DEPARTMENT OF COURTS ADMINISTRATION

CONFERENCE

SYDNEY AUSTRALIA

THURSDAY 18 NOVEMBER 1993

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The Hon Justice Michael Kirby AC CMG *

The legal significance of the decision

The Mabo[1] decision is legally significant in a number of respects. First, it recognised the entitlement of indigenous people of Australia to a form of native land title. This recognition required the overruling of the common law doctrine of *terra nullius*. For this, the High Court has been criticised upon the basis that it thereby usurped a legislative function and so breached the separation of powers doctrine enshrined in the *Australian Constitution*. Secondly, the High Court offered guidance as to the circumstances in which an established

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1 Mabo & Ors v The State of Queensland (1992) 175 CLR 1.

common law doctrine may be overruled by a court. Thirdly, guidance was offered as to the proper influence which international law and international instruments may have upon the development of the common law in Australia. Finally, the decision implicitly brings to the fore an important question of judicial policy.

The most telling criticism which has been targeted at Mabo concerns not how the High Court came to its decision, but whether, as a matter of judicial policy, it ought not to have left such a seemingly radical change of the law to the elected representatives of the Australian people in their democratic Parliaments.

The High Court and the separation of powers doctrine

Criticism upon the basis that the High Court in Mabo acted legislatively, rather than judicially, may be unwarranted given the true nature of the judicial function and the High Court's proper role as a court of ultimate authority in this country.

Typical of the criticisms of this kind is that voiced by the Tasmanian Premier, Mr Groom. He said,[2]

> *"It seems to me extraordinary that the High Court, an unelected body, could move in one decision to overthrow all of our land tenure laws that have served Australia so well for 200 years."*

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2 B English "Groom calls for tighter controls on High Court" in *The Australian*, Monday 13 September 1993, p5.

Mr Groom's statement appears prompted by a belief that "the High Court in the Mabo case, and many others, had taken on a legislative role that should be confined to democratically elected representatives".[3] Similarly, The Hon Peter Connolly, a former Justice of Queensland Supreme Court, wrote, in response to the rhetorical question: "What was wrong with the decision?",[4]

> *"The first answer is that it was sheer invention or, if you prefer a politer word, sheer legislation. As Dr Colin Howard has observed, "The philosophy of the common law is, above all, evolutionary, not revolutionary. Mabo is above all, revolutionary, not evolutionary". In order to emphasise this point, I shall hereafter refer to the decision as the legislation of 3 June 1992... My thesis is... that this is the naked assumption of power by a body quite unfitted to make the political and social decisions which are involved."*

Another example of this same accusation will be sufficient to allow this point to be made. Professor Geoffrey de Q Walker, Dean of the Faculty of Law in the University of Queensland, has written,[5]

> *"The polemic that has followed Mabo highlights the fact that from a constitutional viewpoint it was not (except in relation to the Murray islanders) a judicial decision at all. Most of the controversy has centred on how the Court's*

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3 *id.*

4 P Connolly, "Should the Courts Determine Social Policy" in The Association of Mining and Exploration Companies Inc, *The High Court in Mabo*, 1993, p5.

5 Geoffrey de Q Walker "Ending Constitutional Drift: A Democratic Agenda for Change" in G Walker, S Ratnapala and W Kasper *Restoring the True Republic*, The Centre of Independent Studies, 1993, p12.

decision should be 'implemented', by federal or State legislation, or both. Yet the hallmark of a genuine judicial decision is that it requires no legislative implementation, for the simple reason that it declares what the current law is, and applies it to the facts. Each time a court applies a principle to new facts it is to a degree developing the law, but sweeping new proclamations of policy, or calls to arms that require Acts of parliament to put them into effect, are quite outside the judicial function. The Mabo case, therefore, except in relation to the Murray islanders, represents yet another usurpation by the Court of the constitutional powers of the Australian parliaments and people."

The comments of Justice Dawson in his lonely dissent in Mabo also give some support to this criticism. He said,[6]

"Accordingly, if traditional land rights (or at least rights akin to them) are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts."

Justice Dawson also said,[7]

"The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognize its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided."

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6 175 CLR at 175.
7 *ibid* at 145.

What is the separation of powers doctrine?

In its most basic formulation, the separation of powers doctrine under a Westminster system of government prohibits the legislative/executive branch of government from exercising the powers of the judiciary, and vice versa.[8] The two branches of government are regarded as separate in function. In this respect, the *Australian Constitution* is much influenced by its American counterpart, in turn affected by the philosophical teachings in vogue at the time when the *United States Constitution* was written.

