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DON DUNSTAN FOUNDATION

THE UNIVERSITY OF ADELAIDE

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LOWITJA O'DONOGHUE

ORATION

OF CONSTITUTIONS,
INTERVENTIONS AND OTHER
MELANCHOLY TALES

Bonython Hall Adelaide

29 MAY 2012

The Hon. Michael Kirby AC CMG

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**OF CONSTITUTIONS, INTERVENTIONS AND OTHER
MELANCHOLY TALES**

THE HON MICHAEL KIRBY AC CMG*

Look up, my people
The Dawn is breaking
The World is waking
To a bright NEW day
Where none defame us
No restriction tame us
Nor colour shame us
Nor sneer dismay.

Kath Walker (Oodgeroo of the Nunuccal)
"Song of Hope".

A TIME FOR REFLECTION

Mid 2012 is a time for serious reflection about the indigenous people of the Australian nation and their relationship with the law. The country has before it the report of a panel on the desirability of change to the *Australian Constitution*, so as to re-express provisions relating to Aboriginal Australians and to insert a preamble, acknowledging their special place in our nation. But in the current fragile political

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circumstances, would any referendum fail and thereby add discouragement to the hopes of indigenous advancement? Hope and fear of failure are the twin companions of this journey.

Looking backwards, it is now 45 years since, on 27 May 1967, a referendum was held that approved amendments to the *Constitution* to remove provisions in the original document that were thought to discriminate against Aboriginals. The referendum was carried by the affirmative votes of the Australian electors. Overwhelmingly they favoured the changes¹. Optimistically, Australians hoped that the goodwill, signalled by such a positive vote, was a sign that a page had been turned forever in the history of this country. We hoped that, with one resolve, we could move beyond the past: beyond the ‘the pain and sorrow² of violence, dispossession, prejudice and disadvantage. We hoped that we would adopt new laws to protect the basic rights, dignity and economic well-being of the indigenous people of Australia.

Since the referendum, and the resulting amendments to the Constitution,³ there have been enactments and court decisions of great importance for the journey that Australians recognised they had to take. The National Apology in the Federal Parliament in 2008 was an important high point, rich in symbolism and grace⁴. So have been amendments to State Constitutions – although these have generally been premised on the express requirement that the amendments did not give rise to justiciable rights⁵.

Some of the court decisions since 1967 have not, in their result, proved favourable to the interests of Aboriginals. Of these, I would mention most particularly *Kartinyeri v The Commonwealth*⁶; *Yorta Yorta v Victoria*⁷ and *Wurridjal v the Commonwealth*⁸, all

¹ The referendum was carried in every State of Australia. The proposal received 89.3% of all votes (and 90.8% of valid votes nationally). This was over 10% more than any other referendum before or since. T. Blackshield and G. Williams, *Australian Constitutional Law and Theory* (2nd ed., 1998 1186). See *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 408[147]; [1998] HCA 22 (*Hindmarsh Bridge Case*).

² A reference to a *Song of Hope* by Kath Walker (Oogeroo of the Nunnucul).

³ Effected by *Constitutional Alteration (Aboriginals)* 1967 (Cth).

⁴ House of Representatives, *Commonwealth Parliamentary Debates* (Hansard), 13 February 2008, 166-177. See also K. Rudd “Federal Government Apologies” (2008) 7 *Indigenous Law Bulletin* 2.

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⁶ (1998) 195 CLR 337; [1998] HCA 22

decisions of the High Court of Australia. The first rejected Justice Lionel Murphy's historical view that the amendment to the Constitution, consequent on 1967 referendum, when it empowered the Federal Parliaments to make laws "with respect to the people of any race ... *for whom it is deemed necessary to make special laws*" was to be read so that the words "*for whom*" were confined to mean 'for the benefit of whom' such laws were deemed necessary⁹. Only Justice Gaudron¹⁰ and I¹¹ were attracted to such an interpretation.

In *Yorta Yorta*, in joint reasons, Justice Gaudron and I dissented (as Black CJ had done in the Federal Court¹²) in relation to the way in which Aboriginals, claiming native title rights, could prove continuity of interest in, the land of their forebears.

And in *Wurridjal*, over my sole dissent, the High Court upheld the constitutional validity of the federal legislation authorising what has become known as the Northern Territory Intervention. This imposes special restrictions and controls on Aboriginals in that territory reminiscent of the special protectorates of the 19th Century colonial patriarchy. By the time that case was decided, in 2009, Justice Gaudron had departed the High Court of Australia. As, indeed, I also soon myself did. *Wurridjal* was the last decision I made, and the last judgment delivered, as a Justice of the High Court¹³

Despite these decisions, and doubtless many others, three judgments of the High Court since the referendum, have generally been hailed, in Aboriginal and other circles, as advancing the legal and economic interests of Australia's indigenous peoples. These were, first, *Koowarta v Bjelke-Petersen*¹⁴ (which upheld the challenge to the validity of the actions of the Queensland Government inconsistent with the *Aboriginal Land Fund Act* and the *Racial Discrimination Act* of the

⁷ (2002) 214 CLR 422; [2002] HCA 58

⁸ (2009) 237 CLR 309; [2009] HCA 2.

⁹ This opinion was first expressed by Murphy J. in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. It was revisited in the *Hindmarsh Bridge Case* but rejected by a majority.

¹⁰ (1998) 195 CLR 337 at 367 [44]; [1998] HCA 22

¹¹ (1998) 195 CLR 337 at 411-414 [155]-[158].

¹² *Yorta Yorta v Victoria* (2001) 110 FCR 244.

