about self-determination. It's a whole collection of human rights. I mean these rights have yet to be fully realised, but that's the way I saw it: this is the beginnings, or what had the potential to be the beginnings, of the realisation of other rights for Indigenous peoples. That's what I meant. As I have intimated that hasn't really come to fruition, but that's another story.

Back in 1992, what did Mabo[1] represent for Aboriginal and Torres Strait Islander people?

The *Mabo* decision for the first time in over 200 years put paid to the lie that was *terra nullius.* It was finally seen for what it was: essentially a false claim. The lands had been owned and occupied by Aboriginal and Torres Strait Islander peoples for tens of thousands of years and that fact was never recognised by the colonisers nor the settler state until 1992. The whole foundation of the Australian nation-state was based on a falsehood that nobody owned the place. And *Mabo* essentially said well that's wrong, actually the truth is people were in possession and ownership of this place at the time of the arrival of Cook and the First Fleet. Sadly, the court essentially replaced one lie with another lie, one racist justification for their appropriation of the country with another one, namely extinguishment. Extinguishing native title rights is essentially the new *terra nullius*.

At the time the decision was very controversial. Was there more political and public interest in Mabo than you expected?

No, it was always going to be controversial. The property law of Australia was underpinned by a massive lie and a wilful dismissal of the clear evidence. What people believed was now said to be untrue, so of course it was controversial.

There are many instances in the history of the colonisation of Australia where good people stood up and said 'hey hang on; these people do actually have complex systems of relationships with tribal territories and boundaries and with each other about the custody, occupation, maintenance and ownership of country'. But that was ignored and the country's laws got to the stage, for example in the *Gove Case*,[2] where the judge admits that [and says] 'look, this is a complex system of laws, but

I can't take that into account because the law says the place is *terra nullius*, I've got to follow it, I'm just a lowly Northern Territory Supreme Court judge, I've got to follow the precedent'. And the precedent is based on a lie. It's that lie that the High Court overturned in Mabo. That is what was at the heart of the controversy.

Do you think the general Australian public really understood what the High Court's recognition of Native Title meant?

No, sadly and reprehensibly some vested interests in Australian society generated fear around the 'losing your backyard' nonsense. Not one non-Aboriginal person in this country has lost one square centimetre to native title since it was recognised.

Do you think that was mostly led by the media or by politicians?

A bit of both, I think. It was politicians, it was the mining industry and it was the Farmers' Federation. We were lucky we had a Prime Minister at the time who understood the gravity of the decision and actually showed some leadership to address the issue of Aboriginal land rights. Not entirely adequately from our perspective, but he had the courage and the leadership and the vision to do that. I'm talking about Paul Keating of course, whereas when Mr Howard came along he buckled to those vested interests and that ideology and showed very little leadership, in my opinion, and very much weakened the position of Aboriginal and Torres Strait Islander peoples in the native title law and processes.

Do you agree with the proposition that the mining industry, pastoralists and some state governments were opposed to* any *native title legislation? Do you think their concerns have played out as expected?

I don't think they were entirely opposed to native title legislation, they all realised that some legislation was needed. If for no other reason but to accommodate the legal force, the Racial Discrimination Act, in order to validate existing titles. So the Commonwealth Government had to take some legislative action, it couldn't just let the decision stand alone.

One of the propositions we put to Mr Keating was to have a one-page bill validating titles up to the Mabo decision and then let the common law take its course. He wasn't going to buy that of course because he had so much pressure from the states and from the other vested interests, the mining and pastoral industry in particular, but that was the problem, they couldn't, and nobody else could, overlook the Aboriginal interests. We understood that, so there had to be some validation. We didn't want to penalise most Australians who had acted in good faith in their land transactions, they shouldn't be penalised because of what was largely government action. It's no fault of theirs and we were willing to support validation.

Do you think that pastoralists, mining companies and Indigenous communities have found a way to work together towards the realisation of native title rights?

Well I think the answer is 'yes' and 'no'.

