The Eddie Koiki Mabo Lecture 2013

Mabo and others: Products or Agents of Progress?[1]

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Professor Alloway, distinguished guests, members of the ever-expanding Mabo family, ladies and gentlemen:

Thank you for this opportunity to address you this evening. I am a long way from home – something of a southern interloper - but you have made me very welcome.

I pay my respects to the traditional owners of this land, the Bindal Wulgurukaba people and their Elders, past and present.

This oration began life as a launch of my book *A Mabo Memoir*[2] by Professor Noel Loos - so I apologise, you've missed him and got me. I acknowledge Noel here this evening and his very helpful recently re-published biography of Eddie Mabo.

It is appropriate that I begin with some words about Eddie Mabo, since this oration bears his name. I knew Eddie Mabo for ten years over the life of the litigation that also bears his name. At his funeral in February 1992, with the High Court decision pending, I said, amongst other things:

> "The plaintiffs ... required someone competent in two worlds ... someone who could both understand and work with the lawyers and their law courts in a detailed way on the one hand, and work with and represent his own community with its very different traditions on the other. That person was Eddie Mabo. Win, lose or draw, he brought much of the two systems together with remarkable patience, skill and intelligence. It may be hoped that, in that effort, he has both advanced his people and perhaps, through the case, brought black and white Australia closer together, with increased understanding and mutual respect. Truly that is a wonderful legacy for us all.[3]

I am more than happy to stand by those words this evening. The extent of that legacy remains a matter for constant review and debate. There remains a widely acknowledged native title "gap" that, tragically for many, twenty years on, refuses to close. A further litigious tragedy, quite apart from that surrounding Mabo's premature death, must also be recorded. While facilitating overall success, Mabo himself lost his personal claims before the trial Judge, Justice Martin Moynihan of the Queensland Supreme Court. This personal crisis raised serious questions for the entire case. I return to those aspects later.

[1] B A Keon-Cohen © 2013. This paper may not be quoted or reproduced without the author's prior permission.

[2] B A Keon-Cohen, *A Mabo Memoir: Islan Kustom to Native Title* (Zemvic Press, 2013).

[3] 1bid, Appendix 22, pp 507-9.

Equally, my topic this evening - "Mabo and others: Products or Agents of Progress?" – raises, deliberately, some questions.

Who were these "others"? Did these "others" include not just individuals in history (plaintiffs, witnesses, lawyers, government administrators, activists generally) but also institutions, eg, the High Court, the Parliaments and governments of this country, Queensland's policies and laws applying to Indigenous communities, the common law of Australia? If so, what were their separate roles in this lengthy, hard-fought piece of litigation and its aftermath? Is "progress" an apt word when we look back, 21 years on? And if so, what "progress" precisely are we talking about?

It is appropriate at this lecture, in this University, in this town, to consider "others" for a moment.

As you will know better than I, Eddie Mabo lived, worked, raised his family and studied here, in Townsville, and the University library now bears his name. Indeed, this University, its staff and students, played an important role in his life. Professors Noel Loose and Henry Reynolds, amongst others, knew him well and assisted him. Significantly for the *Mabo* case, the JCU Student Union and the Townsville Treaty Committee (of which Mabo and Loos were co-chairmen) organized an important land rights conference on this campus in September 1981.

At that conference people who subsequently became key players in the litigation delivered papers, and/or spoke, and/or agitated over coffee. This motley crew included the lead plaintiffs Eddie Mabo and Father Dave Passi, lawyers Greg Mcintyre and Barbara Hocking, and numerous supporters including Aboriginal leader Lez Melzer, and members of the then-active Aboriginal Treaty Committee, especially Dr Nugget Coombs and poet Judith Wright. The conference proceedings were published by the Students Union.[4]

At this point, 32 years on (1981 – 2013) we can play endless "but-for" historical games concerning these "others". For example, if no 1981 JCU conference, no case? If no papers and speeches at the conference voicing frustration with and criticism of the prevailing legal dogma, most recently articulated in the Northern Territory Supreme Court in 1970 by Justice Blackburn – the Gove Land Rights case or *Milirrpum* – no impetus to take on such a difficult and uncertain challenge?

Probably, here tonight, a mere two decades on since 1992, it's too early to ask, let alone seek to resolve even provisionally, these questions. After all, historians argue endlessly about the true causes of just about every social or political movement, and legal change at the legislative level and (in a slower more osmotic fashion) at the judicial level, is often sourced in those same, only partially understood, social movements.

The current refusal of the Australian parliament to legislate to recognize gay-marriage in the face of community support in Australia, and legal reforms recently enacted in the UK, France and New-Zealand; and the reliance, in part, by Sir Gerard Brennan in his leading judgment in *Mabo* on judicial policy reflecting changing fundamental social norms-a reliance that triggered the ire of conservative commentators – are two cases in point. The first - gay marriage – is widely considered in the community within which I move, half-a-century after the sexual and feminist revolutions of the 1960s – to now be a "no-brainer"; the second-proper reliance by judges on judicial policy and fundamental community norms (compared to passing talk-back radio agitation) in deciding cases-is to most lawyers these days equally un-contentious – part and parcel of modern judicial technique. But again, this was not always so.

[4] See E Olbrei(ed), *Black Australians: The Prospects for Change* (1982).

Historical and legal movements are rarely as simple as isolating out and assessing the role of individuals. Take that well-known historical figure, Martin Luther. Was he a product of or creator of the forces that led to the Reformation in Europe? Similar ''but-for" questions arise for Eddie Mabo and native title. Our answers depend, to a large extent, on what we, looking back, consider to be significant, and thus worth recording. In the latest issue of the *New York Review of Books,* when reviewing the history of Christianity over the centuries, with its many developments, schisms and controversies, Cambridge University historian Professor Eamon Duffy says:

> "History is written backwards, hindsight is of its essence, and every attempt to characterize any great and complex historical movement is an act of retrospective construction: what is left out of the story is as significant as anything included."[5]

When it comes to the *Mabo* reform, I offer three comments. First, to my mind, a significant aspect often omitted from the Mabo story is the critical supportive role of two of the four additional plaintiffs, Revd Dave Passi, and former Councilor James Rice; and the equally important – in this instance destructive – role of the influential, long-serving Director of the variously named Queensland Department of Aboriginal and Islander Affairs, Paddy Killoran. I shall return to them in a moment.

