



Eddie Koiki Mabo  
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# EDDIE KOIKI MABO

## LECTURE SERIES

The Long Path to Land Justice (2006)

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James Cook University (JCU) celebrates the history-making Mabo decision with the long established **Eddie Koiki Mabo Lecture Series**, an annual public commemorative presentation by a prominent person who has made a significant contribution to contemporary Australian society.

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## The Eddie Koiki Mabo Lecture 2006

# The Long Path to Land Justice

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### Professor Larissa Behrendt

In the years since the Mabo case delivered the promise of land justice, many factors have worked to prevent the expectations it gave to Indigenous people across Australia from being delivered.

This lecture will explore the barriers to achieving the vision of Aboriginal rights to land that were articulated in the Mabo case. These include the re-conceptualising of native title as a regime to give certainty to non-Aboriginal interests, the romanticism of Aboriginal culture that permeated the judgement and the fact that, under the judicial system, it is judges who determine what “Aboriginal culture” is.

Intricately related to this issue is the way that native title, like other Aboriginal rights and interests, tends to polarise Australians. This lecture will pose the question of why this is so and what this means if real social justice is to be achieved for Aboriginal people.

So fundamental was the result in the Mabo case, many of us still remember where we were when we first heard that the High Court had overturned the doctrine of terra nullius and had found that Aboriginal rights existed in land. I was in the corridor of the law school that I was studying at, the same law school where my property class and briefly looked at the Gove Land Rights case and was told that it had affirmed the fact that Australian law did not recognise rights to land of Aboriginal people. We then moved on for the rest of the term to study the heavily protected rights to land of non-Aboriginal people.

There were three things that made the Mabo case an important moment: it overturned the notion that we as Aboriginal people did not exist; it recognised Indigenous rights to land; and it provided an example of how laws that for so long had been used as a tool of colonisation could actually be a tool of justice.

I want to explore each of these three themes in my lecture tonight and I am particularly going to focus on why it is that the first two propositions – the overturning of the doctrine of terra nullius and the recognition of a native title – remain so contentious since the decision; and I also want to look at the extent to which the law has been used to limit the potential of the Mabo decision and look at what possible role it can play in achieving land justice and social justice for Aboriginal and Torres Strait Islander people today.

## **I. The War on Terra Nullius**

The reason why many of us remember where we were when we first heard about the Mabo case was because of the importance of the symbolic overturning of the doctrine of terra nullius. I grew up in a country where the legal system did not recognise the rights of my people to our land and was silent about our sovereignty. It was still the law of the land when I studied at university and to those laws we remained invisible. In the decision in Mabo, Australian law finally recognised that Indigenous people were actually here and that we had a system of laws and governance. It was also an important legal victory because the recognition of Indigenous presence and Indigenous governance systems meant that the court had to find that Aboriginal people held certain rights, including rights to land and that in certain circumstances, those rights survive today.

In the years since the Mabo case, many of our community have become disillusioned with the way in which subsequent courts have wound back the promise of the Mabo decision. But the symbolic importance remains. And it is true that the law no longer treats us as though we are invisible.

So why has the notion of terra nullius become the centre of heated debate? The basic argument put forward in a new book is that terra nullius is a new concept and so, when Captain Cook claimed Australia, he did not do so as a result of the doctrine. Instead, the doctrine came to prominence in the work of historian Henry Reynolds – whose work has been the most attacked by the white-blindfold view of Australian history – and it was this flawed work (so the argument goes) that misled the court. As such, the argument goes, the High Court must have been wrong when it overturned the doctrine and, by implication, the Mabo case was wrongly decided. And much like the decision itself which led to a barrage of idiotic and unsubstantiated fear-mongering claiming that people's homes were in danger from native title claims, this tale of terra nullius has also sparked excitement from the anti-Aboriginal and anti-rights brigade. Even legal commentators have joined the chorus. Professor David Flint was quoted in *The Australian* as saying that the farmers and miners "*who have paid for Mabo, and are still paying*", may have grounds to sue. It has all the

hallmarks of the hysteria whipped up by white supremacists that Mabo would take everyone's backyard.

