Australians and Aborigines and the Mabo Decision: Just Who Needs Whom the Most?

MICHAEL MANSELL*

1. *Mabo In Context*

From time immemorial Aborigines were the undisputed owners and occupiers of the continent of Australia. Whites have become joint occupiers and disputed owners over the last 200 years. The result is an imbalance, with whites asserting control over the whole disputed area.

Some changes to the absolute property domination of Australia by whites began in 1976 when the Federal Parliament enacted the *Aboriginal Land Rights (NT) Act* 1976 (Cth), paving the way for similar efforts in the states. The Act put in place the machinery through which "traditional Aboriginal owners" could claim a form of freehold title to lands, resulting in approximately one third of the land in the Northern Territory being returned to the Aboriginal people.

In New South Wales and South Australia, governments recognised that Aboriginal people had a right to land and provided for it in state legislation. The Federal Parliament, acting in accordance with the desire of the Victorian government, enacted land rights legislation to return some small parts of Victoria to the Aboriginal people. Queensland passed legislation in 1991 affecting both Aborigines and Torres Straits Islanders. Only the Tasmanian and Western Australian governments have failed to provide any land for Aborigines in those States.

It was necessary for governments to take up the land rights issue. Australian courts had ruled that, because Australia was *terra nullius* at the time when whites first arrived, Aborigines had no rights whatsoever to land. We simply did not exist. The courts could not explain from where the nonexistent 300,000 Aborigines suddenly materialised. It was but a matter of time till the law and common sense at last came within a bull's roar of one another. The High Court decision of *Mabo*[1] heralded this change of direction among the judiciary when, on 3 June 1992, it ruled that Aborigines did have a right to land. That right involved native title.

The form of the title depends on the type of traditional conduct of the Aboriginal group claiming it: those who have lived on a piece of land since the time of the coming of the whites had a native title right to live on it. Those who used an area for hunting had a title to continue to hunt, and so

* Barrister and Solicitor, Aboriginal Legal Service, Hobart.

1 *Mabo v the State of Queensland (No 2)*, (1992) 175 CLR 1; 66 ALJR 408; 107 ALR 1 (hereafter *Mabo (No 2)* with all page references will be to (1992) 107 ALR 1).

on. If a group only hunted in an area the decision does not allow them to exclude others from the area providing their hunting rights are not interfered with. Conversely, if a group lived, hunted, farmed and fished an area (as the people in the *Mabo* case itself did), their title to carry on uninterrupted would be protected by the courts.

Stirring stuff indeed! But just how extensive is the *Mabo* decision, and where will it lead Aborigines? Will the Aboriginal movement now align itself, and be content with, the *Mabo* decision?

The *Mabo* decision was a long-time coming when compared with the rights of indigenous people in other countries. American Indians have enjoyed self-government ever since the Marshall courts ruled over the question of their status as long ago as 1823.[2] In Canada, the Aboriginal people's land rights were first stated in 1888[3] and were put beyond question in the 1970s.[4] The Treaty of Waitangi was signed with the Maoris of Aeteroa (New Zealand) in 1840. Despite the long history of recognition, in many respects the indigenous people in the countries mentioned are little better off than Australia's Aborigines. This shows that recognition by the court of right to land alone has little real effect on the overall situation of indigenous people. In itself, the High Court decision of *Mabo* is unlikely to have the dramatic result anticipated by many people.

Mabo does represent a very important opportunity for Aborigines. Aborigines may now have enough land from which future options are really broadened. Those options include: first, remaining subordinate to the needs of Australians; second, becoming self-governing; or third, having absolute control of themselves as a sovereign people.

It is an unavoidable cliche to say that the world is undergoing rapid change. In South Africa the influence of world opinion led to the eventual release of black leader, Nelson Mandela. Apartheid in that country seems all but lost. The former Soviet Union's need to remain a world power was forced to give way to the move towards independent states, and the power of the United Nations to apply its code of acceptable world standards has become even more pronounced than ever.

