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THE MABO LEGACY

All you should know

PAUL CHAMBERLIN looks at the history, and the implications, of the High Court's most far-reaching decision. It has been a year of high drama.

EDDIE Mabo was catapulted from one of the most obscure corners of the nation to a position where the events he has helped wrought will change Australia forever.

The traditional leader of the Meriam people of Murray Island, in Torres Strait, he first tiptoed onto the national stage in 1982 when, with four other Meriam people, he began a High Court action seeking legal recognition of their traditional land rights on the island.

Eddie Mabo saw the case evolve and pass into its 10th year, but he was not destined to see the result. He died of cancer in January last year, aged 52.

Two of the other plaintiffs, Sam Passi and Celuia Mapo Salee, also died before the judgment was handed down. The only two to survive were the Rev David Passi and James Rice.

Where is Murray Island?

The island, also known as Mer, is closer to Papua New Guinea than Cape York. Its 300 inhabitants live a subsistence lifestyle; unemployment is high and as many people play touch football on the beaches as those who fish from them.

A sense of community has not been lost, though. There is one public telephone on the island, and whoever happens to be there for a call quickly passes on the message.

Lack of opportunities has a habit of breaking up the closest of communities. About 1,500 Meriam people now live on the mainland – Eddie and Boneta lived in Townsville.

The Mabo case

From the start it was an unusual, courageous action. The plaintiffs argued that the nine square kilometres of Murray Island, its surrounding reefs and even tinier nearby islands, had been continuously inhabited by Meriam people, despite the coming of European civilisation.

While it was accepted that the colony of Queensland became sovereign of the island and others in Torres Strait in 1879, the Meriam claimed that their land rights continued and had not been validly extinguished. There was a traditional link to the land, even to the extent of a journal recording each islander's individual allotment of land that was patiently tilled by those who had inherited it, or leased it off another islander.

From the start, the case was extraordinarily complex. It took three months just to confirm in the High Court that Captain Cook had once come to Australia. Evidence was heard in the Queensland Supreme Court establishing the islanders ongoing association with the land.

The largest legal hurdle was mounted in 1985, when the then Bjelke-Petersen Government legislated to retrospectively extinguish any land rights the Meriam may have had. But the High Court found in 1988 that the Queensland legislation was invalid as it contravened the Commonwealth's Racial Discrimination Act. This was the first realisation that the Act, supported by the Labor Government and the Coalition, was to have ramifications in 1992 neither side saw or could have possibly foreseen.

What was at stake?

At question was the then curious idea of native title. This form of title had never before existed in Australia, few knew what it entailed and many Aborigines preferred pursuing the more radical vision of "sovereignty" instead. Essentially, native title holds that rights to land did not disappear with the coming of the white man. It demands the overturning of the 18th century notion of *terra nullius*, which held that Australia was uninhabited before 1788 and Aborigines had no land rights under British common law.

What was the outcome?

A year ago on Thursday, the High Court handed down what may well be its most controversial and far-reaching judgment. A majority of six to one declared that the Meriam were "entitled as against the whole world to possession, occupation, use and enjoyment of the lands of Murray Island".

Terra nullius was summarily quashed by the court and the idea that indigenous Australians had no rights to land was ridiculed and condemned.

Justice Brennan said that the common law of Australia would be perpetrating an injustice if it continued to embrace *terra nullius*.

He said there may well be other areas of Australia where native title had not been extinguished, where Aborigines maintained their identity and customs and were entitled to enjoy that title.

This depended upon a close and ongoing association with the land being proven – a clause likely to prevent Aborigines in Victoria and Tasmania being able to make any claims for native title at all, and few, if any, in NSW.

It was a ruling that fell far short of sovereignty, disappointing many other Aborigines who hoped to launch a cascading series of claims.

The court also found that native title was subject to valid Federal or State legislation. That is, legislation could not contravene the Racial Discrimination Act, which prevents any action which would discriminate against any one group of people, but carefully worded legislation could well invalidate the Meriam's title or that of any other group of indigenous people.

The immediate reaction?

On Murray Island, the end of a decade of frustration and anger was celebrated with ceremonial dancing and a turtle feast, tinged with sadness over the death of Eddie Mabo a few months before.

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On the mainland, the first shock waves began running through stunned pastoralists and mining companies when the thought hit that the case could be used as a precedent for an endless series of other challenges. They had believed that a ruling by Justice Blackburn in the 1970 Gove land-rights case had ended forever the idea that Aborigines had land rights under British common law.

The Prime Minister's first statement, a day later on June 4, took what would be a consistent theme: landowners had nothing to fear, and there was and could be no challenge to freehold or leasehold title.

The implications

The simple statement of the decision was that it enshrined what has always existed – that indigenous Australians had rights in 1788 and those rights remain, at least in some form. The question now puzzling the majority of the nation's decision makers is: how far do these rights go? Should compensation be paid for the use of land or its taking away? And should royalties be paid for minerals extracted from Aboriginal land or for allowing stock to graze?

The difficulty of providing a simple solution is that the High Court provided nothing of the sort itself. They handed native title to the inhabitants of a small island off the Australian coast – making no definitive judgment on whether the case could be used as a precedent on the mainland.

Most Aborigines in Australia do not live where their ancestors lived, nor in the same manner. It is believed that none now living in urban areas could claim that native title remained active, while those in remote areas were usually pushed off their land as settlement expanded. There is also some confusion over the status of nomadic tribes.

On Friday, the Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, said most Aborigines would not benefit from Mabo because their native title had been extinguished by titles granted to European settlers – they had been dispossessed absolutely, he stated.

What industry thinks

The first real, considered response from industry came on October 12 when the managing director of the Western Mining Corporation, Hugh Morgan, spoke out against the court and its judgment for throwing 200 years of established property law into disarray.

