

## 2011 Mabo Oration commentary: Bryan Keon-Cohen



Commentary on Terri Janke's Oration by Bryan Keon-Cohen, delivered in Brisbane on 3 July 2011.

Ladies and gentlemen, may I commence by acknowledging the traditional owners of the land upon which this oration is given.

I say that with some feeling. Some of those owners - the Turrbul people – have been my clients. That native title claim continues along a rather long and rocky road. Fortunately those traditional owners were not washed away in the recent Brisbane floods. Whether their traditional connection to country has been washed away, is a very important matter yet to be determined. I will return to the notion of "washing away" later on.

May I also acknowledge the presence of the Mabo family - Bonita, Jessie, Brian, and others. It has been a pleasure to meet you again. It has always been inspiring to sit and chat with you.

I acknowledge the organisers of this oration - Commissioner Kevin Cocks and his colleagues.

Just one point, if I may. There was a team of people involved with the plaintiffs in the Mabo case. The most important component was the Meriam people, especially the thirty-five Meriam witnesses who gave traditional evidence during the trial in 1989.

There were also four lawyers headed by the late and very great Ron Caston AM QC, an outstanding Melbourne Barrister. Barbara Hocking and I, being junior barristers, assisted him. Our instructing solicitor, Greg McIntyre, completed the front-line legal team. But further people assisted the plaintiffs, in particular expert witnesses. One of them, Professor Jeremy Beckett, is in the audience this evening: it is a great pleasure to see him here. In addition, I dragooned into service an array of law students from Brisbane University to assist with specific tasks, and others contributed from around the country. This group included, notably, Professor Garth Nettheim from the University of New South Wales.

Lastly, may I pay my respects and offer my thanks and admiration to our orator - Terri Janke. Terri, thanks very much for a most interesting oration. I listened with benefit. Your address

was instructive, insightful and in particular, forward looking. It's a valuable review of a difficult and important area of law, of government policy and administrative practice; and more importantly perhaps, of failings in all those areas.

I especially commend your work over many years. Your 1999 Report called *Our Culture Our Future* was also valuable, but no action has resulted. Also, I commend you for highlighting serious failings in the current native title regime. You particularly mentioned the burden of proof placed upon applicants and calls of recent times by former Prime Minister Paul Keating, and by the current Chief Justice of the High Court (made in a former manifestation as his Honour Justice French) and others, to reverse the onus of proof that applicants now struggle under.

I've studied this topic around the world; that is to say, in equivalent Commonwealth countries and other civil law countries such as Brazil. Australian applicants labor under the most difficult burden of any when it comes to a trial. For example I acted for the Yorta Yorta people in their claim to portions of central Victoria. That claim lasted eight years (1994-2002). It failed at trial, and on appeal before the High Court. It failed because Yorta Yorta customs and traditions – the knowledge and practice of them - by which they sought to prove connection to country, in the view of the trial judge Justice Howard Olney of the Federal Court, had been "washed away by the tide of history". His Honour was responding, quite properly, to the evidence before him. He was also responding to the onerous requirements of the Commonwealth's *Native Title Act 1993*. The Yorta Yorta were devastated but since then, have successfully negotiated alternative arrangements with the Victorian government.

Eddie Mabo claimed thirty-five portions of land and seas during the Mabo case. He lost all of them. He lost them because the trial judge in that instance (Justice Martin Moynihan who will be known to you all as a much admired member of the Queensland judiciary, and now of the Queensland Crime and Misconduct Commission) decided on the evidence before him, that Eddie Mabo's claims had not been made out. However, His Honour made firmer and stronger findings for two other plaintiffs - James Rice and Fr. David Passi.

Again, I acted for about a thousand claimants in the Wongatha case, a claim to large desert areas to the north and east of Kalgoorlie in Western Australia. That claim dragged on for four or five years. There were something like five hundred respondents. The claim failed for technical reasons, ie, lack of "authorization" provided by the claimant group to those actually filing the claim as named applicants, a procedure required by the *Native Title Act*. But that claim demonstrated again this very onerous burden of proof. I will return to *Wongatha* later.

May I suggest ladies and gentleman, if I may divert for a moment into the dreadful realm of politics, (noting that Minister Pitt of the Queensland government is in the audience) that in my view, there should be a strenuous campaign not only in support (as Terri suggests) of a new cultural heritage body - but a campaign to reverse the onerous burden of proof required by the *Native Title Act*. That campaign should seek legislative reforms by the twentieth anniversary of the handing down of Mabo decision, ie, third of June 2012, next year. (Applause) I think that such reform is long overdue. Ladies and gentleman, all those who had clapped please call upon Minister Pitt - tomorrow morning!

