Chapter Four

Mabo and Federalism: The Prospect of an Indigenous Peoples' Treaty

The Hon. Bill Hassell

"Aboriginal peoples wish to participate more fully in the development of Canada. The current constitutional discussions provide an historic opportunity to address and resolve the constitutional concerns of Aboriginal peoples, especially the right to self-government ... Aboriginal leaders continue to identify the constitutional recognition of their right to self-government as their highest priority and seek to give effect to that right within the framework of the Canadian Constitution ... Recognising the right of the Aboriginal peoples to self-government reflects two essential principles of Canadian society: (1) Self-government in various forms as basic elements of Canadian democracy; and (2) The unique place of the Aboriginal peoples in our society. This recognition is critical to the support of a strong community base from which Aboriginal peoples will both contribute to, and benefit from, a renewed Canada."

"Aboriginal peoples take the position that they have an inherent right to self-government that is not dependent on recognition by non-aboriginal governments."

"Aboriginal Peoples, Self-Government, and Constitutional Reform", Minister of Supply and Services, Canada, 1991.

A common and almost desperate theme of the proponents of Mabo is that we all must accept the legitimacy of the High Court decision.

The Prime Minister has said that the High Court has decided it, therefore it is. He forgets that countless Court decisions are reversed by legislative enactments.

The Federal Opposition Issues Paper (June 1993) says two things:

"Any solution to Mabo should proceed on the basis that all Australians should be treated equally under the law, and so be seen,"

and

"The Coalition accepts that the High Court has determined that Native Title exists .... It will be necessary to establish a fair and efficient procedure for determining whether or not Aboriginal people can establish a claim for Native Title ..."

I am not sure what this says about the Opposition position, but I have noticed no questioning of the legitimacy of Mabo, and it was suggested that there could be no referendum on Mabo as that may be "divisive". Apparently the decision itself is not divisive.

Once the legitimacy of Mabo is accepted, all else follows – the development of Mabo through countless cases, over many years, the uncertainty, the shift in power to Canberra from the States, and the open–cheque liability for compensation.

Much more follows, as we head down the Canada path to separate, sovereign, Aboriginal government.

I am intrigued by a simple question : Why is it that anyone is in favour of the High Court's Mabo decision creating native titles?

It seems to me that a number of things stand out:

Mabo, and the legal rights it creates, are based on race. Generations of Australia's leading thinkers have argued against racism and educated the Australian population that distinctions based on race should not be made in rights accorded by law.

Mabo creates privilege – legal privilege based on race. No Australian who is not an Aboriginal person or a Torres Strait Islander is eligible to make any claim for native title.
The likely consequence of a legally enshrined, racially based privilege in favour of a minority group, especially when the privilege is a very large one and the minority is a very small one, is a backlash of anger and irritation and a renewal of prejudice against the minority, in this case the Aboriginal minority.
Mabo flies in the face of several generations of change to thinking in Australia, change which has seen the removal of discriminatory laws against Aboriginal people, and the partial removal of discriminatory attitudes, and progress towards the acceptance by wider society of Aboriginal people as Australians of equal rights and responsibilities, with their own particular cultural history and background.
When I went to school in a country town in Western Australia in the 1950s, the local Aboriginal community lived on a reserve behind a hill out of town, and that is where the rest of the population wanted them to be – out of sight and out of mind. Australians were taught and accepted that that approach was wrong, and that Australia would be better for everyone if we all lived as one people within the limits of our own desires, capacities and ambitions.
Mabo has decided that Aborigines may go back to land which they may now own as of right, where they will enjoy all the rights and privileges of Australian society, and others besides.
Mabo represents judicial legislation. No amount of legal nicety, sophistic posturing or other casuistry alters the fact that the High Court has moved from the area of judicial interpretation and judicial application to legislative creation. It is a fact that before the High Court decision there was no native title known to Australian law. There is now at least one recognised native title and endless potential for the "identification" of others.
When I went to Law School at the University of Western Australia in the early 1960s and was taught the law of real property by the then Mr John Toohey, now the Honourable Mr Justice Toohey of the High Court, I was taught nothing about native title – because there was nothing to teach.
As Mr Justice Roderick Meagher said at earlier proceedings of this Society (1):
"... a close reading of the leading judgment in the Mabo case, the judgment of Brennan, J., His Honour said there were two ways of approaching the question of whether the natives in question owned the land in question. One way was to apply the existing legal authority. One would be pardoned for thinking that a lawyer would find such a course attractive, particularly if it was his duty to apply the law. But His Honour spurned such a course and thought it more palatable to invent a new law".
Professor Brian Galligan (2) concedes that the High Court has invented a new law, but says that is in order: "The High Court is indeed making law, but that has always been the case". Right, then wrong.
Or, to put it another way, as was done by Dr John Forbes (3), "the High Court in its legislative jurisdiction, has done what no single House of Parliament can do; it has passed an open–ended money Bill".
The legislative role adopted by the High Court under its purported, and one might say usurped, legislative jurisdiction has, and will increasingly, put at risk the respect hitherto held for the High Court. Its recognition as an independent judicial arbiter of the law will die, with as yet unknown consequences for the Court. However, it is certain there will be consequences, because in a democratic society, however slow, inefficient and seemingly ineffective the process may be, the organs and institutions of government are all eventually accountable to the people. For a tiny group of unelected, unrepresentative judges to seize unto themselves a legislative power, as the

majority has done in the Mabo case, will eventually bring its own form of justice upon the High Court. (4) Unfortunately that will be to the detriment of us all. (5).