¹³ *Wurridjal* (2009) 237 CLR 309.

¹⁴ (1982) 153 CLR 16; 56 ALJR 625.

Commonwealth. Secondly, *Mabo v Queensland [No. 2]*¹⁵ (which upheld the “native title” as a legal possibility in the Australian system of land law). And thirdly, *Wik Peoples v Queensland*¹⁶ (which endorsed the compatibility of “native title”, as upheld in *Mabo* and given effect by federal legislation¹⁷, alongside pastoral leases over vast areas of the Australian continent, granted under State and Territory laws, mostly prior to the decision in *Mabo*).

The *Koowarta* decision was delivered on 11 May 1982. So it is exactly 30 years ago. The *Mabo* decision was delivered on 3 June 1992, 20 years ago. The *Mabo* decision is much better known than either *Koowarta* or *Wik*. On 7 May 2012, the Australian Broadcasting Corporation broadcast a special edition of its *Four Corners* programme dedicated to reflections on *Mabo*. Several university conferences on that decision have also been convened on the topic¹⁸. Yet, without the earlier decision of the High Court in *Koowarta*, it is doubtful that the *Mabo* decision and particularly that in *Wik*, would have had much impact at all.

If, in *Koowarta*, the *Racial Discrimination Act* 1975 (Cth) had been held invalid, the protection of federal law against the threatened “bucket loads” of extinguishment of native title would have been missing. The general principle in *Mabo*, and the specific extension of the ruling in *Wik* to pastoral leases, would probably have been rendered nugatory. State and Territory laws, and State executive action, would quickly have swept the dreams of native title into the dust can of lost hopes. Unless prevented by federal laws,¹⁹ State laws and actions might have attempted to restore the *status quo ante*, before the suggested “heresy” of Eddie Mabo’s native title had arrived on the scene and spread like wildflowers in the Australian legal desert.

At this time of anniversaries, we should therefore remember Eddie Koiki Mabo and his struggles in the courts of Australia²⁰ However, we should also remember the

¹⁵ (1992) 175 CLR 1.

¹⁶ *Wik Peoples v Queensland* (1996) 187 CLR 1.

¹⁷ *Native Title Act* 1993 (Cth).

¹⁸ Including a conference on Mabo at the University of Queensland on 31 May 2012. A feature length film, *Mabo*, premiers in Sydney on 7 June 2012 as part of the Sydney Film Festival 2012.

¹⁹ Or unless the federal law was suspended as provided by the *Northern Territory National Emergency Response Act* 2007 (Cth). See *Wurridjal* (2009) 237 CLR 309 at 372-375 [133]-[143] and 432-434 [332] – [340].

²⁰ Told in Bryan Keon-Cohen, *Mabo in the Courts – Islander Tradition to Native Title – A Memoir* (Chancery Bold 2011, Melbourne).

earlier struggles of John Koowarta to uphold the validity of the *Racial Discrimination Act*. And to use that Act to strike down, as invalid, the inconsistent move of the government of Queensland Premier, Johannes Bjelke-Petersen, to frustrate John Koowarta's search for legal rights in his traditional lands: rights potentially of great cultural importance to the spirits of the Winchyanam people from whom John Koowarta sprang. But also rights potentially important to the economic and social survival of indigenous communities, in the often hostile environment of contemporary Australia.

THE KOOWARTA CASE

The people behind the great test cases that come to the highest courts in the land, are rarely, if ever, known to the judges or, indeed, to the general community. When they have died, respect must be paid to the sensibilities and religious customs and to the inhibitions that exist, in some Aboriginal circles, upon reproducing their photographs and images.

Eddie Koiki Mabo is such an important figure in the history of Australia that it is inevitable that books, filmed documentaries and even feature films will portray him and his family for us to look at his real or simulated features. As is well known, although Eddie Mabo lived to see the first decision of the High Court in his long litigious saga²¹, he died just a few months before the announcement of the second decision that will forever carry his name into the history books.

We listen to Eddie Mabo's story and that of his people. We stare at his image and at the actors as they attempt to reproduce his determination, strength and resilience. Although justice in his case came after his death, he had already won a number of moral victories against discrimination on the grounds of his race. And the same is true of John Koowarta.

²¹ *Mabo v Queensland* (1988) 166 CLR 186.

There is much less public knowledge of this early hero in the struggle of Australia's indigenous peoples to establish legal entitlements over their traditional lands. However, Marcia Langton²² has begun the process of correcting this gap in our knowledge. She has explained the derivation of his name and the links that his name gives to the leech and the dingo; symbols that John Koowarta embraced and affirmed.

John Koowarta wanted support from the Aboriginal Land Fund Commission. It had been established under federal law, enacted by Federal Parliament, with bipartisan support, during the Whitlam Government. John Koowarta asked the Commission to purchase a pastoral lease in North Queensland, on the Archer River in the Wik country. Neither John Koowarta nor his community had the capital to acquire the holding. However, the Aboriginal Land Fund Commission had been established to support this process. He and other members of the clan requested the Commission to acquire the lease so as to enable the land to be used by and for the members of his clan for their traditional purposes and for their immediate contemporary livelihood. The Commission acceded to this request. It set about allocating funds to permit the request to be fulfilled.

