THE AUSTRALIAN
THE HEART OF THE NATION

Promise of Mabo not yet realised

Weekend Australian -
29 May 2010
Author: **Noel Pearson**

The anniversary of a legal landmark next week is no cause for celebration

A SMALL minority of Australians will mark this coming Thursday. It will be the 18th anniversary of the Mabo case on native title rights handed down by the High Court of Australia in 1992.

I believe Australians will one day give consideration to the hope of Bonita Mabo, widow of Eddie Mabo, that June 3 be recognised officially as a national day.

The question of the legal status of Terra Australis Incognito lies at the centre of Australia's colonial history. It lies at the core of the relationship between those who trace their ancestry to the peoples who crossed the ocean to this continent up to 60,000 years ago, and those whose ancestors arrived 222 years ago.

It was always going to be the case that questions of patrimony to land would consume colonial societies as long as they remained unresolved. And in this country they remained unresolved for a very long time.

Australia was the only former colony of the British crown that had not dealt with the question of indigenous rights to land until the very last years of the 20th century. We were 200 years behind in the failure of our legal system to accord to native Australians recognition of their ancient ownership of the continent.

Entire law libraries were filled with cases in the former British colonies in Asia, Africa and North America. New Zealand had its equivalent of Mabo in the middle of the 19th century.

It fell to Eddie Mabo finally to deal with the question of Aboriginal title to Australia. This belated decision by our highest court came at a time when the country had to grapple with two remorseless realities. First, Australia could no longer deny the original occupancy and possession of the land by its native peoples.

But arraigned against that was the reality that there had been two centuries of colonial dispossession of the original inhabitants and acquisition of titles across large areas of the country.

In Mabo and the subsequent decision in the Wik case, the High Court put forward three principles that represent its attempt at reconciling history and law.

The first principle is that the accumulated rights of the colonists could not now be disturbed. In other words, white land rights were confirmed. Colonial dispossession could not now be reversed. This was the relentless reality of history.

The second principle is that the remnant lands belong to their traditional owners. The compromise was that the original owners were entitled to what was left over.

The third principle is coexistence of title in respect of various categories of land such as pastoral leases and national parks, where crown grants coexist with the original titles held by the traditional owners.

I felt the compromise was one the country ought to seize on. It was a compromise proffered by our highest institution as a means of ending a two century-old grievance. My febrile hopes rested on the idea that the country might accept the basis of that compromise; after all, it was the law of Britain that respected native title to land.

I thought the people of Australia would draw on their own legal traditions to say Mabo ought to be a cornerstone for reconciliation and a new relationship between the Aboriginal peoples and the rest of the country. Mabo provided to this country a once-in-a-lifetime opportunity for a nation. Nations only get one chance like this to get it right.

During the past 18 years we have seen too much resistance to the entitlement of traditional owners in relation to their remnant lands. There have been court cases that have cost far in excess of the value of the land. Too often the response of the adversaries of native title is ``Thank you very much for principle No 1, we are now going to put you to proof in relation to principle No 2."

The opportunity of Mabo is not completely lost to the country, but it is in severe decline. It is going to slip from the hands of the country as long as the political and judicial leadership remains as poor as it has been.

One of the key areas in which the law has deteriorated concerns the form of title that native title represents. The key issue in Mabo was whether the Aboriginal connection with the land was one that English law would recognise and respect.

In the High Court, Justice Gerard Brennan referred to a 1919 decision of the British Privy Council concerning Southern Rhodesia which held that ``some tribes are so low in the scale of social organisation" that their usages and conceptions of rights and duties represented an unbridgeable legal gulf. Lord Sumner, for the Privy Council, said it would be ``idle" to impute to such people some shadow of the rights known to the law.

Brennan rejected the discrimination in the Southern Rhodesia case. He said the common law of Australia should neither be, nor be seen to be ``frozen in an age of racial discrimination".

The social Darwinian estimation of peoples according to some hierarchy was rejected. No peoples, whatever their cultures, social organisation, religions, beliefs and relationships to country, occupy land without possessing it.

But having made that breakthrough, Australian law immediately descended into a discriminatory estimation of the nature of native title. There is today a bizarre jurisprudence of native title that is based on the idea that native title is the sum total of whatever berry-picking rights indigenous claimants must be able to prove by reference to their traditional laws and customs as they existed in 1788.

Indigenous landholders hardly own the economic property on lands they successfully claim. They are left in a bizarre historical zoo by virtue of the mistaken idea that native title is to be determined by reference to traditional laws and customs as they existed more than 200 years ago.

The key misinterpretation of native title during the past 18 years is this: even as we accept that Aboriginal rights survive the acquisition of sovereignty under what is known as the doctrine of continuity, the mistake arises in relation to the question of ``what continues"? Is it those rights and interests that are established as a matter of proof by reference to the traditional laws and customs of the group? Or is the right to continue the occupation of the land pursuant to the authority of one's traditional laws?

Occupation is proof of possession and possessory title is not a title limited to whatever incidents might be proven by reference to one's understandably arcane traditional laws and customs of centuries ago.

English landowners in the early years of the common law also subscribed to arcane laws and customs. But the Englishman in possession of his estate in 1400 had within his entitlement the inchoate right, say, to build a nuclear power station. The right to build a nuclear power station was an incident of his possession even though he could never imagine at that stage that was a right he wanted to enjoy.

Australian law in the past 18 years has become an absurd quagmire of judicial misconception where Aboriginal people are subjected to strange requirements of proof in relation to their traditional laws and customs in order to establish the nature of their title.

We are left with the ridiculous situation where the title of an adverse possessor under the common law is more complete than the title held by native titleholders. The person in adverse possession has only to prove his control of the land and all of the incidents of possession are presumed to be held by him. But the native titleholders are in an inferior position to that of the adverse claimant.

It is worth reflecting on the rhetoric of indigenous leader Gary Foley, who says ``native title is not land rights". My response is that he is partly right. Native title had the potential to amount to land rights. It certainly represented the best opportunity to settle the question of land rights.

The equivocal story of the past 18 years tells us that without honour, the promise of Mabo as a foundation stone for land rights will fall from the nation's grasp.

A second argument from Foley is also worth reflecting on: ``Reconciliation is not

justice." My response is that true reconciliation can only be based on justice. The onus falls on all those who yearn for reconciliation to work to secure justice.

I hope Mrs Mabo's wish for June 3 to be embraced by all Australians as the day of reconciliation based on justice might one day be realised.

Noel Pearson is director of the Cape York Institute for Policy and Leadership.