Australia has also been touched by these developments. It has become signatory to a number of international instruments which have subsequently changed the laws of the country. The *Racial Discrimination Act* (Cth) of 1975 was based on an international treaty against all forms of racial discrimination. The foreign affairs power to legislate in compliance with international obligations enabled the Federal government to prevent, inter alia, the flooding of Tasmania's last free flowing river, the Franklin. Australia also became a signatory to the Optional Protocol on Civil and Political Rights late in 1991.

Already the Torres Strait Islanders are talking of self-government as a result of the *Mabo* decision. Senator Margaret Reynolds, a member of the Federal government and a member of the Council for Reconciliation, has

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2 *Johnson v McIntosh* (1823) 8 Wheat 543.
3 *St Catherine's Milling Cov R* (1888) 14 App Cas 46.
4 *Calder v Attorney-General of British Columbia* [1973] SCR 313, *Societe de la Baie James v Kamputewart* [1975] AC 166.

openly predicted self-government in areas such as the Torres Strait, Kimberley and Arnhem Land in the Northern Territory.[5] Mr Robert Tickner, the current minister for Aboriginal Affairs, supported the Torres Strait selfgovernment proposal,[6] and Aborigines formed the Aboriginal Provisional Government on 16 July 1990, with the aim of eventual full independence for Aborigines.

Moves toward Aboriginal self-government and Aboriginal independence have been hamstrung by fears of a white backlash, and the lack of a realistic land base from which to proceed. Aborigines have become more hardened to the Australian response to their demands, thus lowering the first of these barriers. The *Mabo* decision may provide the necessary land base to permit Aboriginal self-government and independence.

Although the High Court has declared that native title survived the takeover of this country, to say that in the process the court radically reframed the foundations of property law, is over the top and incorrect. Freehold estates in urban and rural settings cannot be subject to native title because they effectively extinguish native title rights. They do so because the rights which flow from freehold lands (including the right to exclusive possession) are inconsistent with native title based on traditions and customs. Where such inconsistency is apparent, native title rights are extinguished. Similarly, leasehold lands extinguished native title because they provide for the right to exclude others, in some cases by fencing off. Schools, hospitals, court houses and roads also extinguish native title, as does any legislation expressing a clear and plain intention to do so.[7]

The judgment of the Court has been carefully framed to give recognition to some Aboriginal interests over traditional lands while at the same time offering no offence to white land owners. Nevertheless the *Mabo* decision provides for some security of tenure for perhaps a third of the Aboriginal population. It may be enough to form a platform from which Aboriginal people might consider a future which involves less dependency on, and control by, Australians.

2. *Measuring Mabo's Extent*

It is necessary then, to consider just how far the application of *Mabo* goes, and what rights are to be awarded to Aboriginal people under its cover. It is not possible to ascertain the lands likely to be subject to native title claim without firstly considering which groups of Aborigines may assert native title. In general terms, they are those who are connected to the lands according to customs and traditions. That connection can easily be proved where there is occupation of traditional lands, although occupation need not be permanent. It may be in the form of irregular or nomadic contact,[8] and need not always be exclusive.[9] Beyond this basic proposition things are not so clear. Does native title apply

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5 *West Australian*, 5 October 1992.
6 *N T News*, 5 October 1992
7 7 ACR 1 at 51 per Brennan J; at 160 per Toohey J.
8 Id at 147, 148 per Toohey J.
9 Id at 4a per Brennan J; at 9, 142, 147 per Toohey J.

to those groups of Aborigines whose lifestyle is not generally described as being traditional but whose connection with the land has never been lost, even where circumstances have driven them from it? At first glance the view that such peoples cannot have native title appears overwhelming. Brennan J said:

> ... many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connection with it ... But that is not the universal position ... when the tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition.[10]

