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Mabo Misinterpreted: The Unfortunate Legacy of Legislative Distortion of Justice Brennan’s Judgment

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THE LIMITS OF CHANGE:
Mabo and Native Title 20 Years On

Edited by Toni Bauman and Lydia Glick
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Cover art is by Torres Strait Islander artist Alick Tipoti from the work Warn Thurul which means turtle tracks. After the Solal season (mating turtle), many turtles are seen crawling up beaches of the small islands throughout Zenadh Kes. In this print Alick depicts the many threats to the life cycle of the green back turtle throughout Zenadh Kes. Humans and wild pigs, and goanna lizards, dig up the turtle nests to feed on the eggs. Fish and birds prey on the young hatchlings struggling to survive on the beach and in the sea.
CHAPTER 18

Mabo Misinterpreted: The unfortunate legacy of legislative distortion of Justice Brennan’s judgment

Kent McNeil

The High Court’s bold decision in Mabo v Queensland [No 2] undoubtedly changed the legal landscape in Australia in very positive ways. For the first time, Australian common law acknowledged that the Indigenous peoples have land rights based on occupation of land in accordance with their traditional laws and customs. The Court denounced the racial discrimination inherent in past denial of these rights and outlined legal doctrines that could be used to resolve Indigenous land claims in present-day Australia. This led to the enactment of the Native Title Act 1993 (Cth) (NTA), by which the Commonwealth Parliament created a complex statutory regime for acknowledging and giving effect to native title. In doing so, however, I think Parliament seriously misinterpreted Justice Brennan’s judgment in Mabo, thereby limiting the scope of native title, facilitating its loss, and practically eliminating the potential for inherent Indigenous governmental authority over native title lands. While many aspects of the decision could be discussed, in this chapter I want to focus on this misreading of Mabo and the serious consequences that have resulted.

The misinterpretation arises from a passage in Brennan J’s judgment that I think was taken out of context and imported into the definition of native title in the NTA. In Mabo, Brennan J stated:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the Indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

Reproducing the substance of that language, s 223(1) of the NTA defines native title for common law purposes as follows:

(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

In subsequent decisions such as Commonwealth v Yarmirr, Western Australia v Ward, and Members of the Yorta Yorta Aboriginal Community v Victoria, the High Court has interpreted and applied s 223(1) so as to require native title claimants to prove that they had traditional laws and customs in relation to land at the time of Crown acquisition of sovereignty and that they have maintained a connection with the land under those laws and customs up to the time of the claim. If they are successful in doing so, the nature and incidents of their native title rights and interests are determined by those laws and customs, as Brennan J said they must be in the passage quoted above. This means, for example, that claimants who did not have laws and customs governing access to and use of certain resources, such as minerals, are not entitled to native title rights in relation to those resources.

As a result, the content of native title in Australia is generally much more limited than Aboriginal title in other common law jurisdictions, such as Canada where it amounts to ‘the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures’, provided that the uses are not ‘irreconcilable with the nature of the group’s attachment to that land’. Moreover, since native title depends on the maintenance of traditional laws and customs, loss of those laws and customs results in loss of native title.

The problem with s 223(1), as interpreted and applied by the High Court, is that it fails to take other more nuanced parts of Brennan J’s
judgment into account and ignores the order made by the Court in Mabo. Looking first at the order, the Court declared that, with the exception of the Islands of Dauer and Waier and certain appropriated lands, ‘the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands’. As Brennan J pointed out, this was a declaration of ‘the native communal title of the Meriam people’. However, Brennan J also observed that Justice Moynihan, who had made the factual findings on which the High Court’s decision was based, had ‘found that there was apparently no concept of public or general community ownership among the people of Murray Island, all the land of Murray Island being regarded as belonging to individuals or groups’. But all the land belonged to individuals or groups, on what facts did the High Court base its order declaring the communal title of the Meriam people as a whole? Despite Brennan J’s statement that the concept of native title is based on traditional laws and customs, by his own admission Meriam laws and customs did not contain a concept of communal title. Consequently, the communal title declared by the Court could not have been ‘ascertained as a matter of fact by reference to those laws and customs’. It must have arisen from some other source.

Although Brennan J did not provide a clear exposition of the source of the communal title of the Meriam people, I think the following passage reveals his understanding of this matter and explains the order of the Court:

If it be necessary to categorize an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category. Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor.

In other words, a community such as the Meriam people that is in exclusive possession of land and effectively asserts that its members have the sole right to occupy and use the land has a communal title that is proprietary in nature. Brennan J then went on to clarify the relationship between the communal title of the people and the individual rights of members:

Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognized as a burden on the Crown’s radical title when the Crown acquires sovereignty over that territory. The fact that individual members of the community enjoy only usufructuary rights that are not proprietary in nature is no impediment to the recognition of a proprietary community title. Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title ... There is no impediment to the recognition of individual non-proprietary rights that are derived from the community’s laws and customs and are dependent on the community title. A fortiori, there can be no impediment to the recognition of individual proprietary rights.

