INTRODUCTION

The Limits of Change

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As the Chairperson of the Australian Institute of Aboriginal and Torres Strait Islander Studies, I am honoured to introduce this book which reflects on the 20 years of native title since the High Court of Australia recognised the original occupants of this land and overthrew the myth of terra nullius in *Mabo v Queensland [No 2]*.[1]

It is timely to look back on the achievements and the challenges and what this recognition has meant in order to clearly see where we are going in the years ahead. Looking back and reflecting two decades later, many of us will recall the great hopes and high expectations we had for the *Mabo* decision. It is now apparent that many of our aspirations and expectations about the promise of native title were unrealistic and that our hopes have been largely dashed. Nevertheless there have also been successes and the fears generated by some following the *Mabo* decision have not come to pass. Not one Australian citizen has lost a backyard to native title, or a square centimeter for that matter, and the mining and pastoral industries continue to thrive.

I became the Aboriginal and Torres Strait Islander Social Justice Commissioner a short time after the *Mabo* decision was handed down and shared the hopes and expectations of the Aboriginal and Torres Strait Islander peoples and our supporters at the time. For me meaningful land justice is a fundamental pillar of social justice for our peoples. What we were presented with in *Mabo* was an opportunity, after over two centuries of colonisation, to begin to right an historic wrong, namely, the brutal and devastating dispossession and destruction of the first peoples of this land. This was the first real chance in two centuries to deliver social justice to Aboriginal and Torres Strait

Islander peoples. I did not then nor now see social justice merely as a parcel of goods to be delivered by government. Rather, it entails the accepting of the rights of Indigenous peoples which translate abstract principles into the actual enjoyment and exercise of rights. This was to be the role of the Social Justice Package, the third tranche, along with the *Native Title Act 1993* (Cth) (NTA) and the Indigenous Land Fund, of the government's response to *Mabo*. Tragically that vital component of the outcome of negotiations between government and Indigenous representatives has never been delivered.

What the High Court did in *Mabo* was to not only recognise Indigenous land title and rights it also acknowledged the ongoing legal validity of Indigenous law and custom and the need for broader recognition of Indigenous entitlement to enjoy our distinct and unique rights. These rights are about our status as first peoples and they give rise to a raft of possibilities to which the Social Justice Package was directed including the right to practice and enjoy our distinct cultures, the right to control our natural resources and environment and the right to self-determination. The package also targeted the wholesale violation of our basic citizenship rights, like a decent standard of health, the right to an education, rights to housing and essential services and the right to equality before the law. Significantly it was also directly aimed at our future economic development. The situation of our peoples is today compounded by the failure to implement this package.

Twenty years later, we are still contending with the legacy of *Mabo* in ways that extend beyond the questions of law and legislation that arose from it. Perhaps one of the most direct ways conversation has shifted is regarding questions of human rights that are viewed in the context of a broader, global struggle for Indigenous self-determination. The self-determination which is central to the United Nations *Declaration on the Rights of Indigenous Peoples*, and which was eventually endorsed by the Australian Government, seems to have faded into oblivion and been replaced by a deficit discourse and policies of normalisation and modernity which in truth are really policies of assimilation.

So far as the recognition of Indigenous land title is concerned, after 20 years, native title continues to expand across the map of Australia. Around 20 percent of the landmass of Australia currently is subject to native title or to some other form of Indigenous held title. Responsible, sustainable development in partnering with corporations has, in some instances, allowed Aboriginal communities to reap the spoils

of economic benefit while also allowing necessary space to assume responsibility for ensuring that sites and traditional knowledge are preserved and passed on. But the recognition of native title has not in most cases delivered the kinds of benefits which we had hoped for in the immediate aftermath of the decision.

It is time to survey the inequities which are emerging out of the agreement-making processes which have become the modus operandi in native title. Only a minority of registered native title bodies corporate have resources to hold and manage native title as they are legally required to do so, something which we warned about in the negotiations leading up to the NTA. That is, that these corporations were being set up to fail because of a lack of dedicated resources.

We need also to confront the reality that many of the most fundamental questions about the nature of compensation remain unanswered. Many Aboriginal communities seeking recognition in the name of native title have come away disappointed and divided. Post–*Mabo*, there is obvious concern about where priorities should be placed in securing the best outcomes for Aboriginal development. There is little agreement in principle on how to proceed with and access the right to negotiate and future act processes are often divisive for Indigenous communities.

At the heart of the present inability to deliver on Indigenous expectations is the wording of s 223. The way in which the court sees and interprets this section has not always secured the best native title outcomes for Aboriginal peoples. Direction by the courts to craft a record of historical connection to land has often produced a rarified and frozen historical view of traditional cultural practices. As a consequence, the expectations of the court often failed to account for the diversity and evolving reality of modern Indigenous life.

What is the future of native title? What can native title contribute to the next generation? The compromised results of *Mabo* were not simply the result of compromised jurisprudence but emblematic of deeply ingrained racial doctrines of colonial occupation based on a Doctrine of Discovery that is alive and well. The law may have shifted but the colonial mindset has not.

In spite of these disappointments, we cannot stop seeking a more informed and deeper understanding of the past and future of native title for Aboriginal and Torres Strait Islander peoples.

About this book

As the Chairperson of AIATSIS I wish to firstly thank the contributors. I also wish to acknowledge the hard work and commitment of staff members who contributed to this book for the 20th anniversary of *Mabo* in many ways and under tight time frames. I thank the editors at the Native Title Research Unit, Toni Bauman and Lydia Glick, the many others who assisted with proofreading, typesetting, locating archival material and graphic design and those who contributed photographs to the middle section of the volume.

The book, published by AIATSIS, features the reflections of over 35 contributors who have played significant and ongoing roles in native title. It is divided into four sections: chapters relating to the *Mabo* case itself, negotiations leading up to the passage of native title legislation, the implementation of the *Native Title Act* and a final section which reflects on broader issues of reform; the limits, and the question, of change. Chapters 7 and 17 are longer than the others in order to provide the contextual detail in which other chapters are set.

The publication casts a wide net to include a diverse group of contributors ranging from native title holders to current and retired practitioners in the sector, to politicians and leading international scholars in Indigenous law. They offer a range of unique experiences and sometimes contrasting perspectives which are expressed in various forms: from the immediacy of interviews and personal reflections through to more formal academic overviews and analyses. I also acknowledge the many other perspectives which have not found their way into this book, but which are also part of the history of native title.

It is not my intention to discuss each contribution in this introduction individually — there are too many chapters to do justice in limited space. Suffice to say that this book offers a portrait of the last 20 years that I am confident will allow readers to see with greater clarity the challenges that remain and all that has been accomplished.

I commend the book, also to be published as an e-book, to everyone. Undoubtedly it will become a significant historical text, marking as it does, the two decades since the *Mabo* High Court decision, and will be of interest to a wide range of readers.

Notes

1. (1992) 175 CLR 1 *(Mabo).*