The Mabo debate - a chronology

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Executive Summary

The sixteen month-old and still-running Mabo debate is one of the most necessary, important and overdue debates in Australia's history.

This paper is intended to complement other publications on Mabo-related issues by providing a summary, within a chronological framework, of widely reported views and developments.

The centre of the debate has continually changed.

In June and July 1992 hopes were high that the Mabo decision would deliver a new deal for Australia's Aboriginal people.

In August and September 1992 the first dissenting voices started to be heard, some saying the decision offered too little, others too much.

In October-November 1992 ideas of how best to respond to the decision started to be aired and the government announced a time-table.

In December, January and February debate focused on the issue of native-title and mining in the Northern Territory.

In March, after the election, pressure from different quarters started to be brought to bear on the Government and in April while some urged immediate validation of titles, Aboriginal representatives offered a Peace Plan.

In May it became apparent that the Government was prepared to disapppoint Aboriginal people and guarantee large mining projects, such as at McArthur River.

In June a spate of land claims around the country and manoeuvering before and after the Council of Australian Governments meeting fueled the debate considerably.

In July more land claims, talk of threats to back-yards, attacks on the High Court and calls for a referendum took the debate to a low point.

In August the focus of the debate moved quickly from the Aborigines' Eva Valley statement to the Wik/Comalco, Keating/Goss dispute and the Federal Cabinet decision to validate all past grants against native title claims.

In September the Government's draft legislation, while refocusing the debate, highlighted the ground still separating protagonists (e.g. the

extent to which: native title should be preserved/extinguished; States and native-title should be involved in development decisions; the *Racial Discrimination Act 1975* should be rolled-back; and land-management should be part of a wider package).

In early October negotiations on the detail of the proposed Native Title Bill presented the Government with a dilemma- whether to accomodate Aboriginal, Democrat and Green concerns, thereby guaranteeing the passage of a bill but alienating some States, or whether to continue to court the States, thereby making eventual Coalition support for the legislation conceivable but jeopardising the reconciliation process.

The direction the debate takes from here on could determine whether it ends up facilitating a reconciliation between Aboriginal and non-Aboriginal Australians or finalising the dispossession of Australia's indigenous people.

Introduction

> The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land (Brennan J., lead judgment in *Mabo v Queensland No.2*)

The sixteen-month-old and still-running Mabo debate is one of the most important and overdue debates in Australia's history. The direction the debate takes could determine whether it ends up facilitating a reconciliation between Aboriginal and non-Aboriginal Australians or finalising the dispossession of Australia's indigenous people.

This paper is designed as a reference tool. It offers a summary, within a chronological framework, of widely reported views and developments. Where a contribution to the debate was reported in many national print and electronic media, sources have not been footnoted (the date of the contribution can easily lead readers to a source). At the end of the paper there is an index to participants in the debate.

The paper is intended to complement existing publications on Mabo-related issues. It may usefully be read in conjunction with several other Parliamentary Research Service publications- this author's *Aboriginality and Aboriginal Rights in Australia*, 4 June 1992, for the pre-Mabo history of Aboriginal rights; Merrin Mason's *The Mabo Case - Native Title Ousts Terra Nullius*, 15 June 1992, for a summary of the decision; and Anne Twomey's *A guide through the Mabo maze*, 8 July 1993, for an examination of the legal implications of the decision. For collections of learned articles on a range of Mabo related subjects see *Mabo: A Judicial Revolution*, ed. M.A.Stephenson and Suri Ratnapala, University of Queensland Press, 1993, the *University of New South Wales Law Journal*, vol.16, no.1, 1993: *Indigenous Peoples: Issues for the Nineties* and the *Aboriginal Law Bulletin*, vol.3, no.63, August 1993.

June - July 1992: high hopes

On the 3 June 1992 the High Court handed down what has popularly become called 'the Mabo decision'. The decision was warmly, or at least thoughtfully, received in nearly all quarters. Mr Robert Tickner, Minister for Aboriginal and Torres Strait Islander Affairs, predicted the decision would become one of the most analysed and dissected decisions in the history of the High Court. The Chair of the

Council for Aboriginal Reconciliation, Mr Pat Dodson, said the decision was received by the council 'in a spirit of joy and celebration', that it 'should not panic the mining or pastoral sector' and that discussion should lead to a national convention in two years time. The Chair of the Aboriginal and Torres Strait Islander Commission (ATSIC), Ms Lois O'Donoghue, believed there was 'now a strong moral obligation to ensure that Australia's indigenous peoples who have maintained links to their traditional lands are given every opportunity to have those links recognised' and urged all groups to take 'a co-operative and constructive approach to resolving the differing interests in land'. The Australian Mining Industry Council (AMIC) was thankful the Court clearly distinguished between Crown sovereignty over land and ownership of land title and expressed the belief that the decision would not have a dramatic impact on the resource sector. Editorials across the country lauded the overthrow of the fiction of *terra nullius*. Academics such as Professor Henry Reynolds, Dr Peter Jull and Professor Garth Nettheim, and prominent church advocates of Aboriginal rights, such as Father Frank Brennan, were all optimistic that the decision set the foundations for more just land dealings in Australia (just as the Calder decision had done in Canada twenty years earlier) and for a possible reconciliation between black and white Australians.[1]

August - September 1992: the first dissent

While some such as the Aboriginal lawyer and activist Michael Mansell argued that the *Mabo* decision offered too little, 'something for those who are grateful for small blessings, but nothing in the way of justice',[2] others started to come out arguing that it offered too much. In August the Managing Director of Western Mining, Hugh Morgan, started airing his view that reconciliation was an 'exercise in the politics of guilt', that terra nullius should remain the legal foundation of Australian settlement, that the High Court had become activist and that it was somehow improper for Father Frank Brennan and his father the High Court Judge to both be working on Aboriginal issues. On 14 September the Melbourne barrister Dr Colin Howard suggested in the *Sydney Morning Herald* that the Mabo case provided 'a legal

1 See such articles as Henry Reynolds, 'Black-White Watershed', *The Weekend Australian*, 6-7 June 1992; Peter Jull and Garth Nettheim, 'A new start for race relations', *Financial Review*, 10 June, 1992; Frank Brennan, 'Terra nullius no more', *Eureka Street*, v.2(6), July 1992, and Garth Nettheim, '... As Against the Whole World', *Australian Law News*, v.27(6), July, 1992.

2.Mansell, Michael. 'The Court gives an inch but takes another mile', *Aboriginal Law Bulletin*, v.2(57), August, 1992.

framework for creating a nation within a nation, complete with an Australian version of homelands'.

October - November 1992: the first government responses

In October an Inter-Departmental Committee (Department of Prime Minister and Cabinet, Attorney-General's, ATSIC, Department of Primary Industry and Energy) released a discussion paper entitled *The High Court Decision on Native Title* in which the possible implications of and possible Government responses to the Mabo decision were explored.

In the first week of October speakers at two conferences in Darwin repeatedly touched on the subject of Mabo. The first conference was entitled 'Surviving Columbus: The Indigenous Environment Today and Tomorrow', the second 'Constitutional Change in the 1990s'. At the latter, Charles Perkins, former head of the Department of Aboriginal Affairs, called not for reconciliation, but sovereignty, national land rights and a treaty, while Pat Dodson suggested nothing would happen without reconciliation and education and noted that Mabo had the potential to both facilitate a reconciliation and to intensify conflict.