However, as with the original decision, the hyped-up hysteria over terra nullius can be dismissed with a simple reading of the Mabo case. Terra nullius describes a legal fiction that treats Aboriginal people as though they were invisible and had no sovereign and, as a result, no recognised rights to land, water or other resources or to self-governance or sovereignty.

And while the court may have said that the doctrine was overturned, what they really did in the judgement was overturn a case called *Cooper v Stuart*. It was this 1889 case that held that in colonies that were practically unoccupied, without inhabitants and without settled law, Indigenous people's rights were not recognised. (It basically reinforced the terra nullius doctrine but didn't call it that). In using the term terra nullius in 1992, the court was using a new term to describe a long established attitude in dealing Indigenous people. It is like saying that any slaughter of people before the 1930s could not be called "genocide" because the word did not come into the language in its current use before that time. Like "genocide", terra nullius is a new term for an old concept.

The real beef in this debate about terra nullius seems to be with Henry Reynolds, but – and no offence to Henry – while the court did reference his work in two places, this can hardly be characterised as reliance. Sir Anthony Mason, who was the head of the High Court at the time of the Mabo decision, even confessed to not having read any of Henry Reynolds' books.

To assert Reynolds' influence on the court also fundamentally misunderstands the legal process, namely that judges look to what the law is and rely on cases and precedents, like *Cooper v Stuart*. They are not deciding who was right or wrong in history. They are balancing legal rights based on what other cases tell them they can and cannot do.

Sir Anthony Mason also denounced those commentators who speculate about terra nullius and has asserted that the key issue in the Mabo case was whether, when the British claimed Australia, they did so absolutely or whether they had to recognise certain other rights that might exist. The court found that the British did have to take the land with the rights of Aboriginal people attached to it. In the same interview, Sir Anthony Mason also noted that the contention that the doctrine of terra nullius damaged the nation was "absolutely absurd". He said "*We were brought up on the footing that the Aborigines were people roaming the continent who never remained in one particular area without any relationship with the land. Well, of course, we now know that's all wrong.*"

When asked why the High Court seems to get so much criticism for the Mabo and Wik decisions, the former Chief Justice noted that the antagonism seems to come from people *“who are against a just society, who want to repudiate that the state has a responsibility to assist”* those who are disadvantaged.

If such a gross misreading of the importance of terra nullius in the Mabo case can cause such hysteria, it really does raise the question as to why this is so? The answer, I can guarantee, will say more about the way non-Aboriginal see their history than it will say about Aboriginal people. At its heart, this quibbling over terra nullius is another attempt to use a semantic debate to hide an historical travesty.

We have witnessed the denials of frontier violence against Aboriginal people, with historians debating whether the accounts in police reports were more valid than the accounts in squatter’s diaries and the oral histories of Aboriginal people. We had to listen to the semantic debates about whether the children taken from their families – and living with the legacy of the removal policy – were “stolen” or “removed” for their own good. And while Aboriginal people had to come to terms with the psychological, emotional and sometimes physical trauma of those experiences of being taken from their families or having children taken from them, they had to endure a public debate about whether their experiences could properly be described as “cultural genocide” or not.

I have never believed that these debates amongst academics and commentators, often called “the history wars” or “the culture wars”, about how to label and quantify our experiences have ever altered our view of history as Aboriginal people. Their debates have not invalidated the oral histories that we have been told by our elders and they have not changed one iota the way that Aboriginal people live each day and experience the legacies of the very policies that are the subject of those semantic arguments. And that is because those debates are not about Aboriginal history. They are about white identity. These debates are about the story that non-Aboriginal Australians want to tell themselves about their country and, more specifically, they are about the story that white people want to tell themselves about this country. And it seems that the latest manifestation of these “history” or “cultural” wars, is the debate about whether Australia actually was terra nullius the way the High Court described in the Mabo case or not.

Native title has always been seen as threatening to Australian property interests and Australian values. On January 22, 1997 the front page of the Sydney Morning Herald had news of a tragic fire in Melbourne. The photographs showed flames licking a house, charred bicycles and men fighting to save property. The newspapers were able to play an angle that evoked sympathy from Australians. The loss of property was emphasised in its human

elements. On the left of the news of the fire was another news item. It was headed 'Aborigines set strong demands for Wik talks'. At that time, the 'Wik talks' were the latest battleground in the fight by Aboriginal people for the recognition of their property rights by the laws, institutions and people of Australia.