If that is the basis of *Mabo*, then fewer Aborigines could claim native title than should be the case. Some learned authors have seized on this aspect of the judgment to virtually discard any Aboriginal claims other than those north of Alice Springs. Doubt was expressed about Aborigines in Tasmania claiming native title under *Mabo*, by quite mistakenly referring to the need to show "continuing occupation, traditional association, the existence of traditional [Aboriginal] law".[11]

Brennan J's seemingly merciless cut-off point for those who have had the greatest contact with Australians is somewhat softened by the more expansive view of Toohey J. Starting with the foundation upon which native title is based, he explained how the land connection requirement might be satisfied by those not necessarily in permanent occupation of an area of land. Toohey J referred to presence amounting to occupation of the land (as distinct from a coincidental or truly random connection having no connection to a society's economic, cultural or religious life) as the root of the existence of native title. He discussed this in the historical context, that is, at the time of the invasion of Aboriginal lands by the British.[12] Hence, actual physical presence on lands today are not necessary to prove native title. So long as the land was occupied traditionally at the time of annexation and an appropriate connection (not necessarily physical occupation) has been maintained to the present, native title may exist. An indigenous society cannot, as it were, surrender its rights by modifying its way of life.[13] Provided those changes do not diminish or extinguish the relationship between the group and their land, subsequent changes do not affect the groups rights.[14]

The question of whether Aborigines "removed" from their traditional areas can claim native title is unresolved. The more moderate views on the subject are curious, particularly when considering the facts of the very case before the Court. Native title was found to exist in the Murray Islands notwithstanding the introduction of a school, a hospital, the Island Court, the Island Council, a Police Force and other government agencies.

Christianity also had a profound influence on the Islanders, so too had changed methods of communication. The island economy, was based on cash from employment rather than on gardening and fishing.[15] All of these features

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10 Above n1 at 43.
11 *Mercury Newspaper*, 18 November 1992.
12 Above n1 at 150.
13 Ibid.
14 Id at 83 per Deane and Gaudron JJ; at 44 per Brennan J.

affect education, health, laws and enforcement of laws, government, religion and economy.[16]

It may be artificial to view such changes as amounting to what Brennan J referred to as a washing away of any real acknowledgment of traditional law and any real observance of traditional customs, if the attitudes and beliefs of the people themselves are not taken into account. But this does expose the unanswered question: if title nevertheless exists in the Murray Islands despite what appears to be an effective takeover of the essential features of an autonomous society, on what basis would Aborigines in say Cairns or Brisbane be so easily discarded from also retaining native title to their traditional lands? They, as much as any other Aboriginal group in the country, live in the belief that their traditional lands belong to them. Their physical disconnection with the land is due to effective control over their lives now being vested in white authorities. How is this principally different from the Murray Island situation? Is it really the case that the High Court, like many other institutions and individuals in this country, feel for those Aborigines who "look the part", or are more "quaint" and less "westernised". Was the High Court having difficulty finding some rational basis to differentiate between the types of Aborigines it believes do require recognition and those who do not, when no real basis exists?

3. *Offshore Aboriginal Claims*

Until the *Mabo* decision, governments of Australia were certain of their ownership of, and management responsibilities for all Crown land, foreshores, rivers, estuaries, tidal lands, seabed and the sea itself. As the material provided by Aboriginal people and community organisations to the Coastal Zone Inquiry showed, the Aboriginal interest in, and dependency on, such coastal zones. is extensive and intense. The Aboriginal and Torres Strait Commission (ATSIC) submitted to the Inquiry that 150,000 Aborigines and Islanders currently lived within 20kms of the Australian coastline. Approximately 100 coastal Aboriginal communities occupy land under some form of leasehold, freehold, reserve or "native title".[17]

The Inquiry's draft report acknowledges that before the invasion of Aboriginal lands, the "... resources of coastal land, sea, estuaries and islands provided not only subsistence foods, but also materials for shelter, clothing, tools and weapons, as well as objects for ceremonial use". Material supplied to the Coastal Zone Inquiry revealed that, "... some or all of the above pre-contact uses, depending on land history, tenure and legislation",[18] were still practised.

