

**The Mabo High Court judgment: Was it the agent for
change and recognition?**

**Mabo Oration
delivered by
Dr Dawn Casey PSM FAHA**

**presented by the
Anti-Discrimination Commission Queensland**

**and
Queensland Performing Arts Centre
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I would like to acknowledge Jaggera and Turrbul traditional owners past and present. Uncle Bob Anderson.

The Hon Dame Quentin Bryce

The Hon Leanne Enoch, Minister for Housing and Public Works and
Minister for Science and Innovation

Mrs Bonita Mabo and her children Eddie Junior, Celua and Jessie
Commissioner Kevin Cocks.

It is a great honour to be asked to deliver the Anti-Discrimination Commission Queensland's Mabo Oration.

I am proud to be an Aboriginal woman and a descendant of the Tagalaka clan group from Croydon in North Queensland. And, as many of you in the audience will know, there is much pride in being a Queenslander particularly after the great State of Origin win this year.

After the initial joy and excitement at being asked to be the orator I then realized the daunting task before me, knowing I am following in the footsteps of several of the most interesting and recognized Aboriginal and Torres Strait Islander leaders in this country.

Several issues influenced how I approached today's oration to honour Eddie Koiki Mabo. They include this year being the Indigenous Land Corporation's 20th anniversary, and the ongoing debate about how to amend Australia's *Constitution* to recognize our Aboriginal and Torres Strait Islander peoples.

As the ILC was developing its 20th anniversary program, it became obvious that many of our young Aboriginal and Torres Strait Islander people may be aware of the *Mabo* judgment, but not of the negotiated settlement that followed the judgment—what is known as the 'grand bargain'.

This lack of knowledge is of concern to me, especially as more than half of our population are children and young adults.

I have called this oration *The Mabo High Court judgment: Was it 'the' agent for change and recognition*.

Before I answer this question I will revisit the history of the struggles and achievements of Aboriginal and Torres Strait Islander peoples in our pursuit of equality and justice. These struggles have been fought over two basic issues: the right to be equal Australian citizens, and the right to assert our special status as the original owners of this land.

Based on my experience as Director of the National Museum of Australia, I have no doubt some will say that revisiting negative aspects of Australia's treatment of Indigenous peoples is an attempt to make my audience feel guilty. Let me assure you this is not my intention.

My mother, Myrtle Rose Casey, once said to me, 'Never forget where you have come from but you don't have to go back there.' She was talking about a time when we lived in shacks on the outskirts of Cairns.

The 1967 Referendum

In just under two years we will celebrate the 50th anniversary of the 1967 Referendum that enabled the *Constitution* to be amended so the Commonwealth could make laws for Aboriginal people and to delete section 127 which excluded Aboriginal people from being counted in the census.¹

There were significant variations in voting, with Victoria returning the highest 'Yes' (94.68%), compared to Western Australia's (80.95%) and the highest 'No' votes being recorded in the rural areas with the largest Aboriginal populations.²

¹ Torres Strait Islanders were not recognised as a separate Indigenous people at this time.

² Teacher Resource online Victorian Curriculum Assessment Authority 2012.

Myths remain about the actual outcomes of the Referendum and subsequent amendments to the *Australian Constitution*. This is, however, not surprising given the range of organisations and people involved in the preparation of petitions and publicity campaigns.

The campaign for the referendum changes gained momentum over a decade prior to 27 May 1967.

In 1958 a new national organization called the Federal Council for Aboriginal Advancement was established. The majority of members were white and four were Aboriginal people including Bert Groves, who was elected as one of the council's vice presidents, Bill Onus, Pastor Doug Nicholls and Jeff Barnes.

I feel it is important to recognize there have been many in the broader Australian and international community who have been at the forefront of campaigning for the recognition of rights for Aboriginal and Torres Strait Islander peoples. In the fifties and sixties they included Charles Duguid, Ada Broham, Shirley Andrews, Mary Bennett, and Labor MPs Gordon Bryant, Don Dunstan, and Doris Blackburn.

Aboriginal participation in the movement grew to include Joe McGinness and Oodgeroo Noonuccal. Joe was later to become the president of FCAATSI—the Federal Council for the Advancement of Aborigines and Torres Strait Islanders.

Lady Jessie Street of the Anti-Slavery Society played a major role in pursuing constitutional reform and pushing it to the forefront of the fight for Aboriginal rights. Faith Bandler fully supported Street's claims that constitutional change would give Aborigines 'full citizenship rights and nothing less'. However, Shirley Andrews told Street in June 1962, 'it seems to me to be putting the cart before the horse to be concentrating exclusively on the legal aspects of discrimination and ignoring the economic ones'.³

³ Bain Attwood, *Rights for Aborigines*, Allen & Unwin, 2003, p.168

This commentary reflects the confusion around what the campaigners were seeking, namely full citizenship rights, when in fact the *Australian Constitution* does not define Australian citizenship—an issue that is still causing angst among today’s constitutional experts.

In the end FCAATSI agreed to seek the deletion of the words ‘other than the aboriginal race in any state’ from section 51 (26) of the *Constitution*—the so-called ‘race power’. This amendment, Gordon Bryant stated, would enable the Commonwealth government ‘to set up a system... to give special benefits and assistance to Aborigines’.⁴

While the 1967 Referendum ‘Yes’ vote was successful, the then coalition government was reluctant to use its newly acquired constitutional powers. Many of those who had fought long and hard for the Commonwealth to take on the responsibility for Indigenous people were disappointed and dismayed—it was a sign of the many disappointments we would face in the decades to come.