In the context of the United States, James Madison wrote,[9]

> *"The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."*

The high watermark of the separation of powers doctrine in Australia was the Boilermakers' case.[10] In that case it was held that the Federal Parliament could not, by legislation,

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8 In the United States the separation of powers doctrine applies as between the legislature, executive and judiciary.

9 *The Federalist* No 47, reproduced in *The Federalist - Sesquicentennial Edition*, National Home Library Foundation, Washington DC, p 312 at 313. See also Springer et al v Government of the Philippine Islands 277 US 189 (1927) at 201-202.

10 The Queen v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254; Attorney-General (Cth) v The Queen (1957) 95 CLR 529; [1957] AC 288 (PC)

confer upon a Federal court both judicial and non-judicial functions. To purport to do so was inconsistent with the provisions of the *Australian Constitution* and also with the very structure of the Constitution. Upon this basis, the Court of Conciliation and Arbitration could not validly exercise both judicial and non-judicial powers. The outcome of the decision was the division of those functions respectively between the Industrial Court (from which has grown the Federal Court of Australia) and the Conciliation and Arbitration Commission (from which has grown the Industrial Relations Commission of Australia).

The decision of the High Court of Australia in Boilermakers' was affirmed by the Privy Council. Their Lordships observed,[11]

> *"...in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard."*

The context of the Boilermakers' decision is important. It was decided at a time when the declaratory theory of judicial function was almost universally accepted in Australia. Any notion that the judges invented the law was strongly rejected. Chief Justice Dixon asserted that the law would have no meaning as a discipline if there were not pre-existing norms which the judge merely had to find and then to

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11 (1957) 95 CLR at 540-541; [1957] AC at 315.

apply. Such a search might be difficult and, at times, taxing. But aided by "strict and complete legalism", the application of logical rules and analogous reasoning, the relevant principles of law would always be found.[12]

While this declaratory theory of strict and complete legalism is still probably accepted by many in the general community and by politicians in Australia, it is a view which is now held by very few Australian and English judges. Lord Reid, in 1972, denounced such a view as a "fairy tale" in which we did not believe "any more".[13]

Separation of powers, judicial restraint and the High Court

For the purist the strict separation of powers doctrine requires absolute judicial restraint. The classical theory of judicial restraint dictates that the judges do not have regard to "changing economic, social and political ideas" in the exercise of their judicial power,[14] "unless [such considerations] are specifically commended to the court's attention by the legislature".[15] Strict adherence to the notion of judicial restraint is given considerable weight by two undeniable factors: first, the judiciary's exercise of a power legislative in character is illegitimate as the judiciary lacks accountability and therefore the democratic

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12 *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi at xiv.

13 Lord Reid, "The Judge as Law Maker" (1972-1973) 12 *JSPTL* 22 at 22.

14 D Menzies "Australia and the Judicial Committee of the Privy Council" (1968) 42 *ALJ* 79 at 81.

15 P Crisp "Legal Dynamics" (1965) 39 *ALJ* 81 at 81.

authority to make radical new laws. Secondly, the judicial process is inapt to provide the appropriate consultative processes which significant reform or change in the domain of the legislature requires.[16]

In recent years there has been a slow, but steady, drift in Australia away from the strict theory of judicial restraint. The exact limits of judicial creativity are yet to be defined - assuming that the boundary could ever be defined with precision. In Caltex Oil (Australia) Pty Limited v The Dredge "Williemstead"[17] Justice Stephen in the High Court of Australia recognised that "policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of the law".[18] However, he warned that to "apply generalized policy considerations directly... instead of formulating principles from policy and applying those principles... is... to invite uncertainty and judicial diversity."[19]

Justice Deane in Oceanic Sun Line Special Shipping Company Inc v Fay[20] expressed what he took to be the correct approach to be adopted when a judge is invited to change the existing common law and to adopt a new approach. He said,[21]

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16 See the comments of Mason J in State Government Insurance Commission v Trigwell & Ors (1979) 142 CLR 617 at 633.
17 (1976) 136 CLR 529.
18 *ibid* at 567.
19 *id.*
20 (1988) 165 CLR 197.
21 *ibid* at 252.

"There are three main reference points to which regard should be paid in deciding whether the United Kingdom doctrine should be accepted as the law of this country. They are legal principle, decided authority and policy."