The media coverage of the Wik case was cloaked with a politically loaded perspective. The Sydney Morning Herald ran the headline that the Wik decision was "A Decision for Chaos". It printed a photograph of a farmer, a Mr Fraser, looking forlornly down at his land under the headline "Family's land dream turns into nightmare". Although he claimed to be a strong supporter of the Aborigines and said he believed in reconciliation he was 'confused' by the decision and Mr Fraser's reaction was one of bewilderment:

*"I can't believe these judges made that decision. It's not a decision. I can't see that we have made very much progress. We are obviously going through another period of indecision and I am not sure how much of that sort of punishment people can take."*

*(James Woodford. Family's land dream turns into nightmare. Sydney Morning Herald. Tuesday December 24, 1996. At p.1.)*

What the coverage in the media showed was three contemporary perceptions in the public consciousness:

- That the loss of property – houses, bicycles, cars – was seen as a tragedy when (white) people lost their homes, but when Aboriginal people lose a property right it does not have a human aspect to it;
- Aboriginal people, in getting recognition of a property right, are seen as gaining something (making 'strong demands') rather than having recognized something that already exists and should be protected; and
- Aboriginal property interests are seen as threatening the interests of white property owners. The two cannot co-exist. Recognition of Aboriginal rights leads to 'uncertainty' and 'indecision'.

These three perceptions - that there is no human aspect to Aboriginal property rights that Aborigines and Torres Strait Islanders are getting something for nothing and that white property interests are more valuable than black ones – are not just played out in the headlines of that Sydney newspaper. Their influence can be found pervasively throughout the history of colonized Australia, starting from the day that the British declared Australia was theirs on the basis of a legal fiction.

These perceptions are found most strikingly in how Australian law has operated separately for Aboriginal and non-Aboriginal peoples. For most Australians, the right to own property and to have property interests protected is a central and essential part of their legal system. For Aborigines, Australian law has operated to deny property rights, acknowledge them sparingly, and then extinguish them again.

## **II. Native Title Defined by Aboriginal Culture, But Who Defines Aboriginal Culture?**

Along with the overturning of the doctrine of terra nullius, the Mabo case was also a landmark decision for its finding of a native title held by Aboriginal people. One of the great promises of the court when it first formulated the native title right was defining its content by the laws and customs of Aboriginal people. Reading the judgment, it appears on its face to say that the laws and customs of Aboriginal people would be best defined by Aboriginal people themselves. After all, it is we who understood what those practices may have been or how they have developed over time to be part of our vibrant and contemporary Indigenous cultures.

But we have moved a long way away from that original promise to recognise Aboriginal laws and customs as the definer of the scope and content of native title.

The Wik case recognised that a native title right can coexist with a pastoral lease if the exercise of both interests is not inconsistent and there has been no intention to extinguish the native title interest. However, whenever there is a conflict between the use under the lease by the pastoralist and the Indigenous peoples native title interest, the interest of the farmer will always trump. As with the result in the Mabo case, the decision in the Wik case ignited public hysteria that was further fuelled by the deceitful misrepresentations of industry and government. Government propaganda scared farmers by telling them that Aborigines could claim their land and the Wik decision became a focus for the policy platform for the Howard government when it was elected in 1996. By that time, native title had become entrenched in a legislative framework through the *Native Title Act 1993 (Cth)*.

The Howard government's response to the Wik case was laid out in their proposal to implement a '10 point plan'. This plan originally suggested the extinguishment of native title interests by converting the leasehold interest into a freehold interests – a windfall to the farmers since they would gain freehold title of land they currently hold as leasehold (i.e. they would get something for nothing). The cost of conversion and any compensation that would become payable due to an extinguishment of native title was to be covered by the public purse. The philosophy behind this is clear – native title reform is about ensuring the security of title for non-Aboriginal landholders.