In the meantime the High Court has been plunged into political controversy.

The Chief Justice, Sir Anthony Mason was prominently reported (6) defending the Mabo judgment. He said that the rejection of terra nullius was entirely consistent with a decision of the International Court of Justice in The Hague.

A strange approach indeed from the head of Australia's supreme judicial authority, which is bound to uphold Australian law, and which but a few years ago was so anxious to remove all rights of appeal to the Privy Council, then part of our legal system.

Sir Anthony reportedly said that the fact that in Mabo the High Court had considered Government policy did not indicate that the Court was trespassing beyond its judicial function or what Courts had done in the past. Astonishing, to say the least.

The report quotes Mason, CJ:

"To put Mabo in perspective, I should say that in its decision the Court has done no more than the courts have done in the United States, Canada and New Zealand".

My understanding is that in all of these cases the decisions were based on nineteenth Century treaties made with indigenous people; the legal foundation of native land claims was to be found in those treaties. In Australia, there were no treaties of that kind.

In a radio broadcast following a speech at Cambridge, England (7) Sir Anthony went further – much further – into direct political comment:

" .... criticism on the part of interest groups, such as the mining and pastoral industries, and to a lesser extent politicians, has been the most sustained and abusive that I can recall in my career as a lawyer.

"More disconcerting has been the concerted campaign run by the mining interests, supported by the pastoral interests, to discredit our decision in relation to the Aboriginal land rights case, Mabo. Now, that campaign has been conducted with a view to discrediting the decision and to persuading the Government to, in effect, repeal it, and if need be even to initiate the constitutional processes that would result in an amendment of the Constitution".

How extraordinary that Australians should want democratically elected parliaments rather than unelected judges, or even have their own vote at a referendum, to decide their laws and the values reflected in them!

How damaging and dangerous to our future that the Chief Justice of our highest Court should dismissively dispose of Australia's greatest wealth producing industries as mere "interest groups".

How indicative of the isolation and insularity of the High Court that its Chief Justice should be surprised at the anger generated by a decision which threatens the economic and long term social stability of the nation; and how much does his attitude display the disqualification of High Court Judges to measure and apply our alleged contemporary moral values – the very foundation of Brennan's, J. judgment at least.

Finally, the Chief Justice raised grave questions on the status of the decision by saying it was secured "by recourse to a technicality". The full meaning of that significant comment is yet to be explained.

. It goes almost without saying that the Mabo decision further undermined the structure and substance of Australia's federal constitutional system. There has of course been no vote of the people at a referendum in relation to this most fundamental change in our land law and the constitutional control of land.

The issue of the effect of the decision on the federal system has barely been raised in the public debate, no doubt because the High Court has treated federalism with such scant regard for such a

long time. Without venturing into another field entirely, it is abundantly clear that the foundation of federalism as a division of sovereign powers, the balance of which may be changed by the will of the people expressed at referenda, has been destroyed already by successive decisions of the High Court. These decisions have allowed certain powers, the external affairs power in particular, to gain such predominance that they have consumed the structural foundations of the Constitution, much as white ants might consume the bearers under a wooden house, leaving the paper thin outline of structure in place, but the inside either hollow or filled with the powdered remains of masticated timber.

The Murphy doctrine of the late High Court Justice and former Attorney–General has been given full effect.

In part, the Mabo decision is surely an unforseen and unintended outcome of the 1975 Racial Discrimination Act. No ordinary person in 1975 could have contemplated the scenario we now have. The High Court has invented a new form of title to land for some Australians, based on their racial origins. Apparently that is not an act of discrimination which in any way offends the Racial Discrimination Act. The fact that 98.5 per cent of the Australian population are and will always be ineligible to claim a native title because they are not racially Aboriginal or Torres Strait Islanders is not, according to the decision of the High Court, an act of racial discrimination against the 98.5 per cent.