After the Referendum the *Constitution* was left without any mention of Indigenous peoples, though the ‘race power’—an artefact of the infamous White Australia Policy—remained.

In 1998 the High Court in the *Hindmarsh Island Bridge case*⁵ determined that Parliament could use the race power to make laws to the detriment of Indigenous Australians. These issues are informing current discussions about Indigenous constitutional recognition.

The pursuit of equal wages

The sixties also saw a more focused campaign for equal wages and for improvement of the appalling working conditions suffered by Aboriginal people

⁴ Bain Attwood, *Rights for Aborigines*, p.169

⁵ (1998) 195 CLR 337

working in the cattle industry in the Northern Territory, Queensland and Western Australia.

A claim by the Northern Australian Workers Union became a test case when the then Cattle Producers Council sought a full bench hearing by the Conciliation and Arbitration Commission. The cattle council's detailed submission included anthropological evidence asserting that cultural differences made Aboriginal people less useful workers.

Despite urging from FCAATSI, the union failed to call any Aboriginal testimony. Around 40 Aboriginal people attended the hearing and one of them was heard to say to John Kerr, the cattle council's advocate and later Governor-General of Australia, 'you plenty liar'.

In 1966 the commission agreed to the principle of equal wages, but deferred the payment until December 1968.⁶

In 1985 and 1986, a number of Aboriginal people from Palm Island lodged a complaint of racial discrimination with the then Human Rights and Equal Opportunity Commission alleging underpayment of wages by the State of Queensland. The claims covered a period commencing on 31 October 1975 when the Commonwealth *Racial Discrimination Act 1975* came into effect.

In 1996 Commissioner Carter concluded that six of the complainants were 'demonstrably the victims of racial discrimination' by reason of the policy of the Queensland Government. While evidence received by the commission suggested that the loss of income for individual complainants ranged as high as \$21,000, Commissioner Carter decided to award \$7,000 to each of the successful complainants.

In response to the decision in the *Palm Island wages case*, the Queensland Labor Government introduced the Underpayment of Award Wages process

⁶ Bain Attwood, *Rights for Aborigines*, pp.185–6

(UAW) in May 1999. This process made a single payment of \$7,000 available to Aboriginal and Torres Strait Islander people employed by the State on Aboriginal reserves between 31 October 1975 and 29 October 1986, at which point award wages were paid to all workers.

There were a number of features to the UAW process that limited its capacity to compensate people for their true loss, including the \$7000 flat sum; the lack of compensation for underpayment before 1975; the fact that people living on former mission communities, as opposed to state reserves, were not eligible for compensation; and the lack of compensation to the estates of deceased workers. Those receiving money under the UAW process were also required to waive their rights to further compensation.

The vote: Now you have it and then you don't!

Many people now believe that the 1967 Referendum gave Indigenous people the vote. It didn't. The history of the Indigenous franchise is in fact very complicated.

From 1850, the Australian colonies were given the right to govern themselves through their own parliaments. For the most part, colonial laws enabled all men above the age of 21 years to vote in elections.

In 1885 and 1893 respectively, Queensland and Western Australia passed laws that specifically excluded Indigenous people from the vote.

Interestingly, in 1895 South Australia made laws that gave all adults the vote, including all women and therefore all Indigenous women. These laws also applied in the Northern Territory.

The new Commonwealth of Australia came into existence on 1 January 1901. Indigenous people on colonial electoral rolls were able to vote in elections for the new Commonwealth Parliament. However, to protect 'white Australia', the *Commonwealth Franchise Act* of 1902 specifically excluded 'any aboriginal

native of Australia, Asia, Africa, or the islands of the Pacific, except New Zealand' from voting unless they were on the rolls before 1901.

In 1924 there was an embarrassing court case involving an Indian British subject, Mitta Bullosh, who was on the roll to vote in Victorian elections. A court decided that Bullosh should be allowed to vote in Commonwealth elections. To resolve doubts and respond to pressure from Britain and British India, the Commonwealth Government in 1925 extended the franchise to all Indians living in Australia.

There was a partial breakthrough in Indigenous voting rights in 1949. The Commonwealth Parliament granted the right to vote in federal elections to Indigenous people who had completed military service or who already had the right to vote in their state.⁷

Finally, in 1983, the last hurdle in the achievement of equal voting rights was crossed when a Commonwealth Parliamentary Committee recommended that compulsory enrolment should apply to all Australians including Aboriginal people and Torres Strait Islanders.⁸

Let me return to my country

In 1966 Vincent Lingiari became a national figure when he led the walk-off of Aboriginal employees at Wave Hill Station in the Northern Territory, initially to protest poor working conditions and very low wages. The Gurindji strikers established the Wattie Creek Camp and demanded the return of some of their traditional land. What began as an employee-rights action turned into a land rights protest. The strike lasted until 1975, when Gough Whitlam's Government negotiated with the owners of Wave Hill to give the Gurindji people back some of their land, initially in the form of a Crown lease.

