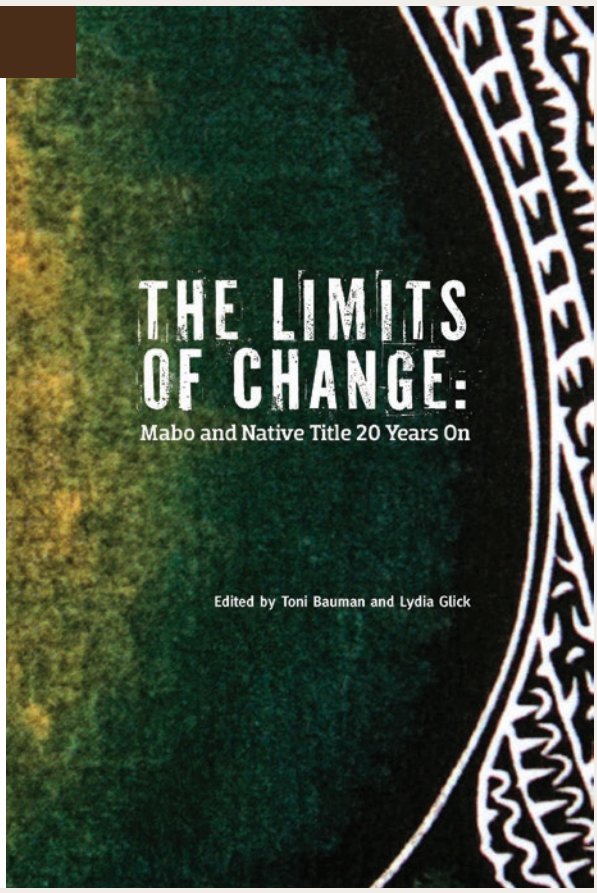
BOOK REVIEW

THE LIMITS OF CHANGE: MABO AND NATIVE TITLE 20 YEARS ON

Edited by Toni Bauman and Lydia Glick
AIATSIS Research Publications ($39.95) (June 2012)

by Robert Woods



Even at a distance of 20 years, the legacy of *Mabo*[1] remains contentious. As Mick Dodson notes in his introduction to this new collection from the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS'), the belated (albeit limited) recognition of Indigenous law and custom by the Mason High Court, and of the extent of colonial dispossession, created 'an opportunity … to right an historical wrong'.[2] Crucially, it was an opportunity grounded in the empowerment of Indigenous Australians, through the recognition of a set of justiciable *legal* rights that validated their entitlement to 'stand on some firm moral high ground that did not depend on sympathy for disadvantage or victimhood'.[3] But reading this book, one cannot help but come away with the sense, as Dodson and others point out, that the potential for change embodied in the *Mabo* decision has to some extent been squandered.

The book itself comprises 34 chapters, divided between four broad (and sometimes overlapping) sections. The first of these examines the background to and substance of the *Mabo* decision itself; the second, the political negotiations that led to the passage of the *Native Title Act 1993* (Cth); the third looks at issues surrounding the implementation and interpretation of that Act; while the fourth is more prospective, exploring avenues for revising and moving beyond native title law. The editors have drawn together contributions from community, political and corporate leaders; legal academics and practitioners; and, native title claimants and holders—many of whom were key participants in the *Mabo* litigation itself, the Act negotiations, and subsequent native title cases. The format of individual chapters varies, including scholarly analyses, interviews, speeches, and personal reflections; many of these have clearly been written specifically for the occasion, while others are reprinted archival materials.

In a sense, the strength of this collection is also a source of weakness. By covering the field, the editors have produced a volume that touches on an extremely wide range of social, legal and political issues associated with native title, and more to the point, one that draws on the perspectives of a wide range of actors and interested parties. But the trade-off for this is that relatively little space is given over to each chapter. This tends to be more of an issue in those sections that cross into legal analysis. For example, looking at the use of *Mabo* by Malaysian courts in the development of their own Aboriginal rights jurisprudence, Ramy Bulan is able to give barely more than a cursory description of the relevant case law before her time is up. Repetition is also sometimes a problem (particularly given that space is at a premium), and with little to orient the reader between chapters, the constant shifts in focus can at times be dizzying.

As a consolidated treatment of the politics of native title, however—from initial recognition in *Mabo*, through the legislative process, to the mechanics of the current Act regime—the book is at its best. While it is somewhat difficult to draw clear threads through a collection this diverse, a number of recurring themes do emerge.

One is the politically contingent and contested nature of the Act drafting, and the implicit link between this and the subsequent interpretation of native title by the courts. That the High Court has taken a progressively more restrictive approach to native title following the backlash against the *Wik* decision[4] has been detailed extensively elsewhere,[5] but the reflective accounts from policymakers, Indigenous leaders and jurists included here provide a useful backdrop.

Another theme is the importance of native title, particularly the 'right to negotiate' provisions of the Act, to Indigenous political and economic empowerment and self-determination. This is dealt with at length in a chapter by Marcia Langton and Alastair Webster, but touched on throughout. The flipside of this, also raised here, are the social and political impacts of native title on Indigenous communities, particularly where the realisation of one group's purported right entails the denial of another's.[6]

Perhaps the timeliest issue raised in this book is the notion that the broad political will necessary to effect an expansion of Indigenous rights may have been expended in the struggle to secure native title recognition. That native title constitutes only one cluster of rights among a broader constellation, most of which continue to go unrealised, is a frequent lament throughout. In light of current calls for the recognition of Aboriginal and Torres Strait Islander peoples in the *Constitution*, and the Gillard Government's postponement of a referendum on the issue, it may be that the political lessons contained here turn out to be the most pertinent ones.

Robert Woods is the editor of the Australian Indigenous Law Review.

1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

2 Mick Dodson, 'The Limits of Change' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012) xvii, xvii.

3 Hal Wootten, 'Mabo at Twenty: A Personal Retrospect' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012) 431, 431. Of course, the significance of this fact was not lost on Indigenous leaders at the time; as Noel Pearson remarked in 1993:

> what the *Mabo* case has done, is to say: 'it's not a matter of how much sympathy you have for us, it's not a matter of how much you're willing to give out of the generosity of your hearts, and it's not a matter of how much kudos as politicians you can get from moving on issues of land justice. It is a question of rights now'.

Quoted in Rob Riley et al, 'ABC Background Briefing with Liz Jackson, 11 July 1993' in Toni Bauman and Lydia Glick (eds), *The Limits of Change: Mabo and Native Title 20 Years On* (AIATSIS Research Publications, 2012) 74, 76.

4 *Wik Peoples v Queensland* (1996) 187 CLR 1.

5 See, eg, Sean Brennan, 'Native Title in the High Court of Australia a Decade after Mabo' (2003) 14 *Public Law Review* 209; Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Aboriginal Studies Press, 2nd ed, 2009).

6 See also Sarah Burnside, 'Outcomes for All?: Overlapping Claims and Intra-Indigenous Conflict under the *Native Title Act*' (2012) 16(1) *Australian Indigenous Law Review* (forthcoming).

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