However, the High Court has made it clear that any attempt by the Sovereign, through a duly elected State government, chosen by the people, to abolish generally the native titles invented by the High Court will be an act of racial discrimination rendering invalid the attempt. It is pretty clear that no State Parliament alone, having had its absolute ownership of Crown lands legislated away by the High Court, can negate that judicial legislation by a simple enactment because it would fall foul of the Racial Discrimination Act – an Act itself underpinned by the extraordinary extension of the external affairs power previously legislated for by the High Court. Only the Commonwealth has the power to negate the postulated effect of the Racial Discrimination Act. It does not have the political will to do so for a number of reasons, including its own substantial gain in power over State lands.

For some, such as Father Brennan, son of the High Court's Justice Brennan, such a general negation of Mabo titles would be unthinkable, notwithstanding that the present outcome would have been not only unthinkable but unforseeable and unacceptable if ever contemplated at the time of the adoption of the Racial Discrimination Act.

I cannot help but observe the extraordinary circumstance that at least one of the Justices of the High Court, the Hon. Mr Justice Toohey, who is busy developing the concept of an implied Bill of Rights in the Commonwealth Constitution, which clearly contains no Bill of Rights, has been unable to imply anything which upholds federalism in our federal constitution. (8)

Mabo has created confusion, uncertainty, division and divisive argument. To say so is to state the obvious. What is less obvious perhaps is the extent to which it has set back the true cause of the Aboriginal people. As Mr Graeme Campbell, Federal Labor Member for Kalgoorlie, said in a radio broadcast on 15 June, 1993:

"As one Aboriginal fella said to me recently, `15 years people will argue about this, it'll make them lawyer buggers rich, at the end of the day blackfellas get nothing except everyone hates us'. Now I think he was absolutely right. Now that's a great threat."

Mabo has raised Aboriginal expectations to unrealistic heights, leading only to future disappointment. To that extent it represents yet again white abuse of Aboriginal people. As Mr Fred Chaney, one of the architects of the Commonwealth's Northern Territory Land Rights legislation of the 1970s, said in a feature article in The West Australian on Wednesday, June 30 (an article with which I almost totally otherwise disagree), "the worst outcome of Mabo would

be if it became no more than another set of dashed expectations". It is not the worst outcome – the destruction of Australian society is the worst outcome – but it is a bad outcome, especially for Aboriginal people.

Mabo assumes that Aboriginal people want to be different, privileged Australians, or, at worst, not Australians at all. In a real sense the decision is insulting to Aboriginal people, because again it emphasises separateness, dependency, and a need for special and different measures to apply. My own experience as a State Minister with responsibility for Aboriginal affairs makes me believe that Mr Graeme Campbell is right when he says, as he has on several occasions, that Aborigines he represents – bearing in mind that his Kalgoorlie electorate covers a high proportion of the potential Mabo claim areas in Western Australia – do not want a Mabo "solution" to their problems.

So far I have not referred to the economic consequences of Mabo. Despite the fact that so much of the public debate centres on the economic outcome, my own belief is that the greatest threat posed by Mabo is to the social and political fabric of our society, as will appear below. However, I do not overlook the enormity of the negative economic impact that Mabo has already had and will continue to have. As has been observed by others, these consequences will not appear for some years, as the downstream effects of uncertainty and non–investment emerge, and there is an eventual realisation that literally hundred of thousands of jobs for the children and adults of Australia are locked away in the special privileges and rights of Mabo lands, and the uncertainties of potential and unresolved claims.

There is no solution to the Mabo issue which creates certainty, expeditious resolution and justice for all Australians, other than a reversal of the Mabo decision. Fred Chaney, in his article (to which I have referred) finds it all very simple:

"Issues of compensation may arise with respect to post–1975 titles. That is part of the uncertainty and again must be put to rest. Governments created the titles; if there are problems in what they have done, that is their responsibility. The only issue which needs further discussion is which level of government will carry the responsibility".

Mr Chaney has apparently not learnt anything from his experience as a Minister in a Government which introduced retrospective tax legislation. It does not seem to occur to him that the High Court has not only legislated, but legislated retrospectively to affect people's rights created in good faith by elected Australian governments since 1975. To him, and others expressing a like view, that problem is simply solved by the payment of compensation, and all we have to do is work out whether it is paid by a State government or the Commonwealth government. Let me refer back to the pithy quotation from the article from Dr John Forbes in The Australian Financial Review:

"The High Court, in its legislative jurisdiction, has done what no single House of Parliament can do; it has passed an open–ended money Bill".

Not only are the beleaguered taxpayers of Australia to foot the bill for the horrendous incompetence of financial management, or mismanagement, by elected governments in the 1980s, they are now to foot the bill, of unknown and undetermined proportions, for the retrospective legislation of the unelected High Court.

An important statement was made in a speech a few weeks ago by a retiring senior State Parliamentarian, who was also an ex-serviceman. He asked if the hundreds of thousands of Australian men and women who fought in at least five wars to preserve this country were now expected to buy it back from the indigenous people.

It must be said that conflict and division arising from the Mabo decision will last for years.