My second comment is that too much of the voluminous commentary since 1992 is best described, in my view, as not ''construction" but "re-construction." I provide just one egregious recent example. In the recent Queen's birthday honors, the Australian James Crawford, also of Cambridge where he is Whewell Professor of International Law, was awarded an AC - which he richly deserves. A week ago, three journalists commented in the Melbourne *Age* that amongst many achievements, Professor Crawford led the Australian Law Reform Commission's Inquiry into the Recognition of Aboriginal Customary Law when the ALRC's Report was tabled in the Federal Parliament in 1986.[6] This is true. I worked in the ALRC from 1978-1980, prior to Crawford's arrival. I was mainly employed, as a researcher, in that very reference under a former Commissioner, Justice Bruce DeBelle and the Chairman, Michael Kirby. The *Age* journalists however go on to claim that that 1986 Report:

> "... is now recognized as one of the foundations of the High Court's Mabo decision that recognized Native Title."[7]

So: should I add additional ''but for'' factors? Were James Crawford and/or the Commission's Report crucial players that led, or were they merely caught up in, the historical forces culminating in *Mabo* in 1992? Absolutely not. The historical fact is that the ALRC, while recording relevant legislation then in place, carefully and expressly **excluded** from its consideration the whole "land rights" question[8] I defy anybody, including *The Age,* to read the ALRC's report, the High Court *Mabo* judgments, plus the oral and written submissions presented to the Court in the course of argument, and find any significant reliance – indeed any reliance at all - upon the ALRC's 1986 Report. I imagine James Crawford is thoroughly embarrassed by this irresponsible and factually wrong journalism. *The Age* owes the good professor an apology.

[5] Eamon Duffy, "The Staying Power of Christianity", *The New York Review of Books,* (20 June 2013) 69-71 at 69.

[6] See ALRC, *Report on the Recognition of Aboriginal Customary Law,* (2 Vols, AGPS, 1986)

[7] Susan Whydham, Nick Miller, Carolyn Webb, "Professors Lead the Way", *The Age,* 10/6/2013, p 9.

[8] See ALRC, Report No 31, *The Recognition of Aboriginal Customary Laws* (2 Vols, AGPS, 1986) Vol 1, para 212: ''However, in view of the detailed work being done by other bodies, and by the Commonwealth government itself, the Commission has treated the question of customary rights to land as outside the scope of its inquiry.

My third comment on the Mabo reform is that, when it comes to "retrospective construction", what to include and what to omit, you may glean my approach by reading my book-which I am launching tonight, not reviewing-and that it helps, I think, to examine these questions at two moments.

My first is the early 1980s. By then, a convergence of forces had set the scene, had produced a sense of "it was time" for activists to challenge this manifest injustice through political action and/or test-case litigation. I mention particularly widespread agitation about Queensland's racist laws, and their administration by government agencies on Indigenous reserves, then in place under the long-reigning Bjelke-Petersen government; growing sensitivity nationally to an international human rights agenda; a rising tide of dissatisfaction with prevailing legal dogma; and disillusionment with politicians, at every level, who had thrown this Indigenous land-rights issue into the too-hard basket for far too long.

My second moment is a decade later. By the time *Mabo (No 2)* was decided, in 1992, further forces may, I think, be added to this heady mix. These include the emerging reformist and activist propensities of our High Court under Chief Justice Sir Anthony Mason; and legal reforms introduced through the Canadian Supreme Court in 1984. More of these "institutional" factors later.

My topic tonight raises the old chestnut-the role of the individual in history. If we accept that the High Court's decision of twenty years ago was a significant legal development in the nation's history, a watershed in race-relations, leading to real advances for many (but not all) Indigenous people in this country, did history make the man, or vice versa? Being a careful lawyer, I think a little of both.

As to the elephant in the room-my role in the Mabo saga - I wish to be up-front and transparent. I wish to immediately correct some serious errors in the historical record; to speak of things said to have happened involving me that actually never happened, to de-construct some re-constructions that are totally, awesomely, wrong, wrong, wrong.

Ladies and gentlemen, I fear many of you may have arrived, this evening, suffering a debilitating dose of that horrible disease, historical revisionism. I speak particularly to you poor souls who have seen Rachel Perkins' ABC tele-movie "Mabo". In it, I am shown stripping to my underpants on the beach at Murray Island. Nearby, three (fully clothed) Meriam ladies, of a certain age, explode in shock, horror, dismay-and worse-mocking laughter. I am then depicted racing across the beach and plunging into the boiling surf. Ladies and gentlemen, the true historical facts are as follows. I know this. I was there. First: it never happened! You don't swim offshore Murray Island. Too many sharks. And if they don't get you, thick black shoals of sardines will.

The point is: this was and is a richly endowed, relatively pristine and remote tropical environment populated by a strong and resilient community-the Meriam People. They were first colonized by a European power-the British-in 1879, a full hundred years after the colonization of Australia's eastern seaboard. Thus, by the 1980s, the Meriam people's traditional culture, like their tropical environment, had suffered significant damage, but speaking generally, less cultural damage compared to many aboriginal communities in mainland Australia.
This very issue faced the *Mabo* legal team for a decade. Anthropologists call it "continuity and change". The issue arose as follows.

At the 1981 conference at this University, as mentioned, not only was the state of the law criticized, the possibility of mounting a land rights test case was also discussed. By the end of the conference, Greg McIntyre and Barbara Hocking held instructions in not one but two cases: one

for the Meriam people, a second for the Yarrabah Aboriginal reserve community, located near Cairns, not far away.