⁷ *Commonwealth Electoral Act 1949.*

⁸ Australian Electoral Commission online fact sheet, 14 April 2015

At the same time, the Whitlam Government was developing the Northern Territory land rights act. This was legislated in 1976 by the Fraser Government and remains Australia's most significant land rights legislation.

Land rights across the states has been a mixed bag. Large areas of arid South Australia have been transferred to Traditional Owners. In more intensely settled states, land rights have been more confined, though there is a relatively generous land rights act in New South Wales.

In Queensland in the mid 1980s, in the usual effort to forestall Commonwealth intervention, the Bjelke-Petersen Government gave discrete Indigenous communities 'deeds of grant in trust' over former reserve land. These deeds could be converted to leasehold. In 1991 the Goss Government legislated a more expansive framework for land rights, allowing some claims for land. In Western Australia land rights legislation has been all but non-existent.

The Western Australian Government led by Brian Burke was also instrumental in undermining the Hawke Government's push for national land rights.

After Bob Hawke became Prime Minister in 1983, a national law was planned that would bind all states to five principles that would extend to the rest of Australia some of the benefits available to Aboriginal people in the Northern Territory—including inalienable freehold title, control of mining on Aboriginal land, and access to mining royalty equivalent funds.

The government watered down its proposals and found itself wedged between powerful mining interests on the one hand, and the Northern Territory land councils on the other. The land councils were up in arms at the prospect of losing rights acquired in the land rights act.

National land rights was abandoned. Aboriginal people felt utterly betrayed. Bob Hawke had also promised a treaty—or compact—with Indigenous Australians at Barunga in the Northern Territory in 1987. Another promise that was never delivered.

The responsibilities that come with being Indigenous

Like many Aboriginal and Torres Strait Islander people, I have always believed I had the responsibility to speak out, and to help in any way I could.

I was a little over 13 in the sixties when attending homework classes arranged by the One People of Australia League I explained how my parents were finding it hard to find a house. Not long after we had a house to rent.

Also at that time I began to realize how unfairly I and other Aboriginal and Torres Strait Islander students were being treated. Living in Cairns, I didn't fully appreciate how Australia had developed and continues to develop laws and policies that are racist and not conducive to creating and maintaining a just society. I will return to this issue later.

Though we were all poor, lived in old and dilapidated houses, and were confronted with discrimination on a daily basis, there was a great community spirit. On the one hand there was the agitating for justice and civil rights, and on the other the organization of social activities. Aboriginal and Torres Strait Islander families came together for dances, huge weddings and weekend card games. Our fathers worked as labourers in various places: Cairns City Council, the Queensland Railways, the wharves, sugar cane farms, sawmills. We marched every year in the Labour Day parade.

The family names surrounding me as a child included Ware, Colless, O'Shane, Singleton, Salam, McGinness, Canuto, Jias, Maza, Grogan, Pitt and Dan, to name just a few.

But I digress.

At high school I nominated French as one of my subjects. When the classes were allocated I was surprised to see I was not included in the French classes. I found myself in a domestic science class. This was the last subject I

needed to be taught, given I was the eldest girl at home with three younger brothers, a sister, and had learned to sew, cook and clean by the time I was ten.

In my class there were a large number of Indigenous students. I remember being surprised when one of our teachers said that most of us were destined to work in the cane fields and timber mills. There was no discussion of trades or universities—or for that matter even of becoming a shop assistant. Both my parents saw education as extremely important as they'd had no access to any form of education. But they didn't know how to help me or to engage with the education system. Along the way they had taught themselves to read and write enough for everyday living.

Like many others at that time, I left school before completing grade 10, then had a child and married very young. I earned a living from cleaning and babysitting. But I grew to expect more from my life. I saved money to attend the local business college. With assistance from the newly introduced Aboriginal and Torres Strait Islander Study Grants Scheme, I graduated with distinction in 1974 and accepted a position as a typist/receptionist at the recently opened Cairns office of the Commonwealth Department of Education. The study grants scheme was one of the many Whitlam Government initiatives for Indigenous Australians.

Another was the *Racial Discrimination Act*, the profound significance of which will become obvious later in this speech.

Shortly after joining the department I was advised I could not be appointed permanently because I didn't have a Grade 10 certificate—or Junior as it was then called. In the space of six months I studied by correspondence for the certificate and gained a permanent position in the Commonwealth Public Service.

I became increasingly aware of the racist attitudes in the broader community, the inadequacies of the education system, and of the restrictive Acts and policies of the then Queensland Government.

When attempting to rent my first flat, I was told by the landlord he would not rent to Aboriginal people. When I bought my first wardrobe it had a stamp on the back 'European labour only used'.

By far my most difficult learning experience was to do with my father. He was born just outside of Croydon around 1909. When he reached the age of 65 as shown on his driver's licence he had to retire from the Cairns City Council and applied for the aged pension. He was advised he needed to provide a copy of his birth certificate. This was not possible, as Aboriginal births were not registered at that time. After much discussion with the social security department, I contacted the local state member of parliament. He obtained the department's acceptance of a signed declaration confirming my father was born around the time in question by a suitably qualified person.

