WHAT WE CAN LEARN FROM THE *MABO* LAWYERS

Darryl Browne is the principal at BROWNE.Linkenbagh Legal Services. He is also an accredited specialist in wills and estates and a Law Society councillor.

By Darryl Browne

On 3 June 2017, the 25th anniversary of the High Court's *Mabo* decision, there will be many good reasons to celebrate the ruling and its aftermath – including honouring the unsung heroes of *Mabo*: the lawyers involved.

The making of *Mabo*: the initiative

It all started in late August 1981 when lawyer Barbara Hocking presented a paper to a legal conference in Townsville. The conference was co-chaired by Eddie Mabo. A fellow presenter was a local solicitor, Greg McIntyre. Thereafter, Mabo and two fellow Miriam People – the Peoples were also called Meriam, interchangeably, throughout the High Court decisions – David Passi and James Rice, engaged McIntyre and Hocking to institute proceedings on their behalf, and on behalf of their family groups, seeking declarations that they were the owners (in the sense of holders of native title by virtue of their traditional laws and customs) of the Murray Islands. (These are Mer [aka Meer], Dawar [Daua] and Waier [Waua]). A few months later, Ron Castan QC was engaged. Hocking left the team in 1986 to become a member of a Commonwealth Tribunal. McIntyre and Castan stayed for the long haul, which ended more than 10 years later.

The first battle: the taking of evidence

The proceedings were commenced in the High Court on 30 May 1982. The statement of claim asserted that since recorded history began, the Murray Islanders maintained a system of laws, customs, traditions and practices for determining questions concerning ownership of, and dealings with, land, seas, seabeds and reefs. It was said that, in accordance with these laws, customs, traditions and practices, the Miriam People owned (or, alternatively, had proprietary interests in or usufructuary rights in relation to) the lands, seabeds, reefs and fishing waters of the Murray Islands. The Miriam People were alleged to be 'a distinct group united by race, descent or ethnic affiliation [which] have been and are the sole inhabitants of the Murray Islands'.

Before the High Court could decide whether those assertions were sound in law, it needed to find the facts of the Miriam People's occupation of the islands. This involved a consideration of public records and other old documents. The first argument in the High Court, which the *Mabo* lawyers lost, concerned the court which would fulfil the function of fact finding. In early 1986, the Court ordered that all disputed issues of fact be remitted to the Supreme Court of Queensland for determination.

Snapshot

- It is 25 years since the hearing of the *Mabo* case.
- That was the third High Court case involving Eddie Mabo's claim for native title.
- The hearing took place nine years after the High Court proceedings were commenced.
- There would be no *Mabo* case without the perceptive, dogged and fearless advocacy of the rights of the indigenous peoples by the Mabo lawyers.

Queensland's retrospective laws

'The existence of traditional rights in the Murray Islands as claimed by [Mabo and Co] is a question which may raise complex issues of fact and law of fundamental importance to all Australians'. So said Justice Wilson in *Mabo v Queensland* [1988] HCA 69; (1989) 166 CLR 186. It almost wasn't so, because in April 1985 the State of Queensland launched a pre-emptive strike which would have had the effect of preventing the matter of 'fundamental importance' being decided. The Queensland Parliament enacted the *Queensland Coast Islands Declaratory Act 1985*. In the subsequent High Court challenge to its validity, the State of Queensland submitted that the effect of the Act was to retrospectively abolish all traditional communal or personal rights and interests the Miriam People may have owned and enjoyed in or to the land on the Murray Islands before its enactment, with no right to compensation.

The second battle: a close call

In 1988, Castan and Hocking were again briefed by Greg McIntyre, and they were joined by Bryan Keon-Cohen, to represent Mabo and Co in contesting the validity of the Queensland Act in the High Court. By then, McIntyre had returned to his native Western Australia. This meant that no member of Mabo's legal team was then based in Queensland – a fact that appears to reflect the power and hostility of the State in Bjelke-Petersen's Queensland.

The contest in the High Court was run on a number of bases, the strongest being the argument that the operation of the Queensland Act was inconsistent with the operation of the Commonwealth *Racial Discrimination Act,* and it was therefore ineffective by reason of s 109 of the *Constitution*.

As to that argument, upon which the success of Mabo's claim ultimately depended, it was a close run thing. Three of the seven High Court judges did not rule the Queensland Act invalid. There were separate decisions and various reasons to this effect from Mason CJ, Wilson J and Dawson J.

However, Brennan, Toohey and Gaudron JJ held that by extinguishing the traditional legal rights characteristically vested in the

Miriam people, the *Queensland Coast Islands Declaratory Act* abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands. This meant that, in contravention of section 10 of the *Racial Discrimination Act*, the *Queensland Coast Islands Declaratory Act* resulted in the Miriam people enjoying their human right of ownership and inheritance of property to a 'more limited' extent than others who enjoyed the same human right. Deane J gave separate reasons but came to the same conclusion.

In a finding that was crucial to the continuance of native title after the 1992 decision, the three judges stated that '[i]n practical terms ... if traditional native title was not extinguished before the *Racial Discrimination Act* came into force, a State law which seeks to extinguish it now will fail'. Essentially, while the *Racial Discrimination Act* remains in place, and its interpretation is not altered by the High Court, native title cannot be extinguished by State laws. Whether there should be constitutional recognition of native title so that the 'ifs' can be removed, and the Commonwealth's ability to abolish native title similarly restricted, is not the subject of this article.

The third battle: the findings of fact

The question whether traditional native title was extinguished before the *Racial Discrimination Act* came into force was not addressed in the 1988 proceedings. That was the ultimate issue decided in *Mabo v Queensland (No 2)*. Before then, the proceedings were remitted to Justice Moynihan of the Supreme Court of Queensland. His Honour made detailed findings in relation to the issues of fact remitted to that court. It was said in the final hearing that those findings 'unavoidably contain areas of uncertainty and elements of speculation'. However, his Honour made a finding that produced a quirky aspect of the *Mabo* story.

Moynihan J disbelieved Eddie Mabo. That finding led to Greg McIntyre alone appearing for Mabo in the famous *Mabo* case. Castan QC and Keon-Cohen appeared for Passi and Rice. This division of representation was made because the finding against Mabo's credibility led the legal representatives to consider that Eddie Mabo's case was weaker than his co-applicants. The extent of the submissions made on behalf of Eddie Mabo in the final High Court case are therefore not the stuff of legend, but merely: 'I adopt the submissions of my learned friend, Mr Castan QC'.

Tribute

Years later, reflecting on the *Mabo* saga, Keon-Cohen remarked: 'We had no legal aid, no money, but we did have very genuine, determined clients and a just cause. You never expected and never got proper payment but so far as we were concerned that was not the point'. That that was not the point did not start with Mabo's brief in 1981 nor end with the High Court's 1992 decision. Ron Castan, Greg McIntyre and Bryan Keon-Cohen all have a proud history of representing the disadvantaged, especially concerning indigenous rights. This pre- and post-dated *Mabo*. These lawyers are beacons, and should be honoured, celebrated and revered. But they are not unique or alone, so our pedestal should not be made too high, for it is a level to which all lawyers should aspire. The *Mabo* lawyers are exemplars of the most worthy calling, which recognises that the law exists to serve the community, that lawyers are essential to achieving that outcome, and that lawyers should particularly assist those whose needs are greatest. **LSJ**

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