The Yarrabah community at that time comprised several groups who had been forced off their country and collected into a reserve under Queensland's policies and laws dealing with Aboriginal and Islander people, disparagingly referred to as "Killoran's Law." We *Mabo* lawyers were thus presented with two possible 'land-rights' test cases involving two Queensland communities - Murray Island and Yarrabah - located at either end of the remote/traditional-closely settled/severely acculturated continuum.

As things transpired, however, our Yarrabah instructions faded away during 1982. This was because our main client was one Mr Percy Neal. By an accident of history, he didn't wait for *Mabo:* he pursued spectacular criminal proceedings of his own - all the way to the High Court - and won. Mr Neal spat at a Yarrabah reserve manager through a fly-wire door; was charged, convicted and jailed by a Magistrate; his conviction was upheld and his sentence, astonishingly was *increased* by the Queensland Court of Criminal Appeal; and finally both conviction and sentence were thrown out by the High Court in 1982[9]. In his reasons, Justice Lionel Murphy of the High Court famously quoted Oscar Wilde and concluded: "Mr Neal is entitled to be an agitator". Thus the Yarrabah claim stalled, while Mabo proceeded. We lawyers considered ourselves to be in very good company indeed!

The historical "what ifs" surrounding Mr Neal - not to mention "Killoran's notorious law" as enforced throughout Queensland's Aboriginal reserves, and the unusual judicial techniques of Justice Lionel Murphy - are intriguing to contemplate. Suffice to say here that we will never know whether, but for "Killoran's oppressive Law," the *Mabo* or *Yarrabah* cases would have emerged; nor the outcome had *Yarrabah* been pursued ahead of *Mabo.* One thing, however, is certain: given the paucity of legal aid (often mentioned in my book: see Chs 2.4, 3.6, 5.2, 11.1, 12.3 and more!) the legal team could not possibly have run both cases together, with the necessary attention to detail - or at all. I also note that not once – never - over the decade, did Queensland seek to negotiate an outcome.

In addition, due to the considerable cultural damage suffered by the Yarrabah group, I doubt their evidence, and their prospects of success at trial, would have been stronger. But I might be wrong in that. We will never know.

However, this false start indicates how vital agitators are in our quest to achieve a just and civilized society.

Mention of these key players - Mabo, Neal, Killoran - raises the "bad King John" theory of history, in particular, the role of the five plaintiffs and that of other key actors, in the Mabo litigation itself.

This theory asserts that "what matters in history is the character and behaviour of individuals" as against ill-defined social, economic or political forces. In his well-known work *What is History?* (1961) E H Carr states:

> "The great man is always representative either of existing forces or of forces which he helps to create by way of challenge to existing authority. But the higher degree of creativity may perhaps be assigned to those great men who, like Cromwell or Lenin, helped to mould the forces which carried them to greatness, rather than those who, like Napoleon or Bismarck, rode to greatness on the back of already existing forces. Nor should we forget those great men who stood so far in advance of their own time that their greatness was recognized only by succeeding generations.

[9] *Neal v R* (1982) 149 CLR 305

Carr continues:

> "What seems to me essential is to recognize in the great man an outstanding individual who is at once a product and an agent of the historical process, at once the representative and the creator of social forces which change the shape of the world and the thoughts of men."[10]

I think much of this can be applied to Eddie Mabo. But the facts concerning the Mabo litigation are complex – and sometimes get in the way of a single "great man" conclusion.

As mentioned, one very influential but largely forgotten force opposing the claim over the decade was Queensland's Aboriginal Affairs bureaucracy and its long-term and influential Director, Pat Killoran. His role in this history should not be forgotten.

Patrick "Paddy" Killoran, as many here might recall, was a powerful figure in Indigenous affairs policy and administration in Queensland over four decades, and an important witness for Queensland in the *Mabo* trial. He began his career with the relevant Department in Thursday Island in 1948, and counted many Islanders amongst his friends. Equally, ''Killoran's law" personified the much reviled regime of control and denial of rights basic rights on Queensland Aboriginal and Islander reserves – truly a contentious historical figure. He, his Department, and his government opposed the claim at every possible point.

I cross-examined Paddy Killoran in 1989 during the *Mabo* trial in Brisbane - perhaps best described as irresistible force meets immovable object. That's another story. Please read my book *A Mabo Memoir,* Ch 13.3, pp 306-20. I'm still unsure who prevailed. Paddy Killoran died in August 2010, aged 88 - apparently, according to the *Australian* newspaper, without "recognition ... (or any) death or funeral notice" or ''valediction in the state or federal parliament."[11] One of Killoran's former Ministers, Bob Katter, also stated:

> "The latter half of [Killoran's] administration went far beyond paternalism and had to be opposed. Manpeople had [their] careers destroyed ... [Killoran's] regime ... had become evil".[12]

At an oration such as this, should I exclude such perhaps contentious claims that speak ill of the dead? Am I being irresponsible, unnecessarily offensive? Perhaps members of the Killoran family are in the audience. What is the historian's proper role? I reply: why not include such facts or opinions, provided they are true – ie, supported by proper evidence – or, as an opinion, reasonably defensible? And if it makes any difference, I shall shortly criticize a deceased Murray Islander from the distinguished Passi family. If it matters, this perhaps at least levels the historical playing-field.

Indeed, I do not rely solely upon the word of the colorful Queensland politician, Bob Katter, and, of course, Paddy Killoran is now unable to defend his name. However, many Queensland reserve residents would, I think, agree with Katter's criticism. Whatever the historical truth, this statement was made; I chose to refer to it this evening; and unquestionably, widespread

[10] E H Carr, *What is History?* (1961; 2"d ed, R W Davies ed, Penguin, 2008) 54-5.