Very small groups of people will benefit from the Mabo decision – a handful of Aborigines. Aboriginal people comprise about 1.5 per cent of the Australian population. It would be a fair

guess that less than one quarter of Aboriginal and Torres Strait Islander Australians have any realistic potential to succeed with native title claims – in other words, a handful of the few. Their gains may be very great. That is why the Aboriginal industry does not seek native title as an alternative to legislated Aboriginal land rights, but rather is pursuing both as part of a wider agenda.

So my simple question, "why is it that anyone supports the Mabo decision?", has led me to many concerns about the deficiencies of the outcome of Mabo. Whilst not all those concerns are equal in value, all have their own measure of validity.

When all those negatives, and no doubt there are others, are considered, a thoughtful person must ask the further question: "what is it really all about?"

What kind of madness is it that leads the established organs and institutions of a nation which prides itself on its legal, democratic and constitutional traditions, to deliberately create a monster – a legal monster of separateness based on race, of divisions of its people based on race, of legal privilege, of uncertainty, of vast indeterminate cost, of certain injustice, of indeterminate consequence, of upheaval of long established and sound legal principles – and in doing so put at risk a groping towards a free and equal society in which an indigenous people can take their place as equals?

There is another extraordinary twist to Mabo which has something to do with how it is treated. It is always assumed that the abandonment of terra nullius as a legal concept by the High Court leads inevitably to the adoption of native title as a legal right. But that is not a logical necessity. Terra nullius has been grossly misrepresented as meaning that Australia was not inhabited or occupied at the time of white settlement. Having made that misrepresentation, it is then possible for the critics of terra nullius, the proponents of Mabo, to condemn the Aunt Sally which they have set up, and thereby justify the outcome of its abandonment in the form of Mabo.

Terra nullius is explained in the article (9), "Old Colonisations and Modern Discontents: Legacies and Concerns" by Professor Alan Frost. It is not the subject of this address, but it is important to make the point (that no one I have observed has previously argued), that even if the misrepresented position of terra nullius were to be accepted as correct, and terra nullius therefore abandoned as a legal concept, it does not necessarily follow that the High Court's legislative decision for native titles is correct.

It is interesting, and perhaps fruitful, to consider the status of European occupation of Australia in the absence of terra nullius (correctly understood). There were no treaties of the kind entered into in Canada, United States and New Zealand. So we do not occupy by right of treaty : perhaps part of the intention of the High Court is that we should hasten to conclusion the proposals of some that we should have a treaty. (An explanation has not yet been provided as to whom Australia should treat with, other than the Aboriginal and Torres Strait Islander people, who are as diverse in their cultures and groupings as Europeans; nor has it been explained how a nation makes a meaningful treaty with one group of its own citizens. But these are issues for another paper.)

If we do not occupy by virtue of terra nullius or treaty, perhaps it would be accepted that we occupy by conquest. The Prime Minister has accepted, on our behalf, responsibility for terrible crimes against the Aboriginal peoples – crimes usually attributable to forces of conquest.

There is a good reason why there was no great or general treaty between the coming white man and Aboriginal Australia – there was no organised system of national or regional governments with which treaties could be concluded.

There were ethnic groupings of Aborigines, but they were never a nation. There were several hundred tribes scattered across the vast continent.

So what is Mabo about? Is it about guilt? If so, whose guilt, and for what? Is it about justice? That seems to be the most oft stated reason for supporting Mabo. But who can see justice even for Aboriginal people in the stunningly illogical, incomplete and inconsistent outcomes of Mabo? I doubt it provides justice even for a few Aboriginal or Torres Strait Islander people. Queensland Supreme Court Justice Martin Moynihan is reported to have reported to the High Court that Eddie Mabo himself had not lived on Murray Island since 1956, and that "his claims of visits to the Island came under somewhat of a cloud ... ".

There is little justice in Mabo for even a few individuals, and certainly none for the wider Australian community.

Is then Mabo about social welfare? Is it some new system by which Aboriginal people will be economically sustained without the continuing support of massive welfare handouts from the working population of Australia? Will the large numbers of them who regularly depend upon welfare as their sole means of sustenance, no longer need to do so as a result of Mabo? Clearly the answer is, "no". Even the proponents and supporters of Mabo acknowledge that it will provide land (and of course the provision of land in itself provides nothing more) to only a small percentage of the Aboriginal population, which is itself a small percentage of the Australian population.

Some opponents of Aboriginal land rights and Mabo have made a consistent mistake over a long period. Their mistake is to see these things in isolation, to see them as individual things, to see them as separate and isolated claims upon our society.

If we are to come to grips with Mabo we must see it as part of a wider agenda.

It is beyond my comprehension to work out why the High Court should, wittingly or unwittingly, have become a party to the fulfilment of that agenda. Being generous, one must respectfully assume that the High Court was simply misguided – that the majority of Judges confused their responsibilities as judicial officers with their personal ideologies, that they were not part of the wider long term agenda which will inevitably lead, if followed, to a divided and damaged, and some would say destroyed, Australian society.