I think there is a realisation from the industry that native title has been here for 20 years now and it is here to stay and it has to be dealt with, so they make it part of their planning and the way they do business. I think the Howard Government's amendments really weakened the position of Aboriginal and Torres Strait Islander claimants and native title holders to such an extent that in some places native title's almost totally meaningless. It just confirms some general views of usufructuary rights that people already had. It doesn't take them much [to lose the right to land], where it ought to be giving people opportunity. I'm not saying that's going to happen in every case, but some opportunity for people to leverage their land for economic development and to help with their social and cultural development is important.

In many instances it's difficult to use native title, particularly non-exclusive native title, in a way that people can achieve the objectives around them: social and economic development, but also political organisation. You have to be fortunate in a sense in your geography to fully reap benefits from your native title and I know a lot of groups get satisfaction from the recognition of native title even if it's minimal. They get some relief out of knowing that they're recognised as the traditional owners of their country. As I say, albeit in minimal form in some places. Without strong exclusive possession native title there's not a lot of leverage going on. The states and the Northern Territory, I think, have a deliberate approach to minimise the benefits that groups can get out of their native title and to maximise the level of extinguishment they can achieve. I think the behaviour of the states has been particularly reprehensible and in some cases absolutely unconscionable.

So you think it's fair to say that states have tried to undermine the native title process?

Oh, they've more than tried to undermine it; they've tried to wreck it. They made it very difficult. In the wake of *Mabo* people had some hope and expectation that finally some land justice would be delivered to them and those hopes have been largely dashed because of the niggardly attitude and bloody-mindedness of states and their absolute allegiance to vested interests.

Going back to 1992 again and Paul Keating's Redfern Speech. At the time how encouraged were you by the speech and the Prime Minister's stance on native title?

I found the speech very encouraging. For the first time ever in Australia we had a Prime Minister with some vision about the place of Aboriginal and Torres Strait Islander peoples within the nation state and not just some vision about that place, but what our rights and interests were and how they should be recognised and protected. I thought it was a very powerful speech.

Following the speech you were involved in the consultations and drafting of the 1993 Native Title Act. How closely did the final legislation represent the position taken by the consultation team?

We did not achieve everything we set out to achieve; some crucial issues were lost like the right to control access to native title. That was very disappointing but the reality is that in negotiations generally the outcome is you win some you lose some.

What were the major wins?

I have already mentioned our loss, consent, let's start there. Our right to control access to native title lands or what is more generally known today as free, prior and informed consent would have given real meaning and real property rights to native title holders. Ensuring the capacity of native title-holders to give or withhold consent was our biggest failure. There was no way we were going to persuade the Prime Minister to give us that, to legislate to empower us to have that. Let's put it another way, he was never going to legislate to enable us to give or withhold consent and that was, I think, primarily because of the mining industry. They used the very emotive language of 'veto', but even though we pointed to the many freeholders that have got a right to consent to access or a veto, he was unconvinced. Freeholders can give or withhold consent to practically anyone. We in a sense wanted the same right.

We also didn't get where we wanted to on national parks. We fought against the Government's position, the plans to schedule lands and thereby extinguish native title. Initially, as I said earlier, we lost the argument about validation and our argument to leave it to the common law. The claims ended up in the courts, so claims became common law claims rather than statutory claims. We lost the argument on the onus of proof. There are also probably other things that I don't remember.

However, under Mr Keating, and I think this statement is vindicated by what's happened subsequently, we were going to get the best deal we were ever going to get. He was the only Prime Minister that could have done this. His cabinet opposed it and in spite of that he got it through and it was half decent and it wasn't a total sell-out of Aboriginal and Torres Strait Islander rights and interests. In the ideal world you'd want to get those things up, but the world isn't ideal. It tosses up terrible challenges that have their own disappointments and you hear people 20 years later being critical of it, but you achieve what you can within the circumstances that are dished up to you at the time and overall I think we did pretty well with Mr Keating.