On 12 October the managing director of Western Mining, Hugh Morgan, argued that given the nature of Aboriginal society in 1788 Australia had indeed been *terra nullius*, that the High Court's decision 'put at risk the whole legal framework of property rights throughout the whole community' and that the Commonwealth should repeal all or most of the *Racial Discrimination Act 1975* so that the states could extinguish native title. Among those who openly supported Mr Morgan's comments were the former Senator John Stone who labelled the High Court's argument's 'emotional and political'. The commentator Padraic McGuiness who, on 17 October, while describing the overthrow of the *terra nullius* doctrine as 'probably a good thing', suggested that there should be a referendum to overrule the High Court's decision and forestall years of costly litigation. The referendum proposal was rejected by both the Federal Government and Opposition.

On 18 October the Northern Territory (NT) Opposition leader, Brian Ede, called upon the Prime Minister to instigate a major round of negotiations immediately and on 20 October the National Farmers' Federation (NFF) called for the Federal Government to legislate to clarify the High Court's decision.

On 27 October the Prime Minister announced the creation of a Mabo unit within the Department of Prime Minister and Cabinet (PM&C) and the commencement of an 11- month period of consultation which would culminate in a progress report before March 1993 and a final report by September 1993. The announcement was welcomed by ATSIC, the NFF and the then Opposition spokesperson on Aboriginal Affairs, Dr Wooldridge. The Government also announced an intention of supporting strategic test court cases, but Dr Wooldridge said a Coalition Government would not allow the Hight Court to 'set the pace' on land rights in the absence of legislation.

On 29 October the Northern Land Council (NLC) acknowledged some possibility of supporting native title claims over about 20 per cent of Arnhem Land, including the Nabalco bauxite mine at Gove, so that traditional owners would have the opportunity of negotiating an agreement with Nabalco. The NLC was erroneously reported as having actually made a land claim but no writs were ever issued.

On 19 November the ATSIC Board of Commissioners endorsed an earlier response to Mabo in which it welcomed the decision, called on Governments and all Australians to acknowledge the end of the doctrine of *terra nullius* and urged all to take a co-operative approach to the resolution of conflicting land interests. The Commission also agreed to help the plaintiffs in the nearly two-year-old Utemorrah case with the cost of presenting the evidence supporting their claim to the Kimberley region in the Western Australian Supreme Court.

Also in November a lengthy essay expressing concern at the Mabo decision was published in *Mining Review* v.16(5). Another three essays were published in the Institute of Public Affairs' (IPA), *Mabo and After*. Peter Durack, the former Senator for Western Australia (WA), explored the possible legal, economic and political consequences of the case. Ron Brunton, director of the IPA's Environment Policy Unit, argued that the High Court was in danger of embracing 'cultural relativism', that oral traditions pose problems as evidence, that the responsibility for deciding land rights should lie with the legislature and that inalienable land tenure is paternalistic and devalues the land. Tony Rutherford, a public policy analyst, argued that the High Court's 'activism' has delivered 'not a very useful form of justice' and an economic set-back.

December 1992 to February 1993: claims and counter claims

Academic contributions to the debate in December included an article by Henry Reynolds in which he argued that moral and legal problems with *terra nullius* had been apparent a century and a half ago and between 1836 and 1855 Colonial Office officials had attempted to weave a concept of native title into policies crafted for the Australian colonies[3]. Pamela O'Connor suggested that the High Court had described native title as a mere encumbrance on the Crown's title, inferior to freehold title, and that until a doctrine of fiduciary duty is developed, the rights of native titleholders in Australia are more precarious than those of the indigenous peoples in the US and Canada.[4]

On 3 December the NLC said it had lodged a claim with the NT Administrator seeking compensation for the loss of ownership of minerals in northern NT when the 1953 Minerals (Acquisition) Ordinance vested ownership of the minerals in the Commonwealth. Both the NT Premier Mr Perron and Mines and Energy Minister Shane Stone criticised the claim.

On 10 December 1992 in an address to a 2000 strong gathering in Redfern the Prime Minister laid the blame for the plight of Aborigines at the feet of non-Aboriginal Australians and suggested Mabo should offer the basis for a new relationship between indigenous and non-Aboriginal Australians. The speech was hailed as one of the most important statements about Aborigines by an Australian Prime Minister.

On the same day Peter Freund, the general manager of Mount Isa Mines' McArthur River project claimed the Japanese embassy in Australia had warned companies in Japan to be cautious about investing in Australia but an embassy spokesperson, Kenji Inaba said they had only asked companies planning to invest 'not to make conflict with the local community'.

On 11 December the Queensland premier, Mr Goss, was accused of ignoring Aboriginal and environmentalist concerns by suggesting that the only decision CRA need make with respect their proposed Century project would be whether the world price for zinc is good enough to invest $800 million.

3Reynolds, Henry. 'Mabo and the Pastoral Leases', *Aboriginal Law Bulletin*, vol.2, no.59, December 1992.

4O'Connor, Pamela. 'Aboriginal land rights after Mabo', *Law Institute Journal*, v.66 no.12, December 1992.

On 29 December three hundred descendants of the Mullenjarli people claimed the Brisbane Central Business District. The claim drew heated reactions from all political quarters and when conflict with other Aboriginal groups became apparent, the claim was dropped.

On 1 January the Kaurna Aborigines were reported considering a claim on Adelaide sites and the SA Aboriginal Affairs Minister was reported as being prepared to meet the group to discuss a compromise plan.

The lack of progress in negotiations between Aborigines and MIM was contrasted by many commentators with the deal finalised in January between the Jawoyn, the NT Government and Perth based mining company Zapopan. The NT Government agreed to hand over title to the already Aboriginal-owned Eva Valley pastoral lease, the Mt Todd mine site and some other lands in the vicinity, Zapopan agreed to provide the Jawoyn with jobs and other compensation and the Jawoyn agreed to relinquish any potential native title rights.

In January responses to the Mabo decision ranged from the Council for Aboriginal Reconciliation booklet *Making Things Right. Reconciliation after the High Court's Decision on Native Title* which called for a combination of further court decisions, legislation and direct negotiations between interest groups, to the call from Western Mining's chair Hugh Morgan, Pastoralists and Graziers' Association vice-president Tim D'Arcy and Council of Civil Liberties president Peter Weygers for the right of Aborigines to claim native title to be decided by a national referendum.

On 29 January the federal parliamentary leader of the National Party, in releasing the Opposition's minerals policy, promised the protection of existing landholders and negotiations with Aboriginal groups, but legislation if necessary.

In February the NLC conceded failure in its bid to use the possibility of a Mabo-style claim over the McArthur River mine to extract a better deal from MIM for the traditional owners of the mine area. Federal Minister for Primary Industry and Energy Simon Crean said he would ensure the rights of existing landholders were protected.

March 1993: mounting pressure for action

The NT Government, despite protests from the NLC, the ATSIC chair Lois O'Donoghue and the NT Labor leader Brian Ede, and despite Dr Hewson saying it might be 'jumping the gun', introduced and passed the *Confirmation of Titles to Land (Request) Act 1993* which requested

the Commonwealth Parliament to pass laws validating land titles in the Northern Territory. Meanwhile, the WA Premier Richard Court and Liberal Party state president Bill Hassell attacked the Mabo decision and called for the protection of mining and business interests. Rob Riley, executive director of the WA Aboriginal Legal Service accused the two of joining with mining interests in whipping up a campaign of fear against Mabo and what it represented for Aboriginal people. The Premier set up a cabinet sub-committee on Mabo to draft legislation (to be known as the *Land Management Act 1993*). Many criticised the composition of the committee and doubted the effectiveness of unilateral State legislation. Just after the federal election major industry groups issued a press statement calling on the Federal Government to follow the lead of the NT Government.