[11] T Koch, "Notorious bureaucrat who oppressed Aborigines dies unlamented", *The Australian,* 2/11/2010, p 7; *A Mabo Memoir,* p 451.

[12] 1bid.

dissatisfaction with and criticism of Queensland's administration of Indigenous reserves was a major contributing factor leading to the *Mabo* challenge. And the fact also is that pressure applied by at least one Queensland Departmental officer – being a Murray Islander no less upon the plaintiffs to withdraw nearly undermined the whole case. I shall return to this sorry affair later.

If I may, for the moment, paraphrase Justice Howard Olney when dismissing the Yorta Yorta native title claim in 1998[13] by 2010, the tide of history had surely washed Paddy Killoran, and the Aboriginal reserve regime that bore his name over many decades, well and truly away.
Let me now, however, return to the pristine beaches of Murray Island-a great spot for skinny-dipping – and the alleged facts of history as depicted in Rachel Perkins' Mabo movie.

My second complaint of "revisionism" or "retrospective re-construction" is that the magnificent physique demonstrated to those lovely Meriam ladies – and now to the world via TV screens and (I'm told) in-flight entertainment programs belongs not to me, but the accomplished Shakespearean actor Ewan Lesie. He is a very talented man: he played me much better than I could play me.

In any event, said physique is but a shadow of my former physical glory. Now that is a fact of history. There's no way anybody here can deny it! If you can, you know far too much intimate detail and you're gagged- forever.

The point is: the concept itself- "history" – ie, "recording relevant facts" – as mentioned, clearly lies in the eye of the beholder: To quote Carr again:

> "History ... is a continuous process of interaction between the historian and his facts, an unending dialogue between the present and the past. (p 30) ...The historian is part of history. The point in the procession at which he finds himself determines his angle of vision over the past" (p 36).

My "angle of vision" is essentially that of a lawyer-albeit with a BA degree that included a major in History from Melbourne University (that other place you may have heard of) writing a decade or two after the events recorded. My approach, my selection of significant moments worth recording is set out at length in my book – *A Mabo memoir* – which book I find myself now launching. I've scored a notable trilogy -in the language of X or Y Gen, an "awesome" PB:author, publisher, and now launcher!

I am acutely aware that, in terms of writing "objective" history which involves not only facts, but crucially, interpretation, I was deeply involved as a participant in *Mabo* and thus, on one view, am compromised. On another view, I am uniquely qualified Many participated, but nobody participated precisely as I did and thus, to that extent, self-evidently, could not write the book I have written. Thus the book is titled as "Memoir", not "History".

This form of history, however, has its own peculiar validity. In any event, I do agree that

20 or so years is far too soon to gain the necessary distance and objectivity to pass judgment. A good example is that not until September 2010 could Bob Katter have published the adverse assessment of Paddy Killoran, mentioned above-the laws of defamation would at least have caused him to pause and consider. Doubtless, the history of Bob Katter and his political adventures will be written differently after his death.

All that aside, for what it's worth, I think that the Mabo litigation of 1982-1992 arose when various tectonic forces were moving and shifting the social, legal and political landscape in Australia.

[13] See *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.

I refer to nine factors that E H Carr, I suspect, would accept as causative "forces". Without some or all of these, I very much doubt that we would be here this evening.

First, widespread criticism of the Bjelke-Petersen government's legal and administrative regime, involving gross denial of human rights, on Aboriginal and Islander reserves in Queensland during the late 1970s and early 1980s;

Second, the reforms of the federal Whitlam government of the 1970s, particularly the enactment of the *Racial Discrimination Act 1975.* I note that in 1985, the Bjelke-Petersen government passed a law specifically designed to kill off the *Mabo* case; that we challenged that state legislation as unconstitutional, being in conflict with the federal *Racial Discrimination Act 1975;* that the High Court upheld that challenge 4:3[14] and had that challenge failed, end of the litigation: back to Yarrabah and Mr Percy Neal;

Third, the arrival of the reformist High Court led by Sir Anthony Mason, plus its release from the strictures of English precedent, finally achieved by legislation in the mid 1980s, through the *Australia Act 1986* (Cwth). By that and prior legislation reaching back decades, all appeals from all Australian courts, state and federal, to the Privy Council in London, were fmally barred. Thus, but for those reforms, after 3 June 1992, the Queensland government, had it been so minded, could have sought to reverse the decision by going "over the top": ie, by appealing the High Court's decision to the Privy Council in London. In the sweep oflegal history, had *Mabo (No 2)* been decided a mere decade or two earlier, it might have been reversed , in London, by English judges, considering the mix of legal, historical and social issues triggered by the case from their great distance, and from their very different perspective.

At another, more case-specific level, I add the following:

Fourth, the fact that counsel for the unsuccessful *Gove Case* plaintiffs, Ted Woodward QC, back in 1971, carefully decided not to appeal that failure from the Northern Territory Supreme Court to the High Court, for fear that, as the High Court was then constituted, he might achieve a dangerous adverse precedent. His decision, in hindsight, was very wise. I note that Sir Edward Woodward, later of the Federal Court, was commissioned by the incoming Whitlam Government triumverant early in 1972 to inquire into establishing land rights in the Northern Territory. I note that today's High Court is a very different tribunal to that of Chief Justice Mason.