Of course, reform of the *Native Title Act* is ultimately a federal matter. But equally, the Commonwealth Government since 1901 (more particularly since the constitutional referendum of 1967) and state governments have demonstrated a peculiar inability to legislate in this very difficult policy and legal area. In short: indigenous affairs is a political hot potato. There are no votes in it. Politicians don't like it. It's all too hard. It raises very serious issues in the community. Well, I suggest that our leaders should lead, and do something about the manifest injustice that continues, day after day, in the native title arena.

Terri has also, to her credit, highlighted deficiencies in the copyright laws that operate in this country. Copyright law focuses on individual creators, not a community as the source, or the owners of the songs, dance, or knowledge that is the subject matter of an artistic work. She calls for a National Indigenous Cultural Authority, and I support that.

May I offer just four further observations on Terri's extensive and valuable paper. This is based on thirty years or so experience in one aspect of an important element in her paper - native title claims.

The first point I make is just how precious and fragile traditional knowledge can be and indeed is; and how privileged we are as a nation to still have it within us - to still have some access to it as a vital remembered body of knowledge, as a living thing. I consider this to be a national privilege, not as many still seem to say, a national problem.

Manifestly it is a wonderful thing that this very unique aspect of Australian cultural and social life is still with us. But In today's Australia we need take steps to preserve it. Traditional knowledge is fragile knowledge. It is very important – indeed, in native title claims it is essential - and it brings to us remarkable insights. How timely therefore is Terri's call for governments and communities to take action.

Let me give you a couple of examples of the significance of traditional knowledge from my personal experience in native title litigation.

The pre-contact Indigenous world - before colonisation, before the extensive impact of settlement and all that it brought - is still available, and often is only one step removed in terms of evidence before a Federal Court in a native title claim. For example in the Mabo case, Eddie Mabo gave evidence about discussions he recalled (often in great detail) with his adopted father and grandfather. They told him stories about Meriam gardening customs and practices, cultural and spiritual life, myths and legends. Eddie then, according to his evidence, was about five or six years old. We're talking about 1940.

Eddie's grandfather, on the evidence before the court, was born in the 1860s or perhaps the 1870s. So he would have been about seventy-five years old when talking with his grandson. This is hearsay, one removed. That is to say, the witness Eddie Mabo is telling the court what his grandfather told him about Indigenous life pre-contact. That is, pre-1871 when Christianity arrived in the Torres Straits at Darnley Island in the form of the London Missionary Society. The LMS had an enormous impact which was damaging, but absorbed by the Meriam people on Murray Island, about 50 km to the south.

Jeremy Beckett knows all about this topic. He gave important expert evidence in the Mabo trial in 1989 on those sorts of matters. So this is a conversation pre-1871, well before 1879 when the Torres Strait islands were formally annexed by the British Crown to the Colony of Queensland. This is, I think, truly remarkable. But I can go further.

In the Wongatha claim there is a famous passage of evidence concerning a barbwire fence. As mentioned, this was a very large claim within the Western desert of WA. The claim, about the size of Victoria, was to remote spinifex country. I acted for several Aboriginal groups who had been combined according to the wisdom of the National Native Title Tribunal. The President is amongst us, Mr Graham Neat. So, I was acting for about one thousand claimants with over five hundred respondents - mining companies, shire councils, pastoralists, sporting groups. You name it, they were there.

During the trial, in about November 2002, an elderly lady - Rosie – gave sworn evidence before Justice Kevin Lindgren, who was conducting the claim. She stated that she was born

about 1950 at an Aboriginal community three hundred miles north-east of Kalgoorlie. This is spinifex country. She spoke about how, after a long drought around 1955, she and her family with a dozen people came in to a government ration depot, essentially their first contact with white society. This is what she said, taken from the transcript:

*Me and my family come in from the desert to Stock whip and Blanket, a local ration depot. I remember following a camel and cart. My Granny sent people out from the depot into the desert to look for us. We saw my uncle coming towards us. From the bush they saw the smoke from our fire. We could understand my uncle when he talked and he gave us tin meat. My uncle brought us in by camel and cart; my mother was pregnant at the time. We were all naked. We didn't know anything about tea, flour or sugar. The first time we saw a fence we were afraid of it. I remember them telling us to come through the fence. We were all frightened as we hadn't seen one before. We thought it was a giant spider web cause of all the lights, as the moonlight was shining on it all. All of the little wires were shining.*

I asked Rosie: How did you feel at the time? She answered: Frightened. Here is an even stronger item of evidence - direct first hand evidence - of Australian Indigenous life and worldview, prior to first contact with a colonising society. As mentioned, this was evidence given in November 2002. I think such memories are remarkable and memorable and ought to be treasured in some appropriate place. We should do what we can to respect and preserve and continue such a unique pre-contact world. Of course, that traditional world is changing, yet it continues to this day in many ways.