He said the full implications of the decision had not been realised by the court, and Aboriginal claims for their own laws, taxation system, diplomats, passports and even national sporting teams now had some substance. Calling the court "social adventuresome", he said the Racial Discrimination Act must be repealed because this underpinned the quashing of *terra nullius*.

The Prime Minister immediately hit back, calling Morgan a disgrace and the bigoted "voice of the 19th century".

Whatever Keating might have thought, Morgan was soon followed into print by a succession of industrialists, pastoralists and conservative politicians, all speaking of mineral exploration stagnating, foreign investment drying up and business confidence plummeting.

Even ALP parliamentarians voiced their extreme disquiet over the lack of detail in the judgment – the latest being Keating himself, who a week ago commended the High Court for its courage "but not for their facilitation".

What Aborigines want

No one Aborigine can speak for another, meaning that the most varied and voluminous responses to Mabo have come from Aboriginal and Torres Strait communities.

In general, however, Aboriginal leaders want native title to be revived once a mining or pastoral title expires. They also want land acquired for those dispossessed by white settlement, and the Racial Discrimination Act to be left unchanged, as so far it has proven to be the one thing protecting native title from State or territory government tampering.

For every mining leader forecasting doom and the end to investment in areas where Mabo-style claims could or have been made, there has also been the occasional Aboriginal group resorting to fantasy to make a political point.

The Mullenjarli tribe of Brisbane, for example, decided in December to put that city's CBD under claim.

A few days later the nascent claim fell apart with much disharmony. Politicians of all sides called the claim "madness", while an elder of the neighbouring Jagera tribe said the Mullenjarli instigators of the claim would have been put to death under tribal law for claiming another people's land. The action showed a fundamental ignorance of the Mabo judgment, and only served to harden opinion against the majority of black leaders who are striving for a position acceptable not only to their communities but the nation as a whole.

The key players

The driving forces behind the Government's response are undoubtedably the Prime Minister, one of his senior advisers, Simon Balderstone, and the head of Mr Keating's departmental unit overseeing the consultations, Sandy Hollway.

Tickner, a committed minister devoted to improving the welfare of Aboriginal communities and empowering its people, appears to have been shunted to one side in the decisions involving Mabo. Although the unit still reports to him, the major announcements are being made by others.

He is understood to have known nothing of a deal revealed last week between Keating and the Special Minister for State, Frank Walker, with the Northern Territory's Chief Minister, Marshall Perron, to approve NT legislation which guarantees security of title for the giant MIM mining project at McArthur River at the Gulf of Carpentaria.

For industry, Rick Farley, the executive director of the National Farmers' Federation and a member of the Council for Aboriginal Reconciliation, and his counterpart on the Australian Mining Industry Council, Lauchlan McIntosh, are voices heard as those of reason among the outlandish.

Another influential figure is Father Frank Brennan, the director of the Catholic Centre for Social Research Action. Dedicated to improving the state of Aborigines in Australia, he has not concealed his anger over the approach of mining interests towards resolving the dilemma.

He is also the son of Justice Brennan, perhaps the most outspoken of the six High Court judges who ruled in Eddie Mabo's favour.

Countdown to action

Much of the final governmental position on Mabo will be decided in the next fortnight. A discussion paper, prepared by a special Mabo unit within the Department of Prime Minister and Cabinet, will be issued publicly this week. A fortnight after Morgan's comments in October last year, the Federal Government announced it would support strategic land rights test cases and begin a consultation process with industry, Aboriginal leaders, the States and territories and other interested parties.

Where the Federal response is headed

The consultation process is a torturous one. There is a deadline of September for a resolution of some sort from the Government, but in the meantime the Commonwealth will discuss the matter with other governments on June 8 in Melbourne.

The States and territories have a crucial role in the debate – they have control over land titles except native title, which appears as if it can only be granted by the Commonwealth or the High Court.

A Cabinet committee of ministers whose portfolios are touched upon by Mabo appears to be firming its view on where the Government should go after that meeting, with emphasis on a policy of "co-existence".

It feels that a practical approach is needed to solve the problem of contested land, rather than resort to a complex legal structure and various pieces of legislation.

Consensus is the word – which usually means that no-one goes away completely happy. But it is the only real option.

The last thing needed is another explosive Mabo court battle – 10 years of division would not only ruin the developing relationship between the mining industry and Aborigines, but devastate investment and employment opportunities in regional Australia. Both sides have the financial clout and could drag a legal battle out to the death.

What the committee wants is a process allowing agreed access to land for parties involved in an Aboriginal land claim. One option is agreements between Aboriginal traditional owners and miners allowing native title to an area to be suspended for the life of a mining project.

The terms would be cast from the start, allowing Aborigines access to all of the area except for the actual mine site. The land would be "rented" to mining interests, who would be compelled to restore mine sites. Native title could be suspended for the life of a project, and then revived once a lease expired.

In the case of disputes, a native title tribunal would operate in each State or territory to try to resolve the issue. A national compensation fund for dispossessed Aborigines is also understood to be on the agenda, as is a limited mining veto and right to some royalties for blacks holding native title.

For pastoralists, the equation is more complex. According to the pastoralist and Opposition spokesman on national development, Ian McLachlan, Aborigines can still engage in their traditional pursuits on pastoral land virtually without hindrance. How would the granting of native title change this right?

It is one of the many questions still unanswered. Not even Eddie Mabo, with all his courage and foresight, could have foreseen what would spring from his wish to see a century of wrongs righted.

Eddie Mabo, left, and a case witness, Jack Wailu, on Murray Island. Picture courtesy of Business Review Weekly