25Dr CHARLES PERKINS MEMORIAL ORATION

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"Eddie Mabo as Principle Plaintiff: Tragedy and Triumph"

by

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"Vice-Chancellor, Deputy Vice-Chancellor, Charles Perkins family, Eddie Mabo family, ladies and gentlemen:

Thank you for this opportunity to address you this evening.

I also pay my respects to the traditional owners of this land, the Gadigal people of the Eora Nation and their elders, past and present. We shall return to the Gadigal people.

My topic is "Mabo as Principle Plaintiff: Tragedy and Triumph".

This 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 one of the most significant legal developments 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. I shall return to this theme.

But first, I wish to correct some serious errors in the historical record.

You have just seen extracts from the 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. Fortunately, you were spared that footage tonight.

Ladies and gentlemen, the true historical facts are as follows. I know this. I was there.

First: I was there - but 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 Australia's eastern seaboard. Thus, by the 1980s, the Meriam'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.

Back in September 1981, a land rights conference was held at James Cook University, Townsville. Organised by students, it attracted many leading "agitators" (I use the word advisedly for reasons that will appear) both white and black. These included Dr Nuggett Coombs and the poet Judith Wright of the Aboriginal Treaty Committee; Professor Henry Reynolds, and 2 of the 5 Mabo plaintiffs: Eddie Mabo and Revd Dave Passi. Also present were Greg McIntyre, a Cairns solicitor, and Barbara Hocking, a Melbourne barrister, soon to become important members of the *Mabo* legal team.

At this conference, the possibility of mounting a land rights test case was discussed. By the end, Greg McIntyre and Barbara Hocking held instructions in two cases: one for the Meriam people, a second for the Yarrabah Aboriginal reserve community, located near Cairns.

The Yarrabah community at that time comprised several groups who had been forced off their country and collected into a reserve under the much criticised Queensland policies and laws dealing with Aboriginal and Islander people, disparagingly referred to as "Killoran's Law."

Patrick "Paddy" Killoran was the long-serving Director of the Queensland Department of Aboriginal and Islander Affairs and a key witness for Queensland. I cross-examined him in 1989 during the trial – perhaps best described as irresistible force meets immovable object. That's another story. Please read my book *Mabo in the Courts* (2011)[1]. I'm still unsure who prevailed.

Back in 1981, Mabo's lawyers were thus presented with two 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 aYarrabah reserve manager through a fly-wire door; was charged, convicted and jailed by a Magistrate; his conviction was upheld and his sentence increased by the Queensland Court of Appeal; and both conviction and sentence were thrown out by the High Court in 1982[2]. In his reasons, Justice Lionel Murphy famously quoted Oscar Wilde

[1] A reprint entitled *A Mabo Memoir: Islan Kustom to Native Title,* will be published in March 2013. It may be ordered from the author.
[2] *Neal v R* (1982) 149 CLR 305

and concluded: "Mr Neal is entitled to be an agitator". Thus the Yarrabah claim stalled, while Mabo proceeded.

I leave to historians the historical "what ifs" surrounding Mr Neal – not to mention Justice Lionel Murphy.

However, this false start indicates first: how vital agitators are in our quest to achieve a just and civilized society. Second, it raises the "bad King John" theory of history, in particular, Eddie Mabo's role 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. What seems to me essential" Carr continues, "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."[3]

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.

Let me return to the pristine beaches of Murray Island – a great spot for skinny-dipping – and the facts of history as depicted in the Mabo movie.

My second observation is that the magnificent physique demonstrated to those lovely Meriam ladies – and now to the world via its TV screens – belongs not to me, but the accomplished Shakespearean actor Ewan Lesie. 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" - can lie 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

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

history. The point in the procession at which he finds himself determines his angle of vision over the past" (p 36).

I am but a lawyer – albeit with a BA degree that included a major in History from Melbourne University (that other place you may have heard of). Worse, in terms of writing "objective" history which involves not only facts, but crucially, interpretation, I was a participant in *Mabo* and thus, on one view, am compromised. And in any event, 20 years is far too soon to gain the necessary distance and objectivity to pass judgment. But, for what it's worth, I think that the Mabo litigation of 1982-1992 arose at a moment when various tectonic forces were moving and shifting the social, legal and political landscape in Australia.

I refer to three major factors that E H Carr, I think, would accept as causative "forces". Without these, we might not be here this evening.

(1) the intense 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;
(2) the reforms of the federal Whitlam government of the 1970s, particularly the enactment of the *Racial Discrimination Act 1975.* I pause to note that in 1985, the Queensland Bjelke-Petersen government passed a law specifically designed to kill off the case; that we challenged it as unconstitutional, being in conflict with the *Racial Discrimination Act 1975;* that the High Court upheld that challenge 4:3[4]; and had that challenge failed, end of Mabo.
(3) the arrival of the reformist High Court led by Sir Anthony Mason, plus its release from the strictures of English precedent, again achieved by legislation in the mid 1980s, ie the *Australia Act 1986* (Cwth). .