After the 13 March election the Prime Minister announced the establishment of an Office of Aboriginal and Torres Strait Islander Affairs (later calledthe Office of Indigenous Affairs) within his own department and started to receive recommendations from all quarters. ATSIC chair, Lois O'Donoghue, recommended that the Federal Government legislate to provide a set royalty to Aborigines from resource development. On 21 March a joint media release by the Australian Chamber of Commerce & Industry, Australian Chamber of Manufacturers, Australian Mining Industry Council, Australian Coal Association, Business Council of Australia, National Association of Forest Industries, National Farmers' Federation and National Fishing Industry Council called for urgent legislation to ensure certainty of titles. The director of the Central Land Council, Mr Kumanjai Ross, urged the Government to stop the rezoning of land to extinguish native title and not to amend the *Racial Discrimination Act* to create certainty for a few vested interests. On 26 March the Prime Minister received an interim report on the implications of the Mabo High Court decision prepared by and Interdepartmental Committee (PM&C, ATSIC Attorney General's and the Department of Primary Industry and Energy)

April 1993: the first plans

On 6 April Federal Cabinet considered a 150 page report prepared by PM&C on how to handle the High Court's decision.

In early April the WA Liberal Party president Mr Hassell was criticising not only the High Court decision but the High Court Justices and the executive directors of both AMIC and the NFF were urging the Government to create certainty of land title quickly. Those warning against the 'quick fix' included the chair of the Council

for Aboriginal Reconciliation, Pat Dodson, and Father Frank Brennan who recommended the Government facilitate greater Aboriginal input into deliberations by resourcing a group of 20 Aboriginal leaders from a wide range of organisations. The historian Henry Reynolds argued native title rights should be enshrined in a new republican constitution. Former Federal parliamentarian Fred Chaney suggested a way in which both the High Court's abolition of a legal fiction and existing interests in land could be accommodated.

Later in April the Prime Minister invited key Aboriginal organisations to a meeting with his ministerial committee in Canberra. Aboriginal organisations met in Alice Springs before the planned Canberra meeting and produced the Red Centre Statement. Eleven delegates met in Canberra on 26 April to further develop a set of agreed principles and produced the Peace Plan which was presented to the Prime Minister and his Ministers the next day. The plan urged the Commonwealth to commit itself to: affirming and protecting Aboriginal rights; establishing a tribunal to determine Aboriginal titles not just on the basis of common law but also on a needs basis; setting up a National Land Fund to which Aborigines who cannot assert title would have access to purchase land; ensuring absolute protection of sacred sites; providing for compensation for land disturbance and use of minerals; and entering into a process of negotiation on longer term issues. In return the Aborigines would agree to the validation of mineral titles which might otherwise be invalid due to the *Racial Discrimination Act 1975*.

May 1993: the first compromise

On 5 May a group of Aboriginal people within the Watarrka National Park near Uluru was reported to have told the Central Land Council that they wanted to pursue a Mabo-based claim to the park.

In early-May ATSIC chief executive officer Dr Peter Shergold warned that a reactionary debate would create only fear and uncertainty when what northern Australia needed was acceptance of Aborigines as full participants in development.

In mid-May ATSIC deputy chair, Sol Bellear called on Aborigines not to pursue new Mabo-style claims and for mining companies to refrain from further outlandish statements pending the outcome of consultations being co-ordinated by the Prime Minister. Historian Professor Geoffrey Blainey joined the debate with a claim that the Mabo judgment was based on a misunderstanding of history and that colonisation had been bound to intrude on Aboriginal society. Charles

Perkins claimed the Aboriginal input into the Mabo debate was being restricted to a select few and being conducted in a clandestine manner.

At about this same time divisions seemed to open up within the Opposition ranks over Mabo as National Party frontbencher Peter McGauran came out attacking those who would give us 'a form of reverse apartheid' and Ian McLachlan attacked the High Court 'adventure' arguing that 'apart from some mild impediments, Aborigines have had the same sorts of rights as they had before 1788.'

On 23 May the Prime Minister told a gathering at a formal Maori ceremony in New Zealand that the High Court's decision would provide the basis for reconciliation between Aborigines and other Australians but criticised the Court for not saying what native title implied.

On 27 May the NT Government introduced legislation aimed at validating existing mining titles and preventing a Mabo-style claim over mining projects such as that planned for McArthur River. MIM and its four Japanese partners had warned that unless there was certainty of title by 1 July, their McArthur River project would be delayed indefinitely. The Prime Minister had been unable to persuade the NT government to agree to enable native title to be revived after the expiry of the mining lease and had eventually, through his Special Minister of State, Frank Walker, asked the NT to proceed with its legislation because of the economic importance of the project. Aboriginal groups accused the Prime Minister of betrayal but a spokesperson for the Prime Minister said they didn't see how the legislation could extinguish native title as it made no mention of it. Peter Yu of the Kimberley Land Council said that to regain the confidence of Aborigines, Mr Keating should have the Federal government assert its primacy, confirm Aboriginal title on all Aboriginal reserves, vacant Crown land and national parks, set up a negotiating structure which would include Aborigines and commit funds to enable Aborigines to participate fully in negotiations.

On 28 May the opposition spokesperson on national development and infrastructure, Ian McLachlan, claimed the High Court decision had placed nearly $50 billion worth of new development projects in jeopardy.

On 30 May AMIC's Lauchlan McIntosh claimed several projects were threatened by claims while the then chair of the Aboriginal Legal Service, Paul Coe claimed miners were running a scaremongering campaign.

On 31 May the Opposition spokesperson on resources, Peter McGauran, called on the Government to legislate away the Aboriginal title conferred by the Mabo decision. On the same day AMIC released 'A Comprehensive Response to the Mabo decision' recommending, among other things, that any legislation worked out between governments should include a sunset period of five years for native title claims to be made.

June 1993: the debate heats up

On 3 June the Government released a 106 page discussion paper on Mabo which set out 33 principles. Mining and pastoral leases granted between 1975, the year of the *Racial Discrimination Act* and 30 June 1993, would be validated by legislation and native title suspended to the extent that it is inconsistent with the rights of other title holder's (e.g. miners or pastoralists). Aborigines would have no veto over mining on these lands but native title would revive after the expiry of a lease. Tribunals would be established in each State to decide native title claims, the extent of inconsistency between titles, and compensation where appropriate. In cases of existing inconsistent leases, the Commonwealth would accept joint responsibility for compensating Aboriginal owners. After 30 June Aborigines would have the right to veto developments and it would be up to State Governments to organise compensation for any new leases granted.

The discussion paper received some criticism. AMIC rejected the proposition that there should be a veto over future access to land affected by native title. AMIC's Director, Lauchlan McIntosh, and Assistant Director, Geoffrey Ewing, both argued that the provision for the revival of native title after the expiry of a lease went beyond the High Court decision. The executive director of the NFF, Rick Farley, welcomed many of the proposals but believed the revival of native title after the expiry of the lease unacceptable to the farm sector. The WA Premier Richard Court suggested some of the proposals could lead to a form of apartheid and all but ruled out compensation for Aborigines who claimed native title over leases granted since 1975. Philip Toyne expressed his belief that the Government was moving too quickly and recommended tying Mabo with the processes of reconciliation and constitutional reform.