Prime Minister John Howard was concerned to ensure that non-Indigenous sectors of the Australian community were informed and consulted about his attempt to erode Indigenous native title rights through the Native Title Amendment Act 1998. His address to the Longreach community meeting in Queensland is revealing. He begins with his ideology of the “white man on the land”, the rural idyll:

*“... although I was born in Sydney and I lived all my life in the urban parts of Australia, I have always had an immense affection for the bush. I say that because in all of my political life no charge would offend me more than the suggestion that what I’ve done and what I believe in has not taken proper account of the concerns of the Australian bush.” (Transcript of the Prime Minister, the Hon. John Howard MP, “Address to Participants at the Longreach Community Meeting to Discuss the Wik 10 Point Plan, Longreach, Queensland.” Reproduced in Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund. CERD and the Native Title Amendment Act 1998. Parliament of the Commonwealth of Australia, 2000. At p.276. Howard. At p.276.)*

There is no such concern for Indigenous people who clearly do not fill this same sentimental, nationalistic ideology. He then proceeded to rank the rights of one over the rights of the other.

*“...the plan the federal government has will deliver the security, and the guarantees to which the pastoralists of Australia are entitled...” (Howard. At p.276.)*

When finally passed through compromises in the senate, the Native Title Amendment Act 1998 (*Cth*) further eroded native title interests, overlooking the fact that Indigenous people in the debates around the original Native Title Act had conceded rights in order to gain the ability to have control over land in which there was a native title interest. The right to negotiate was considered to be essential by Indigenous people at that time and was weakened by these amendments. This is strong evidence that so-called “special laws” for Aboriginal and Torres Strait Islander people are actually laws for different and lesser protection. It is also evidence of the proposition that indigenous conceptions of rights and political aspirations are tolerated only to the extent that they do not upset the power structures within the legal system.

While the legislative framework that was put in place after Mabo focused more on ensuring security for non-Indigenous title holders than for facilitating the claims of native title claimants, there was also an erosion by subsequent court cases as the make-up of the High Court changed and, through years of Howard government appointees, became more conservative.

A key disappointment for Aboriginal people in the development of native title jurisprudence was the Yorta Yorta case. It highlighted the fact that even where Indigenous culture is alive and vibrant and exists in a contemporary form, courts could view Aboriginal culture as having vanished into the ether and not exist in a way that gives rise to a native title right. This is an outcome that is frustrating and insulting to Indigenous people who live in strong communities, bonded by history, kinship, language and shared cultural values. It is an outcome that also highlights that native title is not defined by the laws and culture of the Aboriginal people as the Mabo case promised but instead is defined by what non-Aboriginal people think Aboriginal laws and cultures should look like. This non-Aboriginal view often treats Aboriginal culture as though it should exist in a vacuum, often looking for the practices that would have been expected to exist 200 years ago. No other culture on the face of the earth is expected to remain in a time capsule. No one suggests that the pasta is not Italian simply because it is cooked in a microwave or that the English legal system is no longer English because they don't hang people on the gallows any more.

In fact, the sad irony is that while very few Australians have close contact with Aboriginal people, many seem to feel that they know a lot about Aboriginal culture. The ignorance surrounding Aboriginal culture was displayed in recent media coverage and political posturing about the high levels of violence in Aboriginal communities. When a Northern Territory prosecutor's comments about the endemic levels of sexual abuse in Aboriginal communities sparked a media frenzy and self-righteous outrage by some politicians, many of us were wondering why the decades of reports highlighting this issue in Aboriginal communities across Australia never had a similar reaction. Regardless, and however the issue was raised, what ensued was instructive as to why, with all the best intentions and good will of people working on the ground, governments do not meet their responsibilities and in fact exacerbate the situation.

The original response from Minister for Aboriginal Affairs, Mal Brough, was to blame the Northern Territory Government for not putting police into communities where violence was endemic. And, while he was absolutely correct in asserting that any community of 2500 people with no police force would have law and order issues, there are many other factors that contribute to the cyclical poverty and despondency within some Aboriginal communities that create, over decades, the environment in which the social fabric unravels

and violence, sexual abuse, substance abuse and other anti-social behaviour is rife. I'm not pulling this assertion out of thin air - the decades of reports into the very issues that caused the media frenzy and public outrage have all sourced the problem back to these facts.