That being the case, native title may well recognise Aboriginal rights to use and enjoy traditional coastal areas. As long ago as 1974, the Woodward Aboriginal Land Rights Commission Report, referred to Aboriginal claims to the coastal zones, and suggested a two kilometre buffer zone from the low

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15 Id at 150 per Toohey J.
16 Ibid.
17 Coastal Zone Inquiry *Draft Report*, at 15.
18 Id at 150.

water mark. The pleadings in the unresolved Kimberley land claim include an offshore component, and the Northern Land Council's public statements on litigation of the *Mabo* principles for the Northern Territory clearly encompasses sea, sea rights, and minerals beneath the sea bed.[19]

4. *Who Owns the Coastal Resources?*

Any successful recognition of Aboriginal rights beyond the low water mark, whether by way of court action or legislation, or even a negotiated agreement with state or territory governments, will greatly improve the circumstances of Aborigines. Nowhere in Australia are royalty, lease or licence payments made to Aborigines for use of maritime resources. Torres Strait is the only region in Australia where indigenous people are formally involved in the management of commercial fishing. Under that arrangement only the trochus fishery is reserved for the exclusive use by the indigenous fishermen. Of the 28 barramundi licenses issued in the Northern Territory in 1988, only one was held in the Aboriginal community.[20]

At the 23rd South Pacific forum in Honiara[21] in July 1992, 16 members of the Forum Fisheries Agency (FFA), of which Australia is a member, signed a treaty on surveillance and law enforcement to protect and preserve the vast fisheries resource of the South Pacific region. A key element of the treaty was the provision for minimum terms and conditions of access to the resources. The treaty was a response to the many years of exploitation by these foreign fishing fleets which paid scant regard for either conservation or fair compensation for the islands concerned.

Developments in the South Pacific are particularly relevant to Aboriginal and Islander interests in the coastal zones and fishing grounds of Australia. Australia has taken for granted its unqualified right to issue licenses and leases for the purposes of exploiting the resources of the sea in areas where Aboriginal subsistence is entirely dependent on these resources. *Mabo* questions that right, with the potential for Aborigines to negotiate an appropriate arrangement with respect to these areas or, in the absence of any such agreement, sue for just compensation. Under the FFA treaty, the United States is to pay US$18 million annually, plus observer costs. Observers will be placed on 20 per cent of the fishing boats and are strictly bound to report their boat movements and catches.[22] Such would be the type of compensation claim in the Torres Straits.

It is not easy to find out how much the Federal Government allocates to the Torres Straits, which is curious. It is known that a mere $79,000[23] is allocated to employ 14 Islanders for the purposes of monitoring the movements of New Guineans in and out of the area. This work is a necessary part of protecting Australia's most northern coast line, and with it, Australia's sovereignty. Precisely what Australia's access to the rich fishing grounds of

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19 *Mercury Newspaper*, 8 Janaury 1993.
20 Id at 38.
21 *Insight*, 7 August 1992.
22 Ibid.
23 *Social Justice for Indigenous Australians 1992-93*, at 180.

the area is worth is a matter for conjecture. One can imagine the value of Australia's exclusive territorial right.

5. *The Desire for Self-management*

On 6 October 1992, local leader Getano Lui Jnr issued a press statement expressing his peoples aspirations for "self-government". In the ATSIC annual report for the Torres Strait region, Mr Lui ominously remarked:

> Our location between Indonesia and Papua New Guinea and mainland Australia makes us aware of the strategic importance of the Torres strait ... [W]e fear for our marine food sources as we watch foreign shipping use our waters. All of this and the expectations by some, that we should accept these things without having the management input to the decision making process.[24]

Lui and other indigenous people believe their chances of gaining greater control will come from developments having no connection with the *Mabo* decision. The self-government push has seen the success story of the Norfolk Islanders, who were granted self-government status by Australia in 1978.