In that particular case Justice Deane went on to find that the arguments for change based upon suggested policy and principle were "not sufficiently strong" to warrant the Court's departing from the established law.[22] He stated that, in such a situation, change was the proper domain of the legislation "enacted after full inquiry and informed assessment of international as well as domestic considerations of a kind which the Court is not equipped to make of its own initiative."[23] Despite these cautious words, one is left with the impression that, if the policy considerations before Justice Deane had been considered more compelling, the judge would have had little hesitation in over-ruling the pre-existing authorities. As such, the comments of Justice Deane represent a clear recognition of the proper and legitimate creative role of the courts - especially of the nation's highest court.

The High Court "creates" law

That the High Court of Australia has substantially abandoned strict adherence to past authority and the notion of judicial restraint is evidenced not just in Mabo. It can be seen in a number of recent decisions which exemplify that court's new-found creativity.

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22 *ibid* at 255.
23 *id.*

In Trident General Insurance Co Limited v McNeice Bros Proprietary Limited[24] the High Court by majority[25] held that a person, not a party to an insurance contract, was entitled to enforce the indemnity against the party's liability to pay damages as the result of a successful claim in negligence against the party. While the ramifications of the decision remain to be explored, the decision may have dispensed with the doctrine of privity of contract. It may have done so by court decision and this despite many calls for legislative reform which earlier fell upon deaf ears in Parliament.

Similarly, in McKinney v The Queen[26] the High Court, by majority[27], laid down a "rule of practice for the future" to be applied in the context of confessions made by a person in police custody. The "rule" was that, wherever police evidence of a confessional statement allegedly made by an accused while in police custody was disputed at trial, and its making was not reliably corroborated, the judge should warn the jury of the danger of convicting on the basis of that evidence alone. Law reform bodies had for years cried out for legislative reform in this area (as Justice Brennan noted in a powerful dissent[28]). The court-mandated requirement would have implications for police practice and resources. Yet the High

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24 (1988) 165 CLR 107.

25 Mason CJ, Wilson, Deane, Toohey and Gaudron JJ; Brennan and Dawson JJ dissenting.

26 (1991) 171 CLR 468.

27 Mason CJ, Deane, Gaudron and McHugh JJ; Brennan, Dawson and Toohey JJ dissenting.

28 171 CLR at 478-479.

Court would wait no longer for legislation based on law reform reports. It acted resolutely itself to defend the justice of proceedings in Australian Courts.

In The Queen v L[29] the High Court unanimously[30] rejected the notion that, by reason of marriage, there was an irrevocable consent to sexual intercourse on the part of a spouse. This legal fiction had survived for two centuries. It was peremptorily terminated.

In Australian Capital Television Pty Limited v The Commonwealth [No.2][31] the High Court, by majority[32], held invalid key provisions of the *Political Broadcasts and Political Disclosures Act* 1991 (Cth) upon the ground that they involved a severe impairment of freedoms previously enjoyed by Australian citizens to discuss public and political affairs and to criticise Federal institutions. An implied guarantee of freedom of speech with respect to public and political discussion was found to be inherent to a constitutional democracy such as Australia.[33] This was despite the fact that previous suggestions that the *Australian Constitution* required

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29 (1991) 174 CLR 379.
30 Mason CJ, Brennan, Deane, Dawson and Toohey JJ.
31 (1992) 66 ALJR 695 (HC).
32 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.
33 See also Nationwide News Pty Ltd v Wills (1992) 66 ALJR 658 (HC).

freedom of speech and other communication[34] had been strongly rejected.[35]

In David Securities Pty Limited & Ors v Commonwealth Bank of Australia[36] the majority[37] held that a rule, well settled for nearly two hundred years, precluding the recovery of money paid under mistake of law should no longer be regarded as part of the law of Australia.

In Dietrich v The Queen[38] the majority[39] held that, in the absence of exceptional circumstances, a judge should, on application, adjourn, postpone or stay a criminal trial where an indigent accused person, charged with a serious offence is, through no fault of their own, unable to obtain legal representation. If such an application were refused and the resulting trial were unfair, the conviction might be quashed upon the ground of miscarriage of justice. This decision was in marked contrast to the earlier decision of the High Court in McInnis v The Queen.[40] The dissent of Justice Murphy in that case was approved, and followed, in the Dietrich case.