Aboriginal leaders claimed the Federal Government's document reduced the whole issue to one of real estate management, overlooking the special relationship of Aboriginal people to their land. Noel Pearson, director of the Cape York Land Council, called the document

'fairly slimy and useless', and Mick Dodson, the Social Justice Commissioner, suggested the word processors of the bureaucrats who produced the paper were 'the latter day equivalent of guns and strychnine'. While prepared to acknowledge some positive features in the document, Lois O'Donoghue, the ATSIC chair, said she had deep concerns about some of the principles and threatened to resign if the Government tried to impose a solution rather than negotiate. Special Minister of State Frank Walker responded with an assurance that the 'no veto' principle was 'on the table' for discussion.

At the beginning of June a series of land claims fuelled debate.

· On 3 June four women from the Western Arrernta-Luritja group in the NT were reported as seeking native title to the Lake Amadeus area adjacent to Kings Canyon National Park. The area had been successfully claimed by Aboriginal people under the *Aboriginal Land Rights (Northern Territory) Act 1976*, but had not yet been formally transferred.

· On 4 June the Wiradjuri people in NSW were reported as having lodged a claim to central NSW between the Lachlan and the Murrumbidgee rivers, from Dubbo to Albury.

· On 8 June the Tasmanian Aboriginal Centre was reported as planning to lodge a claim for more than 20 per cent, perhaps 53 per cent (all vacant crown land), of the State.

· On 9 June representatives of the Ngunawal, Walgali, Djilamatang and Ngarigo people in the ACT and NSW were reported as having lodged a claim in the High Court over land from Mittagong and Boorowa in the north, to the Victorian border in the south, from Braidwood in the east to the Murrumbidgee River in the west.

· Also on 9 June the Charleville based Bidjara Aboriginal Housing and Land Company in Queensland were reported as having lodged a claim with the High Court for 140,000 sq km of central and south-west Queensland, including the Carnarvon National Park, and for $500m compensation.

· On 12 June the Queensland Aboriginal and Torres Strait Islander Legal Service was reported as saying it would lodge a claim with the High Court claiming the entire region between the Australia mainland and Papua New Guinea and seeking $500 billion compensation from the Government for damage to fisheries and non-indigenous use of island resources.

On 5 June a conference was held on the position of indigenous people in national constitutions. Deputy ATSIC chair, Sol Bellear, urged serious consideration be given to the considerable compensation due to Aborigines. The President of the Australian Law Reform Commission, Justice Elizabeth Evatt, recommended formal recognition of Aboriginal customary law to help resolve problems of land ownership. The national secretary of the Aboriginal Provisional Government, Michael Mansell, called for a 'slowing down' of the Mabo discussion so that Aborigines could have more time to consider its implications.

Speaking the next day at the conference on 'Mabo and its implications for reconciliation' Ron Castan QC responded to criticism of the High Court for not fully explaining native title and noted that for the purposes of the Mabo decision the Judges did not have to grapple with native title's mining or pastoral leases implications.

On 6 June the Kimberley Land Council executive director Peter Yu accused the Court Government of colluding with the WA Chamber of Mines and Energy in preparing legislation to extinguish Aboriginal common law rights. The Government's draft *Land Management Act 1993* contained virtually identical principles to those in the Chamber of Mines draft paper.

Also fuelling the debate at the beginning of June was the manoeuvering before the imminent Council of Australian Governments meeting. The Special Minister for State, Mr Walker, challenged the Victorian and Western Australian Premiers over their objections to granting native title holders veto over access to their land, but the Prime Minister tried to defuse the looming row with the States. In speeches at the opening of a political history exhibition at old Parliament House, Mrs Boneta Mabo and the Arts Minister, Senator McMullan, both appealed for calm.

On 8-9 June talks at the Council of Australian Governments (COAG) meeting in Melbourne quickly became deadlocked. The Premiers of WA, Victoria and Tasmania rejected the very concept of native title and if Aborigines were going to claim it, then legislation was needed to extinguish it. The Prime Minister's offer of Commonwealth compensation for existing mining leases on Aboriginal land could not persuade the States to agree to a national response. When the meeting ended inconclusively the Federal Government blamed the Victorian and WA Premiers for their intransigence. Several Premiers blamed the Federal Government for wanting to go beyond the simple validation of titles issue. Many commentators and participants alike

believed there should have been more preliminary discussions of the Federal Government's plan.

Immediately after the COAG meeting, in a softening of its stand on veto rights for native-title holders, ATSIC proposed that economic development of native-title land could go ahead despite traditional owner's objections if the development was not to be on a sacred site and if it was deemed by an independent and non-political tribunal to be in the national interest. AMIC did not, however, soften its stand in a paper responding to each of the Prime Minister's 33 principles.

Support for the Prime Minister not to give up on a national approach came from the Premier of NSW, John Fahey, the Australian Petroleum Exploration Association's executive director, Dick Wells, and the executive director of the NFF, Rick Farley. Mr Kennett planned legislation which would validate all existing leases but allow the State Government to grant monetary compensation or 'traditional cultural rights title'.

On the 10 June two eminent QCs (Mr Sullivan and Mr Barker) separately offered in letters to the *Sydney Morning Herald* calm and reasonable explanations of what the Mabo decision said and did not say. On 12 June the commentator Peter Smark, attempted the same, arguing that 'the sooner the distorters of reality over Mabo are discredited, the sooner we can get on with fashioning a country fit for a new millenium'.

The debate did not have a chance to calm down. The leader of the National Party, Tim Fischer, criticised the Coalition leadership for having been 'too quiet on Mabo' and the Shadow Treasurer, Alexander Downer, warned that 'anecdotal evidence' suggested 'enormous concern' overseas about investing in Australian mining, tourism and agricultural industries. A London-based mining analyst for Lehman Brothers International, Mr Rob Davies, was indeed reported on the 14 June as saying 'Australia could go back to being a Stone Age culture of 200,000 people living on witchetty grubs'. The comment was dismissed by the Prime Minister and the Minister for Aboriginal and Torres Strait Islander Affairs, Mr Tickner. In Queensland, however, the Liberal Party State president Paul Everingham warned of division over Mabo, said projects worth $30 billion were jeopardised by native title claims, and called for the legislative nullification of the Mabo decision. The Federal National Party leader warned that WA may attempt to secede from the Commonwealth.

On 15 June delegates to a National Aboriginal and Islander Legal Services conference in Adelaide said negotiations over Mabo were

moving too quickly and the incoming National Aboriginal and Islander Legal Services Secretariat chair, Ray Robinson, suggested that the treaty which was necessary to enshrine Aboriginal rights could take 15 to 20 years to achieve. The former head of the Federal Department of Aboriginal Affairs, Charles Perkins, urged everyone to try to take some of the heat out of the debate. The very next day the executive director of the Australian Bankers Association, Mr Alan Cullen, said Mabo-type claims may affect the security value of land against which banks might lend, the Deputy National Party leader, John Anderson, spoke of 80,000 timber industry jobs being on the line and the Tasmanian Premier, Ray Groom, announced an intention to legislate to reduce the compensation liable in the event of native title claims to prospective land.

On 16 June 250 Kimberley Aboriginal leaders from 20 language groups met and called on the Prime Minister to continue his stance against 'red-neck' state governments and to maintain the integrity of the *Racial Discrimination Act.* On 17 June the Prime Minister spent over an hour fielding questions from hostile callers to a Sydney radio station.

On 18 June the Prime Minister announced that the federal government would legislate on Mabo. The legislation would facilitate validation of existing land titles, define native title, establish a system of tribunals to register and determine land claims and set parameters for compensation for Aborigines whose native title rights have been extinguished contrary to the *Racial Discrimination Act 1975.* The Prime Minister invited the States to join in a national response. The leader of the Opposition, Dr Hewson, attacked Paul Keating's handling of the Mabo issue, but there was speculation that the Opposition's sub-committee had reached a stalemate.