Governments of all levels continue to under-fund Aboriginal community on basic needs. Health services, educational facilities and adequate housing services have never been supported in these communities and instead of co-ordinating their efforts, governments engage in the slanging matches that occurred between Mal Brough and Northern Territory Chief Minister Clare Martin about who was at fault. Brough said it was a law and order issue; Martin said it was a housing issue. Both were right - both levels of government have been negligent. It is estimated that the basic health needs of Aboriginal Australians is under-funded by \$450 million. This attempt to shift the blame is referred to as "cost-shifting" and it is a feature of many issues within the Aboriginal Affairs portfolio where financial responsibility is shared between state/territory governments and the federal government. The attempt to avoid responsibility (or share responsibility) means that Aboriginal people are the losers.

One sure sign that governments were not going to take any responsibility for fixing the problems that they were so happy to chest-beat about was the quick assertion that the issue didn't need any money thrown at it. This was a clear indication that they were uninterested in addressing their neglect of basic services and infrastructure – the root causes of the problem – and were instead going to grandstand about what everyone else should do.

And sure enough, soon enough, the blame started to be put squarely on the shoulders of Aboriginal people because, it was asserted, this behaviour was cultural. Across the country for as long as these issues of violence and sexual abuse have been issues, we have consistently said that this behaviour is not cultural. There is nothing in our culture that condones abuse of women, boys and girls. And we have been consistently telling the judiciary to reject the so-called "customary defence" whereby Aboriginal defendants claimed that sexual assault or physical assault are part of our culture. We have consistently raised questions when courts have valued cultural practices that violate the rights of women and children (such as promised marriage) over the rights of the victims. This advocacy that was designed to educate the judiciary was then hijacked by politicians who started to say that customary law should be outlawed as though it was "customary law" that was the problem.

Firstly, the advocacy by people working to educate the judiciary never included the blanket prohibition of customary law from the factors a judge can take into account when he or she decides a sentence. Secondly, judges hearing matters where violence or sexual assault has

been committed are dealing with the end result of government neglect. They are part of dealing with the symptoms and, as such, the judiciary have limited ability to deal with the root causes that lead to that violence and dysfunction. But politicians and their governments are in a position to attack those root causes. They are just continually refusing to do so and instead come up with knee-jerk reactions.

First, they have to accept that there are no quick fixes and the commitment must be for the long term. There will be no picture of them riding in on a white horse to save the Aborigines.

Secondly, they have to provide adequate resources to communities to do the following:

- Allow community based services to provide interventions to protect Aboriginal women and children at risk
- Provide essential services in relation to health, housing, education and employment
- Provide adequate infrastructure in the communities
- Invest in human capital
- Work with Aboriginal communities on all of the above

The irony wasn't lost on many blackfellas that the media frenzy and government posturing occurred the week after the budget in which Australia was flush with surplus. There is no sustainable argument that the government does not have the resources to deal with the root causes of this problem. What they do lack is political will. And the sad thing is that until the root causes are addressed, many Aboriginal people – especially Aboriginal children – will continue to live lives without promise or opportunity as a result.

The other sad irony is, of course, that Aboriginal art and culture is often quickly appropriated as a part of the marketing of Australia. We see it in the opening of the Olympic games, on Qantas planes, on tea towels and t-shirts and in tourist brochures. But this country that likes to parade our culture to attract overseas interest has little interest in ensuring that the culture is protected and allowed to flourish.

### **III. The Complicity of Law**

The Mabo case too provided an example of how laws that so long can be used as a tool of colonisation had the capacity to be a tool of justice. This was an important moment as the failure to protect rights in the Australian legal system has a long tradition.

The framers of our constitution believed that the decision-making about rights protections – which ones we recognise and the extent to which we protect them – were matters for the parliament. They discussed the inclusion of rights within the constitution itself and rejected

this option, preferring instead to leave our founding document silent on these matters. It was also a document framed within the prejudices of a different era – of its own kind of xenophobia, sexism and racism.

A non-discrimination clause was discussed in the process of drafting the constitution that would have included, in part, the following: *...nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.*

This clause was rejected for two reasons: it was believed that entrenched rights provisions were unnecessary; and it was considered desirable to ensure that the Australian states would have the power to continue to enact laws that discriminated against people on the basis of their race.