Fifth, the availability, and dedication, beyond the call of duty, to the plaintiffs' cause, of the brilliant legal and personal skills, and financial support, of the late and very great Ron Castan AM QC. I say without hesitation: without his dedication, skills, and high standing before the Court, *Mabo* would probably have failed at several points over the decade;

Sixth, thorough instruction in English provided, at Queensland taxpayer's expense, by the same often criticised Queensland Aboriginal Affairs Department to the Meriam people over many decades, including to the youngster Eddie Mabo, on Murray Island during the late 1940s. This instruction was provided in the form of a Scottish school teacher, Robert Miles, with whom Mabo lived for a period;

Seventh, the construction, also at taxpayer's expense, of an airstrip on Murray Island in 1978 – and of a single public telephone booth. A feature of Queensland's administration of Islander communities since 1879 was controlling movement and communications to and from the islands, thus keeping Islanders ignorant about and isolated from the outside world. Access to Murray Island during the 1970s was effectively limited to a Department-controlled barge, the *Melbidire.*

[14] See *Queensland Coast Islands Declaratory Act 1985* (Qld); *Mabo (No 1) v Queensland* (1988) 166 CLR 186

Without such 20th century developments as a phone and an airstrip (introduced largely to enable quicker response to health emergencies), we Melbourne lawyers could not have visited the Island (due to time and costs involved) to gather evidence, nor could the Queensland Supreme Court have flown to the island in 1989 to hear that evidence. Without evidence, no case.

Eighth, the 1981 land rights conference, discussed above, which triggered the idea and, at the same time, bought the plaintiffs, their supporters, and the lawyers together;

My ninth, I say immediately, is perhaps a contentious inclusion in this illustrious pantheon of "but for" historical causes, perhaps a trifle cheeky, since it involves, on one view, an all-out attack on the Queensland legal profession, no less. I refer to the existence, until its removal in 1989 (which required a High Court challenge, resisted by the Queensland Bar Association)[15] of not the well-known "rabbit proof fence", but a rugby state-of-origin equivalent designed to keep out irresponsible, trouble-making southern lawyers, a "non-Queensland-state- of-origin-lawyer-pest-infiltration-control-regime. This protective barrier of restrictive rules was introduced by Queensland legal authorities and their political mates to protect Queensland lawyers from competition from all others, ie, to make it extremely difficult for non Queensland (read Victorian Mabo) counsel, to appear in Queensland courts absent extravagant residential, and other, qualifications..

This threat to Melbourne lawyers' continued involvement was, after some anxious discussion, circumvented by a ruling given by none other than the then Chief Justice of the High Court, Sir Harry Gibbs (a distinguished Queenslander) early in 1986. His Honor resolved this question on the basis that the case was commenced, in 1982, in the original jurisdiction of the High Court. Thus, when the matter was "remitted" from that Court to the Queensland Supreme Court for a trial of facts, that proceeding before Justice Martin Moynihan attracted federal jurisdiction[16] Thus the restrictive Queensland regime that made it virtually impossible for out-of-state counsel to appear in Queensland's courts until 1989 did not apply to us Victorian barristers in Mabo.

Queensland is a peculiar place, sometimes. But for this ruling by Gibbs CJ – who knows? And while on peculiarities I add this: a currently-serving High Court Judge - who shall remain nameless – suggested to me that I should launch my book in Queensland in order to "remind them" that, this Judge said, "that they are, in fact, part of the Commonwealth." So there! Perhaps he or she had this (historical) issue in mind.

And if you think my reference to "irresponsible trouble-making southern lawyers" is a trifle emotional, let me add: when introducing the Queensland 1985 *Declaratory Act* to Parliament in April 1985, an Act designed to "kill off" the Mabo case prior to it even reaching a trial, the responsible Minister, Deputy Premier Bill Gunn, offered amongst other insults the following in Parliament, AKA "cowards-castle":

> "The islanders were led by two Melbourne University do-gooders, a Queen's Counsel named Kastan and a person named Keon.... They were leading the Islanders up the garden path..." (Book p 94)

[15] See *Street v Queensland Bar Association* (1989) 168 CLR 461; *A Mabo Memoir,* p 101.

[16] See *A Mabo Memoir,* p 101.

I repeat here my response set out in my book: (p 95):

> "Clearly, accuracy and common sense were not pre-requisites for high office in Queensland, nor were such standards expected in the Parliament (p 93) .... I, for one, strenuously object to half my heritage {the paternal Cohens) being gratuitously declared as non-existent by anybody, let alone an ill-informed Queensland politician. But then, whenever Indigenous issues were raised, the Bjelke-Petersen government was never one to allow inconvenient facts to inhibit comfortable ideology. Be that as it may, I'm sure that if Ron Castan were here, he would join me in saying -just as Justice Lionel Murphy said of Mr Neal that he was 'entitled to be an agitator'-we too were, and are, entitled to be 'do-gooders', and we remain proud of that status." (p 95)

As I said at the outset: it's always a pleasure to visit Queensland. Clearly, Queenslanders should buy, and read my book!

To return to E H Carr and my nine "but for" historical causes: all these forces combined, I believe, to throw up a moment-and a man for that moment. That man was Eddie Mabo and, to a lesser degree, his fellow plaintiffs. Further, Mabo possessed, I think a degree of "creativity" that, in Carr's words, "helped to mould the forces which carried [him and his fellow plaintiffs] to greatness." More of that later.

I might add that over the past twenty years – depending on whom I talk to - many other "but-for causes" have been mentioned to me-including the person speaking to me at the time! As mentioned, this very select club just keeps growing: I have already mentioned its latest recruit, Professor James Crawford.

My next observation about historical revisisonism -to return to my frantic frolic on the beaches of Murray Island – is that not everything that Eddie Mabo, or his fellow plaintiffs, or his lawyers did on Murray Island, or in the name of the Meriam people, was welcomed by the residents. Indeed, some of our conduct caused them considerable astonishment, even anger-and it seems, much laughter.

For example, as my book records, the claim itself was strenuously opposed by some senior families on the island. More than once, siblings opted for one side or another, and gave evidence for, or against, the claim, especially opposing many of Eddie Mabo's personal land claims. As Noel Loos records in his book:

> "[Mabo's] long absence from Mer ... sometimes found him out of step with those who had remained behind. They had apparently accepted the Queensland Government's appraisal of him as an urban activist, a troublemaker, a friend of 'reds', and a non-Christian."[17]

One could not say that throughout the decade-long litigation, and beyond, the Meriam community as a whole constituted a united and irresistible historical force supporting the recognition of native title on their island. Far from it. The point is: there were winners and losers in this, as in any other hard-fought litigation. As to the fate of our individual in history: this fractious background makes the determination of the plaintiffs -especially Mabo, Dave Passi and James Rice-and given their sometimes isolated stance, all the more admirable. But "isolated" is the wrong word to describe Eddie Mabo. Throughout, he and his partner, Bonita, and their growing family, stood together, "agitators" all of them, and proudly so. I recognize and applaud Bonita's contribution as second to none. Perhaps when assessing this particular historical event, we should speak not of the "individual", but the "family" in history.