On the same day in Geneva ATSIC chair, Lois O'Donoghue, spoke before the United Nations Working Group on Indigenous Populations of the strong commitments given by the Prime Minister and the need for all Australian Governments to take account of Articles 23-28 of the Draft Declaration on the Rights of Indigenous People in preparing their legislative responses to Mabo.

Adding fuel to the debate in late June were extravagant claims by some non-Aboriginal leaders. Premiers Court and Kennett suggested private land was under threat. On 19-20 June the leader of the National Party claimed dispossession of the Aborigines was inevitable, their culture had been 'relatively stationary' and that they had not even managed to develop a 'wheeled cart' before white settlement. In an address to the annual conference of the RSL's Victorian branch

Western Mining's chief executive Hugh Morgan accused the High Court of 'guilt speak', claimed the Mabo ruling had put Australia's political and economic future at risk. These comments drew sharp criticism from the Government, most commentators and some Federal Liberals. Dr Michael Wooldridge suggested at a Liberal Party lunch in Perth that Mabo should be viewed as an opportunity, not a hindrance, and it was no use pretending it never happened.

The Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, spent most of June rebutting Mabo myths and on 20 June produced a paper with that title. In launching the paper the Minister criticised senior members of the Coalition for spreading misinformation and the press for their beating-up of Mabo-style land claims.

On 22 June ACTU president Martin Ferguson said the trade union movement would support the Prime Minister's attempt to implement a national resolution with nationwide publicity and hoped this resolution would include a national land acquisition fund for those Aboriginal people who had lost their traditional lands, a right of negotiation over resource developments, a resource rent equivalent or royalties for mining on Aboriginal land, protection of sacred sites and the transfer where appropriate of land ownership to Aboriginal people.

On 24 June a paper entitled *Mabo, Native Title and the Community* was produced by the Australian Chamber of Commerce and Industry, Australian Coal Association, Australian Mining Industry Council, Australian Petroleum Exploration Association, Australian Tourism Industry Association, National Association of Forest Industries and the National Fishing Industry Council. The paper called for states to be able to grant and validate property titles. for native title claims to be determined by existing courts and for claims to be allowable only within a sunset period. The federal Minister for Resources and Tourism, Mr Lee, however, backed the Prime Minister's plan for a system of tribunals.

On 27 June a similar group of organisations (in place of the Australian Coal Association the NFF was listed) issued a statement calling for existing property titles and crown ownership of resources to be confirmed, compensation to be paid by the Federal Government, legal costs of landholders to be met by the Crown and court-based procedures to be established to expedite claim resolution. The chief executive of BHP, John Prescott, said some of its key projects were affected by uncertainty surrounding Mabo.

On 28 June, only hours before the Federal Opposition was due to issue *The Mabo Case - An Issues Paper*, the leader of the Queensland National party, Rob Borbidge, said Dr Hewson had 'gone missing' on Mabo and the members of the Federal Opposition had been left 'political eunuchs'. The Opposition's policy paper called for the Commonwealth to separate its response to Mabo from the wider issue of Aboriginal reconciliation, to put economic development first and to allow the States and Territories a free hand in formulating their responses to the decision. The policy was endorsed by all the members of the Coalition's working party, including Michael Wooldridge and Peter Nugent who had initially opposed separating Mabo from reconciliation. The Government labelled the paper 'superficial and fundamentally flawed', Mick Dodson called it an 'amateur cut-and-paste job' and Lois O'Donoghue said it lacked imagination. NFF chief Rick Farley and the leader of the Australian Democrats, Cheryl Kernot, both called the Opposition's decision to separate Mabo from the wider process of reconciliation wrong.

On 29 June the NT Legislative Assembly passed legislation validating doubtful land titles in the form of the *McArthur River Project Agreement Ratification Amendment Act.*

July 1993: the debate overheats

Half a dozen land claims in the first week of July considerably raised the temperature of the debate.

· On 2 July the Gubbi Land and Cultural Association in Queensland was reported as having filed a writ claiming vacant Crown land and seabed rights along a stretch of the south Queensland coast and descendants of three Fraser Island tribes were reported as formally proclaiming their ownership of the island after having failed to secure Queensland Government support for a land claim they had lodged with the Supreme Court.

·On the same day Mr Shaw, chair of the Tasmanian regional council of ATSIC, and two other descendants of the Mannalargenna were reported as having lodged a claim in the High Court over 126ha of Flinders Island on behalf of the Cape Portland Tribe and the Tasmanian Aboriginal people.

· On 3 July the NLC was reported preparing a statement of claim based on native title which would also challenge the NT legislation which validated the MIM lease over the McArthur River mine project site near Borroloola.

· On the same day the Wik people of Aurukun in Queensland were reported as having submitted a claim for title over 35,000 sq km of land on western Cape York. They claimed that Comalco was an 'unlawful trespasser' and had, together with the State of Queensland, been 'unjustly enriched', and sought a declaration that they had native title over their traditional lands and that Comalco's mining leases are invalid.

· On 6 July Aborigines from the Gascoyne and Murchison in Western Australia were reported as having formed a Land Council committee to consider 'possible Mabo-style land claims'.

· On 7 July the Torres Strait Islanders were reported as organising a series of sea-rights claims in the High Court - one claim had already been filed in the High Court by Carlemo Wacando on behalf of the people of Darnley (Erub) and Stephens (Ugar) Islands, claiming the islands and the seas around them.

· On 8 July 17 members of the central Australian Arrernte people were reported to be seeking through a claim lodged with the High Court, traditional lands including the western two-thirds of the land around the Pine Gap Joint Defence Space Research Facility.

· On the same day, the Wadi people of the NSW Illawarra area lodged a claim for lands from Helensburgh to Nowra and inland to Mittagong.

· On 9 July lawyers acting for the Arabana people were reported to be about to lodge a claim with the High court for an area which covered the towns of Marree and Oodnadatta, Lake Eyre and 14 pastoral properties in SA's mid-north.

· On the same day the NSW Aboriginal Legal Service was reported as having lodged a writ on behalf of Mrs Essie Coffey of the Muruwari tribe in the Sydney registry of the High Court for mainly pastoral land on the NSW-Queensland border between Brewarrina and Cunnamulla.

· The NSW Aboriginal Legal Service was also reported as planning to take to the High Court a claim by the Kamilaroi people for lands stretching from Dunedoo in northern NSW to St George, just south of the Queensland border- including the towns of Moree, Narrabri, Tamworth and Gunnedah- and a claim by the Bundjalung people for lands stretching from Grafton to Tweed Heads.

On 2 July the leader of the Australian Democrats, Senator Cheryl Kernot called on the Prime Minister to release the Government's draft Mabo legislation so it could be widely circulated before coming into Parliament. On 8 July the Senator released the Democrats' proposed model for a tribunal which would have half Aboriginal representation, dismiss ambit claims and quickly decide valid claims.

On 3 July Henry Reynolds argued in the *Australian* that conservative leaders were showing 'less concern for Aboriginal rights than the aristocratic Englishmen who ran the empire 150 years ago'. Kenneth Davidson argued in the *Age* that Mabo is inseparable from the reconciliation process and 'until reconciliation is achieved, whatever is built in this country will be on weak foundations, and that will deny Australia the chance to reach its full human and economic potential.'