The Aboriginal Land Fund Commission was comprised of resolute members, five in number. Under the Act, three were of Aboriginal descent and two were not. However, there was no recorded disagreement within the Commission about affording the funds necessary to fulfil John Koowarta's dream. The excellent and detailed examination by Associate Professor Alexander Riley²³ of the University of Adelaide Law School, has explained the struggle that then unfolded between the Commission and officials of the government of Queensland, led by Premier Bjelke-Petersen. This is a story of the bricks and mortar necessary for the advancement of the dignity and legal and economic entitlements of indigenous peoples in Australia.

²² Marcia Langton, 'Koowarta and His Heroic Struggle for His Rights', in Symposium, Melbourne Law School Turning Points: Remembering *Koowarta v Bjelke-Petersen*, 11 May 2012 (Hereafter *Koowarta* Symposium).

²³ A. Reilly, 'Queensland, the Commonwealth and the Aboriginal Land Fund Commission: The Foundations of *Koowarta*', *Koowarta* Symposium, 2012.

Under the *Land Act* 1962 (Q)²⁴ any sale or transfer of the Archer River pastoral holding was subject to the veto of the Minister for Lands of the State of Queensland. The solicitors for the Commission secured the approval to the transfer of the then leases. They then sought the Minister's permission for the transfer. In the optimistic times that had followed the referendum on Aboriginal rights in 1967, the creation of the Commission, the appropriation of federal funds, the agreement of the current land holder and the desires of John Koowarta, there was an air of optimism and expectation that the Minister's approval would be forthcoming.

However, in June 1976, the government officials of Queensland indicated that the Minister had rejected the transfer. He withheld his permission. He was pressed for reasons, which he took a long time to deliver. This showed once again the unreasonableness of permitting officials, acting under statutory power, a legal exemption from the obligation to provide reasons for their official acts²⁵. The politics of the situation, rather than the state of the common or statute law, ultimately forced the Minister to provide reasons. Those reasons were blunt:

“The question of the proposed acquisition of Archer River Pastoral Holdings comes within the ambit of declared Government policy expressed in cabinet decisions of September 1972, which stated – “The Queensland Government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation²⁶.”

Because this stated policy had been affirmed, and reaffirmed by the Queensland cabinet, John Koowarta concluded that he and his community were being denied an entitlement by reason of their Aboriginal race, colour or ethnic origin. Guided by excellent lawyers, led by the late Ron Castan QC of the Melbourne Bar, (who was later also to act for Eddie Mabo), John Koowarta decided to initiate proceedings in the High Court of Australia, invoking the *Racial Discrimination Act* 1975 (Cth). This federal enactment makes any discriminatory acts based on racial grounds illegal.

²⁴ Section 4(2)

²⁵ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, reversing *Osmond v Public Service Board of NSW* [1984] 3 NSWLR 477(CA).

²⁶ (1982) 153 CLR 16 at 20; 56ALJR 265 at 627, per Gibbs CJ.

John Koowarta's action immediately led the State of Queensland, for its part, to challenge the constitutional validity of the *Racial Discrimination Act*. That challenge, in turn, led Mr Koowarta to argue that the Act was valid as a special law based the races power, as it had been amended in the 1967 referendum²⁷. He also based his argument on the external affairs power²⁸ in the *Australian Constitution*.

A majority of the High Court (Chief Justice Gibbs with Justices Stephen, Aicken and Wilson) rejected John Koowarta's reliance on the races power. However, another majority (Justices Stephen, Mason, Murphy and Brennan) upheld the validity of *Racial Discrimination Act* based on the external affairs power. They did so for reasons which they severally expressed.

The narrowest expression was that of Justice Stephen whose vote it was to prove determinative. It was to the effect that "external affairs" in the Constitution included reference to the public engagement of the national government with other nations, things or circumstances outside Australia. Justice Stephen held that it was not enough that a challenged law should give effect to a treaty obligation. Nor was it necessarily excluded because the subject was not one provided for expressly in a treaty to which Australia was a party.²⁹ By referring to developments occurring in international law since the *Charter* of the United Nations of 1945, Justice Stephen recognised the growing significance for international law of the global prohibition upon racial discrimination. Following the Second World War, such prohibition was a central purpose of international law. As he put it, "...[It is a purpose] which, more than any other, dominates the thoughts and actions of the post-World War II world"³⁰. A similar point was later to be made by Justice Brennan in the second *Mabo* decision, when explaining and justifying his decision and giving reasons in that case³¹.

²⁷ *Australian Constitution*, s51 (xxvi).

²⁸ *Australian Constitution* s51 (xxix).

²⁹ *Koowarta* (1982) 153 CLR 16 at 50; 56 ALJR 625 at 645-6.

³⁰ *Ibid* at 646.

³¹ *Mabo v Queensland [No.2]* (1992) 175 CLR 1 at 42; (1992) 66 ALJR 408 at 42: ["It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional land.] See also *Advisory Opinion on Western Sahara* [1975] ICJR, at 39 85-86.

Normally, judges, lawyers and the public generally are afforded few insights into the modes of thinking of decision makers in courts such as the High Court of Australia, other than those provided by the written reasons delivered by the justices in support of the orders that they propose on judgment day. In the *Mabo* case, however, a few tiny glimmers of extra light were provided as to his reasoning and approach by former Chief Justice Mason in an interview that he recently granted to the *Four Corners* team. In the case of John Koowarta's proceedings a small of number of additional clues have been provided by a distinguished former professor of the University of Adelaide, Professor Hilary Charlesworth³².