If one is aware of the intentions and the attitudes held by the drafters of the constitution then it comes as no surprise that it is a document that offers no protection against racial discrimination today. It was never intended to do so. And the tolerance for discrimination on the basis of race and gender that was so prevalent in Australian society at the time the constitution was drafted has left a legacy in which our contemporary prejudices can find some comfort.

The 1997 High Court decision in *Kruger v. The Commonwealth* (*Kruger v. The commonwealth* (1997) 190 CLR 1) assists in making this point. This was the first case to be heard in the High Court that considered the legality of the formal government assimilation-based policy of removing Indigenous children from their families. In *Kruger*, the plaintiffs had brought their case on the grounds of the violation of various rights by the effects of the Northern Territory Ordinance that allowed for the removal of Indigenous children from their families. The plaintiffs had claimed a series of human rights violations including the implied rights to due process before the law, equality before the law, freedom of movement and the express right to freedom of religion contained in s.116 of the Constitution. They were unsuccessful on each count - a result that highlighted the general lack of rights protection in our system of governance and the ways in which, through policies like child removal, there was a disproportionately high impact on Indigenous people as a result of those silences.

What we can see in the *Kruger* case is the way that the issue of child removal – seen as a particularly Indigenous experience and a particularly Indigenous legal issue – can be expressed in language that explains what those harms are in terms of rights held by all other people - the right to due process before the law, equality before the law, freedom of movement and freedom of religion. *Kruger* also highlights how few of the rights that we would assume we inherently hold are actually protected by our legal system. It reminds us

that there are silences in our constitution about rights; that these silences were intended; and it gives us a practical example of the rights violations that can be the legacy of that silence.

The feeling that our constitution did not reflect the values of contemporary Australian society gave momentum to the 1967 referendum. The result of that constitutional change though is often misunderstood. It has been held out as the moment at which Indigenous people became citizens or Aboriginal people attained the right to vote. It did neither. In reality, the 1967 referendum did two things:

- It allowed for Indigenous people to be included in the census; and
- It allowed the federal parliament the power to make laws in relation to Indigenous people.

The notion of including Indigenous people in the census was, for those who advocated a “yes” vote, more than just a body-counting exercise. It was thought that the inclusion of Indigenous people in this way would create an imagined community and as such it would be a nation-building exercise, a symbolic coming together. It was hoped that this inclusive nation building would overcome an “us” and “them” mentality.

Sadly, this anticipated result has not been achieved. One only need look at the native title debate to see how the psychological divide has been maintained and used to produce results where Indigenous peoples rights are treated as different and given less protection. One of the fundamental vulnerabilities of the native title regime, as it currently exists, is that the interests of the native title holder(s) are treated as secondary to the property interests of all other Australians. The rhetoric of those antagonistic to native title interests often evokes the nationalistic myths of white men struggling against the land to help reaffirm three principles in the public consciousness:

- That when Aboriginal people lose a property right, it does not have a human aspect to it. The thought of farmers losing their land can evoke an emotive response but Aboriginal people can not
- That when Aboriginal people gain recognition of a right, they are seen as getting something for nothing rather than getting protection of something that already exists. They are seen as “special rights”; and
- That when Aboriginal people have a right recognised, it is seen as threatening the interests of non-Aboriginal property owners in a way that means that the two interests cannot co-exist. In this context, native title is often portrayed as being “un-Australian”.

The other lesson that can be learnt from the 1967 referendum is that the Federal Parliament cannot be relied upon to act in a way that is beneficial to Indigenous people. It was thought by those who advocated for a “yes” vote that the changes to section 51(xxvi) (the “racism power”) of the Constitution to allow the Federal Government to make laws for Indigenous people was going to herald in an era of non-discrimination for Indigenous people. There was an expectation that the granting of additional powers to the Federal Government to make laws for Indigenous people would see that power be used benevolently. This has, however, not been the case and we can see just one example of this failure in the passing of the *Native Title Amendment Act 1998 (Cth)*, legislation that prevented the *Racial Discrimination Act 1975 (Cth)* from applying to certain sections of the *Native Title Act 1993 (Cth)*.