Put very simply, the wider agenda is to create an Aboriginal, separate, sovereign state geographically within Australia, but not part of, or tenuously only a part of, the Australian nation.

Once more the Aboriginal people are being used – used by people whose aim is to weaken and destroy the nation we know, for reasons which can only be assumed to be as inverted, perverse and obscure as those which have driven Marxists and other totalitarian thinkers in all ages.

A small article appeared in The West Australian newspaper on April 20, 1993. Needless to say, it was not given great prominence or followed up by a newspaper which is almost obsessive in its support of Mabo, and its critical condemnation and disparagement of its opponents. However the article did appear, small as it was, under the heading "New Nation Tip By 2000". The article said in part, "`Aborigines will achieve a nation state within Australia by 2000'", says a leading Australian historian. Associate Professor Henry Reynolds, from Queensland's James Cook University, said the High Court Mabo decision would add momentum to the Aboriginal nationalist movement. `There are some pretty strong movements for people to gain self–determination, to have greater control over their internal affairs such as education, health and law and order' he said yesterday. `This would give Aborigines a special sense of identity and independence while remaining Australian citizens,' Professor Reynolds said. `The ideal is that there should be equality, and a great deal of effort has been put into this in the last ten years', he said."

But the ideal is not equality. The idea being pursued is independence and sovereignty, as in Canada where it is further developed. The official Canadian publication to which I have already

referred, in several places details the rejection of proposals for self–government for Aboriginal people, on the basis that the self–government being sought would not be delegated or constitutional self–government within the Canadian federation, as proposed by the Canadian government, but sovereign, independent self–government. I quote again the Canadian Government publication: "Under this proposal Aboriginal governments would have exercised delegated powers. Aboriginal peoples rejected the proposal ... Again, Aboriginal leaders took the position that the right of self– government must be free standing and capable of being implemented independently from a requirement for negotiated agreement".

A publication in October, 1990 by the Friends of the Earth (10), included an article entitled "Towards Aboriginal Sovereignty". Its sub–heading reads:

"On 16 July 1990 the Aboriginal Provisional Government (APG) was formed by Aborigines in Australia. This article was prepared by the APG, and outlines its structure, purpose and strategies and some of the implications of the establishment of a sovereign state for Aborigines".

The article makes the position very clear – the objective is an independent, sovereign Aboriginal state made up of various territories throughout Australia, albeit geographically divided. "Let it be clearly understood : the Aboriginal Provisional Government wants an Aboriginal State to be established, with all of the eventual control being vested back into Aboriginal communities and only oversee powers being vested in the Aboriginal Provisional Government. The amount of land involved would essentially be Crown land, but in addition there would be some land which would be needed by the Aboriginal community other than Crown land ... At the end of the day enough land would need to be returned to Aboriginal communities throughout Australia to enable them to survive as a nation of people, and the remaining land would be kept by whites and their governments as a basis for them to continue their nation".

There is no mistake as to the nature of the sovereignty being sought, or that it includes international relationships:

"The political control of each local Aboriginal community would be vested in the community themselves. There would be no point in transferring white power to an Aboriginal Provisional Government which simply imposed the same policies from above. The local communities must have absolute control over their day to day activities and the direction in which the local Aboriginal communities were to move. The residual powers of negotiation with foreign governments for trade, co- ordination of some uniformity between Aboriginal communities and so on should be vested in the Aboriginal Provisional Government." (Op. cit. p. 40, emphasis added).

Lest you see this publication as a fringe document, I refer you also to an article entitled "An Aboriginal Republic, Too?" which appeared in The Independent Monthly in March, 1992 by the same Associate Professor Henry Reynolds, who is said at the top of the article to examine "The precedents for a self–governing black Australian nation".

He takes the issue further by revealing that the Commonwealth Government of Australia has supported Aboriginal self–determination in international forums, as well as at home.

"The Australian Government has frequently paid lip–service to the principle of self–determination. There was the Government's commitment to this in the motion on Aboriginal rights moved by Prime Minister Hawke as first business in the new Parliament of August, 1988. A commitment to self–determination was also enshrined in the preamble to the Reconciliation Act of 1991. The Minister for Aboriginal Affairs, Robert Tickner, has given his personal commitment."

Reynolds concludes his article with the following:

"The Federal Government is in an awkward situation. Ministers profess to believe in self determination and say so in international forums. Having already given Norfolk [Island]

significant autonomy, can the Government in all seriousness deny the same consideration to Australia's `First Nation'? To do so would confirm the view that, rhetoric notwithstanding, Australia still has a colonial attitude to its indigenous people".