When *Koowarta* was decided, Professor Charlesworth was serving as one of the associates (clerks) to Justice Stephen. Justice Stephen's appointment as Governor-General of Australia, to succeed Sir Zelman Cowen, had already been announced by Prime Minister Malcolm Fraser, at the time of argument in *Koowarta*. With customary propriety, Justice Stephen offered to stand aside if any party objected to his participation in the *Koowarta* case. None did. As we now know, had the Queensland Government objected, legal history would have been different. The *Koowarta* ruling, upholding the validity of the *Racial Discrimination Act* on the basis of the "external affairs power", would not have been made, at least at that time. Absent an established foundation for the validity of that Act, the Queensland Government's veto would arguably have stood. Absent a later, equivalent ruling, the barrier revealed in *Koowarta* against unfavourable State Government or Territorial laws or executive actions, unfavourable to Australia's Aboriginals by reference to their race, might well have been legally valid.

In the High Court chambers, the young Hilary Charlesworth endeavoured unsuccessfully to persuade Justice Stephen to change his view that the validity of the Federal *Racial Discrimination Act* could not be founded in the basis of the races power under the Constitution. However, her early interest in international law was stimulated by the broad view that Justice Stephen took of the developing head of constitutional power relevant to that topic. And of the sheer necessity, in the modern

³² Hilary Charlesworth, "Internal and External Affairs: The *Koowarta* case in context", *Koowarta* Symposium, Melbourne, 2012.

world, of arming the Federal Government and Parliament in Australia with full and appropriate powers to deal effectively with the international community, by treaty and otherwise, and with the growing body of global laws.

The fascination with international law, nurtured in the Stephen chambers in Canberra, was to lead Hilary Charlesworth into a distinguished career as a professor of international law. This was recognised most recently by her appointment as a Judge *ad hoc* of the International Court of Justice³³. She contests that there was any disparity between the essential reasoning for the ambit of the external affairs power given by Justice Stephen and that offered by Justices Mason, Murphy and Brennan. Basically, all of them were sympathetic to the necessities of Australia's playing a full role as a member of the emerging system of law. All of them were attentive to the impact of international law on domestic (including constitutional) law. All of them appreciated the obligations of the new world legal order to safeguard peace and security, by defending universal human rights at home and abroad. After the Holocaust and the repeated instances of racial genocide, the majority of the Justices of the High Court of Australia were aware that was at the very core of international law. And that Australia could not be a full participant in the new world order, combating racism, if it were missing from the table because of any constitutional incapacity.

As Professor Charlesworth has observed, the events since the *Koowarta* decision of the High Court have not borne out the optimistic predictions about the relationship between Australia's constitutional law and international law back in 1982, particularly the international law of human rights³⁴. Still, the decisions of the High Court of Australia since *Koowarta* have generally supported the broad ambit of that head of power. They have done so notwithstanding its potential to undermine some of the federal attributes of our Constitution³⁵.

³³ In *Australia v Japan (Whaling in the Antarctic case)*, 2011 (ICJ).

³⁴ See Charlesworth *ibid.* - Cf *Al Kateb v Godwin* (2004) 219 CLR 562 at 589-594 [62]-[72], per McHugh J. at 617-630 [152] – [191], per Kirby J.; [2004] HCA 37. See also *Roach v Electoral Commission* (2007) 233 CLR 162 at 177-179[13]-[19], per Gleeson CJ.; 224-226[181]-[182], per Heydon J.; [2007] HCA 43.

³⁵ See e.g. *XYZ v The Commonwealth* (2006) 227 CLR 532; [2006] HCA 25; *Vasiljkovic v The Commonwealth* (2006) 227 CLR 614; [2006] HCA 40; *Thomas v Mowbray* (2007) 233 CLR 307; [2008] HCA 5; *R. v Wei Tang* (2008) 237 CLR 1 at 40 [84]; [2008] HCA 39.

The lines drawn by the High Court to mark off the *permissible* ambit of “external affairs” from the *impermissible* are often disputed and sometimes disputable³⁶. There is, of course, a point beyond which the “external affairs” power cannot be pushed, appearing as it does in a constitution whose federal character is an essential and over-arching theme. But the importance of the *Koowarta* case was that it upheld the deployment of the “external affairs” power in our constitution in a matter that directly impacted upon the laws and executive activities of State governments. And it did so in the context of basic human rights that had previously been seen as essentially ones of purely national and domestic concerns. Because there will be no going back on this wider vision of the *Australian Constitution* and its engagement in the world, John Koowarta left an indelible mark on the Constitution. The same was true in Eddie Mabo’s case. These insights, necessary to their cases in the High Court, were to prove yet another gift of the indigenous people to the modernisation of Australia’s laws and of the nation’s view of itself.

THE RISKS OF TEST CASES

John Koowarta’s test case, like the later proceedings of the *Wik Peoples* case that it foreshadowed, was decided by the narrowest of margins in the High Court: four Justices to three.

Over the years there have been many similar outcomes where the composition of the court at a particular time has been vital to the outcome of a case. The *Wik* case came up for decision in 1996, the first year of my appointment to the High Court. Had another nominated lawyer been appointed in my stead, the outcome might have

³⁶ See e.g. *XYZ v The Commonwealth* (2006) 227 CLR 532 at 612 [226], per Callinan and Heydon JJ.; *Thomas v Mowbray* (2007) 233 CLR 307 at 402-411 [269]-[294], per Kirby J. See also *New South Wales v The Commonwealth (Work Choices Case)* [2006] 229 CLR 1; [2006] HCA 52. The industrial relations power in the Constitution, s51(xxxv), like the acquisitions power in s51 (xxxi), is conferred subject to a condition. In the first category it is that disputes must be settled by the independent process of conciliation and arbitration. In the second, it is that property may only be acquired “on just terms”. At least since 1921, the High Court of Australia has insisted upon an ample and plenary interpretation of the grants of federal power, without inhibitions adopted by reference to implied or reserved powers of the States said to arise from federalism. See *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129; (1921) 29 CLR 406 (PC). However, previously it had been settled law that the *Engineers* doctrine was modified where the constitutional power was granted subject to a condition. This and much else proved unpersuasive to the majority in the *Work Choices* case. See (2006) 229 CLR 1 at 208 [494] ff.