It is therefore apparent that Indigenous land rights can be layered, as Moynihan J and the High Court found the Meriam people’s rights to be. A community in possession of a territory necessarily has a communal title, regardless of whether their traditional laws and customs contain such a concept — this was the title that was declared to exist in the Court order in Mabo. Moreover, this title amounts to a right ‘as against the whole world to possession, occupation, use and enjoyment of the lands’ because, as Brennan J stated, the ‘ownership of land within a territory in the exclusive occupation of a people must be vested in that people: land is susceptible of ownership, and there are no other owners’. In the passage quoted above, Brennan J also made clear that the fact that the traditional laws and customs may provide only for lesser proprietary or usufructuary rights does not negate the all-inclusive title of the community. So when he stated later in his judgment that ‘[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory’, he cannot have meant to include the communal title derived from a people’s exclusive occupation of its territory. Instead, he must have had in mind the individual and group rights referred to by Moynihan J that were based on traditional laws and customs. Thus, in the case of the
Murray Islands, there are at least two layers of Indigenous land rights: the individual and group rights of members that are determined by reference to Meriam laws and customs, and the community’s all inclusive rights against the whole world that arise, not from Meriam laws and customs, but from exclusive occupation of the islands by the entire community.

Unfortunately, the drafters of s 223(1) of the NTA seem to have disregarded the Court order in *Mabo* entirely and taken no account of the passages in Brennan J’s judgment that refer to the proprietary title of Indigenous communities that is derived from their exclusive occupation of land. As a result, in interpreting and applying the NTA in cases such as *Ward*, the High Court has limited native title to rights that existed under traditional laws and customs at the time of Crown acquisition of sovereignty. Although one of the express objects of the NTA in s 3(a) is ‘to provide for the recognition and protection of native title,’ the title that is recognised and protected is the title as defined in s 223(1), not the kind of communal title that was declared by the High Court to exist on the Murray Islands.

The restrictive definition of native title in s 223(1) gives rise to this question: Did the enactment of the NTA foreclose the possibility of future declarations of all-inclusive communal title based on exclusive occupation, as declared in the Court order in *Mabo*? I think the answer is clearly no, for several reasons. First, as held in *Mabo*, the communal title of Indigenous peoples is proprietary, and as a general rule legislative abrogation of property rights has to be clear and plain to be effective. The same rule applies to Indigenous land rights. Principles of statutory interpretation also discourage giving substantive effect to a definition section (which s 223 clearly is), and favour constructions of legislation that maintain the jurisdiction of the courts. Moreover, s 51(xxxi) of the Australian Constitution provides that the Commonwealth Parliament can make laws for the ‘acquisition of property on just terms’, thereby imposing a constitutional requirement of compensation. If the NTA did away with Indigenous communal title based on exclusive occupation as declared in the Court order in *Mabo*, just compensation would have to be paid to any Indigenous communities that lost their communal title as a result. Finally, in *Wik Peoples v Commonwealth*, Justice Drummond held that a claim to ‘Aboriginal and possessory title’ filed before the enactment of the NTA could go ahead without being converted into a native title claim under the NTA, especially if aspects of the claim were outside the Act’s scope, and the case proceeded all the way to the High Court on that basis. In other words, enactment of the statute and inclusion of a definition of native title therein did not do away with possessory land rights outside the NTA. Although claims brought under the NTA are limited to native title claims that come within the definition in s 223(1), claims brought outside the Act are not.

As mentioned above, native title claims brought under the NTA have been limited by the High Court’s interpretation of s 223(1) to rights and interests that can be proven to have existed under traditional laws and customs at the time of Crown acquisition of sovereignty. In addition, the Court held in *Yorta Yorta* that Indigenous communities lost the authority to make new laws and customs at that time, effectively denying them any right of internal self-government. Referring to native title rights and interests in that case, Chief Justice Gleeson and Justices Gummow and Hayne stated:

> It is important to recognise that the rights and interests concerned originate in a normative system, and to recognise some consequences that follow from the Crown’s assertion of sovereignty. Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence only to a normative system other than that of the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.

While this denial of authority to make new laws and customs seems to stem principally from the outdated English doctrine that all political authority comes from the Crown, in my opinion the denial also relates to reliance on traditional laws and customs to define native title. Given that the content of that title depends on the laws and customs in existence at the time of Crown acquisition of sovereignty, changes to those laws and customs could change the content of the title, not just within the Indigenous community, but vis-à-vis the rest of Australian society. For example, if their traditional laws and customs at the time of Crown sovereignty did not give them a right to the minerals on their native title lands, changes to those laws and customs that would give them that right could have an impact on the rights of the Crown...
and other Australians. The High Court does not seem to be willing to envisage this kind of possibility.