My father's mother was Aboriginal and his father a white cattle station owner. There was a family member on his father's side who lived in Cairns, so we visited her to seek her agreement to make the declaration. My father had worked since he was around seven years old, first on the cattle station and then in Cairns where he was highly respected. He had to sit and listen while this old lady considered she could 'possibly' recall he was born at that time and eventually signed the document. I hold no animosity against her for her patronizing words—she was of that era. My father was a man of few words and never told me what he thought, but it left me with an indelible memory and did, I suspect, confirm my unconscious resolve that government policies and systems needed to change.

I had by this time already joined the local Aboriginal Housing Society whose membership included Peter Noble, Clarrie Grogan and Mick Miller. Not too much later I became president of the local Aboriginal and Torres Strait Islander Education Consultative Committee.

As a public servant in the Commonwealth Department of Education, I quickly gathered that recruitment practices and regulations severely limited employment and promotion opportunities for women and Aboriginal and Torres Strait Islander people.

It is important here to acknowledge a chap called Joe Kelly, head of the Aboriginal and Torres Strait Islander Education Secondary and Study Schemes in Queensland in the mid seventies, who strongly pursued the creation of the first 'identified' positions.

In the early eighties I met Clyde Holding, the Hawke Government's Minister for Aboriginal Affairs, when he visited Cairns, and at his request wrote to him outlining the impediments I saw.

This was a time of transformational change in the public service brought about by the *Public Service Reform Act 1984*, sponsored by Minister John Dawkins and public servant Dr Peter Wilenski. In 1984 I went to Canberra as one of a team of two to write Australia's first Equal Opportunity Plan in the Department of Education where Peter Wilenski was the Secretary.

As you can imagine, some long standing public service mandarins were less than happy about these developments, including John Stone who resigned as Treasury Secretary in August 1984. In an online *Quadrant* memoir published in 2013, Stone strongly criticised Dr Wilenski and the *Public Service Reform Act* as 'setting in train the politicization of the Commonwealth Public Service'.

I went to work in various positions in a range of government departments including for a short while as a Senior Executive in Queensland with the state Department of Aboriginal Affairs.

In the early nineties, I was in the Commonwealth Department of Prime Minister and Cabinet where I helped to establish the Council for Aboriginal Reconciliation under the chairmanship of Patrick Dodson and deputy

chairmanship of Sir Ronald Wilson. The process of Reconciliation was intended to conclude with the treaty or compact Bob Hawke had promised at Barunga.

Another of my responsibilities was coordinating the response to the Report of the Royal Commission into Aboriginal Deaths in Custody. The Royal Commission ran from 1987 to 1991. Patrick Dodson was one of five commissioners, with the late Rob Riley leading the Indigenous Issues Unit. The Royal Commission's various reports remain important social and historical documents. They examined not just 99 deaths but also looked at the underlying socio-economic and historical causes of Indigenous incarceration, the legacy of Indigenous dispossession, and racial discrimination since 1788.

In 1994 I received a call from a colleague who had worked with me in the Prime Minister's department. This resulted in my being given the task of coordinating the development, design, and construction of the National Museum of Australia, and building a new home for the Australian Institute of Aboriginal and Torres Strait Islander Studies. In 1999 I was appointed Director of the National Museum.

It was an interesting career choice, not taken lightly. Museums are culturally significant, visited by millions of people including school children. I could see how museums could help to create greater awareness of important issues: looking after the environment, raising the status of women, educating people on the culture and history of Aboriginal and Torres Strait Islander peoples. It also meant I would be in a position to negotiate and speed up the repatriation of Indigenous human remains and secret-sacred objects from museums in Australia and overseas, an issue I had been concerned about for many years.

The National Museum of Australia opened on the 11 March 2001 as the largest single Commonwealth-funded project for the Centenary of Federation

celebrations. We used an innovative construction agreement called 'alliancing', and the project was completed on time and within budget.

Speaking at the opening of the museum, Prime Minister John Howard told the audience that [and I quote]:

What [the Museum] does unusually, and I think very attractively is seek to interpret the history of our nation. Not only in terms of events and objects but also in terms of the life experience of people from different backgrounds, Indigenous people, people who came to this country having been born elsewhere, and people who have been born in this nation ...

It will I think over time change the way in which people view museums, because this museum and what its concepts seek to do is to interpret and relate history and the experience of our country in a somewhat different way. Quite properly and inevitably there will be debate in the future about that way of interpreting our history and that way of relating those events. But importantly, it represents a quite different way of presenting the history and culture of a nation...⁹

The great majority of visitors loved the museum and by the end of 2002 it had exceeded our estimated visitor numbers by several hundred thousand. However, it had also become the battleground for the conservative warriors fighting the culture wars. These included Miranda Devine, Leo Schofield and Keith Windschuttle, as well as the late Christopher Pearson and David Barnett, both of whom were members of the museum council.

In 2003, in his closing address at the Liberal Party National Convention in Adelaide, Prime Minister Howard said:

⁹ 'Transcript of the Prime Minister The Hon John Howard MP Address at the opening of the National Museum of Australia, Canberra', 11 March 2001.

We no longer naval gaze about what an Australian is. We no longer are mesmerised by the self appointed cultural dieticians who tell us that in some way they know better what an Australian ought to be than all of us who know what an Australian has always been and always will be.

And:

... We have ended that long seemingly perpetual symposium on our self-identity that seemed to occupy the 10 years between the middle of the 1980s and the defeat of the Keating Government in 1996.¹⁰

About a month before my contract was due to end, I was called to the Minister's office and advised that, though I had done a very good job in building the museum, my contract would be extended only for one year while the government looked for a person with a PhD. I immediately recalled my high school experience and thought: 'we are now in the twenty-first century and in reality how little had changed'.