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

(4) the availability, and dedication, beyond the call of duty, of the brilliant legal skills of the late and very great Ron Castan AM QC;
(5) thorough instruction in English provided, at Queensland taxpayer's expense, by the same despised Queensland government, to the Meriam people over many decades, including to the youngster Eddie Mabo, on Murray Island during the 1940s and 1950s in the form of a Scottish school teacher, Robert Miles;
(6) the construction, at Commonwealth taxpayer's expense, of an airstrip on Murray Island in 1978 – and of a single public telephone booth. Without such 20th century developments, 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;

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

(7) The 1981 land rights conference, discussed above, which bought the plaintiffs, their supporters, and the lawyers together.

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!

My third observation – 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 the film correctly shows, 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.

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. 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.

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 piece of historical revisionism, who turned this

apocryphal skinny-dip into irrefutable lounge-room fact, was of course none other than Rachel Perkins, daughter of Charles Perkins in whose honor we meet tonight. 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 the 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 the Mabo film shows, Sam Passi was spoken to and influenced by agents of the Queensland bureaucracy - a clear contempt of court. He withdrew as a plaintiff, suffered a mild heart attack, gave limited evidence on Murray Island supporting the claim (but opposing Mabo's claimed traditional adoption and inheritance) and did not re-join as a plaintiff. He died in 1990.

His younger brother, the Rev Dave Passi, was also pressured, withdrew with Sam, but was subsequently re-admitted as a plaintiff, despite strenuous Queensland opposition, by order of the trial Judge. He gave valuable evidence supporting the claim and, in the final result, achieved strong factual findings from Justice Moynihan about his traditional land rights on the 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.

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, 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 – in my experience a courteous, thoughtful man - most of the time - with independent views, a passionate sense of injustice, grim determination to right many wrongs (some very personal), no fear of anything or anybody, and blessed with acute intelligence, much traditional knowledge, and exceptional English skills. 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. And Mabo led by example. I pay tribute to all of the Meriam witnesses who spoke out – and many of them made a difference.

Having been banned from the Island in 1956 as a twenty-year-old for a petty offence of drunkenness, Mabo had lived and worked on the mainland, been exposed to new ideas, and had developed a broader vision 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."

Equally, Mabo it was who introduced his Melbourne lawyers to the details and mysteries of Meriam history, culture, ancestry and contemporary customs and traditions, in particular, the system of traditional land holding- and much else.

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 this University. But, as with all native title claims, without direct indigenous evidence, the claim will surely fail.

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 Mabo the ambitious politician, rather than Mabo the witness of truth.

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, or 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 at Yarrabah, the historical moment seemed to be 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.

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, his 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 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 19912, Mabo would die twelve months hence. Thus, on this basis alone, any appeal launched in his name would die with him. Lastly,

3) to be brutal, we lacked legal aid to support the 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.

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; 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.

Standing here, 20 years on, I think it fair to conclude that, prior to and over the decade of the litigation, he "helped to mould the forces" that led to ultimate victory. He was, on this account, to quote Carr again, "at once the representative and the creator of social forces which change the shape of the world and the thoughts of men."

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

First, Mabo lost his personal 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 his 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.

I offer here a brief snapshot of a complex, still developing, jurisdiction. The Commonwealth's legislative response – the *Native Title Act* - 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".

According to the National Native Title Tribunal, as at 30 June 2012, 471 claims concerning native title had been filed in the Federal Court. Of these, 150 had succeeded, in whole or in part. These cover about 16% of the continent. Meanwhile, 44 claims failed. The rest were "in the pipeline".

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.

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 30 June 2012, 2,490 agreements had been negotiated under the future act regime set out in the *Native Title Act* – many of these with the mining sector.

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. For these groups – those at Yarrabah near Cairns and the Gadigal people of Sydney are but two of many examples - *Mabo* has delivered not only next to nothing, but often bitter disappointment.

Twenty years on, agitation is growing to reform the Act in an effort to redress this continuing injustice.

Currently, the Attorney General, the Hon Nicola Roxon, has issued an "exposure draft" of proposed minor reforms to the *Native Title 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, being those that therefore most deserve recompense, but are least able to access the native title regime.

In this ongoing search for land justice, younger generations – black and white - have, and continue to gain strength and inspiration from Eddie Mabo's example. This is a valuable and powerful legacy that continues to shape the native title debate today, and I anticipate, into the future.

The endeavors of these current "agitators" inspired by people like Charles Perkins, Eddie Mabo, and Percy Neal 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.

However, this is another major battle yet to be won amongst many sectors of our society over the next twenty years. I wish these young agitators well.

Thank you for your attention."