As long ago as February, 1981 an article was written in a publication, the Current Affairs Bulletin, entitled "The Makarrata, a Treaty Within Australia between Australians, Some Legal Issues ... " by Bryan Keon–Cohen, who is described as a Barrister of the Supreme Court of New South Wales and Victoria, and a Lecturer in the Law School at Monash University. He refers to the discussion about the treaty, then called "a Makarrata", a title which went out of fashion with the Aboriginal industry when non–Aborigines woke up to what it was really about.

Under the heading, "Content", the author said:

"Presuming all parties agree to sit down, in good faith and with the intention of achieving a Makarrata, what are they to negotiate about? What should the Makarrata contain? The abovementioned fundamental objectives, or something like them – which it can be assumed Aboriginal negotiators seek to achieve – will need to be translated into a `list' of demands. The Aboriginal Treaty Committee's current list provides a useful starting point. The Committee has suggested that the `Treaty, Covenant or Convention' should include provisions relating to the following matters:

i) the protection of Aboriginal identity, language, law and culture;

ii) the recognition and restoration of rights to land by applying throughout Australia the recommendations of the Woodward Commission;

iii) the conditions governing mining and exploitation of other natural resources on Aboriginal land;

iv) compensation to Aboriginal Australians for the loss of traditional lands and damage to those lands and to their traditional way of life;

v) the right of Aboriginal Australians to control their own affairs and to establish their own associations for this purpose".

Under the later heading, "Political Control", the author says:

"The fifth item on the Treaty Committee's Agenda, `The Right of Aboriginal Australians to Control Their Own Affairs', is a little ambiguous. It appears to seek, basically, to extend the current Federal policy of self–management and self–determination. Again, Aborigines will need to specify their demands ... The thrust is not in this area of private control, but public administration – powers of self–government. This may be considered at two levels : first, representation in current governing structures; second, the creation of separate, aboriginal–dominated, self–governing structures".

The evidence is clear to me from the published material I have referred to, and other material going back at least to the 1970s, that Mabo is but a small part of a wider agenda, which certainly includes a separate, sovereign, Aboriginal state within Australia capable of conducting international affairs.

Even the recent document issued by the Council for Aboriginal Reconciliation entitled "Making Things Right" is carefully ambiguous in listing as one of its "Eight Key Issues as Crucial to Reconciliation", the issue of "Greater opportunities for Aboriginal and Torres Strait Islander Peoples to Control Their Destinies".

The essential agenda appears to involve five steps:

Step One: Transfer of control over land to the Commonwealth Government.

This is an essential step because it is clear that the individual States which have had historically, and legally until the High Court invented native title, essential control of the disposition of land, and the use of land, would not be prepared to concede the very foundation of the economic well being of their people for the creation of a separate, sovereign, Aboriginal state. It is only the

remote, unrealistic and extraordinary government of Canberra that can so easily be moved in these directions, especially as the pay–off for acceding to extraordinary forms of morality supposedly applicable elsewhere in the world, is that Canberra in its everlasting and voracious push for power will thereby increase its own power.

The transfer of control of land to Canberra is being effected by the extraordinary combination of laws made by the Commonwealth Parliament and decisions on those laws by the High Court. The Commonwealth Parliament enacted the World Heritage Properties Conservation Act which enables a single Commonwealth Minister in Canberra to take total control over any usage or occupation of land which is even so much as nominated for World Heritage listing. Interestingly in the context of this debate about Mabo, where compensation is so central an issue, no compensation is payable in respect of World Heritage listing controls which damage, destroy or outlaw the legal, property, occupation or livelihood rights of affected Australians. These extraordinary and undemocratic powers over land have been upheld as perfectly valid by the High Court under the external affairs power.

The Aboriginal and Torres Strait Islander Heritage Protection legislation, enacted under the power of the Commonwealth to make special laws for the people of any race, enables another single Minister in Canberra to stop any activity on private land, or State land, or in a park or reserve, which that Minister deems may be prejudicial to Aboriginal heritage. It is clear that new treaties to protect the environment, including the Treaty on Biodiversity, will in due course find their way into legislative enactment, further extending Commonwealth control over land and land usage, and no doubt that too will be enthusiastically upheld by the High Court of Australia, dutifully protecting the federal Constitution of this nation.

The High Court has upheld the power of the Commonwealth to abuse its export licensing power so that it can stop whole industries. There is no law in Australia which prevents the mining of uranium at as many places as it may be discovered, under normal mining legislation of the relevant State, and authorised in accordance with the law of that State. Uranium is confined to the absurdly illogical three mines policy position by the undoubted abuse of Commonwealth power in prohibiting exports except from the three selected and approved mines. Yet another major restriction and control on land use, in this case mining, transferred from the States to the Commonwealth with the complete approval of the High Court of Australia.