Next year will be 40 years since the 1967 referendum and this provides us with an excellent opportunity to revisit the implications of these silences in the constitution and to develop a more comprehensive agenda for legal reform to meet the continuing failure of rights protections in Australia. Such reform offers the ability to provide renewed protection of Indigenous rights and substantially change the status quo between Indigenous peoples and the Australian state and could include:

- A preamble to the constitution: a Preamble is important because it sets the tone for the rest of the document. It can be used to give assistance in interpreting the act that follows. If recognition of prior sovereignty and prior ownership were contained in a constitution preamble, we may find that courts would read the constitution as clearly promoting Indigenous rights protections (something that was left unclear in the *Hindmarsh Island Bridge* case).
- A Bill of Rights: Although some rights have been implied into the constitution, the few explicitly in the text of our founding document have been interpreted minimally. Many rights the High Court has found have been implied. A Bill of Rights that granted rights and freedoms to everyone would be a non-contentious way in which to ensure some Indigenous rights protections. Such a Bill of Rights does not have to be entrenched in the constitution, like the United States, but can be effective in legislative form. New Zealand and the United Kingdom now have a Bill of Rights in this form.
- A Non-Discrimination Clause: Such a clause could enshrine the notion of non-discrimination in the constitution. However, it must acknowledge the international human rights standard that states that affirmative action initiatives do not breach this principle.
- Specific constitutional protection: An amendment could be made to include a specific provision. In Canada, a comparable jurisdiction with a comparable history and comparable relationship with its Indigenous communities, the *Constitutional Act*

*1982 added the following provision to the Constitution: Section 35 (1): The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.*

Some of these steps to improve the Australian rights framework for Indigenous people – a constitutional preamble, a bill of rights – would have benefits for all Australians. This reinforces the point that comes out of the litigation in the Kruger case, namely, that many of the rights of Indigenous people that are infringed are not “special rights” but rights held by all people. On the flip side, measures that protect the rights of all Australians will have particular relevance and utility for Indigenous people.

#### **IV. The Vision of Eddie Mabo**

Eddie Mabo had an unwavering belief in the rightness of his claim. He also tested a legal system that had worked well to protect the interests of the middle class members of the dominant culture and pushed that system so that it sought to protect the rights of the poor, the marginalised and the disadvantaged. And this has to be the real test of any law, any policy and our constitution: it is not enough that it works well for those who are already privileged. Its worth is how it delivers for those who are underprivileged, who are on the margins, who have been dispossessed.

The other legacy of Eddie Mabo’s vision is that laws need to be just but they also need to be matched with a legal system that can ensure that justice is ongoing. This needs to be complimented with a government commitment to meeting the basic needs of all of its citizens for basic services including health and education, the provision of infrastructure to all communities and investment in the development of human capital, or people. Legal structures and government commitment also need to be matched by a changing of hearts and minds, an alteration of the “us” and “them” mentality that has infested native title debates.

I was a member of the ACT Bill of Rights Consultative Committee that undertook community consultation processes as part of our inquiry as to whether there should be a Bill of Rights in the nations capital. During those consultations, there appeared a strong reluctance to recognise the rights of minorities. Feedback from those consultations included comments such as “if a Bill of Rights includes the protection of Indigenous people, it will not be for the benefit of all Canberrans” and “if a Bill of Rights mentions Indigenous rights and the rights of other minorities it will have no legitimacy.”



What is noticeable in this example is the meanness of spirit about the possible protections that a democratic society can offer. This mentality protectively guards the rights and benefits that are given to citizens within a community and seems to assume that if those rights are extended to the poor, the culturally distinct and the historically marginalised, someone will be worse off. This worldview sees the recognition and protection of the rights of the disadvantaged and culturally distinct as being in direct competition with their own position. It is this “us” and “them” mentality that psychologically separates one sector of the community from the other. And it sees the giving of rights protection as a win-lose.

In order to move away from that mentality, we need to realise that the way to measure the effectiveness and fairness of our laws is to measure them against the test I identified earlier. Namely, measure them against the way in which they work for the poor, the marginalised and the culturally distinct. In order to do that, society needs to understand that when you extend benefits to those who are less well off, you do not lose, but you are securing the social fabric for everyone, that is, it is a win-win. And a key part of this must be that Australians cease to view Aboriginal people a threat, as un-Australian. Instead, they need to understand, what we have always understood, that our fates are tied.

## ITEM INFORMATION

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