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34 See Ansett Transport Industries (Operations) Pty Limited v The Commonwealth & Ors (1977) 139 CLR 54 at 88 per Murphy J.

35 See, for example, Miller v TCN Channel 9 Proprietary Limited (1986) 161 CLR 556 at 579 per Mason J.

36 (1992) 175 CLR 353.

37 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.

38 (1992) 67 ALJR 1 (HC).

39 Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting.

40 (1979) 143 CLR 575.

These examples clearly demonstrate the High Court's marked tendency toward judicial creativity. Against such a pro-active and reformatory approach, it ought not have come as any real surprise to the astute observer of the judiciary in Australia that the High Court in **Mabo** would adopt the course which it did. No doubt the **Mabo** decision is creative. No doubt it sits upon the fine line which separates a truly legislative act from the exercise of true judicial function. But it is certainly consistent with the recent approach of the High Court to many difficult problems where injustices have long endured and been completely ignored by the legislature despite repeated calls for urgent reform.

A system based upon the common law, of its nature, requires a creative judiciary. If the judges of the common law did not so act the law would fail to adapt and change to modern society. In the past, the declaratory theory had even great intellects deceived - or ready to indulge the fiction. Nowadays, a mature common law system requires that strict legalism be tempered by judicial consideration of both principle and policy in stating what the law is. Strict and complete legalism, giving effect to simple views concerning the separation of powers doctrine, has become inappropriate to a contemporary modern common law system. This is especially the case where the system operates under a written constitution designed to endure indefinitely. The recent increase in apparent creativity on the part of the courts in Australia may be the more noticeable only because of their earlier abstinence long maintained. That abstinence may have

created a log jam of injustice which only now the High Court and other Australian Courts are striving to clear.

Where inquiry is focussed upon the creative nature of the judiciary, except in very clear cases, the debate often turns to emotive, rather than substantive, questions. Mabo is a very clear example of this. The essential complaint is not about the legal accuracy of the Mabo decision. It is not easy to accept that six of the seven experienced Justices of the High Court simply got the law wrong. The essential complaint, as I understand it, is that the Court ought not have done what it did in this case. Yet Mabo, reduced to fundamentals, says only that: (a) our system of real property law accommodates native title; (b) native title may be extinguished; (c) it may be extinguished in a number of ways by either the Crown or by the indigenous people themselves; and (d) where it has been extinguished there may (or may not) be a right to compensation.

Whether the High Court ought to have ventured upon this rather modest re-statement of the law invites conflicting opinions about the proper limits of judicial creativity. In my own respectful opinion, the High Court acted appropriately in overturning a doctrine which was inherently discriminatory and which no longer conformed (if it ever did) to modern notions about the rights of indigenous societies and their legitimate claims upon settler societies. In acting as is did, the High Court undoubtedly overturned and restated important and fundamental aspects of the common law of Australia. But in so

acting, it was not effecting a usurpation of the legislative function. It was merely performing one aspect - the creative aspect - of the Court's own judicial function and its duty to the Australian community. Let no one doubt that judges of the common law have been making up law for centuries. That is the very nature of the system. That is the reason why its highly practical techniques of problem solving have outlasted the British Empire and are in operation in the busy courts of the four corners of the world, serving about one-third of humanity.

The High Court and the common law

The **Mabo** decision made clear the circumstances in which the common law of Australia may be overruled as it advances to a higher principle. In so doing, it provided invaluable guidance for courts faced in the future with like problems in completely different areas of the law, less controversial.

Justice Brennan stated that a rule of common law may be overturned by the appellate court if the postulated rule "seriously offends the values of justice and human rights". However, such a rule may not be overturned if "the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning". Thus, a balancing exercise is required involving judgment in each case. The competing interests at work are the modification of the legal system "to bring it into conformity with contemporary notions of justice and human rights" and the peril of destroying the "skeleton of principle which gives the body of our law its shape and

internal consistency". Where the challenged rule of law is so entrenched and fundamental to our common law system that change cannot be accommodated, the change will not be permissible. Then to change the law would be destructive of our very system of common law. Any such changes must be left to Parliament which, it can be assumed, would act with care and justice to most of the interests involved.[41]

According to the High Court in Mabo the concept of *terra nullius* was merely a categorisation of the Australian continent's land established by earlier cases. Such a categorisation represented an element of the common law susceptible to change without unacceptable consequences for the totality of our common law. Similarly, and as a consequence, the common law governing real property, properly interpreted, drew a distinction between the Crown, as sovereign, having title to Australia and owning beneficially all of the land in Australia. That is, the common law applicable accommodated the Crown's sovereignty over Australia's land subject only to the indigenous native tile. In fact, the common law itself (not to say statute law) provides perfectly effective means for that indigenous native tile to be extinguished. Thus, according to the principles explained by Justice Brennan, the recognition of indigenous native title did nothing to fracture the skeleton of the common law.

