2012

Of Constitutions, Interventions and Other Melancholy Tales

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Look up my people
The Dawn is breaking
The World is waking
To a new, bright day
Where none defame us
Nor colour shame us
Nor sneer dismay.

Kath Walker (Oogeroo of the Nunuccal)

'*Song of Hope*'

A TIME FOR REFLECTION

The middle of 2012 is a time for serious reflection about the indigenous people of the Australian nation and their relationship with our law. The country has before it the report of a panel that has enquired into 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 circumstances, would any Referendum fail and thereby add discouragement to the hopes of indigenous advancement?

Looking backwards, it is now 45 years since, on 27 May 1967, a Referendum was held adopting amendments to the Constitution to remove provisions contained 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 changes.[i] 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 sorrow[ii] of violence, dispossession, prejudice and disadvantage'. We hoped that we would adopt new laws to protect the basic rights, dignity and economic wellbeing of the indigenous people of the Australian continent.

Since the Referendum, with the resulting amendments to the Constitution,[iii] there have been enactments and decisions of great importance for the journey that, in the Referendum, Australians recognised they had to take. The National Apology in the Federal Parliament in

2008 was an important high point, rich in symbolism and grace. 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 justicable rights. 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*[iv]*; Yorta Yorta v Victoria*[v] and *Wurridjal v the Commonwealth*[vi], all 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 necessary.[vii] Only Justice Gaudron[viii] and I[ix] were attracted to that interpretation.

In *Yorta Yorta*, in joint reasons, Justice Gaudron and I dissented (as Black CJ had done in the Federal Court[x]) in relation to the way in which Aboriginals, claiming native title rights, could prove continuity in the maintenance of traditional laws and customs in relation to 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 concluded her service in the High Court. As, indeed, I also soon myself did. *Wurridjal* was the last decision I made, and the last judicial order I proposed, as a Justice of the High Court.[xi]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*[xii] (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 Commonwealth. Secondly, *Mabo v Queensland [2]* [xiii] *(*which upheld the existence of 'native title' as a legal possibility in the Australian system of land law). And thirdly, *Wik Peoples v Queensland*[xiv] (which upheld the compatibility of 'native title', as upheld in *Mabo* and given effect by federal legislation,[xv] alongside pastoral leases over vast areas of the Australian continent, granted under State and Territory laws 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 an edition of its *Four Corners* programme dedicated to reflections on *Mabo*. Several university conferences on that decision have also been convened.[xvi] But 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 struck down, as lacking a constitutional foundation for its validity, 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 it in *Wik* to pastoral leases, probably would 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 validly suspended in relation to inconsistent federal laws,[xvii] State laws and actions might have attempted to restore the *status quo ante*, before the suggested 'heresy' of Eddie Mabo's native title had intruded onto the scene and spread like new 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 Australia[xviii] However, we should also remember the 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, Jo 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 Eddie Koiki Mabo and John Koowarta sprang. But also rights potentially important to the economic and social survival of their 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 of religious customs and to the inhibitions that exist, in some Aboriginal circles, upon reproducing their photographs and images.

Still, in the case of Eddie Koiki Mabo, he 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 imagined features. As is well known, although Eddie Mabo lived to see the first decision of the High Court in his long litigious saga[xix], 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.

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 Langton[xx] has begun the process of correcting this gap in our civic 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 nothing more than to have reparative action on the part of the Aboriginal Land Fund Commission. It had been established under federal law, enacted with bipartisan support during the Whitlam Government. John Koowarta wanted the Commission to acquire 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 group requested the Commission to acquire the lease so as to enable the land to be used by and for the members of his Aboriginal group for their traditional purposes and for their immediate contemporary livelihood. The Commission immediately acceded to this request. It set about allocating funds to permit the request to be fulfilled.

Fortunately, 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. But there was no recorded disagreement in the Commission about affording the wherewithal to pay the necessary money to fulfil John Koowarta's dream. An excellent and detailed examination by Associate Professor Alexander Riley[xxi] of the University of Adelaide Law School, has

explained the struggle that then unfolded with the officials of the government of Queensland, led by Premier Bjelke-Petersen. This is the story of the bricks and mortar necessary for the advancement of the dignity and economic and legal entitlements of indigenous peoples in Australia.