If, however, Indigenous peoples have the kind of proprietary communal title that Brennan J described and the High Court declared in relation to the Murray Islands, this problem does not arise. In that situation, the community's rights vis-à-vis the rest of the world, as declared in the Court order in Mabo, are all-inclusive because they arise from exclusive occupation. Traditional laws and customs do not define the content of that title externally; instead, they apply internally to govern the rights of the members among themselves. Consequently, changes to those laws and customs would not have an impact on the rights of other Australians. Brennan J envisaged just this kind of scenario in Mabo:

> Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, as currently acknowledged and observed.  

In Yorta Yorta, the High Court did acknowledge that some modifications to traditional laws and customs are permissible. However, Gleeson CJ and Gummow and Hayne JJ clearly limited the authority of Indigenous communities in this regard:

> What the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible. Because there could be no parallel law-making system after the assertion of sovereignty it also follows that the only rights or interests in relation to land or waters, originating otherwise than in the new sovereign order, which will be recognised after the assertion of that new sovereignty are those that find their origin in pre-sovereignty law and custom.

But to maintain that Indigenous communities retained law-making authority within their communities (as Brennan J appears to have envisaged in the passage quoted above) is not to deny the sovereignty of the Crown. In the Canadian case of Campbell v British Columbia, for example, Justice Williamson held that the Nisga’a Nation retained a right of self-government over their Aboriginal title land that is not inconsistent with the Crown's acquisition of sovereignty. The monolithic conception of sovereignty clung to by the High Court in Yorta Yorta also fails to acknowledge the reality that communal rights necessarily entail community decision-making authority, the exercise of which depends on Indigenous governance systems.

In summary, I think the Commonwealth Parliament seriously misinterpreted Justice Brennan's judgment in Mabo when it enacted the NTA. The negative consequences for Indigenous peoples in Australia are apparent in the limited content of native title, loss of title when traditional laws and customs are not maintained, and judicial denial of a right of self-government. Of course one solution to this problem would be to amend the NTA so that the definition of native title contained therein correctly reflects Brennan J’s judgment. Another possible solution would be for Indigenous communities to commence legal actions outside the NTA and seek declarations of the kind of title found in the Court order in Mabo. The goal would be to restore the formulation of Indigenous land rights contained in Mabo and distorted by the definition of native title in the NTA. Twenty years after the Mabo decision, this correction is long overdue.

Notes
1. (1992) 175 CLR 1 (Mabo). I am very grateful to Simon Young for his feedback on a draft of this Chapter.  
2. Ibid., 58.  
10. Mabo (1992) 175 CLR 1, 217. As the Court order adopted this wording from the order proposed by Brennan J at the end of his judgment (at 76), it was evidently based on his reasons.
11. Ibid., 75.
12. Ibid., 51. See also-per Tooohey J, ibid, 191: ‘the particular nature of the rules which govern a society or which describe its members’ relationship with land does not determine the question of traditional land rights’. He found that ‘the Meriam people were present on the Islands before and at the time of annexation and that the Crown in right of Queensland has not attempted since then to dispossess them’, and this sufficed for them to have ‘traditional title’.
13. Ibid., 51–52.
14. Ibid., 51.
15. Ibid., 51.
16. See also per Tooohey J, ibid, 191: ‘the particular nature of the rules which govern a society or which describe its members’ relationship with land does not determine the question of traditional land rights’. He found that ‘the Meriam people were present on the Islands before and at the time of annexation and that the Crown in right of Queensland has not attempted since then to dispossess them’, and this sufficed for them to have ‘traditional title’.
17. Ibid., 217 (Court order).
18. Ibid., 51. The communal title that Brennan J envisaged thus arises from the same source as Aboriginal title in Canada, i.e., from exclusive occupation: see Delgamuukw [1997] 3 SCR 1010.
26. I am grateful to David Yarrow for bringing this aspect of the Wik decision to my attention.
29. Mabo (1992) 175 CLR 1, 61 (emphasis added). See also Deane and Gaudron J at 110, Toohey J at 192.
32. See also R v Pamajewon [1996] 2 SCR 821, where the Supreme Court of Canada assumed, without deciding, that the Aboriginal peoples of Canada can have a right of self-government. If such a right were incompatible with the sovereignty of the Crown, one would expect the Court to have said so. In Mitchell v MNR [2001] 1 SCR 911, Binnie J, concurring with the majority judgment of McLachlin CJ, went on to conclude that an Aboriginal right to bring goods into Canada without paying customs duties would be incompatible with the Crown’s sovereignty, but added that this does not preclude a right to self-government. See also Delgamuukw [1997] 3 SCR 1010, [170–71].