been different. Legal formalists often like to believe, and even teach, that the law is wholly objective. That its discipline is a pure science. That outcomes are always predetermined. However, experience in Australia, as elsewhere, often shows the contrary. Appointments, especially to a final national and constitutional court, are therefore always important. As Professor Julius Stone, my great law teacher demonstrated in my youth, judges, especially appellate judges, and particularly justices of the High Court, necessarily exhibit legal values in their decisions. Their approaches, opinions and life experiences inevitably influence the outcome of their cases. This happens when the judges are faced (through ambiguity or imprecision) with “leeways for choice” that they must resolve in deciding a case.³⁷

This is why the *Australian Constitution*, like that of other common law countries, rightly reserves the appointment of judges to the elected executive government. It is in this way that governments, reflecting the changing values and aspirations of the Australian people over time, influence judicial outcomes long after the appointing ministers have departed the Treasury Benches. Far from being illicit or objectionable, this is exactly how the Constitution is meant to work. Party political allegiance is, and should be, irrelevant to judicial appointment. But values and philosophy are the very essence of the judicial role.

In Australia, conservative federal governments generally know this well. They give effect to it without embarrassment. It was Deputy Prime Minister Tim Fischer who, after attacking the majority of the High Court for its decision in the *Wik* case, called bluntly for the appointment of “capital ‘C’ conservative[s]”³⁸. This was a call that was fulfilled. On the other hand, governments of the Australian Labor Party have frequently been neglectful, apologetic or casual about the power of judicial appointment. Of course, it is usually easier to find capital ‘C’ conservatives amongst appointable lawyers than it is to find candidates who are, or have become, liberals and legal realists. And, in any case, Labor governments can sometimes be more conservative over values than Coalition ones, as we all know.

³⁷ Julius Stone, *The Province and Function of Law* (Maitland, Sydney, 1946). See also Julius Stone, *Social Dimensions of Law and Justice* (Maitland, Sydney, 1966), 649.

³⁸ Tim Fischer quoted *The Age*, (Melbourne), 6 March 1997, A6; *Courier Mail* 5 March 1997 1; *Canberra Times*, 8 March 1997, 17. Cf M.D. Kirby, “Attacks on Judges – a Universal Phenomenon” (1998) 72 *Australian Law Journal* 599 at 605.

With the approaching departure of Justices Gummow and Heydon from the High Court of Australia, two vacancies present which will have to be filled in October 2012 and March 2013. By our traditions, once the vacancies are filled, the appointed judges have nothing to do with politics or politicians. Yet *Koowarta*, *Mabo*, *Wik* and countless other cases, before and since, reveal the importance of every appointment to the High Court and to other superior courts in Australia. The importance is magnified in our country because the final court comprises but seven human actors. This is smaller than every equivalent national final court, save for New Zealand. Of course, some Labor appointees, after their appointment, turn out to be legal conservatives and formalists. Some Coalition appointments emerge as strong liberals and legal realists. But, the point I make is that there is no escaping the importance of the constitutional power of judicial appointment. If a single one of the majority participating judges in *Koowarta* or *Wik* had held a contrary view, the history of the legal rights of Aboriginal Australians would have been significantly different.

It is this fact that demonstrates how risky test cases can sometimes be for advancing the interests of Aboriginal Australians, including in the High Court. Not only is much dependent on the judges. Much also depends on the other actors in the drama. John Koowarta and Eddie Mabo were fortunate to have had the services of Ron Castan, and his team of lawyers. The Wik Peoples were fortunate in the advocacy of Walter Sofronoff, Sir Maurice Byers, J.W. Greenwood and their team. This is not to say that the opponents were poorly represented; quite the contrary. But governments and wealthy interests can usually secure top lawyers. Vulnerable litigants, with few resources, are often dependent on pro-bono lawyers who are willing to discount, or waive, their fees and to act in the interest of their vision of justice.

Another risk in the equation is sometimes presented by the approaches of governments and other actors in the administration of public institutions³⁹. We now know how important, in the *Koowarta* case, was the decision of the Aboriginal Land Fund Commission to exercise its powers in support of John Koowarta and his

³⁹ Alexander Reilly, *op. cit.* *Koowarta* Symposium, Melbourne 2012.

community. According to recent research, the Commission faced not only the vehement opposition of the Queensland Government against what it saw as the Trojan horse of international ideas invading their constitutional space. It also felt pressure from the Minister for Aboriginal Affairs in the Fraser Government seeking to reduce the tensions over Aboriginal rights that were emerging in Queensland. This was especially significant because of the provisions of their statute, which obliged the Commission to carry out the performance of its functions “under the general direction of the Minister”.⁴⁰ Presumably because the political pressure was never formalised as a legal direction, the Commission stuck to its guns. It pressed on with its challenge. And then the Federal Government’s lawyers felt obliged, as the Commonwealth usually does, to intervene to support the constitutional validity of what the Commission was seeking to do. Which is what then happened.