Norfolk Islanders are largely made up of the descendants of the liaison between the crew of the beleaguered ship, the Bounty, and Melanesian women. The permanent residents of the island number about 1500. The privilege awarded the Norfolk Islanders includes the right to elect their own government. The self-governing community has limited powers in law and order, taxation, education, immigration, health and social welfare matters. Most interesting for our purposes, was the statement of reasoning allowing for self-government. In the preamble to the *Norfolk Island Act* of 1979, it was stated, that self-government was granted because of "... the special relationship of the [Pitcairn] descendants of Norfolk Island and their desire to preserve their traditions and culture". That was enough to achieve self-government.

During the second reading debate the former Liberal Aboriginal Affairs Minister, Ian Wilson, supported the move for self-government because he understood the "... distinctive feeling that the people of Norfolk Island have ... that uniqueness, that sense of belonging to Norfolk Island". The Queensland National Party member, Clarry Miller, saw an inherent right in the Islanders because "I think it is generally accepted that Norfolk Island is quite unique in most respects. The government has responded to that fact in accepting that these Australian citizens ... should not be treated as other Australians". When John Dawkins spoke for the ALP, he said:

> We cannot avoid the question that Norfolk Islanders are a part of Australia; yet at the same time we can't be seen to be preventing the people that lived there for so long from continuing to live in a way they have for so long. We are determined to ensure that they are allowed to exercise a real sense of self-government.[25]

This prompted noted commentator Henry Reynolds to conclude that the test for self-government appears to be:

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24 *Torres Strait Regional Council Annual Report*, 1990/91 at 2.

25 See Reynolds, H, "An Aboriginal Republic Too?" *Independent Monthly* March 1992, at 11.

> A sense of belonging, some unique traditions, a history, going back to the beginning of white man's interest in the South Pacific. On none of these accounts ... could the Norfolk Islanders be shown to have any where near as powerful a case for autonomy as Aboriginal and Islander communities.[26]

The Federal Government's Council for Reconciliation, in an attempt to keep pace with developments, considered Aboriginal claims for selfgovernment, or sovereignty. Chairman, Pat Dodson, has said "It may not be the first cab off the rank, certainly not by 1994. If we can get some intelligent people to tell us how it can be achieved, we'll find a way".[27] In a Queensland Government sponsored discussion paper entitled "Towards SelfGovernment"[28] a committee has done precisely that. The report proposed legislation to progressively assume greater control of education, health, justice, social welfare, economic development, conservation and cultural and language policy.

The Aboriginal Provisional Government outlined both the structure and the practical ways in which Aboriginal self rule would work in the APG Papers Volume 1.[29] During its 12 day speaking tour of Aboriginal communities in October 1992, the APG executive outlined in even more detail the finer points of the carefully thought through suggestions. The information on how self rule can work is there for all to see.

The reconciliation process was established by the current federal government to challenge the bigoted attitudes of Australians towards Aborigines, arguing that such attitudes amount to the underlying root cause of Aboriginal problems. This may be so, but the mere existence of racist attitudes should not be regarded as a barrier for initiating change. One gets the feeling that the longer racist attitudes are found to exist by governments, the greater is the justification for not doing anything.

The APG position is inextricably linked to a positive and broad based approach to *Mabo*. The APG believes that three of the four components for Aboriginal self-determination are present, namely, Aboriginal desire, current trends on the ground, and world trends. The final and critical component — a sufficient land base — is missing. Or is it?

In its response to the *Mabo* decision the Commonwealth Attorney-Generals office released a map of existing Aboriginal tenures together with potential Aboriginal *Mabo* type claims to crown land. It is extensive, covering 10 per cent of the Australian land mass. While Aborigines are a minority of the Australian population, they are a significant majority on crown lands, especially those lands likely to be subject to native title claims.