I also knew that, for some, I had dared to inhabit their sacred ground—and that simply wouldn't do!

John Mulvaney, distinguished pioneering archaeologist and co-author of the *Prehistory of Australia*, wrote of this time:

Having witnessed the behaviour of Barnett and Pearson towards council members, the director and important international visitors to the museum, including their denial of the validity of oral traditions, combined with their vocal objections to aspects of the Aboriginal exhibits, I am convinced that they were not only disrespectful towards, but completely rejected Indigenous belief systems. Surely this was in conflict with membership of a museum council that is concerned with the traditional culture of Aboriginal people?

¹⁰ 'Transcript of the Prime Minister The Hon John Howard's MP closing Address at the Liberal Party's National Convention in Adelaide 8 June 2003.

Under these circumstances, the failure to renew Casey's tenure is an affront to Aboriginal Australians. This associated with the fact that no Aboriginal has served on the museum's council (or the council of the National Gallery of Australia—despite that institution's extensive collection of Aboriginal art) has profoundly influenced my attitude towards museum affairs, the integrity of which, I believe, has been undermined by a racially biased policy.¹¹

In the National Museum of Australia, we were following the latest in museum practices internationally. Museums and their visitors have benefited greatly from the inclusion of non-mainstream histories: of Indigenous people, of women and of immigrants. To these refreshing perspectives, the National Museum of Australia added interesting architecture and the latest multimedia technology to engage younger audiences.

After my departure, the museum council in 2006 refused to approve the listing on the National Collections Register of a painting by one of our most recognized Aboriginal artists, Queenie McKenzie, on the basis it reflected her interpretation of the Mistake Creek massacre of Aboriginal people, the facts of which were being disputed by the culture warriors. This decision was reversed in 2012, recognising a great work of art and the legitimacy of our Indigenous oral traditions.

Koowarta and Mabo High Court decisions

I will now return to a central theme of this speech, the *Mabo* High Court judgment, and the man who did most to achieve it.

Eddie Mabo was a distinguished Queenslanders from a humble background who has left an enormous legacy. I should also pay tribute to the other plaintiffs: Reverend David Passi, Sam Passi, James Rice and Celuia Mapo Salee.

¹¹ John Mulvaney, *Digging Up A Past*. University of New South Wales Press, 2011. p.300

The *Mabo* judgment would not have been possible without the *Koowarta* decision. In the 1970s, John Koowarta and his community approached the Aboriginal Land Fund Commission for finance to help with the purchase of a pastoral property on Cape York. This was agreed, but required the approval of the Queensland Minister for Lands. When that approval was refused, John Koowarta commenced proceedings against the Queensland Government. In response, Queensland brought a separate action seeking a declaration that the Commonwealth's *Racial Discrimination Act* was invalid. The High Court's subsequent *Koowarta* decision upheld the validity of the *Racial Discrimination Act* by a majority of four to three judges.

Joh Bjelke-Petersen then converted the pastoral lease into a national park. John Koowarta died in 1991 and it took another 20 years for Queensland to make amends. In 2010 Premier Anna Bligh passed a law revoking part of the national park, and in 2012 her successor, Campbell Newman, went up to Cape York with the title deeds and delivered an unexpected apology.

Meanwhile, in 1982, Eddie Mabo and his fellow litigants had commenced proceedings to claim title to Mer—Murray Island—and associated islands and reefs on behalf of Traditional Owners. In an attempt to thwart this claim, the Bjelke-Petersen Government passed the *Queensland Coast Islands Declaratory Act 1985* to extinguish any property rights the Meriam people may have had before its enactment. In 1988, following the *Koowarta* decision, the High Court struck down this legislation because it was inconsistent with the *Racial Discrimination Act*.¹²

In 1992 the High Court decided in *Mabo No 2* that customary native title could be recognised at common law, reversing the longstanding doctrine of *terra nullius*—that the land of Australia had belonged to no one when the British arrived.

¹² *Mabo v Queensland* [1988] HCA 69 (8 December 1988).

In some quarters the decision was condemned for its activism, and the fear of judicial activism currently haunts debates about Indigenous constitutional recognition.

Many benefits have flowed from the *Mabo* judgment and the recognition of native title to land—these benefits have been both practical and symbolic.

I can answer the question posed in the title of my lecture in the affirmative. The *Mabo* judgment **was** an agent for change and recognition, though many issues of Indigenous recognition and rights remain unresolved.

The *Mabo* judgment forced the government to the negotiating table with Indigenous people for the first time in Australia's history. These negotiators included Lowitja O'Donoghue, then chairperson of the Aboriginal and Torres Strait Islander Commission, Mick Dodson, then Aboriginal and Torres Strait Islander Social Justice Commissioner, David Ross of the Central Land Council and Noel Pearson, then of the Cape York Land Council.

The *Native Title Act* was the central part of the national settlement, providing a means to have native title determined as well as other processes.

As part of the complex negotiations to put in place a statutory framework for native title, the Indigenous leaders agreed to the validation of government acts to extinguish native title between 1975, when the *Racial Discrimination Act* came into force, and the date of the *Native Title Act*. This meant land title certainty for other Australians. Their backyards were safe!