Counterfactual speculation is possible. What if the federal Minister had given a direction to the Commission to back off, so as to avoid political confrontation with Queensland? What if the Commission, by its statute, had not included a majority of Aboriginal members? What if those members had lacked the courage and determination to press on with, and to fund, the constitutional challenge to the Queensland Government’s stance? Once again, the risks of a test case are revealed. Courage, determination, means and luck are vital ingredients for success.

The timing of litigation, as of legislation, can also be vital. The setting for the significant decisions in *Koowarta*, *Mabo* and *Wik*, was undoubtedly fixed by the overwhelming vote of the electors in the 1967 constitutional referendum. This created a new national *Zeitgeist* – a spirit of the times in the law - to which at least a majority of the Justices were not impervious.

Some Aboriginal leaders have been critical about other ill-timed and poorly mounted challenges presented by private individuals, such as in *Coe v the Commonwealth*.⁴¹ The litigation that challenged the Northern Territory Intervention has also been

⁴⁰ *Aboriginal Land Fund Act 1974* (cth), s5(2). [“The Commission shall perform its functions in accordance with any general directions given by the Minister”]

⁴¹ *Coe v The Commonwealth* (1994) 68 ALJR 110 (Wiradjuri claim); *Coe v The Commonwealth* (2001) 75ALJR 334; *Coe v the Commonwealth of Australia and Government of the United Kingdom* (1978) 52 ALJR 334; 53 ALJR 403.

questioned, on the basis that it was doomed to fail, as legally it did. On the other hand, there may sometimes be merit in a challenge to orthodoxy by individuals approaching the independent courts. The political process in Australia is now substantially controlled by the ever dwindling numbers of Australians who join the major political parties. Because of the power that they exert over elective government, a disjuncture exists between democratic theory and political power realities⁴². The right of individuals to endeavour to subject public power to questioning, and to public and legal scrutiny, is an important feature of freedom. I am far from convinced that the *Wurridjal* case, which contested the constitutional validity of the Northern Territory Intervention, was ill conceived or untimely. The decision and the dissent stand, at least, as a sharp reminder of the vulnerability of Australia's indigenous people to the use of the Constitution, as it is presently interpreted, in ways that specially disadvantage the rights of Aboriginals when compared to those of every other race or ethnicity in the nation. When important principles are involved, the symbolism of subjecting power to judicial accountability can be potent, at least in the long term. So it will prove in due time with the Northern Territory Intervention.

JUDICIAL OR POLITICAL?

Just the same, Eddie Mabo died before his challenge to the rejection of land rights was finally decided. Although John Koowarta succeeded before the High Court, his family's claims to their land were effectively stymied by designation of the land as a national park, by manoeuvres that occurred both before and after his death in 1991. In fact, it was not until 2011 that Premier Anna Bligh in Queensland confirmed the decision to revoke a section of the Mungka Kadju National Park, in preparation for its return the land to John Koowarta's community. And her successor, Premier Campbell Newman, has recently concluded this legal process by presenting the title documents to John Koowarta's community. It took 30 years to vindicate the success that John Koowarta won in the High Court. But finally it happened.

⁴² Sir Anthony Mason, "Democracy and the Law: the State of the Australian Political System" (2005) 43 (10) *Law Society Journal* (NSW) 68 at 69; Cf M.D. Kirby, "Law Reform, Human Rights and Modern Governance: Australia's Debt to Lord Scarman" (2006) 80 *Australian Law Journal* 299 at 312-313.

Nicole Watson, a law lecturer and a member of the Birri Gubba people, has asked a pertinent question: Why should Australia's Aboriginal people place their trust in a legal and judicial process that rarely delivers justice that is either practical or timely?⁴³ She points out that, in the aftermath of *Mabo*, *Yorta Yorta* and other decisions, actual access by Aboriginal Australian's to economic benefits from "native title" has been very difficult to attain. It has been problematic to prove. Expensive to litigate. Contested by powerful interests in the mining and extractive industries. And divisive within the indigenous communities themselves.⁴⁴

Given the dimension of the disadvantages still so clearly faced by urban, regional, rural and remote communities of Aboriginal Australians, why should economic *benefits* accrue to a comparative few just because of the chance consideration of provable ancestry, where the *burdens* in terms of health, housing, education and imprisonment rates are so widespread? Was a different solution to Australia's poor record of indigenous disadvantage not possible? Has the attainment of that different approach been set back, rather than advanced, by the well meaning interventions of the courts in *Koowarta*, *Mabo* and *Wik*? These are serious questions. They demand an answer.

If, in the heady aftermath of the 1967 referendum, we were starting again, what would hindsight suggest that we should have done in Australia? Probably, our Parliament should have struck with bold legislation while the iron was hot. We should have moved quickly to include a preambular acknowledgement of the Aboriginal and indigenous peoples in the *Australian Constitution*. Embarked on a process to create a properly representative, national body of all Australia's indigenes. Plunged into a negotiation of a treaty, which after all, was common British practice with dispossessed peoples or their princes even in Canada and the American settlements. This would probably have happened but for the mistaken belief of the early settlers that Australia was *terra nullius*. Any such treaty would

⁴³ Nicole Watson, "Litigation or Grass Roots Political Activism? Reconsidering Mabo", paper for *Koowarta* Symposium, Melbourne, 2012.

⁴⁴ Marcia Langton, *Op cit.*, *Koowarta* Symposium, Melbourne, 2012.

have addressed the material disadvantages of the indigenous peoples, viewed as a whole and from a perspective of a comparison with the majority population.

