

# Review Article

*Mabo: What the High Court Said* by PETER BUTT and ROBERT EAGLESON (The Federation Press, 1993) pp 1-96

*The Mabo Decision* by RICHARD H BARTLETT (Butterworths, 1993) pp 1-174

*Essays on the Mabo Decision* (Law Book Company, 1993) pp 1-204

Alan Sullivan QC

The decision of the High Court of Australia in *Mabo v Queensland (No 2)* ('*Mabo No 2*') is one of the most important and significant decisions of that great and distinguished Court. It is also one of its most controversial and, without much doubt, its most publicised. It has been subjected to an avalanche of oral and written commentary, analysis and criticism, much of it ill-informed, distorted or even downright hysterical.

In such a climate it is refreshing and important that respected and well-qualified writers have attempted to present, explain and analyse the decision and its possible implications in a balanced, accurate and, above all, readable way. The last quality is essential because the decision affects all Australians and all Australians must have the opportunity to have access to explanations of the decision which are not only legally accurate but also readily digestible.

Each of the three publications the subject of this review are commendable examples of such attempts. Each has a different approach and style and, probably, a different market in mind. However, subject to some qualifications, a lay person or lawyer who read any one of them would be presented with a clear, concise and accurate explanation of the decision in *Mabo No 2* and would be much better informed about that decision and its ramifications than he or she otherwise might be.

With these prefatory comments, it is desirable to discuss each of the three works individually.

*Mabo: What the High Court Said*

This is a book which is expressly modest in ambition. It is not primarily directed at 'legal experts'. Rather, its intended audience is the general public. Nor

do the authors seek to interpret or comment upon the High Court's decision. Rather, their goal is explained and stated in these terms:

We are concerned that the discussion in the community on the Mabo case should proceed on the basis of a clear and factual understanding of the High Court judgment. To promote a balanced understanding, we have sought to let this book simply set out what the judges said.<sup>2</sup>

The book adequately fulfils these aims. The careful lay reader would, in this reviewer's opinion, have a clear and factual understanding of *Mabo No 2* as a result of reading this book. In a readable and convenient way it sets out, by topic, what each of the judges said on each particular aspect of the case thus exposing not only the similarities in approach but also the differences.

This approach is also of considerable assistance to 'the legal expert' although such a reader is not the book's primary target. However, for any lawyer proposing to take home the 217 page judgment 'for bed time reading' it would be extremely useful to read Messrs Butt and Eagleson's book first. He or she will then much more quickly and readily follow the complexities and subtleties of the individual judgments themselves.

For the legal reader, however, the book has a number of minor drawbacks and is no true substitute for reading the decision itself. First, it would have been more useful for such a reader if brief references had been made to the page number of the judgment from which the various extracts are taken. Secondly, the format of the book (dividing the case into its various segments and then within each segment setting out the various views of the judges) tends to deprive the individual judgments of their cohesiveness and symmetry. Brennan J's judgment, in particular, suffers by this treatment. When read as a whole it is, with respect, a brilliant piece of legal reasoning, the sum of the whole being greater than its individual parts. That overall impression is not as readily revealed by its treatment in this book.

Such criticisms, however, are minor ones especially in the light of the author's aims. As indicated, those aims are well and truly achieved and their book is one which should, truly, 'promote a balanced understanding' of the decision in *Mabo No 2*.

### *The Mabo Decision*

Professor Bartlett's book comprises two parts. First, a readable and reasoned commentary on *Mabo No 2* in which the author displays his considerable knowledge and expertise on the topic of native title and, secondly, the text of the actual decision (although, regrettably, the text as reported in the Australian Law Reports not the Commonwealth Law Reports). Self-evidently, it is a book intended, primarily, to be read by lawyers although the commentary is expressed

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2 P Butt and R Eagleson *Mabo: What the High Court Said* (1993) Federation Press, 7.

with such clarity and in such a style that a much wider audience would also gain valuable insights into this area of the law.

The authors commentary is a particularly valuable one because it places *Mabo No 2* in its proper perspective — not as a decision of the High Court made in a vacuum by inventing new law — but rather as a decision of the Court which brings Australia, albeit belatedly, into line with other common law countries such as the United States of America, Canada and New Zealand in recognising common law native title. The author, whilst obviously not critical of the result in *Mabo No 2*, is critical of some of the reasoning. Not surprisingly, his criticisms are well-expressed and have some substance. Many, however, including this reviewer, would question the correctness of some of that criticism, especially that contained in paragraphs 5.3 and 8.2 of the commentary where the author condemns, as being irrelevant, the emphasis of the majority on the rejection of the concept of 'terra nullius' and appears to be critical of the Court for allegedly engaging in 'rhetoric' and 'emotive pronouncements'.

Overall, however, the author's commentary is a lucid, thought-provoking and very learned one. The book is an excellent first reference for any lawyer wishing to know more of the concept of common law native title and wishing to gain an insight into the High Court's decision in *Mabo No 2*.

### *Essays on the Mabo Decision*

As a collection of (mainly) legal essays on a particular topic, this is a good one. It gives vent to a wide spectrum of views on a variety of the issues in, and implications of, *Mabo No 2*. It is a book, however, primarily for the initiated as most of these contributors assume some knowledge of the topic on the part of the reader.

Each of the essays offers a considerable amount to anyone who thinks of *Mabo No 2* not as the last word on native title rights in Australia, but rather as the catalyst for future developments. I found of particular interest and enjoyment the contributions of Ms Phillips, Ms Sharp, Father Brennan, Mr Hanks and Mr Gray QC. Starting from a different viewpoint, I was compelled to acknowledge the force of some of the points made by Mr Mansell, Ms Hocking and Professor Detmold. Time and space do not permit detailed discussion of each essay in this collection except to say all justify the Publisher's Note by making "a significant contribution to the debate surrounding this important decision".

### **Concluding Remarks**

It has been a pleasure to review each of these books. They are well-written, balanced and informative. Most importantly, they put *Mabo No 2* in a proper perspective and responsibly analyse its possible implications. Collectively, I think, they justify and explain the final comment of Mr Gray QC in his contribution to *Essays on the Mabo Decision*:

*Mabo* is a decision which should be celebrated by all Australians as a clear indication that the pre-eminent legal institutions in this country is one with the courage to reject unsound legal fictions, no matter how difficult that task may be, and to give effect to the realities that once prevailed in Australia and to those which presently exist.<sup>3</sup>