On 6 July the Chief Minister of the NT, Marshall Perron, told international journalists that Aborigines were 'centuries behind us in their cultural attitudes and aspirations' and had poor hygiene practices.
Mr Perron, like Mr Morgan and Mr Fisher before him, was criticised by most commentators but Liberal frontbencher John Howard suggested Mabo opponents must be heard and not labelled racist. Rick Farley, the executive director of the NFF, urged everyone to accept some blame for the state of progress on the issue and 'to pull their heads in'. On the same day as Mr Perron's comments a critical response to Mr Tickner's 'Rebutting Mabo Myths' was produced by the Association of Mining and Exploration Companies, Australian Tourism Industry Association, the Chamber of Commerce and Industry of Western Australia, the Chamber of Mines and Energy of Western Australia, the Forest Industries Federation WA, the Pastoralists & Graziers Association of Western Australia and the WA Fishing Industry Council.

From 5-7 July the leader of the Federal Opposition John Hewson, his deputy Michael Wooldridge, his Aboriginal Affairs spokesperson Peter Nugent, Deputy National Party leader John Anderson, spokesperson on infrastructure and national development Ian McLachlan and shadow attorney-general Darryl Williams visited the Gulf country, Cape York Peninsula and the Torres Strait Islands- all declaring they became more convinced that the Mabo decision had limited relevance to mainland communities.

On 8 July the Business Council of Australia rejected a proposal prepared by its Sydney consultants which would have linked Mabo with a wider reconciliation. The proposal by the Callidus Group included the establishment of a land-holding company in which all

Aboriginal people would be shareholders, the granting to the company on a freehold basis of land which a three-way negotiating process identified as possibly subject to native title land, the possibility of the Aboriginal company board allocating land to specific groups and trading in land with benefits flowing to shareholders, and the validation of titles issued between 1975 and 1993 with compensation for the loss of 'native title' being paid to the company.

In early July many claims by non-Aboriginals helped to raise further the temperature of the debate. In Victoria Premier Kennett suggested backyards were under threat. In NSW a solicitor was advertising an ability to advise private property owners on whether their land is affected by the Mabo decision. In SA a hoax letter advised home owners that Aboriginals could enter their property at will. In Queensland the Opposition Leader, Mr Borbidge, claimed the draft of the Commonwealth's Mabo legislation would force miners to pay compensation dating back to the time of European settlement in 1788.

Contributions to the debate from people with interests in the WA situation started to amount to a concerted campaign against the Mabo decision. On 5 July the Western Mining chair Sir Arvi Parbo backed Hugh Morgan's claims and called for a referendum. On 11 July AMIC and The Western Australian Chamber of Mines and Energy released the results of an opinion poll which found an overwhelming number of respondents believed Aborigines should be treated the same as non-Aboriginal Australians and would be concerned if the Mabo decision affected economic development or existing property titles. Mr Tickner called the survey a sham and some commentators noted that Aborigines had wanted equal treatment for 200 years.

Throughout mid-July Premier Court suggested much of his state could be subject to native title and called for a referendum on Mabo. Neither Dr Hewson nor Mr Nugent supported the referendum proposal, and when Mr Tickner suggested a referendum on the issue might infringe the *Racial Discrimination Act 1975* Mr Court called for the Minister's resignation. The President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, suggested a referendum on Mabo would not be discriminatory, but the question posed could be. On 16 July Rick Farley, executive director of the NFF dismissed Premier Court's suggestion that up to 80 per cent of WA could be claimed and said he had been comforted by talks with the Federal Government and Aboriginal Groups. On 19 July the Minister for Primary Industries, Mr Crean, attempted to quell residual farmer concern with an assurance that native title would not be revived at the end of any continuing pastoral lease. The statement was welcomed

by the NFF President John Crawford. Hugh Morgan, however, continued his attack on the High Court, claiming on 27 July that its bench 'seemed to be ashamed to be Australians' and that Mabo 'carried the seeds of the territorial dismemberment of the Australian continent and the end of the Australian nation as we've known it'.

In July many prominent lawyers came to the defence of the High Court and its decision. The High Court Chief Justice Sir Anthony Mason described the Mabo decision as belatedly reflecting what's happened in the great common law jurisdictions of the world and in the International Court. The Federal Court judge, Justice Marcus Einfeld spoke out in defence of the High Court judges who had suffered personal vilification and against what he saw as a rising tide of hatred and racism. The Federal Race Discrimination Commissioner, Ms Irene Moss, described harassment of some Mabo supporters as 'low-level terrorism'. The Human Rights and Equal Opportunity Commission president, Sir Ronald Wilson, also called for an end to the comments intended to 'degrade and demean the very people whose rights were recognised'.

On 8th July Australian leaders of the Christian, Jewish and Muslim faiths, together with five former Royal Commissioners on Aboriginal deaths in custody issued a plea for an end to the 'extravagant claims and counterclaims' which were jeopardising the reconciliation process. One of these former Royal Commissioners, Hal Wootten QC, suggested Australians were unconsciously racist and the Federal Liberal and National party leaders did not understand the issues. The Chair of the NSW Aboriginal Law Centre, Professor Garth Nettheim, believed the extremists in the mining industry would deliver 'a continuation to its conclusion of the conquest of Aboriginal Australia' and appealed for calm. On 13 July a description of the High Court judges by Labor backbencher Graeme Campbell as 'pissants' drew criticism from Sir Anthony Mason. On 14 July the Anglican Archbishop, Peter Carnley, likened Richard Court's attempt to deny Aborigines native title to Adolf Hitler's stratagems to deprive Jews of their property. On 21 July the Australian Catholic Bishops Conference expressed disappointment at the misunderstanding, fears and false expectations that have become widespread in the community, claimed that until Australia 'recognises the legitimate land rights of its indigenous peoples we cannot hope to attain our full integrity and stature as a nation', and appealed to all leaders in the debate to exercise wisdom and restraint.

On 20 July the Yorta Yorta tribe was reported as having lodged a claim in the High Court to 50,000 ha of crown land along the Victorian/NSW border. The area included the Barmah and Moira

state forest near Barmah, the Gunbower and Perricoola state forests between Echuca and Koondrook and Kow Swamp, south of Cohuna. The claim called for full beneficial ownership of minerals and all natural resouces (including river and lake waters).

In late July comments from many prominent people did nothing to calm the debate. On 27 July prominent businessman Henry Bosch was obliged to resign from an advisory board to the Department of Administrative Services, after describing Aborigines as 'stone age' and 'backward'. On 28 July the executive director of the Australian Banker's Association, Alan Cullen, although defended by Liberal party frontbencher Wilson Tuckey, apologised for any offence he might have inadvertently caused by using the term 'abos' in a radio interview. In a treatise entitled 'The Aboriginal Corridor' the historian Geoffrey Blainey suggested there was something sinister about the pattern of existing Aboriginal landholdings.

Throughout July pressure mounted for the Prime Minister to recommit the Government to validation of existing leases and to seeking a national approach to the Mabo issue. On 16 July the president of the Institution of Engineers Australia, Dr Brian Lloyd, said this was not an issue where power plays between governments could be accepted as legitimate and called for the Federal Government to quickly collaborate with all parties to settle the issue. The ALP President Barry Jones urged the Prime Minister to get the Premiers 'back into the tent'. Dr Hewson said Mr Keating had been 'staying in the bunker'. Mr Fahey suggested the Prime Minister's 'decision to be invisible' had 'allowed the debate to drift'. Mr Kennett said a uniform national approach was still possible and Mr Goss urged the Federal Government to support McArthur River type legislation to protect Comalco's operations in Cape York. Discussions between Government officials proved encouraging and on 22 July the Attorney-General, Michael Lavarch, announced that the government would introduce legislation in the Budget sitting.