[17] Noel Loos & Eddie Koiki Mabo, *Edward Koiki Mobo: His Life and Struggle for Land Rights"* (2nd ed, UQP, 2013) p 16

As is well known, the irony and tragedy is, that Mabo himself lost his claims and, it might be argued, to that extent, his significance in history. I have no hesitation in saying that such a conclusion would be factually wrong, not to mention unfair. But more of that later.

The larger point is: twenty years on, all sides now agree that hard-fought forensic battles – indeed the use of formal court processes at all-are entirely inappropriate for assessing and determining native title claims. A better way is needed-and some progress has been made. But significant reform, I believe, 20 years on, is now overdue.

My Fourth and last observation on my alleged tropical transgressions is that the film's Director, who is responsible for this salacious pieces of historical revisionism, who turned this apocryphal skinny-dip into irrefutable lounge-room fact, was of course none other than Rachel Perkins, daughter of the legendary Indigenous leader, Charles Perkins. Faced with such a formidable team, I salute them both. But I urge you all: do not believe everything you see or hear on today's multi-platform media circus – especially the digital versions. But perhaps here I merely reveal my age.

Let me now examine further the critical role of some individuals - the plaintiffs - in this "historic" case; and second, briefly overview the past 20 years of the *Mabo* legacy.

Eddie Mabo, was, of course, but one of the five original plaintiffs named in the writ issued in the High Court of Australia on 20 May 1982.

These were Eddie Mabo; his elderly aunt Celuia Mapo Salee; former Murray Island Council Chairman and respected elder Sam Passi; his younger brother the Revd Dave Passi, an ordained Anglican Minister; and former Councillor and teacher, James Rice.

During the ensuing decade:

Celuia Mapo Salee died in 1985 prior to the trial commencing and thus had little involvement.

As mentioned already, and as the Mabo film and my book record, the plaintiff Sam Passi was spoken to and influenced by at least one officer of the Queensland bureaucracy. This was his elder brother George Passi, a life-long teacher and administrator with the Education and Aboriginal Affairs Departments - on instructions from above. This conduct was, without doubt, an egregious contempt of court {for which, in appropriate cases, you can be jailed) and takes us straight back to the already-mentioned Paddy Killoran. There is no ''property"in a witness, but seeking to suborn, or influence a party to litigation in the conduct of his or her case can amount to a serious offence.

Sam Passi thus withdrew as a plaintiff, suffered a mild heart attack, gave limited evidence on Murray Island supporting the claim (while opposing Mabo's claimed traditional adoption and inheritance) and did not re-join as a plaintiff. He died in 1990, with the case still proceeding. George Passi died in 1990.

George and Sam's younger brother and original plaintiff, the Rev Dave Passi, was also pressured by George, withdrew with Sam, but was subsequently re-admitted as a plaintiff, despite strenuous Queensland opposition, by order of the trial Judge. The Reverend Dave gave valuable evidence supporting the claim and, in the final result, achieved strong factual findings from Justice Moynihan about his traditional land rights on Murray Island. Only he, of all five plaintiffs, remains alive today. He resides on Thursday Island.

Last but not least, James Rice, to his great credit, resisted pressure to withdraw, persisted throughout the decade, gave extensive evidence in Brisbane, and also achieved strong findings of

fact. He died in 2008.

But for the courage and persistence of Dave Passi and James Rice, the case would, I believe, have certainly failed. Let me explain.

This recitation of the demise, successes and failures of Eddie Mabo's colleagues brings us to the central point: ignoring for the moment the broad sweep of history, including how the facts of history are impacted by their telling, and retelling in many oral, written or digital forms, what was Mabo's experience, in fact, as principle plaintiff? Did he help "mould the forces" or did the forces mould him?

I often encapsulate Eddie Mabo's role in two succinct propositions: First, without Eddie Mabo, no case; Second, If only Eddie Mabo, the case would almost certainly have failed. What does this mean?

As to the first proposition: Mabo and Revd Dave Passi both gave initial instructions, as mentioned, at the Townsville conference in September, 1981.

But from the beginning, as referred to in my speech at his funeral, Eddie Mabo was the driving force, the dedicated plaintiff, the go-to man for instructions, the essential interface between the two radically different cultures at play. On the one hand was the traditional culture of the Meriam People, with its own myths and legends, rules of conduct, customs, traditions and language. On the other was the weird and wonderful world of civil proceedings in Australian courts – the Supreme Court of Queensland and the High Court of Australia- with judges and barristers in robes, complex procedures, rules of evidence that stop you saying what you want to say, formal court rooms in Brisbane and Canberra, and seemingly endless legal gobbledygook.

In the middle of all this was Eddie Mabo. Supported by his lawyers, he was the man who explained each world to the other. He explained the Australian legal maze to the Meriam witnesses and convinced them to follow his example, that is, to stand up against the Queensland government and bureaucracy which had governed every aspect of their lives for generations.

This was a very significant break and a courageous move. I pay tribute to all of the Meriam witnesses who spoke out-and many of them made a difference. They are all listed at **Appendix 25** of my book, being witnesses for both the plaintiffs and Queensland. I'm sure all of these Meriam witnesses had the best interests of future Meriam generations as heart and spoke the truth as they knew it. It's just that those supporting Queensland objected to many of Mabo's personal claims; and second, had different ideas about where their future lay.