Authorities are beginning to see that it is futile to continue the policy of imposing white values on remote Aboriginal communities. The Tangantyere Council outside Alice Springs is a good example. It has a successful working arrangement with the Northern Territory police to give greater "policing" control to the people themselves. Under the arrangement, which has been in place since 1990, the Tangantyere community is able to gather up its flock

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26 Ibid.
27 *The Australian* 11 August 1992.
28 Above n20.
29 *APG Papers* Vol 1 1992.

of intoxicated members during night patrols. Normally these people would be apprehended and often, gaoled. By virtue of this arrangement the arrest rate of Aborigines in the region has dropped dramatically and relations between Aborigines and police has never been better. It also provides a model for other jurisdictions and shows the direction in which Aborigines generally, and not just the radicals, are moving.[30]

Aboriginal courts of limited jurisdiction have been operating since as long ago as 1939 in Western Australia, they now also operate in Queensland and the Northern Territory. Whether these courts will be retained should Aborigines once again acquire control over themselves is questionable. The courts have been criticised as being inferior or second class bodies and are tolerated by the white legal system in a most paternalistic way.[31]

Inevitably the question of the economic viability of Aboriginal self-determination arises. It is conceded that in the past most Aboriginal models providing for a degree of autonomy have relied on either government revenue or pay-the-rent schemes for a financial base. But, as the Torres Strait example shows, control over resources may enable Aborigines to gain greater financial benefits than they do at present. It is known[32] that approximately six billion dollars is raised by governments from crown lands in Australia, only two billion of which is spent on Aborigines. To say that Aborigines having control over crown land would still result in financial dependence on Australia is a dubious comment, to say the least.

With the establishment of the Aboriginal Provisional Government — which although still relatively unknown now boasts the biggest paid up membership of Aborigines in the country — the political structures necessary to advance the options for Aborigines is at last developing. The number of Aboriginal technocrats trained in the essential functions of administration who are willing to work within their own communities, increases the likelihood of success for Aborigines to do their own thing.

6. *Conclusion*

It is widely accepted that it is to Australia's shame that its leaders have portrayed this country overseas as being strongly opposed to racism. Yet in the backyard exists a moral disgrace. The effect of years of deliberate government policy, which deny Aborigines their lands and control over themselves, has caused too many to remain living in third world conditions. Some improvement in those conditions can be acknowledged. However, time has moved on and with it an understandable set of demands from Aborigines which far outstrip notions of mere equality.

From the reform period of the 1960s through to the present, there has always remained one issue rarely threatened by the Aboriginal movement — the paramountcy of white political rule. In fact the heady days of the 1970s, which saw the growth of the Aboriginal political movement, was dependent

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30 The *ALRC Report on Aboriginal Customary Law No 51*, Summary Report, gives more examples of this type of sensible, working arrangement.

31 Id, para 140.

32 Above n25, citing *Year Book of Australia* (1990) No 73.

on white rule remaining. The calls were not for the relinquishing of white control over Aborigines but for a fairer exercise of that control. It may well be the case that the down grading of the importance of Aboriginal issues throughout the 1980s has caused Aborigines to rethink strategies and ultimate goals. Whatever, the call from a broad cross-section of the Aboriginal community for either self-government or self-determination means that the Australian hold on Aborigines cannot last.

This ought not engender fear or resentment. Australians *can* succeed in their own right without having to exercise power over a sizeable number of Blacks. If Australians feel they must dominate other people, then they do so at their peril. Each of the peoples — Aborigines and Australians — should be allowed to go it alone. The forced marriage of the peoples has irretrievably broken down.

The *Mabo* decision cannot be ignored in this context. In itself it will not supply an instant remedy for Aborigines wanting autonomy or independence. The decision will be an aid to Aboriginal self-development. The decision represents the application in Australia of the elementary common law protection of basic land rights of the dispossessed, so commonly applied in the Americas in the nineteenth century. Late as it is, it is a most welcome decision in Australia.