Under the *Land Act* 1962 (Q)[xxii] any sale or transfer of the 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 lessees. They then sought the Minister's permission. In the optimistic times that 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 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 then 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 acts[xxiii]. The politics of the situation, rather than the then 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 isolation.[xxiv]

Because this stated policy had been affirmed and re-affirmed by the Queensland cabinet, John Koowarta concluded that he and his group 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 also later 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 enactment makes illegal any discriminatory acts based on racial grounds.

John Koowarta's action immediately led Queensland, for its part, to challenge the 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 on the races power, as it had been amended in the 1967 Referendum.[xxv] He also based his argument on the external affairs power[xxvi] 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. But 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 differently expressed.

The narrowest expression was that of Justice Stephen. This 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.[xxvii] By referring to developments 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. 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'.[xxviii] A similar point was later to be made by Justice Brennan in the second *Mabo* decision, when explaining and justifying his decision and reasons in that case.[xxix]

Normally, other 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 judges 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 vignettes have been provided by a distinguished former professor of the University of Adelaide, Professor Hilary Charlesworth.[xxx]

When *Koowarta* was decided, she was serving as one of the associates (clerks) to Justice Stephen. His 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 *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 sustained.

In the High Court chambers, the young Hilary Charlesworth was unable 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. But her early interest in international law was stimulated by the broad view that Justice Stephen took of the developing head of power on that topic. And of the sheer necessity, in the modern 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 rules.

The fascination with international law, nurtured in the Stephen chambers in Canberra, was to lead Hilary Charlesworth into a most 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 Justice.[xxxi] She contests that there was any disparity between the essential ruling of the ambit of the external affairs power made by Justice Stephen and that offered by Justices Mason, Murphy and Brennan. Basically, all of them were sympathetic to the necessities of Australia playing a full role as 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 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 was 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 rights.[xxxii] 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 the potential of that head of power to undermine some of the past federal attributes of our Constitution.[xxxiii]

The lines drawn by the High Court to mark off the *permissible* ambit of 'external affairs' from the *impermissible* are sometimes disputed and disputable.[xxxiv] 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 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 inerasable mark on the Constitution. The same was true in Eddie Mabo's case. These were to prove yet another gift of the indigenous people to the necessary 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* 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 other nominated lawyers been appointed in my stead, the outcome might well have 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 always important. As Julius Stone, my great law teacher demonstrated in my youth, judges, especially appellate judges, 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' which they must resolve in deciding a case.[xxxv]

This is why our 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 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 meant it to work. Party political allegiance is and should be irrelevant. 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]'.[xxxvi] 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 Labor governments can sometimes be more conservative over values than Coalition ones, as we all know.

With the approaching departures 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 individual appointed 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 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 be sometimes 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 is sometimes presented by the approaches of governments and the determination of actors in the administration of public institutions.[xxxvii] We now know how important, in the *Koowarta* case, was the resolve of the Aboriginal Land Fund Commission to exercise its powers in support of John Koowarta and his 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 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'. 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 come in and support the constitutional validity of what the Commission was seeking to do. Which is what then happened.

Counter factual 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 shown. Courage, determination, means and luck are vital ingredients of success.

The timing of litigation, as in 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 law - to which at least a majority of the judges were not impervious.

Still, 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*.[xxxviii] The litigation that challenged the Northern Territory Intervention has also been questioned, on the basis that it was doomed to fail, as legally it did. On the other hand, there may sometimes be merit in the fact that individuals challenge orthodoxy by 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 real power they exert over elective government, a disjuncture exists between democratic theory and political power realities.[xxxix] 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 manoeuvres that ensued 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 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 came.

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 process that rarely delivers justice that is either practical or timely?[xl] She points out that, in the aftermath of *Mabo*, *Yorta Yorta* and other decisions, actual access by Aboriginal Australians to economic benefits from 'native title' had 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.[xli]

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 Constitution. Embarked on a process to create a national, properly representative, 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 British administrators that Australia was *terra nullius*. Any such treaty would 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 of the self-determination, promised to every 'people' by international law,[xlii] Australians should probably have created a much larger body than 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 who could trace their ancestry to specific 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 aberration 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 responded 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 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 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 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 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 Tehan[xliii] 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 segments 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 1980s, 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.