Many Indigenous Australians were unlikely to benefit from the *Native Title Act* because their traditional land had already been alienated. So the Land Account—then called the Land Fund—was legislated to provide some compensation for the widespread dispossession of Indigenous peoples since 1788.

In effect there was a 'grand bargain'. This put in place processes to allow for the orderly recognition of native title, and some compensation for

dispossession, without creating widespread uncertainty in the broader community.

Disappointingly, governments have never delivered on a third part of the agreed settlement, the Native Title Social Justice Package.

As with any legislation, the *Native Title Act* has not lived up to the expectations of some of our people. For others, however, the Act has provided access to land and resources, and a right to negotiate about the future of land that is, or may be, subject to native title.

We have seen native title recognised in places that would not have been anticipated when the *Native Title Act* was first legislated. In South-East Queensland the Quandamooka determination in 2011 recognising native title rights over North Stradbroke Island was a game changer, as will be the almost completed Noongar Settlement in south-west Western Australia. These are amazing achievements. They are a testament to the resilience, courage and leadership of Traditional Owners and others involved in these settlements.

Indigenous Land Corporation

I am currently Chairperson of the Indigenous Land Corporation, one of the institutions set up after the *Mabo* judgment.

The ILC has unique independence from government. The corporation has its own source of revenue, the Land Account, the compensatory fund legislated as part of the 'grand bargain'. Its board has a majority of Indigenous directors. They are appointed by the Indigenous Affairs Minister but cannot be directed by the Minister. The ILC currently has the discretion and flexibility to pursue Indigenous benefits over the longer term, at arm's length from political or budgetary cycles.

In December 2013, the Minister for Indigenous Affairs, Senator Nigel Scullion, initiated a review of the two agencies I then chaired: Indigenous Business Australia and the Indigenous Land Corporation. I have no doubt that Minister Scullion wanted the ILC and IBA to be merged. As Opposition Spokesperson on Indigenous Affairs, he was quoted in the media in relation to the appointment of the ILC CEO: 'The [then] Minister,' he said, 'was appointing someone to a position that might not exist after the election.'

The ILC Board saw the ILC/IBA Review as a threat to a basic part of the native title settlement: the Aboriginal and Torres Strait Islander Land Account. In a merged agency, the Land Account's revenues would inevitably be used, sooner or later, for purposes other than those originally legislated.

The ILC's principal strategy in the face of this threat was to develop a draft Bill to amend our governing legislation, the *Aboriginal and Torres Strait Islander Act 2005*.

The draft Stronger Land Account Bill was released in March 2014, and endorsed on the same day by a group of senior Indigenous leaders, including three who had helped to negotiate the *Mabo* settlement and served on the first ILC Board: Lowitja O'Donoghue, David Ross and Noel Pearson.

The Bill developed by the ILC was largely adopted by the Australian Greens, and introduced to the Senate in June 2014. It was then sent for inquiry to a Senate committee.

Senator Scullion does not support the Bill and the Prime Minister has so far refused all the ILC's requests for a meeting.

The Stronger Land Account Bill has five main purposes.

First and foremost, it seeks to protect and strengthen the Land Account by making the Land Account's purpose explicit in the legislation. Secondly it seeks to ensure that funds from the Land Account can be used **only** for land-related purposes.

The ILC Board also supports a request from the Torres Strait Regional Authority that the ILC's remit be extended to sea, in addition to land.

If legislated, the Stronger Land Account Bill would mandate the highest standards of governance and accountability in the ILC, beyond those required in our Act or in the overarching public governance legislation. We want to impose higher standards on the ILC because it is the steward of moneys intended to compensate Indigenous Australians for dispossession and for the trading away of certain of our rights in the post-*Mabo* settlement.

Another measure in the Bill would enable the Land Account's capital base to increase over time, to cater for the land-related needs of a growing Indigenous population.

The Bill also contains some small measures promoting more Indigenous involvement in the ILC and Land Account. This can only be a good thing as we are a tiny minority of the Australian population, dependent on the goodwill of others in a system where the majority rules. The terms of reference for the ILC/IBA Review had asked the reviewers to consider 'appropriate powers of Ministerial direction or Government control'. This set alarm bells ringing, given that our original legislation had enshrined Indigenous control of the ILC.

The government-dominated committee that inquired into the Stronger Land Account Bill has—perhaps unsurprisingly—recommended against its legislation.

I believe this is wrong as a matter of principle. This is good legislation, which any government should adopt. It was offered to the government and the parliament on its merits. Though government established the ILC, its board can legitimately advocate issues of Indigenous rights that relate to the ILC's functions.

The government's own reviewers, Ernst & Young, found that both the ILC and IBA are operating well. They recommended some reorientation of effort, but

considered that the two agencies should remain as stand-alone entities, given their different histories and purposes.

Later this year, however, the ILC Board will no doubt change radically. The terms of most members expire in October, and we are unlikely to be reappointed by the minister.

The Land Account will remain fundamentally vulnerable because Parliament has the power to withdraw it, to legislate its abolition.

It is also important to remember that, at the time, the Liberal and National Parties strongly opposed the historic settlement out of which the ILC and the Land Account arose.