In a proper exercise to respect the self determination, promised to every “people” by international law⁴⁵, Australians should probably have created a much larger body with greater resources, than enjoyed by the Aboriginal Land Fund Commission. One with proper powers to establish a national Equality Fund, designed to improve rapidly the conditions of all of this country’s Aboriginals and Torres Strait Islanders. By this I mean all, not just those could trace their ancestry to identified undemised Crown land. With goodwill and great effort, had we done these things immediately after the 1967 referendum, we would probably now be much further advanced. A return to paternalistic, unconsulted, impositions such as the Northern Territory Intervention would then probably have been unnecessary. With a little luck, we might have been able to consign the “races power” in our Constitution to the historic relic that it represents.

But we did none of these things.

This was *despite* (or perhaps even *because of*) the fact that Australia was one of the oldest electoral democracies in the world: with forms of responsible government dating back to 1856. And with legislatures created even earlier. We were paralysed by substantial inertia and hostility that remained just below the surface.

Courts do not initiate litigation. Except in plainly hopeless cases, they have very limited power to rebuff it. This is the background against which we must understand the initiatives taken by the courts in *Koowarta*, *Mabo* and *Wik*. The courts simply respond to cases brought to them for decision by others. Under our conventions, courts could not respond to such claims by conceiving and substituting a better one. And so we entered into the era of land rights cases and highly complex legislation. That is where we now find ourselves. Our solution may not address generically the burden of Aboriginal disadvantage. Yet to John Koowarta, Eddie Mabo, the *Wik* and

⁴⁵ See e.g. *International Covenant on Civil and Political Rights*, 1966, art 1; *International Covenant on Economic Social and Cultural Rights*, 1966, art 1. See also now *Convention on the Rights of Indigenous People*.

their communities, recognition of their land rights has been both precious and long overdue.

The benefits of native title may have proved divisive – and certainly they were less than a panacea for the variety of indigenous peoples often in desperate need. Still there is no doubt that the discovery and affirmation of native title found in *Mabo*, protected from extinguishment by the ruling in *Koowarta*, and extended and clarified in *Wik*, did advance the civil, community and economic interests of Australia's indigenous peoples. Associate Professor Maureen Tehan⁴⁶ illustrates this truth by reference to lines on the map of the continent, drawn from her long experience with the Pitjantjatjara and Ngaanyatjatjarra peoples. Very large segment of the Australian land mass are now subject to recognised native title claims. These may not yet – or ever - embrace the majority of our indigenous peoples. But they do extend to many. Judicial consideration of the outstanding claims is continuing. Responsibility, power and economic benefits are flowing to native title owners and the communities they serve. Whilst it is true that some indigenous people have had it lucky, that is a common feature of life for the rest of Australia's citizens. In Professor Tehan's word, for a legal practitioner like her in the 1980's, working in remote communities, the decision in *Koowarta* was the first step. It changed the 'toolbox' of lawyers, though its impact was to prove varied and sometimes paradoxical.

But sadly, the Federal Parliaments and Governments failed to follow up *Koowarta* and to introduce a grand national response. The hope of the early days was replaced by a resuscitation of the permit system, upheld in *Gerhardy v Brown*⁴⁷. This was followed by special liquor and other controls of a distinctly paternalistic kind - culminating in the Northern Territory Intervention. Viewed in this context, the continued journey taken by the courts in recognising and upholding native title rights is scarcely surprising. Courts in Australia are law-makers, but only in the minor key. They are limited to resolving the legal cases brought through their doors. They cannot invent or change the cases brought to them. But they can bring their independent powers to bear in deciding them.

⁴⁶ Maureen Tehan, "Practising Law and Politics in 1980's Australia: the Liberating Effect of *Koowarta*", *Koowarta* Symposium, Melbourne, 2012.

⁴⁷ *Gerhardy v Brown* (1985) 159 CLR 70.

Nicole Watson says that she yearns for the activism of the tent embassy in Canberra, for street protests and political action by Aboriginal leaders. No one would doubt the importance of such initiatives. They will certainly continue in Australia. But the inescapable fact of the tiny fraction of Australians who are, and identify as, indigenous, in a population often indifferent and sometimes hostile, means that there must be space for both political and legal initiatives. The question is not “either/or”. Each process has its advantages and disadvantages. Whilst the disadvantages of costs, delays and follow up of court orders are illustrated in *Koowarta*, *Mabo*, and *Wik* the advantages, as shown by a number of leading cases, are many;

- * They initiate a process of change which lies outside the compromises and deals effected by those who wield the levers of power in the narrow circle of purely political activists;
- * At their core lie the judicial institutions of a free society. They can draw upon earlier judicial principles to uphold notions of liberty and equality that do not necessarily bend to the pressures of party power-play and political influence;
- * Courts introduce a random element, into the power dynamic. They do this precisely because their process can be initiated by private individuals beyond the “usual suspects” of partisan political activists and because they cannot be controlled by politicians;
- * Courts are more likely to be influenced by notions of justice, equality and principle than the forces of compromise that influence and control purely political decisions;
- * Courts can enforce their orders and generally their decisions will eventually be obeyed and upheld in Australia both for legal and political reasons; and
- * Courts inject into political discourse decisions that themselves then interact with politics. Judgments can necessitate prompt legislative action, just as the *Mabo* and *Wik* decisions of the High Court of Australia led to immediate legislative action on the part of the Federal Parliament.