Sadly, the Federal Parliament and Government 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 *Gehardy v Brown.*[xliv] And 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 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 them independent powers to bear in deciding them.

Nicole Watson says that she yearns for the activism of the tent embassy in Canberra, for 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, or identify as indigenous, in a population often indifferent and sometimes hostile, means that there must be space for both political and legal initiatives. The questions 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* and *Mabo*, 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 operate the levers of power in the narrow circle of purely political activisms;

> 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 activist 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;
>
> 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 necessitated immediate legislative action on the part of Federal Parliament.

It is natural, of course, for judges and lawyers like me to want to think optimistically about their discipline and its institutions. Some of their 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 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*[xlv] 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 refection 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: But 2% of the population, and the 48% of those incarcerated. So shocking are these statistics that, exceptionally, the Governor of New South Wales (Professor Marie Bashir), used her office to convene and encourage fellow citizens, who demanded action, fresh and radical thinking and real change.[xlvi]

We recognise now that the issues affecting Aboriginal citizens are interrelated, not neatly divided like different departments 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 health crisis. 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. The 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, out of whom must come the solutions to endemic disadvantage, which the rest of the population can support and sustain.

Despite the doctrinal quandaries[xlvii] 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 to emerge from the indigenous community and to be 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 are the Wik. But 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 is foremost of these. And there have been many others. Marcia Langton, Roberta Sykes, Mick and Patrick Dodson, Larissa Behrendt, 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 judgements can occasionally quicken the pace. Theoretical and conceptual analysis of where we are and 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. Ideas for political and judicial action in Australia will surely come from the reports and recommendations of Megan Davis – a young hero. She was recently elected by the General Assembly of the U.N. as Special Rapporteur for the world – on Indigenous Peoples. We should listen to her and learn from her reports.

Above all, it is necessary for Aboriginals 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 communities most affected. And this despite the recommendation that this was an absolute pre-requisite for an effective and just initiative.[xlviii]

To the heroes of indigenous Australians of the past, like John Koowarta and Eddie Mabo and other brothers and sisters: honour and praise. To the heroes who struggled but did not succeed, respect and thanks for standing your ground. To the heroes still amongst us – encouragement and recommitment.

> To our father's fathers
> The pain, the sorrow.
> To our children's children
> The bright tomorrow

Song of Hope

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i 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*).

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

iii Effected by Constitutional Alteration (Aboriginals) 1967 (Cth).

iv (1998) 195 CLR 337; [1998] HCA 22

v (2002) 214 CLR 422; [2002] HCA 58

vi (2009) 237 CLR 309; [2009] HCA 2.

vii 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.

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

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

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

xi *Wurridjal* (2009) 237 CLR 309.

xii (1982) 153 CLR 16; 56 ALJR 625.

xiii (1992) 175 CLR 1.

xiv Wik Peoples v Queensland (1996) 187 CLR 1.

xv Native Title Act 1993 (Cth).

xvi Including a conference 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.

xvii As was 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].

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

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

xx 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).

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

xxii Section 4(2)

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

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

xxv Australian Constitution, s51 (xxvi).

xxvi Australian Constitution s51 (xxix).

xxvii *Koowarta* (1982) 153 CLR 16 at50; 56 ALJR 625 at 645-6.

xxviii *Ibid* at 646.

xxix *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.

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

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

xxxii 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.

xxxiii 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.

xxxiv 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 E*ngineers* doctrine was modified where the constitutional power was granted subject to a condition. This and much else was not determinative in the *Work Choices* case. See (2006) 229 CLR 1 at 208 [494] ff.

xxxv 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.

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

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

xxxviii 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.

xxxix 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.

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

xli Marcia Langton, above n20, *Koowarta* Symposium, Melbourne, 2012.

xlii 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 of Rights of Indigenous People.

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

xliv Gerhardy v Brown (1985) 159 CLR 70.

xlv Such as was mentioned by Dr Mark McMillan 'Because International Law Matters', paper for the *Koowarta* Symposium, Melbourne 2012.

xlvi 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.

xlvii 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.

xlviii 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