The second point I want to make is that this evidence passes away year by year. As Terri has mentioned, the best sources of traditional knowledge are the elders, something that is self-evident. Rosie (I hope I haven't breached any protocols here) I imagine has now passed away, or she may be incapacitated. I'm talking about twenty years after the event, and she was born around 1950.

Equally, Eddie Mabo himself died, as has been often mentioned, in January 1991. Further, Sam Passi, a very important plaintiff, suffered a stroke during the Mabo litigation. He withdraw as a plaintiff, but gave (much reduced) evidence from the immense knowledge that he held. In Mabo itself there were, as I mentioned, thirty-five Meriam witnesses who gave evidence on Meriam customs and traditions.

I visited Murray and Thursday Islands only last week to talk to the community about a book I've written about the case called *Mabo in the Courts*. Five only, out of those original thirty-five witnesses, remain alive today. One plaintiff, Dave Passi, is still fit - not as fit as he used to be - but he is alive and lives on Thursday Island. The short point is: I could not run the same trial today. I would run a trial but would be relying on a younger generation. They, may I anticipate, have a good deal of traditional knowledge. Looking at the dancers who have entertained us this afternoon gives me great heart that many traditions, many essential core beliefs, continue to be practised in a very vital way. But it would be a very different trial.

The Yorta Yorta community lost because the trial judge found, as I have said, that the tide of history has washed away their traditional knowledge and their traditional connection to country. The basic point I make here is that the Australian nation, through its native title scheme, has a limited time to deliver justice to Aboriginal claimants. Traditional knowledge is important to claims: it must be passed down and it must be preserved, but equally in my opinion, the native title scheme itself has to adjust and change. Solutions have been proposed and Terri's, presented today, is important. Again, in the Yorta Yorta claim, the

Yorta Yorta community of its own initiative - with the agreement of the Court - videotaped all the Yorta Yorta witnesses involved in the case. I'm not sure what has happened to those tapes, but they are an important archive of cultural knowledge. Terri's Indigenous Cultural Authority is another proposed solution. The conundrum however has to be faced: that in recording oral histories communities face the risk of compromising their vitality, their ability to, ironically, adapt and change, to avoid being reduced to a museum piece, frozen in time.

In the Mabo trial we also faced this problem. The trial judge, Justice Martin Moynihan, rejected Eddie Mabo's claims and rejected his evidence. Moynihan J. questioned Eddie Mabo's traditional knowledge since part of it (on the evidence) had been generated by Mabo reading anthropological and other works in the James Cook University library – now renamed after him! I personally find this approach unacceptable; but I'm only a barrister, not a judge.

The trial judge found for example that Eddie had proudly stated that he had studied the works of Professor AC Haddon who headed the Cambridge anthropological expedition that visited the Straits and the Murray Islands in 1888 and 1898. Cambridge University Press published four or five magnificent volumes arising from that expedition. We relied on those volumes, just as we relied on Eddie Mabo's and the other witnesses' evidence. But as to Mabo, the trial judge questioned whether he was really listening to oral histories handed down in the traditional way from generation to generation, rather than a witness who had learnt part of his oral traditions from a book.

Another source that Eddie Mabo said he had read, was Ion Idriess' work of fiction *Drums of Mer*. I take the view that a person's culture may be derived, day by day, from all sorts of sources, including Twitter, YouTube, the internet, books, conversations in the pub - whatever. As Terri has said and as Justice Michael Kirby has indicated, this notion – culture - that we're talking about here lacks any firm boundaries. It's often difficult to understand its sources, its totality, and its relevance to a particular topic.

The third point I want to make is to remember that cultures and traditions can arise at various levels: that is, by reference to a nation, or a group (whether be it Greek, Italian or Australian) or a family or an individual. At every level, "cultures" will adapt and change; they all absorb impacts. They are not museum pieces frozen in history.