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41 175 CLR at 29-30.

The inherently discriminatory nature of the application of the doctrine of *terra nullius* meant that it no longer accorded with, what Justice Brennan, described as "values of justice and human rights". Similarly, the application of the concept of *terra nullius* to inhabited lands (such as the Murray Islands) was itself questionable in that it perpetuated a bygone age of racial discrimination. Such a concept was inappropriate to modern Australian society and its law.[42]

Strictly construed, the holding in the Mabo decision simply rejected that particular islands of the Murray Islands were not properly categorised as *terra nullius*. Once such a categorisation was rejected the common law doctrines applicable since the time of settlement properly recognised a form of prior native title. While the exact legal characteristics of native title remain unclear, it is clear that the common law applicable to the Australian continent recognises a form of native title in appropriate factual circumstances. Of course, the traditional categorisation of the Australian continent as *terra nullius* represented a *factual* bar to the proper recognition of any form of native title. In this important respect the Mabo decision rejected the trilogy of cases[43] which gave effect to the fallacy that the Australian continent was *terra nullius*. Such rejection

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42 *ibid* at 41-42.

43 See Attorney General (NSW) v Brown (147) 1 Legge 312 at 316 per Stephen CJ; Randwick Corporation v Ruttledge (1959) 102 CLR 54 at 71 per Windeyer J; New South Wales v The Commonwealth (1975) 135 CLR 337 at 438-439 per Stephen J. These cases are discussed by Brennan J in the Mabo case: 175 CLR at 26-28.

lays the foundation for claims of a similar nature in respect of mainland Australia where each claim will be determined upon its own factual circumstances.

Upon such a basis Mabo was essentially nothing more than a clarification of law and a re-finding of fact. In such a case, the spectre of Mabo, as an illegitimate decision of law, is properly answered. The essential question for legal advisers of today is relatively simple. It is: in a particular situation do the factual circumstances give rise to a *prima facie* claim for indigenous native title and if so, what, if any, actions by the Crown, or the indigenous people themselves, may be said to have extinguished that *prima facie* claim? The only substantive question of law which then remains, if a claim exists or has been non-consensually terminated, is the disputable question of compensation.

The impact of international law

Before Mabo there was no doubt that international law was a source of our law. However, the impact of international law was, for the most part, one of influence only. It remains probable that international law is not, as such, part of the domestic law of Australia - as indeed of most countries. International law does not generally become part of domestic law until either Parliament so enacts or the judiciary incorporates the principles into the domestic law.[44] In adopting and adapting the principles of international law in

44 M D Kirby "The Australian Use of International Human Rights Norms" (1993) 16(2) *UNSW Law Journal* 363 at 373.

domestic decisions, the influence of international law is increased. Nevertheless, the incorporation of international law into domestic law by the judiciary remains the exception, and not the rule.

It is usually only where the issue for determination before a court is uncertain that a judge will seek the guidance of international legal material.[45] Such uncertainty may arise where an established doctrine of the common law, by the passage of time, becomes inappropriate to the responsibilities and demands of modern society. Such was the case in Mabo. It may also arise where a statute is ambiguous and a principle of international law is relevant to assist in resolving the ambiguity.[46]

Early recognition within the High Court of Australia of potential role of international instruments to influence Australian law may be found in the judgments of Justice Murphy.[47] However, in recent years, the acceptance of international law and international instruments in performing the judicial function has steadily grown.[48] The culmination in Australia of this new found legitimacy for international law - as an influence upon domestic law - was the Mabo decision.

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45 *ibid* p 374.
46 *id.*
47 See, for example, Dowral v Murray & Anor (1978) 143 CLR 410; McInnis v The Queen (1979) 143 CLR 575; Koowarta v Bjelke-Petersen & Ors (1982) 153 CLR 168.
48 See, for example, Commonwealth of Australia & Anor v The State of Tasmania & Ors (1983) 158 CLR 1; J v Lieschke & Ors (1987) 162 CLR 447 per Deane J at 463. See also the other cases discussed by Kirby, *supra* n.44, pp377-383.