The current constitutional debates

In the past there have been many calls to reach some kind of ‘final settlement’ between the Australian state and Indigenous Australians, including several pushes for a ‘treaty’.

There have also been various ways of representing Indigenous interests within the Australian polity. We have had successive, sometimes simultaneous, models of advisory body, some appointed by government, some with elected representatives, one—ATSIC—with powers over some Commonwealth funding for Indigenous Australians. The abolition of ATSIC was a great loss to Indigenous Australia. There is no doubt ATSIC had faults, however it should have been reformed, not destroyed.

The last Labor Government put in place the National Congress of Australia’s First Peoples, designed to exist at an independent distance from government. While the current government has no power to abolish, it has ceased funding to the congress.

The fact remains that Indigenous Australians are relatively powerless in the face of the Australian state, a point that has been made strongly in recent debates about recognition of Indigenous Australians in the *Australian Constitution*.

There is now a bipartisan commitment to Indigenous constitutional recognition. It is a logical next step in advancing Indigenous recognition and rights; it harks back to the unfinished business of the 1967 Referendum; it would be a landmark in the process of Reconciliation; it would build on the act of recognition that was the *Mabo* judgment.

More than three years ago the Expert Panel set up by the Gillard Government reported on how the *Constitution* might be amended to recognise Indigenous Australians. The former government did not move on the panel's recommendations, and instead legislated an Act of Recognition that has since been renewed by the current government.

Most Australians seem to support recognition of Indigenous Australians, and would surely agree to the removal of the 'race power' from the *Constitution*.

Without strong political leadership, however, inserting new rights in the *Constitution* is likely to be problematic, including any new clause banning racial discrimination, however desirable that may be. This was a key recommendation of the Expert Panel.

There are differing opinions in the Indigenous community, but also an overwhelming consensus that any constitutional change must go beyond symbolism.

Current Australian Government Indigenous policy

Prime Minister Tony Abbott came to power vowing to be the 'Prime Minister for Indigenous Affairs'. There can be no doubt that he wants to achieve better outcomes for Indigenous Australians.

There are, however, a number of fundamental flaws in his approach, including the decision to place Indigenous affairs in his own portfolio.

Many people in the arts sector can attest to the low priority the arts are given when they have been assigned to Premiers' or Prime Ministers' departments.¹³

On the face of it, having the most powerful decision maker in government in charge of your policies and programs looks promising. In reality it doesn't work this way. To be fair to Mr Abbott, he has responsibility for the whole nation. Indigenous people are, as I have emphasized, a minority. Many of our priorities don't sit well with his party's policies, not to say ideologies.

The government's new Indigenous Advancement Strategy has collapsed the Commonwealth's Indigenous programs into five streams, administered by the Department of the Prime Minister and Cabinet. The fraught process of allocating money under these streams has led to well-publicised confusion and distress among Indigenous service-delivery organisations. There has been an overall reduction in funding of around \$500 million.

The Prime Minister's department has been placed in a very difficult position. An intrinsically policy department is performing contortions to administer an unprecedented concentration of disparate Indigenous programs.

Many have also questioned having a Minister for Indigenous Affairs hailing from the Northern Territory's Country Liberal Party. The Country Liberal Party has a very poor record on Indigenous service delivery, and little respect for Indigenous rights. The party also has a long-standing ambition to get its hands on the Northern Territory land rights act. No good will come if that happens.

In February this year the Prime Minister declared that the annual report on Closing the Gap, was 'in many respects profoundly disappointing', and that the nation is not on track to achieve most of targets. The current targets, put in place by the former Labor Government, relate to health, education and

¹³ There have been rare occasions when this has worked well, for example during Bob Carr's tenure as Premier of New South Wales.

employment. A new target on school attendance was added by this government.

Outside government, Indigenous groups have rightly been agitating for a target on incarceration, given that little has improved since the Royal Commission into Aboriginal Deaths in Custody. Indigenous children are still more likely to be under child protection orders, despite the *Bringing Them Home* report.

Property rights and land tenure

Despite a basic political consensus on Indigenous issues, there are policy emphases that are close to the heart of coalition governments. The Liberal and National parties tend to prioritize Indigenous economic development over a purely 'land rights' approach. Coalition ministers have a habit of calling Indigenous Australians 'land rich, dirt poor'.

This brings us to current conversations, exciting but also fraught with risk, about how Indigenous land can be made a more effective base for Indigenous economic development.

There is a widespread perception that communal title on Indigenous land inhibits economic development. Some Indigenous leaders are looking for systematic change in the laws and regulations to which native title and other Indigenous-held land is subject. These issues were discussed at the summit convened by the Australian Human Rights Commission in Broome in May.

There have been various attempts to overcome the perceived tenure problem. The Northern Territory land rights act has been amended to enable the leasing of whole townships to a Commonwealth entity, which can then sub-lease blocks to individuals, families or businesses.

New legislation in Queensland, pushed through in the dying days of the Newman Government, gives Aboriginal councils the option to transfer the tenure of selected lots in their communities to freehold, with the ultimate aim of allowing people to buy and sell their homes.

The Australian Government is currently leading the Council of Australian Government's (COAG) inquiry into Indigenous land administration and use.