The WA Liberals at their state conference on 24-25 July rejected the national approach recommended by the Federal Liberal leader and Shadow Attorney-General, and opted for a referendum on Mabo.

On 27 July the Federal Government decided that Aborigines would not have veto over mining on land where native title existed, but would have a 'right of negotiation'. The Government also decided that existing residential, pastoral and tourist leases would be validated and that Aborigines whose native title was extinguished by land grants between 1975 and 1993 would be eligible for compensation which would take into account special attachments. Existing mining leases

would not be affected by a successful native title claim but mining leases would not extinguish native title and any application for renewal of a mining lease where native title existed would have to be negotiated with Aborigines or arbitrated by a tribunal. States would have the right to override a decision on land use but only if they set up tribunals approved by the Commonwealth and only if they adopted a 'satisfactory' attitude toward the High Court's decision. If they did not the Commonwealth would set up its own tribunal in the states and retain the overriding power.

The Government's new plan was welcomed by some. Rick Farley of the NFF believed it would allay farmers' fears, ACTU President Martin Ferguson believed it would bring certainty back into the debate and Professor Garth Nettheim of the University of NSW considered it an attempt to find a balance. Others rejected the plan. Dr Hewson believed it typified the Prime Minister's 'take it or leave it' approach. The Opposition spokesperson on Aboriginal Affairs, Peter Nugent, said it fell short of guaranteeing a national consensus. Premier Kennett called it unworkable. AMIC felt the three tiered process would not offer the certainty that the mining industry required. Noel Pearson of the Cape York Land Council believed miners would rely on the override power of governments to guarantee mining projects. The national chair of the Australian Aboriginal Legal Service, Ray Robinson, called it appeasement.

On 22 July the Victorian Parliament passed legislation purporting to validate land titles issued since 31 October 1975 and providing for the Supreme Court to adjudicate any claims to native title and compensation. Both Liberal and Labor federal leaders believed the legislation could be open to legal challenge and such a challenge was to be considered by the Aboriginal Legal Service. ATSIC deputy chair, Sol Bellear, called the legislation an exercise in political point scoring which could damage the reconciliation process irreparably.

On 25 July the Government was reported to be considering a proposal from Ron Castan and Phillip Toyne to reverse the present approach to Mabo and make all vacant Crown land native title land unless a tribunal decided otherwise.

On 31 July WA Liberal party president, Bill Hassell, renewed his personal attack on the High Court judges and claimed their decision was part of a five-step agenda to establish a separate Aboriginal State in Australia. In the assembly the following week Premier Court argued that Aboriginal leaders Rob Riley and Peter Yu had sought as much in a submission to the Prime Minister. Mr Riley pointed out

that the submission had been about Aborigines running their own services, not governing a separate state.

August 1993: a second compromise

On 1 August among those seeking to encourage the States to co-operate with the Commonwealth were the Minister for Foreign Affairs and Trade, Gareth Evans, who said that Australia's image overseas could be damaged by 'redneck' attitudes and the Special Minister for State, Frank Walker, who warned that the economy faced chaos if land titles were not quickly validated. The Ministers both dismissed a report that the Macassan people of Indonesia could make claims on parts of northern Australia. On the same day the former Royal Commissioner Hal Wootten argued that the States should be stripped of their powers to decide on Aboriginal issues.

On 4 August the Prime Minister was reported as having taken heart from a Saulwick Herald Poll which showed 88 per cent of voters understood that the native title could only exist where Aborigines have maintained a continuous relationship to the land.

The Eva Valley statement which came out of a meeting of 400 Aboriginal leaders in the NT from the 3-5 August included the demand that the Federal Government frame national legislation to override all State and Territory legislation, that the Government abandon its intention of validating existing titles so native title might be claimed on the expiry of leases, that no grant of any interest on Aboriginal land be made without the consent of the native title holders and that native title be given precedence over all other titles. Leaders such as Social Justice Commissioner Mick Dodson and the chair of the NLC, Galarrwuy Yunupingu, claimed Mr Keating had caved in to pressure from the mining industry and had failed to negotiate adequately with Aborigines. The Prime Minister objected to the suggestion that he had not consulted enough and some commentators suggested the Aborigines had left their run too late.

The issue of whether a response to the Mabo decision should be linked with a response to other problems continued to be debated. On 6 August the Anglican Bishop of Canberra and Goulburn, George Browning, suggested that the fact that few Aborigines would benefit directly from the legal precedent of the Mabo decision meant that it was 'doubly important' for Australians to make a commitment to support the wider Aboriginal requests. On 8 August Minister Tickner foreshadowed a land acquisition fund (either a fixed amount of the Budget or a percentage of royalty equivalents from mining on

Aboriginal land) to help address the needs of dispossessed Aboriginal people. Of different opinion were Dr Hewson, who criticised an attempt to marry Mabo issues with reconciliation, and the leaders of the NSW, Victorian, Queensland and South Australian National Parties who issued a joint communique on 9 August calling for a state-based land management approach to Mabo which would, among other things, protect existing mining leases and reject the right of veto.

By the middle of August the most debated issue was that surrounding the Wik people's legal action. In early August there were appeals from the Comalco chair Mr John Ralph for the Federal Government to indemnify lenders and investors against losses arising from Aboriginal land claims so that a $1.7 billion expansion of Comalco's Queensland operations could go ahead, and appeals from the Queensland Premier Wayne Goss for the Prime Minister to help validate the leases by the end of the month or place the investment and 2,000 potential jobs in jeopardy. On 6 August the Federal Attorney-General Michael Lavarch noted that much of the claim of the Wik people was unrelated to Mabo and on 9 August the Special Minister of State, Frank Walker, maintained the Queensland Government could 'probably solve these problems quite easily by itself'. On 10 August, however, both Mr Lavarch and the Minister for Industry, Technology and Regional Development, Mr Griffith, assured the Queensland Government that the Commonwealth would help validate Comalco's leases. On 11 August ATSIC called on the Government to neither amend the *Racial Discrimination Act*, nor subject it to overriding legislation. On 12 August Mr Keating claimed the validation sought by Mr Goss and Comalco was 'code for suspending and overriding' the *Racial Discrimination Act* and said his Government would not connive in the denial of the Wik people's rights. The Opposition leader Dr Hewson and Shadow Minister Peter Nugent labelled the Government confused.

On 16 August Professor Henry Reynolds added an historical perspective to the Wik 'breach of trust' debate. He pointed out that in the 1950s when Comalco was granted leasehold over nearly all the Weipa reserve against the wishes of those living there the Queensland Government controlled nearly every aspect of the Wik people's lives, that in the 1960s the dispersal of the people of Mapoon was violent and that in the 1970s objections to the granting of a lease over 2000 sq km of the Aurukun reserve were met with degazettal of the reserve and the sacking of the elected council.

The Queensland Government started to call for federal legislation validating all land title since 1788. Though rejected by Mr Keating, Mr Tickner and Mr Walker, the approach was reported to be

supported by such ministers as Mr Lavarch, Mr Griffith, Mr Crean, Senator Evans, Senator Richardson and Senator Collins. The mining industry claimed their fears that no area was safe from Wik-style claims were confirmed when on 17 August the Birri Gubbi people lodged a claim in the High Court for title over land from Rockhampton to Townsville and west Goonyella, taking in almost all the Bowen Basin coalfields (under BHP, CRA and MIM leases), claiming that in issuing other titles over the land the Queensland and Commonwealth Governments had breached a legal duty of trust.