This topic was greatly discussed in the Mabo case. Queensland's proposition was: "It's all gone judge. Look at the impact of Christianity, of Queensland government administration of 'Killoran's law' etc, etc...." We said No, wrong! and Jeremy Beckett's evidence was crucial here. We said no because the Meriam domain is a flexible, strong and resilient entity which accepts, absorbs, adapts and lives with these impacts.

The plaintiff David Passi, for example, was at that time a Reverend - an ordained Anglican minister - of the Archdiocese of Carpentaria. He gave what I consider to be very impressive evidence which I talk about in my book - how he fused traditional Meriam and Christian beliefs into one holistic view of the world. His spiritual and traditional life, he explained, was based on Meriam customs, traditions, myths, legends and beliefs handed down through generations; and secondly on the doctrines of Christianity. He had no difficulty explaining to the Judge how, in his ministry, he lived comfortably with both systems as practiced today. He delivered his Ministry based on both traditions. This is unquestionably impressive evidence and, I think, influenced the judge significantly. But I might be wrong in that.

Let me pursue further, for a moment, this question of culture at an individual level. I bear the rather weird name Keon-Cohen. You might ask: "What kind of cultural omelette is this?" Well, on my father's side, my grandmother, Ethyl Mary Keon, came from Ireland in the 1870s

to Tasmania. She was an Irish Catholic. My grandfather arrived from London in the 1880s. He was of the Jewish faith. Jumping forward, my mother was English and associated with the Anglican church. My father was born in Melbourne, attended a Presbyterian school, then entered a high Anglican college at university. Given all that, you might not be surprised to hear that I call myself a traveling agnostic - a work in progress - still trying to resolve these several inherited strands and unscramble the omelette. Everybody can tell a similar story. The point is: "traditional" Indigenous culture at personal and community levels is changing, adapting, and with it so too, I suggest, must Australian institutions, particularly the *Native Title Act*.

Let me give you further examples. I remember the day when we first visited Murray Island to conduct research for the case in March 1983. Bob Hawke was elected that weekend. I recall sitting on the beach, under a palm tree, drinking pure water (no alcohol), listening to the election results. At that time there was only one phone on Murray Island: a public phone box outside the Community Council Chambers. Last week when I visited Murray Island, I saw computers, mobile phones, and internet connections in many houses. A whole new cultural impact is being dealt with. And my trusty old phone-box has disappeared!

Another example indicates both a change in traditional culture and a welcome development and flexibility in native title law. In his findings of fact following the trial, the judge rejected all claims by the Meriam people to their traditional seas, located around the three Murray Islands. On the evidence before him, Justice Moynihan was not convinced that traditional connection had survived to those seas. This result was astonishing to the Meriam people. Their view is that the land, seas, sky and stars comprise one interconnected entity.

Yet in 2010, twenty years later, a determination was issued in relation to a joint seas claim made by about fifteen communities from across the Straits to a large portion of seas. That claim succeeded before Justice Finn of the Federal Court. The Meriam people were part of that claim. They thus succeeded in 2010 where they had failed at trial in Mabo. They now enjoy traditional rights to the seas, and the resources of the seas, to significant areas around the three Murray Islands. That is an astonishing result, I think, and a very welcome development in this area of law. It pays to be determined, and have a long view in the native title jurisdiction.

The fourth and last point I would like to make when commenting on Terri's oration is to emphasise the crucial importance of younger generations in this ongoing work. They provide both a bridge with the past, and a fresh vision, real hope for the future. You will recall Rosie's evidence in the Wongatha claim. She and her family in 1955 were frightened when they came to the strange gleaming object in the moonlight, which turned out to be - not a giant cobweb - but a barbwire fence. Yet they had the courage to step through that fence into an unknown future, modern Australia.

Eddie Mabo, I can assure you, was frightened of nobody and nothing - including his lawyers. Yet many Indigenous witnesses - in the Mabo case and in many other claims that I have conducted - are understandably very apprehensive. They are frightened about entering into the formal and very (I think) inappropriate forensic setting of the Federal Court of Australia to give their evidence. And yet they do it.

These claimants should be applauded for their efforts. Most have never given evidence before. Certainly my witnesses in the Mabo case fell into that category. Yet they go forward because they believe in what they are doing. I think we can take inspiration from their example - their ability to adapt to new challenges and also to retain their memory, both oral and now written traditions, their individuality, their family and community cultures.

Ladies and gentleman, we can take further inspiration from Terri's oration this evening. It displays leadership in grappling with new problems, and delivers the real hope that in future, the defining elements of all our pasts - of all Australian communities' pasts - will not be lost.

Terri, I offer my congratulations and thank you for listening to me.