Some Indigenous groups, most notably the Northern and Central Land Councils in the Northern Territory, are wary of this inquiry. The land councils support development for Indigenous Australians, but see a single-minded emphasis on economic development as code for undermining Indigenous rights. Minister Scullion has previously attempted, unsuccessfully so far, to introduce a regulation that would weaken the land councils by devolving some of their functions and resources to regional corporations.

The land councils are also worried that Indigenous rights will be trampled in the apparent rush to develop Northern Australia.

There is a view in high-level policy circles within government that land rights **are** part of the 'Indigenous problem'. I wish to refute this view categorically. Land is central to our culture and identity. It is central to our self-determination and to our future.

I strongly believe it is possible to balance maintaining the integrity of Indigenous land rights with a range of economic and social developments.

However, any changes to the nature of Indigenous land titles need to respect and preserve hard-won Indigenous gains. Indigenous people will need first to understand, and then to consent to any changes to their property rights. And important institutions, such as the land councils, shouldn't be threatened or undermined just because they take a stand against some part of the agenda of the government of the day.

Policies aimed at unlocking opportunities must go beyond imposing on Indigenous Australians standard private-property rights that risk the loss of land from the Indigenous estate. We need to look for innovative tenure

arrangements, and governments must meet their responsibilities to invest in the administrative infrastructure to manage these tenure arrangements.

The ILC's experience shows that other pre-conditions for economic development need to be in place. An evidence-based approach to reform would note the different economic-development outcomes occurring across different tenure types, and seek to identify the real common denominators of economic development on Indigenous-held land.¹⁴

Moving the frontier of Indigenous policy

The ILC's political travails over the last year and half are symptoms of wider problems—the way short-term aims affect matters of fundamental importance.

The ILC's attempt, through the Stronger Land Account Bill, to get parliament to protect the Land Account is just one part of a wider struggle. The Northern Territory land councils have their own struggle against a political conviction in some quarters that Indigenous land rights are an obstacle to development, and that the land councils themselves stand in the way of this development.

With the Western Australian Government's announcement that it intends to close many Indigenous communities, poor and remote- living Aboriginal Western Australians are being threatened with another dispossession—they face an object lesson in the power of the state.

In May this year an interesting proposal was put to the Australian Government in the *Empowered Communities: Empowered Peoples* report from a coalition of Indigenous organisations across Australia. This report called for fundamental changes in the relationship between government and Indigenous peoples. National Indigenous policy should recognise 'the primacy of the local nature of peoples and places', the report said, and act to advance 'the empowerment of the families and individuals connected to those peoples and

¹⁴ Dawn Casey, *Continuing the Mabo Legacy: Strengthening Native Title Outcomes*, National Native Title Conference, June 2015.

places'. Indigenous people must assume responsibility for their own lives and futures, and governments should relinquish certain powers—they should stand aside but support Indigenous groups with resources and capacity building.

As the report says, and I quote:

Indigenous leaders and communities trying to take responsibility for improving the future of their peoples are too often stuck in a morass of red tape and policy churn associated with the political cycle and the all-too-temporary whims of successive governments and their ministers.

I can only sympathise with these sentiments. To me it seems that not just Indigenous peoples, but all Australians are suffering from the fraught practice of modern politics—the entrenched short-termism, the way party positions trump evidence, the sheer exhaustion of political language.

Truly innovative changes are needed in Indigenous policy settings, but can our politics deliver this?

In conclusion

I have spoken today on how racial discrimination continues to be central to Australian politics, albeit in a more disguised form than it once was. It continues under the rhetoric of keeping Australia safe, maintaining Christian values, or saving Indigenous people from themselves.

Deep down, I am uneasy about something I call the 'psychology of the nation'.

The *Mabo* judgment itself revealed deep fissures in Australian society. After the *Wik* judgment found in 1996 that native title could survive on pastoral leases, Prime John Howard held up a map of Australia showing the vast areas of Australia that could potentially be taken over by Indigenous

Australians. The Deputy Prime Minister, Tim Fischer, promised 'bucket loads of extinguishment'. The nineties also saw the rise of the One Nation Party.

Since the current government came to power, we have seen an attempt to amend the *Racial Discrimination Act* that would have been detrimental to Indigenous peoples.

This year we have witnessed the vilification of Gillian Triggs, the President of the Australian Human Rights Commission, for standing up for human and minority rights.

In recent weeks we have seen the rallies to 'Reclaim Australia' with banners saying: 'Patriotism is not racism'. I ask you, what Australia are they reclaiming?

AFL crowds have been booing Adam Goodes after his 'invisible spear' dance during the AFL Indigenous round. Commenting on this, Waleed Aly said:

Australia is generally a very tolerant society until its minorities demonstrate that they don't know their place ... The minute someone in a minority position demonstrates that they're not a mere supplicant, we lose our minds.

In this fraught environment, the call for some mechanism to guarantee Indigenous rights, for some Indigenous power within the nation, is surely the correct one. Above all, I think that Indigenous Australians need protection against bad laws and the ideological fixations of governments, of whatever persuasion, or the personal agendas of ministers. There does need to be a Bill of Rights in some form, an Indigenous Bill of Rights or a wider Bill of Rights covering all citizens.

In closing I would like to also pay tribute to all of those who have gone before us in the fight for justice and fairness for Indigenous Australians and indeed all Australians.

I hope the spirit of Eddie Mabo can give us all the courage to deal with the unfinished business that still haunts Indigenous Australia.

Thank you.