To say this does not reduce in any way the importance of expert anthropological advice and evidence provided, in this case, by Professor Jeremy Beckett of Sydney University. But, as with all native title claims, without direct indigenous evidence, the claim will surely fail.

Having been banned from the Island in 1956 as a twenty-year-old for a petty offence of drunkenness,[18] Mabo had lived and worked on the mainland, been exposed to new ideas, and had developed a broader vision that enabled him to break from Queensland's colonial shackles and think and act independently. This was a major achievement and a mark of his character. Here was a man who stood up, at times alone, and who like E H Carr's Cromwell or Lenin, "helped to mould the forces which carried [him, his family and community], to greatness."

[18] See report of the proceedings against Eddie Mabo and others, in the Murray Island Community Court, dated 2/2/1956, at *A Mabo Memoir,* p 36.

As to my second proposition – if only Mabo, case dismissed - unlike his surviving co- plaintiffs Dave Passi and James Rice, Mabo's evidence was entirely disbelieved by the trial judge. Thus his claims to about 40 garden and village areas on the island, and to fish-traps offshore, were all lost at trial. The trial judge, Justice Moynihan, on the evidence before him, considered Mabo had exaggerated his traditional entitlements. His Honour concluded, in effect, that too often Mabo the witness before him spoke as the ambitious politician, rather than a witness of truth. A courtroom can be a very unforgiving forum – much more so than the pages of our newspapers.

Most significantly, His Honor also concluded that Eddie Mabo was not who he said he was. That is, he rejected Mabo's sense of self. His Honour determined that Mabo was not adopted, Islan Way, as Mabo claimed, from his biological parents to his adoptive father, his mother's brother, Benny Mabo. Thus he did not, the judge found, under custom or tradition, nor under Queensland law, inherit Benny Mabo's traditional lands - or those of any other person. I disagreed with these "no adoption, no inheritance" rulings but my views did not matter. What mattered were the findings of the trial judge.

In this sense, at this point: if only Mabo, case dismissed. Like that other agitator, Percy Neal of Yarrabah, his historical moment seemed to have been lost.

For Eddie Mabo, there was much personal anguish at this trial result plus the fact that some Meriam witnesses denied, (while others supported), his claimed inheritance. The whole question was, during the litigation in the 1980s, and remains today, contentious. For us lawyers and the case's progress, this rejection of our lead plaintiff posed a serious crisis.

Mabo however - and this marks the man – after the initial shock and great disappointment, not to mention disgust with white-man's system of justice - rose to the occasion and overcame his personal loss for the greater good, and secured his place in history. This was, I think, another personal triumph.

This occurred as follows.

After reading the trial Judge's *Determination,* over Christmas 1990-91, Ron Castan, our instructing solicitor Greg Mcintyre and I, as Castan's junior, faced a real procedural problem: given these trial results, what to do next? Should we proceed straight to the High Court relying upon the findings secured by the two successful plaintiffs, Passi and Rice? Or, should we appeal Justice Moynihan's rejection of Mabo's claims to the Queensland Court of Appeal?

After much anxious consideration we lawyers bit this difficult strategic bullet and advised our client: do not appeal your personal rejection. We reasoned:

(1) the prospects of success of such an appeal were uncertain;
(2) we could be stuck in the appeal process for years and lose momentum in the main game. I note also that, unknown to us all in January 1991, Mabo would die twelve months hence. Thus, on this basis alone, any appeal launched in his name would die with him;
(3) Last, to be brutal, we lacked legal aid to support any such appeal.

We thus advised Mabo (and the other surviving plaintiffs, Passi and Rice) that they should allow the case to proceed directly to the High Court for final argument on the ultimate legal issues, relying solely on the successful personal claims of Passi and Rice.

To his credit, Mabo accepted this advice (as did Passi and Rice).

The case thus proceeded to Canberra in May 1991; Mabo remained the lead plaintiff (again

after much anxious thought in Castan's chambers – we didn't want to lose time and momentum before the Court in an unseemly squabble about whose name historians should record); and the rest, as they say, is – "history."

But in making the decision he did, in allowing the case to proceed, truly the man made history. The Meriam People and the nation, I believe, should recognize his vision and concern for the greater good, not just personal gain.

The tragedies, however, remain, and they are two.

First, Mabo lost his personal litigious battle, as mentioned, but through an inspired act of self-denial, made a major contribution to winning the war.

Second, he died, aged just 56, of cancer in a Brisbane hospital in January 1992, just six months prior to seeing ultimate success in *Mabo.* Perhaps he did see it all-from above. But over these past twenty years, truly his spirit and achievements live on.

So, what of the case's legacy over the past twenty years?

In my view-and there are many views on this topic -much progress has been achieved in the arenas of native title and national reconciliation, yet much remains to be done. One view that I respect, and that accords with mine, was expressed a month ago, on 17ib May, by Justice Peter Gray upon his retirement from the Federal Court after 29 years service – much of that occupied in the native title jurisdiction. In his retirement speech (as quoted in the same Melbourne *Age)* his Honor said:

> "The biggest disappointment in my career has been to see the opportunity given to us by the High Court in the Mabo case squandered. The concept of native title has been reduced to something of little practical significance by judges who have been unable to understand, and legislators who have been consciously averse to, the vital relationship between people and land in Aboriginal traditions."

His Honor added that a future generation of Australians would have to devise a new native title system that:

> "... recognizes and respects the rights of our Indigenous peoples and returns to them a measure of control over what but for colonization, would have been indisputably theirs."[19]

His Honor here poses both a serious challenge to young activists, and the ultimate "but for" historical question: ie, but for colonization, no need for Mabo in the first place. This however glosses over the complexities of colonization and the potential for British law to recognize, from day one of extension of sovereignty, Indigenous traditional rights to country. The brutal fact is that compared to equivalent British colonies that received, like Australia, the common law, we have opted, post 1788 and post *Mabo,* for the most restrictive recognition of traditional connection to country of all. Indeed, *Mabo,* with all its potential referred to by Justice Gray, was established by equivalent cases in the USA in 1826; New Zealand in 1847, Nigeria in

[19] Jane Lee, "Mabo's native title victory squandered, says Judge", *The Age,* 1/6/2013, p 7.