It is natural for judges and lawyers like me to want to think optimistically about their discipline and its institutions. Some of this euphoria must give way to realism and to

the changing moods of different decades. Nevertheless, we should not write off the courts of Australia as continuing, significant players in the process leading to reconciliation, justice and greater equality for Australia's indigenous peoples. The record of the courts is patchy, it is true. But the stories of empowerment told by Aboriginal Australians who were acquainted with the decisions in *Koowarta*, *Mabo* and *Wik*⁴⁸ reveal how greatly court decisions can act as a personal catalyst. They can help to mobilise self confidence and pride in the leadership and courage of heroes who have gone before. And re-enforce a determination to continue and extend their efforts. Large struggles usually come on multiple fronts. Although the courts will sometimes fail, in Australia they cannot be ignored nor are they destined always bound to disappoint. The record of the past 30 years since *Koowarta*, and that decision itself with *Mabo* and *Wik* establishes the contrary.

RALLYING POINTS AND NEW INITIATIVES

A reflection on the 45 years since the referendum, the 30 years since *Koowarta* and the 20 years since *Mabo* shows, I suggest, this much. Progress in Aboriginal advancement in Australia remains painfully slow. A symbol of this fact can be found in the hugely disproportionate rates of imprisonment of Aboriginal citizens especially the young: Although Aboriginals are just over 2.2 percent of the population they are 50 percent of those in the juvenile justice system⁴⁹. So shocking are these statistics that, exceptionally, the Governor of New South Wales (Professor Marie Bashir), used her office to convene and encourages fellow citizens who demanded action, fresh and radical thinking and real change⁵⁰.

We recognise now that the issues affecting Aboriginal citizens are interrelated, not neatly divided like different departmental and ministerial responsibilities. Homelessness and poor housing is connected with problems of nutrition and access to clean water. These deprivations, in turn, are related to the Aboriginal health crisis.

⁴⁸ Such as was mentioned by Dr Mark McMillan "Because International Law Matters", paper for the *Koowarta* Symposium, Melbourne, 2012: the Justice Reinvestment or Aboriginal Young People campaign.

⁴⁹ "Focus on prevention, not punishment, for young Aboriginal people." *Law Society Journal (NSW)*, June 2-12, 29.

⁵⁰ The Governor of New South Wales, H.E. Prof. Marie Bashir, convened the launch of an initiative at Government House Sydney on 2 May 2012.

The health impediments are interrelated with poor educational opportunities, truancy and despair. Australians of goodwill on all sides of politics want to see action. But the landscape is messy. Initiatives are often disappointing in their outcomes and counterproductive in their execution. In these circumstances, there is room, and a need, for multiple initiatives from all branches of government: legislative, executive and judicial. And from the private sector, the educational institutions, the churches and civil society. Above all from indigenous peoples themselves, from whom must come the solutions to endemic disadvantage, which the rest of the population can support and sustain.

Despite the doctrinal quandaries⁵¹ and the occasional deficiency of the judicial decisions in Australia concerning Aboriginals, the fact remains that court proceedings and their aftermath have constituted an important opportunity for heroes who have emerged from the indigenous communities and been recognised, in full dignity, by their fellow citizens because they have refused to accept indifference and hostility as an answer to legal injustice.

John Koowarta was such a hero. So was Eddie Mabo. So were the *Wik*. And there are other heroes, and many of their faces were seen in the recent documentary about the negotiations that followed the *Mabo* decision of the High Court.

Lowitja O'Donoghue was there at that time. There have been others. Marcia Langton, Roberta Sykes, Mick and Patrick Dodson, Larissa Behrendt, Tom Calma, Noel Pearson and many others.

Increasing numbers of younger heroes are now entering the legal profession and the academy. Political action is essential. Legal action and court judgments can also occasionally quicken the pace. Theoretical and conceptual analysis of where we are, where we have come from, and where we might be in another 30 years is critical. This is the role for everyone to play in this long drawn-out journey. For example ideas for future political and judicial action in Australia will surely come from the reports and recommendations of Megan Davis – a young hero. She was recently

⁵¹ This is pointed out by Prof. Megan Davis and Mr Sean Brennan “Constitutional Landmark, Transition Point or Missed Opportunity?” paper for *Koowarta* Symposium, Melbourne 2012.

elected by the General Assembly of the United Nations as Special Rapporteur for the world – on Indigenous Peoples. We should listen to her and learn from her reports. But you will search the newsprint and electronic media for any report of this appointment, notable for Australia – and a compliment to the indigenous community.

Above all, it is necessary for Aboriginals themselves to speak out; and to be listened to respectfully, attentively. I hope that in my lifetime I do not see another initiative like the Northern Territory Intervention – pressed forward for suspect motives, within eight weeks of a federal election and with no consultation in its design with the Aboriginal peoples and the indigenous communities most affected. And this despite the recommendation that consultation was an absolute prerequisite for an effective and just initiative⁵².

To the heroes of indigenous Australians of the past, like John Koowarta and Eddie Koiki Mabo and to other brothers and sisters: honour and praise. To the heroes who struggled but did not succeed: respects and thanks for standing your ground. To the heroes still amongst us: encourage and recommitment. To the heroes yet to come: a song of hope.

“See plain the promise
Dark freedom-lover!
Night’s nearly over
And though long the climb
New rights will greet us
New mateship meet us
And joy complete us
In our new Dream Time.

To our father’s fathers
The pain, the sorrow.
To our children’s children

⁵² *Wurridjal* (2009) 237 CLR 309 at 398-399 [226]-[232]. Full consultation with the Aboriginal communities affected was a central part of the recommendation of the Northern Territory Committee of Enquiry, whose report was purportedly the trigger for the Northern Territory Intervention.

The bright tomorrow”

Song of Hope