Now we have Mabo. This extraordinary decision creates a new form of title, totally inconsistent with the laws of the States which have hitherto been the sole creators of forms and systems of title, and effectively transfers a major degree of power over all unalienated Crown land in Australia from the States to the Commonwealth, through the application of the Racial Discrimination Act, upheld again by the external affairs power. The Commonwealth Government is now attempting to dictate to the States a requirement that they deal with Mabo in certain particular ways, and indeed Mr Keating has proposed that the Mabo principles be significantly extended.

Step Two:

This is part of the extension of Mabo proposed by Mr Keating. Despite Mabo, all present land rights legislation of the Commonwealth in relation to the Northern Territory, and other land rights legislation, is to be kept in place, and indeed extended in accordance with Mr Keating's proposal, so that Aborigines have a veto over any development or project on Aboriginal lands of various kinds. In all the literature I have read it is made quite clear that the policy intention of the proponents of Mabo is that the Mabo decision is to apply in addition to, and not instead of, legislated (that is, legislature legislated) land rights legislation.

Step Three: Mabo itself.

Mabo is to provide the legitimacy for Aboriginal land "rights". Mabo condemns State legislatures such as the Western Australian legislature, which democratically rejected Aboriginal land rights legislation. Mabo provides an international justification for creating special rights and privileges for indigenous people. Mabo is a morality to support the separateness of Aboriginal people and their special rights and privileges. But above all Mabo provides, in the absence of the legislative will to do so, vast areas of land for Aboriginal people who are able to prove claims (which, as indicated by the way the Mabo decision itself was decided, will not be difficult), and these vast areas of land will provide the economic underpinning for an independent, sovereign, Aboriginal State.

Step Four : The Treaty.

One has only to read, with a growing sense of alarm and despair, the "progress" in Canada to realise that we are but a step or two behind them. The agenda is exactly the same. First, we are persuaded that there has been an injustice in the past - as if we did not know that already. Then we are made to feel guilty. Then there is talk about reparation and compensation. Then there are demands for land. Land is granted under Aboriginal land rights legislation. Land is then granted under the Mabo native title approach. And the completion of the "progress" is the signing of a treaty. There is no doubt that the development of a treaty is in train under the promotion of the Federal Labor government, with some Liberal reservations. Currently that train of "progress" is called the process of reconciliation. A few years ago it was called Makarrata. We are constantly given new titles as each is exposed for what it truly represents.

The treaty leads inevitably to step five.

Step Five : Self Government.

As already noted, the Canadian Aboriginal people have repeatedly rejected any form of self–government which is seen as subsidiary or delegated. The ultimate agenda here in Australia is the same – independent, sovereign self–government, that is, self–government the legitimacy of which is not founded in delegated power from the Commonwealth Parliament, but is founded in the (claimed) inherent right of Aboriginal people to self determination. And that is the end of Australia as we know it.

By comparison to this plan, its long term objectives, its devious expositions and implementation, the occasional furtive claims for Western Australian secession are but child's play!

On 17 November, 1988 an article appeared in The Northern Territory News under the heading "Islanders Reject Pact". The article reported in part:

"Torres Strait Islanders have demanded immediate sovereignty and rejected the Aboriginal Treaty proposed by the Prime Minister Mr Bob Hawke. Delegates representing Australia's 25,000 Torres Strait Islanders voted unanimously yesterday to secede ... The Chairman of the Torres United Party, Mr James Akee, said delegates had demanded the Federal Government begin immediate negotiations for the Islanders to gain sovereign independence ... He said Torres Strait Islanders wanted full control of their affairs including only Torres Strait Islanders, and no whites, in government bureaucracies affecting them. The all-black bureaucrat situation should apply for the bridging period until sovereignty took effect".

This really sums it up. All steps are bridging steps until sovereignty takes effect.

Well meaning people like Fred Chaney are sorely misguided. Their long term dedication to the cause of the well being of Aboriginal people has blinded them to the reality of what is going on.

Australia is being undermined from within by a process, which is said by Brennan, J. of the High Court, to satisfy "the expectations of the international community" and "the contemporary values of the Australian people".

Leaving aside the propriety of judicial decision–making based on such criteria, and questions as to the qualifications, if any, of Brennan, J. to determine and apply those expectations and values,

one may ask if the High Court will change its Mabo judgment, or at least its direction, if it can be shown that the Australian people do not share his enthusiasm for handing over the people's land according to the whim of Judges.

Or, is it the situation that the High Court Judges have now assumed the mantle of infallibility as to the exposition of the contemporary values of the Australian people?

As has been shown, the expectations of the international community are partly being generated by the participation of Australian Aborigines and Australian Government officials in international forums.