1921 and Canada in 1973 and again in 1984.[20] Australia has fallen well behind best international practice in this area which remains central to reconciliation.

So where are we at, and where are the failings? I offer here a brief snapshot of a complex, still developing, jurisdiction. The Commonwealth's legislative response-the *Native Title Act 1993*- was enacted after much furious debate, in December 1993. It was significantly amended, against Indigenous interests, in 1998 by the Howard government's "Ten Point Plan".

As at 15 March 2013, 457 claims concerning native title were proceeding in the Federal Court. Since 1 January 1994, 222 Determinations of Native Title have been registered. Of these, 174 record that Native Title exists in whole or in part; 48 that Native Title does not exist. Importantly, 162 or 73% of these determinations were made by consent, i.e. a bruising contested trial was avoided. These 222 registered determinations over 1,754,382 square km or 19.2% of Australia's land area.

Sadly, with the dying out of the best evidence – the elders-claims become more and more difficult with every passing year. This is because in an oral culture the best evidence concerning traditional matters (not all the evidence) dies with them. *In Mabo* itself, three of the five original plaintiffs died before final judgment in June 1992.

But encouragingly, after 20 years of Indigenous people enjoying, for the first time, a legally supported seat at the negotiating table, agreement-making has proven to be the real jewel in the native title crown.

As at 15 March 2013,737 Indigenous Land Use Agreements or ILUAs had been registered, covering 22.8% of Australia, plus 6,254 sqIan, over sea areas, i.e., below high water mark. In addition, 2,490 private agreements, associated with Native Title claims and negotiated under the future act regime, have been reached with mining companies and others wishing to access and use claimed land.

These achievements have delivered real benefits to those indigenous groups in more remote Australia who can still demonstrate continuing traditional connection to country, as required by the Act. All this brings black and white Australia closer to meaningful reconciliation and mutual understanding.

However, as always, there is a downside. Many communities, especially in closely- settled areas around the continent, have suffered so much dispossession and cultural destruction since 1788 that they cannot now access the benefits of *Mabo* and the *Native Title Act* reforms. The burden of proof required by the Act, and judicial interpretation of it, is simply too onerous for many claimants. The community at Yarrabah near Cairns, and the local Bindal Wulgurukaba people, are but two of many examples - *Mabo* has delivered not only next to nothing, but often bitter disappointment. This is the lost potential, the "squandering of opportunity" present to our legislators by Mabo, that Justice Gray, and many others, now complain of.

Twenty years on, agitation is growing to reform the Act in an effort to redress this retreat to further injustice. Currently, the Commonwealth Government has made a reference to the ALRC to review the *Native Title Act;* and at the same time, has introduced legislation by way of proposed minor reforms to that *Act.* In my view, these do not go nearly far enough if "Mabo benefits" are to be delivered to Indigenous communities most affected by colonization, that is, the communities most deserving of some recompense, but least able to access the native title regime.

[20] See *Johnson v M'Intosh* (1823) 8 Wheaton 543; *R v Symmonds* (1847) NZPCC 387; *Amondu Tijoni v Secretory Southern Rhodesia* [1921) 2 AC 399; *Colder v Attorney General (British Columbia)* [1973) SCR 313; *Guerin v R* [1984] 2 SCR 335 respectively.

The most important reform currently proposed would enable parties to agree to disregard the historical extinguishment of Native Title in 'environmental' areas such as National Parks, and crown reserves.

In my view, this proposal points in the right direction, but is entirely inadequate if the denial of recognition and/or compensation to those traditional owners most impacted is to be corrected. A more radical approach that represents a genuine attempt to correct current injustices develops this "disregard extinguishment" concept to its logical conclusion, that is:

Reverse the onus of proof. Here, once all parties and a Federal Court judge accept that the claimant group descends from the original (1788) inhabitants of the claimed area, all sides should then also accept that the claimants' connection to country and traditional rights to land have continued to current times. The respondents (e.g. governments, mining companies) then bear the onus of 'proving' that that title has been lost, e.g. by extinguishment. Such calls have been made by now High Court Chief Justice Robert French, Paul Keating, Lois O'Donoghue and others.

Second is Constitutional reform which extends the above logic to the constitutional arena. Current proposals are circulating following the Report (January 2012) of a Panel on Constitutional Recognition of Indigenous Australians. Here, I would advocate entrenching into our Commonwealth Constitution the recognition of traditional rights, as was done in Canada in 1982. Section 35(1) of the Canadian constitution, introduced in 1982, states:

> a. "The existing aboriginal and treaty rights of Aboriginal people of Canada are hereby recognized and affirmed."

I pause to note that since 1982, Canada has sunk neither into the Atlantic, nor Pacific oceans. Likewise, such a proposal, like *Mabo* itself, will not wreck Australia. It should be included in the current discussion on entrenching Indigenous rights into our Constitution.

In this ongoing search for land justice, younger generations – black and white - have, and continue, to gain strength and inspiration from Indigenous leaders, such as Eddie Mabo, the Revd Dave Passi, and James Rice. All three played pivotal roles in the Mabo story, and leave a powerful legacy that continues to shape the native title debate today, and anticipate, into the future.

The endeavors of current "agitators" will, I hope, also secure throughout our nation the sentiment that the presence amongst us, and the survival into the future, of Indigenous traditional culture and communities is a wonderful privilege – not just a problem.

Certainly that has been my experience, acting as a barrister over these past 30 years. I wish these young agitators well.

I now have the "awesome" pleasure of declaring my book launched. Please enjoy. Thank you for your attention."

Owen Dixon Chambers East,
14 June 2013