Mr Howard of course was totally different. He essentially just ignored us and went through a charade of consultation. You remember the Liberal Party and the National Party originally opposed the Native Title Act, they voted against it. He couldn't entirely undo it, but he undid a lot of things that weakened the position of Aboriginal and Torres Strait Islander claimants and native title holders and we're paying for it now through the hugely expensive and inefficient process put in place by Mr Howard.

You're talking about the Howard Government's 'Ten Point Plan' and the 1998 Native Title Amendment Act. So that Act is still a major cause of concern for Aboriginal and Torres Strait Islander people?

Yeah it is. It very much weakened our position and made our rights and interests a secondary concern while everybody else was looked after. Mr Howard talked about certainty, as if life was certain. Life is not certain, but to the extent that they got certainty it was for everybody else not for the Aboriginal and Torres Strait Islanders. After Mr Howard our native title rights and interests became very uncertain. Prior to that there was at least some level of certainty with the Keating legislation which attempted as best as it was able to at the time, to level the playing field. John Howard totally shifted the goal posts.

There is currently a Native Title Act Reform Bill before the Senate with proposed procedural changes. Do you think

the proposed changes are positive? Are they going to make a difference?

Mr Howard's Native Title Amendment Act is a bit like that old car that keeps breaking down, you are very attached to it, but each time it gets more expensive to fix so in the end you realise you have to get rid of it and get a newer model. This native title model is beyond repair and we are spending billions of dollars on it. The time comes when you simply cannot continue to deny the reality of the need for a new model.

This is what the old model Native Title Act is. We have enormous transaction costs for very little result and what results there are affirm the non-Indigenous side of the ledger and don't deliver to Indigenous people. It's a very unfair and unbalanced statute that seeks to minimise the benefits for Aboriginal people and Torres Strait Islanders and to maximise the level of extinguishment. That seems to be its main purpose now.

The Attorney General has said it's too soon to reverse the burden of proving continuous connection to the land and placing the onus of disproving traditional owners' connection on the state. Do you agree with the Attorney General's position?

I've got no idea why she's saying that. Why isn't it early enough? It's a silly response.

The implication is that there is a time when it will be suitable and then it's either a principled move or it isn't. We were here when Cook purported to appropriate the place for the King, we were here when the First Fleet arrived and we were in possession of the place. That ought to be the presumption; it involves just a simple, logical analysis of the facts. When they came they saw that there were people here, they're living here, they have camps, they're using the land, they're getting married, they're having kids, they're hunting, they're making art, they're making tools, they're fishing, they're enjoying their lives. They seem at least to be in occupation of the place, and if you're in occupation there's a high presumption that you're also in possession of the place. Why should we now prove that we were?

That's what the onus is about: we have to prove that we were here in occupation and possession of the place when they arrived. Not only is that highly unfair, it's illogical. It's nonsense to talk about the right time and the wrong time. The right time was 1770 or at the very least 1788. So over 200 years later it's still not the right time? The Attorney's talking rubbish.

Finally, in your view, what has* Mabo *done for the reconciliation process in Australia?

That's a difficult question to answer. I think people are now saying 'well what's the big deal about native title? The sky hasn't fallen in, they haven't lost their backyards and people are getting on with their lives'. I think there is a realisation that part of the reconciliation process must involve a settlement of the land rights question for Aboriginal and Torres Strait Islanders. I think most fair-minded Australians believe that. And I think industry, though there are pockets that still whinge—we're a great country of whingers, you know?—still whinge about having to go through the process. Most of them are wisely getting on with business and putting it in their business plan. They know that they've got to deal with these issues so they plan to do that.

But to the question of what impact it has had on reconciliation, the answer is 'I don't know'. I think we're a lot further down the track now than we were 20 years ago with reconciliation, but I've always seen reconciliation as a process that will in a sense negotiate the terms and conditions of the relationship between the Indigenous and non-Indigenous Australians generation by generation. What we put in place now may not be acceptable to our grandkids. They might do something else, but we will at least try and lay a foundation for them to build on.

1 *Mabo and Others v Queensland (No. 2)* (1992) 175 CLR 1.

2 *Milirrpum v Nabalco Pty Ltd,* (1971) 17 FLR 141.