Justice Brennan said,[49]

> *"The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."*

This statement is significant for a number of reasons. It is most explicit. It provides for the future harmonious development of the common law of Australia with the developing principles of international law. It provides to those who advocate the beneficial influence of international law a cause for renewed vigour.[50]

The impact of **Mabo**, in this respect, has already been felt to some extent. For example, the High Court in **Australian Capital Television Pty Ltd v The Commonwealth**[51] implied into the *Australian Constitution* a guarantee of freedom of communication as to public and political discussion. Justice Brennan,[52] in particular, had regard to Canadian and United States decisions on basic rights as well as decisions in the European Court and Commission of Human Rights.

In **Dietrich v The Queen**[53] Justice Brennan, following what he had said in **Mabo**, re-iterated the legitimate influence of

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49 175 CLR at 42.
50 Kirby, *supra* n.44, p 386.
51 (1992) 66 ALJR 695 (HC).
52 *ibid* at 710-711.
53 (1992) 67 ALJR 1 (HC).

international law.[54] Similarly, in Chu Keng Lim v The Minister for Immigration, Local Government & Ethnic Affairs[55] Justices Brennan, Deane and Dawson said,[56]

> *"We accept the proposition that the courts should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty."*

The proper inference to be drawn is that, after Mabo, the astute lawyer in Australia will, where appropriate, direct the attention of Australian courts to relevant international material. Courts themselves, upon the basis of Mabo and the subsequent cases, will increasingly regard such material as legitimate sources of data. As the cases bear out, such use of international material need not be limited to circumstances in which "international law declares the existence of universal human rights".[57] The use will come to extend to other, perhaps more mundane, circumstances. In this respect, Mabo requires that the common law of Australia will in future be influenced by legal authority, policy, principle and applicable rules of international law.

What is so revolutionary about this notion? In the age of nuclear fission, the Human Genome Project, global telecommunications, jumbo jets, international problems such as HIV/AIDS, and so on, do we not need a legal system - and legal

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54 *ibid* at 15.
55 (1992) 67 ALJR 125 (HC).
56 *ibid* at 143.
57 175 CLR at 42 per Brennan J.

weapons in our judicial armoury - which, in appropriate cases, can bring our Australian law into harmony with the advancing law of the community of nations? I suggest that we do. Mabo advances this necessary and beneficial legal development apt for the coming century.

How remarkable is the recognition of native title?

The recognition of indigenous or Aboriginal land rights is by no means peculiar to the law of Australia. Indeed, Australia is one of the last of the common law nations to acknowledge in its legal system the legitimacy of indigenous or aboriginal land rights.

For example, the right of indigenous people to native title has been recognised, in a similar form to Mabo, in Canada[58]. Likewise, in Amodu Tijani v The Secretary, Southern Nigeria[59] the Privy Council recognised that a "usufructuary" right was vested in the indigenous people of a part of Nigeria, despite the fact that the "radical" title to land was held by the British Crown. In New Zealand, the courts have been vigilant in their protection of the common law rights of the Maori - although in that country the Treaty of Waitangi establishes a special relationship between the Crown and the Moari people which has no equivalent in Australian history.

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58 See, for example, Delgamuukw v The Queen (British Columbia Court of Appeal, Unreported, 25 June 1993); Calder v Attorney-General of British Columbia [1973] SCR 313; Guerin v The Queen [1984] 2 SCR 335; R v Sparrow [1990] 1 SCR 1075.

59 [1921] 2 AC 399 (PC).

Where the particular factual circumstances prevent the recognition of native title, by the application of the established common law principles,[60] native title has often been recognised by legislative enactment.[61] It is surprising to note that, in the United States, the recognition of indigenous native title at common law, once adopted by the Supreme Court, now appears to be denied. It has largely become the domain of the legislature.[62]

Without embarking on any detailed analysis of the developments in other jurisdictions, the point to be made is that, by whatever means chosen in each particular jurisdiction, native or indigenous title has been recognised in most settler and non-settler communities of the common law. In many cases, principles have been adopted similar to those applied in Mabo. The particular factual circumstances sometimes demanded a different result. However, an inference may clearly be drawn that the High Court's decision in Mabo was by no means remarkable - still less revolutionary - tested

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60 See, for example, Campbell v Hall (1774) 1 Cowp 204; 98 ER 1045 (KB) (concerning a claim in Jamaica); In re Southern Rhodesia [1919] AC 211 (PC) (concerning a claim in Zimbabwe). See also Vajesingji Joravarisingji v Secretary of State for India (1924) LR 51 Ind App 357 (PC) (concerning a claim in India).