I do not know the basis of any morality which dictates that a nation should accept its own destruction. I do not know the basis of any morality which says that 98.5 per cent of the people of a nation should concede certain exclusive fundamental rights to 1.5 per cent of the population of that nation. I do not know the basis of a morality that says that it is wrong to discriminate against Aboriginal people, but all right to discriminate against non–Aboriginal people, as the Mabo decision does. I wrote to the Hon. Ronald Wilson, former Justice of the High Court, who appeared on a television programme with me in relation to Mabo, and asked him to imagine the stream of protests and abuse which would break out around the country if some law were passed by a State or Commonwealth government, or a decision were made by a court, which provided that certain land was to be available to non–Aboriginal Australians, but that no Aboriginal would ever be qualified to acquire that land on the same basis, because of his or her race. And rightly so that there should be protests, but why not equal protest in the reverse situation?

It is increasingly clear that those who perceive themselves as the guardians and promoters of Aboriginal interests have abandoned any pretence that the objective is equality for all Australians.

The fundamental question remains unanswered : why should Aboriginal and Torres Strait Islander Australians have a greater, better or different right to acquire land than I do? As a fifth generation Australian whose forebears carved out their wealth in the South–West of Western Australia from the 1840s onwards, but who left none of their lands down the line to my generation, I make no claim to better land rights than last year's, last month's or last week's immigrant or lawful refugee. Why do Justices Brennan and Toohey and four of their colleagues, and Mr Tickner and Mr Chaney and Dr Wooldridge want to reduce my rights as an Australian citizen? – and, more importantly, by what right do they claim to do so?

It is important to understand that every step in the seemingly inexorable path to separate Aboriginal sovereignty depends on the preceding step. Only the Commonwealth will pursue extremist agendas represented by the post–Mabo demands, and earlier by extremist greenies. Therefore it has been necessary for the proponents of these agendas to help the Commonwealth seize power over land from the States.

The relevant decisions of the High Court have allowed this to be substantially achieved. The next steps will be the treaty and self–government. The States not directly much affected by Mabo will wake up too late if they don't take a strong stand now.

The questions implied by the title to this address – "Mabo and Federalism: The Prospect of an Indigenous People's Treaty" – are very clearly answered by the evidence which I have presented. Mabo is part of a process, allowed by High Court decision making, which has the effect of finally destroying the legal foundation of federalism.

By all reasonable expectations, if the present path is followed, there will be an indigenous peoples treaty, and that will lead inexorably and inevitably to an independent, sovereign, indigenous peoples government over a significant area of what, until then, will have been Australia.

Endnotes:

1. Published in Native to Australia, a Samuel Griffith Society publication, 1993.
2. The Weekend Australian, July 17–18, 1993, page 20.
3. A Reader in Law at the University of Queensland, in an article published at page 51 of The Australian Financial Review on 30 June, 1993.
4. Both proponents and opponents of Mabo now concede the High Court made new law, as referred to in the above notes. In addition, a key Mabo advocate and son of Brennan, J, Father Frank Brennan, said (June 11, 1992, reported The Australian 13 June, 1992), "The Mabo decision changes the law of the land." The issue moves from whether the High Court invented a new law – which was earlier denied – to the much more slippery field of argument, as to whether it was legitimate, traditional or proper for the High Court to adopt a legislative role.
5. More recently the historical basis of the High Court's Mabo decision has been questioned. A distinguished Professor of History, formerly from the University of Western Australia, has written in private correspondence (in my possession):

"I noted early on that the High Court Judges who decided on the Mabo case ventured out of the field of law into the realm of history, and did this in a most unimpressive manner. More recently I have noticed that their historical interpretations have been accepted and used as texts for the present debate, and this should not be allowed for the sake of the reputation of the Australian High Court and for the sake of the international intellectual reputation of Australia, where the current debates are not impressive. For example, for a High Court Judge to make a decision on a claim made by a Mr Mabo who lived in the Torres Strait Islands, and then apply that decision to Australia, would be the same as an American Supreme Court Judge making a decision about a Puerto Rican living in Puerto Rico, and then saying that decision applies to the American Indians. I am not certain how that thinking is to the legal profession. It is certainly unimpressive for the historian.

Like American Puerto Rico, the Torres Strait Islands are a lately acquired colonial possession of Australia, inhabited by a separate people whose lands were annexed at a special time for special reasons. As incorrect historical evidence is now being used and warped, the correct facts need to be presented, not only to make the debates properly informative and the political decisions soundly based, intellectually, but also to reveal to the High Court Judges the important pieces of historical evidence they failed to use when they made their judgment. With the correct historical evidence before them they might have reached different conclusions. However, that consideration is for members of the legal profession, not the historian. The only role of the historian is to present the factual evidence."

6. In The West Australian, July 2, 1993, p.6.
7. Reported "A.M.", A.B.C. Radio July 13, 1993.
8. See "A Government of Laws, and Not of Men?" by Justice John Toohey, Conference on Constitutional Change in the 1990s, Darwin, October 1992.
9. Chapter 11 of Upholding the Australian Constitution, the Proceedings of the Inaugural Conference of The Samuel Griffith Society, July 1992.
10. Chain Reaction Co–operative Ltd., 33 Pirie Street, Adelaide, South Australia, No. 62.