

Remarks on the launch of *A Mabo Memoir, From Islan Kustom to Native Title*

The Hon Michael Black AC QC

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I would like to begin by saying how very much I appreciate Melissa Castan's introduction and Dr Bryan Keon-Cohen's invitation to launch his book.

One of the principal players in the book, the late Ron Castan AM QC, the leader of the plaintiffs' team of lawyers, was a colleague of mine at the Bar and was Melissa's father. I remember him with admiration and affection. He was one of the great lawyers of his time – and by that I seek to embrace not only his outstanding qualities as an advocate and scholar, but also his outstanding personal qualities and his commitment to the ideals of justice. It is therefore particularly moving for me to have been introduced today by Melissa Castan whose scholarship and commitment to human rights and the broader cause of justice is very much in the same tradition.

And I would say the same about our author, Bryan Keon-Cohen. Bryan and I were also colleagues at the Bar. We once worked long hours together on another memorable case, *The Commonwealth v Tasmania*, better known as *The Tasmanian Dam Case*. I am delighted to be launching his book today.

A Mabo Memoir, From Islan Kustom to Native Title, is a book of great importance, recording as it does the remarkable story of a case of profound significance in the history of our nation and in the nation's relationship with its own past and with its indigenous people.

As many will know, this book is in one sense a re-publication of the earlier work by Bryan Keon-Cohen, *Mabo in the Courts: Island Tradition to Native Title*, a memoir published in two volumes in 2011. The original work was sold out and is now out of print and for that reason alone the present work is very welcome. But whilst the text of *A Mabo Memoir: Islan Kustom to Native Title* is essentially that of the earlier work, and has not been rewritten or updated, *A Mabo Memoir* is to my mind really a new book. The original work has been re-titled and wholly re-designed (and very well re-designed if I may say so) and has had various typographical and layout errors corrected. The new work also contains maps, photos, copies of documents, cartoons, appendices, cross-references and a substantial subject index. The two paperback volumes of the original have now become one volume, in hardcover.

There is also an excellent chronology which provides a readily accessible overview of the lengthy and complex course of events that the book describes. The chronology begins, appropriately, with a reference to the arrival of Melanesian people on the Murray Islands some 3000 years ago, passes through more recent history and then outlines the numerous steps and complexities of the Mabo litigation to judgment and beyond.

The book reminds us of the remarkable circumstance – often overlooked or simply forgotten – that the Mabo litigation was before the High Court of Australia for over 10 years. The book includes a copy of the writ issued out of the High Court in May 1982, some nine years before the argument on the substantive claim to native title was heard and some 10 years before judgment was delivered on 3 June 1992. But even that was not the end of the matter since there remained (would you believe?) a substantial argument about costs and this was not resolved until the end of 1992.

Many will have forgotten, but the book reminds us and explains, that the Mabo litigation resulted in not one but two fundamentally important judgments of the High Court of Australia. The case most people know simply as "Mabo" is properly designated *Mabo (No 2)* and appears as such in the official reports. The first "Mabo" was a much earlier judgment in the same litigation in which the High Court held that Queensland's attempt to defeat the claim to native title by an Act of the Queensland

Parliament had failed. The Court held that the Queensland legislation was invalid as being inconsistent with the *Racial Discrimination Act*, a law of the Commonwealth, the validity of which the court had upheld in *Koowarta v Bjelke-Petersen*, which it had decided in 1982, only a few days after the writ was issued in *Mabo*.

The complexities of the case were not confined to the legal issues – very challenging though they were. Much of the book is necessarily directed to the extraordinarily lengthy and complex process of fact-finding, involving a total of some sixty-seven days of court hearing before Justice Moynihan of the Supreme Court of Queensland, to whom that aspect of the matter had been remitted. This in itself is a remarkable story and, I hasten to add, certainly not without interest: human, legal - and just about every other sort of interest.

I agree with the author when he observes that “test cases of this type involve a rich mix of court procedures, personalities, evidential problems and legal issues, political factors, financial difficulties and much more” and indeed all these the challenges, and more, were present in the Mabo litigation and are dealt with in the book. Unsurprisingly, the account of some of these events evokes a very considerable feeling of drama. Many of the events WERE indeed dramatic. For those who read the book as lawyers, there will be times when your hair will stand on end. There were- I think the technical term is “wicked”- wicked problems in abundance. But they were faced and argued through.

Reflecting on these and other matters and considering nearly 500 pages of very readable text, an admirable and very helpful chronology and some 200 pages of appendices and footnotes, I doubt whether, as a practical matter, a comprehensive record of the history of this case from the Plaintiff’s side (or indeed from any side) would ever have been written had not this author, with a long personal involvement, devoted so much of his own time, energy and scholarship to that task. We should be very grateful to him, a point also made, I should note, by others including Justice Michael Kirby.

Bryan was also quite right to acknowledge, very directly, the qualifications that have to be made about history written by one of the actors. Happily, whilst evidently bearing this very much in mind, he was not deterred by those considerations because it is important that the challenges and complexities of litigation of this nature be placed on record by those who were actually involved. This is quite apart from the consideration that, as a matter of practical reality, no one else might be able to do so.