61 See, for example, discussion of the New Zealand situation by Blackburn J in Milirrpum & ors v Nabalco Pty Ltd & The Commonwealth of Australia (1971) 17 FLR 141 (SCNT) at 234-242, esp at 242. See also P G McHugh "Aboriginal Title in New Zealand" (1984) 2 *Canta L R* 235, esp at 237.

62 See, for example, the discussion by Blackburn J in Milirrpum *ibid* at 209-218. See also McHugh, *supra* n.61, pp 241-243. However, note also that the apparent recognition at common law had as its factual substratum treaties concerning the "purchase" of land from the Indians by the Crown: see Milirrpum *ibid* at 209.

against international developments. Instead, it was in line with the international developments of accepted responsibilities towards indigenous people and it was in line with the responses of many legal system similar to our own, which had long ago abandoned the fiction of *terra nullius*.

To those who say that the creative judiciary ought to have waited for the legislatures of Australia to correct this long standing affront to justice to an unimportant section of the Australian community - the questions come back: why had they not acted before now? How long must the courts wait before discharging their own constitutional duty to ensure justice under the law?.

Conclusions

In my respectful opinion, the **Mabo** decision is commendable in a number of respects. First, the High Court recognised the legitimate claims of indigenous people to native title. It did so overruling the inappropriate application of the common law doctrine of *terra nullius* to the Australian context. That the application of *terra nullius* was inappropriate to inhabited countries - such as Australia undoubtedly was - was explicitly recognised by the Court. No fair minded person, with knowledge of the Aboriginal presence in Australia before British settlement, could seriously object to the decision of the nation's highest court in refusing any longer to build its laws as to land title on a myth and a falsehood.

Secondly, the High Court provided valuable guidance to Australian courts in respect of two crucial aspects of the future development of our common law system. Those are: the proper influence which international law and international instruments may play in the development of the common law; and, the proper circumstances in which long standing rules of the common law in Australia may be overruled.

Thirdly, the decision itself, and the subsequent debate, brings to the fore the important issue of the judicial role in a constitutional democracy. The criticism of the decision upon the basis that the High Court in Mabo usurped a legislative function overlooks the legitimate judicial function of judicial creativity in the law. The High Court has increasingly assumed that function in recent years. Other Australian courts have also followed suit. The creative function invites, to some degree, a rejection of the concept of strict judicial restraint. But creativity in the common law judiciary is by no means a recent development. Ultimately, the duty of the courts of Australia requires of them the attainment of a proper balance between stability and adaptation of the common law to new and ever changing social circumstances. The Mabo decision is consistent with, indeed is an example of, the High Court's performance of its judicial function.

It is clear that Mabo, as it stands now, leaves many questions unanswered. However, those questions did not have to be answered by the High Court in that case. The decision has,

nevertheless, provided a framework for the recognition of indigenous native title. That framework must now be completed, either by subsequent case law or by legislative enactment. At least now Australia has a judicial stimulus to action: to establishing a more just legal system as it affects the Aboriginal people of this continent.

Without **Mabo**, that stimulus might never have been provided. As a civilised people, we need to ponder that fact when we criticise the decision in **Mabo** and the judges responsible for it. In the long perspective of history, **Mabo** will probably be seen as remarkable not for its delivery in 1992 but because it was so long coming in Australian law. It will be viewed as an illustration of the way in which the common law system eventually corrects itself from most errors and rights most wrongs. Being a system based upon human reason and justice it eventually attains those goals. It did so here. The correction creates, it is true, some uncertainty and some opposition at the time. But, far from being a revolutionary usurpation by the judges of legislative power, **Mabo** is an example of the common law in action.

It would be most unfortunate if the High Court of Australia, or indeed other Australian courts, were to respond to the debate which has followed the **Mabo** decision by abdicating or curtailing their legitimate creative functions, returning the courts to a less creative role. Such an outcome would remit the common law of Australia to a condition of

stagnancy, inhibiting the necessary correction of injustices by the courts in the daily performance of their charter.

Views may legitimately differ about whether, in the particular matter of native title in Australia, the judges of the High Court would have been wiser to stay their hands and leave reform to Parliament. But my own assessment is that history will treat the decision kindly. As it will the judges who made it.