I would also note that Bryan has been careful to treat with appropriate courtesy the opposing views, and there were many. Some of those whose responses to the issues and to the Mabo decision were inflammatory and not based in fact, have got off rather lightly as it seems to me. But better to err on the side of scholarly courtesy and I commend him for that.

There are other, very powerful, reasons why this book is important. The first is that the litigation it records is vitally important in our history as a nation. More specifically, this work is fundamentally important because it is a book about the development of the common law in Australia at a critical time in its development when, as the common law of Australia, it had to confront, directly, its relationship with the indigenous people of this land.

The first European settlers of Australia, and their successors after 1788, brought with them the common law of England - a body of judge-made law, based on principles established and developed by judicial precedents hammered out in real cases over the centuries and said to have been based, ultimately, upon the ancient customs of the realm. These people brought the law with them and saw it, and its associated concepts and ideals such as trial by jury, as part of their birth-right. But it was also, of course, like all law, capable of error, including errors made by egregious misapprehension about the nature, complexity and quality of indigenous society.

In colonial times, and well into the 20th century, the common law that came here, and which was a foundation for our law, was not referred to as the common law of *Australia*. Few, if any, saw it as

such and in fact until well into the second half of the 20th century the common law that was being developed here by the decisions of our courts was largely subject to English precedent. Moreover it was potentially subject to direct correction on appeal, in all but some constitutional cases, by the Judicial Committee of the Privy Council sitting in London. I practised at the Bar during those times and to have spoken in those days of the common law of Australia would have invited censure from nearly all judges.

But by the 1980s times had changed. Appeals to the Privy Council had been abolished and our constitutional independence was complete with the passage of the Australia Act in 1986. Increasingly, we began to see judge-made law in Australia as part of an integrated Australian legal system of federal, State and Territory courts with the High Court at its apex. In short, we began to speak of a common law of Australia- for such it had indeed become. When that point is reached in the development of a settler nation and its system of law the nature of that law's relationship with the indigenous people and their land becomes an issue of critical importance. What does the law that we now recognise as, and call, the common law of Australia say to the indigenous inhabitants of this land? What is its relationship with them?

But it is in the nature of the common law that its development can only occur through the principled resolution of controversies brought before the courts.

Thus, and this is the point, the common law can develop – and justice may be done – when people such as our author, and Ron Castan, and the other members of the Mabo team have the skill, the insights, the determination, and at times the courage, to argue the cases, great and small, that stand as milestones in our legal history. They do not just happen, and in cases of this nature one has to sail into the unknown, beyond the known boundaries, where the great developments of the law may – or may not – be made.

The common-law grows out of time, place and circumstance and Bryan Keon-Cohen's new book is an invaluable permanent record, from the viewpoint of one of the principal actors, of how it developed in a way that, as the common law of Australia, rebutted the false assumptions of the past about the rich culture of indigenous Australians and allowed recognition – albeit limited – of native title.

Before concluding I would like to add a personal comment and a postscript. The two, as you will see, are related. At the very end of the book, in the last 3 pages in fact, the author refers to another chapter in the story of the Meriam people, the story that began some 3000 years ago. That other chapter was written when, in June 2001, the Federal Court travelled to the two little Meriam islands – Dauar and Waier (there are photos of them in the book) - which, for good reason, were excluded from the determination in *Mabo (No 2)*. On that day in 2001, on the island of Dauar, under a canopy in the rainforest and with a bench covered with brightly coloured cloth, held in place by shells and coral, and after the singing of hymns, the [Federal] Court held a sitting. The court was opened in the ordinary way and the presiding judge then declared, in a determination consented to by the State of Queensland, that the Meriam people, as the common-law holders, are entitled to possession of their lands and gardens on the two islands, according to their traditional laws and customs. Note that it was not a grant; it was a declaration of the entitlement of the Meriam people.

I was the judge that day. I observed at the time that this marked the culmination of a 21 year process for the Meriam people. The author, however, corrects me as being a little premature because, as he points out, there was a sea claim still to be made. And, indeed, that claim was subsequently made, and it was determined in favour of claimants, including the Meriam people, by Justice Finn in July 2010. The determination went on appeal to the Full Court of the Federal Court and from there to the High Court of Australia. Today, I am happy to report that about three weeks ago, on 7 August, the High Court delivered judgment on the appeal favourably to the claim of the Meriam people. It was the end of a very very long road, but we can be sure that this would not have occurred but for the historic events recorded in this book.

When a judge makes an order for native title, as I did that day in 2002 on Dauar, he or she does not say that native title is granted. Rather the judge determines that it exists, which is to say that it has always existed. Whatever the deficiencies of our laws with respect to native title, the circumstance that it is recognised in this way is - to my mind - profound, as we strive ("struggle" may be a better word) to a new era in our relationship with the indigenous peoples of our land. I believe that a better future in that part of our national life is possible and will be achieved. But this prospect is a result, in large measure, of the events described in the book.

May I congratulate the author upon a very fine book, a very important record of a great case in our history. I also congratulate him upon his contribution to an understanding of the work of a barrister, to an understanding of how the common law develops and of what the conduct of great cases is like. I congratulate him too for writing an account that can stand as an inspiration to young people embarking upon a career in the law . Finally, and most importantly, I would like to offer my congratulations to him and his team for the achievement that his book records.

I now take great pleasure in declaring *A Mabo Memoir: Islan Kustom to Native Title* duly launched.