After a meeting of cabinet on 20 August, the Federal Government decided that the Commonwealth would introduce legislation to validate all past grants against native title claims, not just those issued since the *Racial Discrimination Act 1975* came into force. The Queensland Government could pass legislation which might also validate against 'other possible causes of invalidity' (e.g. a breach of fiduciary duty). The decision was welcomed by Comalco and Premier Goss but concern was expressed by several Queensland Government backbenchers and several people in the ALP's left faction. For the Kimberley Land Council chairman, John Watson, the Cabinet decision was 'a clear message from the Government that we only have rights as long as no one else minds' and 'a disgraceful sell-out to special interest groups'. Aboriginal Legal Service of WA executive director Rob Riley, the deputy chair of ATSIC Sol Bellear and the Social Justice Commissioner, Mick Dodson, were among those who called for the reversal of the Government's decision. The Wik peoples' barrister, Ron Castan QC sought and received an adjournment of their Federal Court case till after the foreshadowed legislation was available for examination. The director of the Cape York Land Council, Noel Pearson, said the proposed legislation would hobble the Wik's legal and negotiating position, would seem to be discriminatory and might be challenged in the High Court.

Throughout the Wik/Comalco debate, calls for a referendum persisted. On 13 August Peter Reith, the former shadow Treasurer, suggested a referendum could change the Constitution so that the only valid land title is that created by state legislation, making clear the Australian public determination 'to actively encourage a pro-development, pro-investment culture to create jobs and improve economic performance' while a plebiscite could be conducted by any government to provide them with a mandate for handling the issue. On 20 August the WA Attorney-General Cheryl Edwardes suggested that if the States were denied the legislative course a constitutional referendum should be held across the country.

On 22 August the Special Minister of State, Mr Walker, suggested 'tens of thousands of jobs' and 'hundreds of millions or billions' of dollars could be lost if Australia failed to come to terms with the High Court's Mabo decision.

On 23-24 August many opinions were aired at the 'Mabo: Sovereign risk or national opportunity' Conference in Sydney. In addition to the contributions from anthropologists and lawyers, Senator Margaret Reynolds asked whether 'we have the national maturity to achieve the economic benefits of prosperity within a climate of social equity?'. The Executive Director of the AMIC, Lauchlan McIntosh, welcomed the recent Commonwealth Government decision to validate all titles but believed legislation must remove all land law uncertainty. Sandy Hollway, a deputy Secretary in charge of the Mabo issue in PM&C, argued that 'the shrillness of much of the recent debate in fact obscures how far the country has already come in getting to grips with the issues' and that there was more common ground than generally recognised (e.g. the rights to reoccupy land at the conclusion of a mining lease and rights to be notified, to object and to be heard are all to be found already in Australian law). Mabo was also discussed on 23 August by the 250 people attending a Northern Territory Aboriginal Constitutional Convention at Tennant Creek.

On 24-25 August the Prime Minister met personally some of the protagonists in the Mabo debate. The chief executives of BHP, CRA and Pasminco expressed concerns about the proposed right of negotiation, the non-adversarial nature of the proposed tribunals and the proposal that native title be revived at the expiry of a mining lease. The Council for Aboriginal Reconciliation was concerned with social justice matters related to Mabo and a delegation of Aboriginal leaders from the Eva Valley summit presented a statement condemning the Government's current approach and was urged to delay the introduction of the proposed legislation.

On 25 August the Australian Democrats leader, Senator Cheryl Kernot, came out of a meeting with representatives from all the main interest groups urging the Prime Minister to convene his own 'roundtable' because his 'one-on-one approach' was running the risk of producing a 'second best outcome' and years of litigation. The Senator said the Democrats and the Greens would waive the 1 October deadline for Mabo legislation if the Government agreed to spend longer in consultations.

Also on this day Mr Goss argued that historical injustices will not be remedied by a series of ambit land claims, particularly where third

parties have subsequently acquired title in good faith and ignorance of the existence of native title.

On 27 August Mr Fahey announced that the NSW Government would introduce unilateral legislation to deal with Aboriginal land claims in his state. Claims would be heard by the Land and Environment Court, legal representation would generally not be allowed and special attachment to the land would not be taken into account when calculating compensation. The proposed legislation was criticised by Aborigines and Mr Tickner.

At the Aboriginal Peoples, Federalism and Self-determination Conference held in Townsville from 29 August - 1 September, most speakers condemned the direction the Mabo debate had taken. Professor Henry Reynolds noted that the British Colonial Office had recognised a system of Aboriginal land ownership 157 years ago, and argued that legislation which validated titles effectively made the community complicit in the dispossession to which they had previously been mere beneficiaries. Professor Garth Nettheim described the new *NSW Native Title Bill* as 'the most disgraceful piece of Australian legislation that I've read' since viewing Queensland's Aboriginal and Torres Strait Islander legislation in the 1960s. Senator Margaret Reynolds contrasted the poor state of debate in Australia with the role Australia was playing in UN discussions and the WA Aboriginal Legal Services' Rob Riley suggested 'vested interests were tripping over each other to be the hero who killed the Mabo monster'. Many speakers believed that Mabo should have meant negotiation and notice was given that a follow up to the Eva Valley summit was planned for 15 September in Canberra.

On 30 August Mr Perron offered not to contest Aboriginal claims to 138,000 sq km of the NT and not to seek compensation from the Commonwealth for revenue lost to the Territory as a result of land grants under the *Aboriginal Land Rights (Northern Territory) 1976* if the Commonwealth amended this act to remove Aboriginal mining veto rights, to insulate pastoral estate from claims, to make the land granted to Aborigines alienable freehold and to empower the NT Government to acquire land compulsorily, regardless of title, for public purposes. Both the Northern Land Council chair, Mr Galarrwuy Yunupingu, and Mr Tickner rejected any proposal which eroded existing Aboriginal rights. Earlier in August Frank Brennan had indeed suggested that Mr Perron had been co-operating with the Commonwealth only because he could see them granting native title holders fewer rights than NT traditional owners were granted under

the 1976 legislation and when this happened he might be able to get the power of the NT land councils trimmed.[5]

Also on 30 August the chancellor of Sydney University, Dame Leonie Kramer, claimed that the High Court had wrongly attributed shame and guilt to the Australian nation by its Mabo judgment. AMIC released a legal opinion that the Government's draft proposals went further than was necessary to grant native title to Aborigines.

September: draft Commonwealth legislation

On 2 September the Prime Minister released an outline of the Government's proposed legislation which he called 'a mature national response and the biggest chance the nation has ever had to correct a 200-year old problem' and which included the following elements: all existing residential, commercial, tourism, pastoral, mining and fishing leases and interests which had been made by the Commonwealth would be validated and compensation would be payable to native title holders on the basis of 'just terms'; the States and Territories would be able to pass legislation validating their own grants, as long as they comply with certain conditions including the payment of compensation; pastoral leases would extinguish native title unless specific provision is made but native title would survive the granting of a mining or forestry lease; land grants made after 30 June 1993 will not extinguish native title, but native title holders would not have a veto over developments on their land; a special division of the Federal Court would receive, vet and decide native title claims and a National Native Title Tribunal would arbitrate disputes over development on native title land; the States could set up their own tribunals within Commonwealth guidelines and, along with the Commonwealth, could overturn a tribunal decision in the 'state or national interest'; and land subject to native title could be compulsorily acquired upon the same basis as other land and native title could be voluntarily surrendered to the government in order, for example, to gain statutory title to the land so that part could be sold or leased.

On 3 September the NFF welcomed the proposed legislation, complaining only of the absence of provisions to publicly fund defendants in a Native Title action. The Opposition spokesperson on resources and energy, Peter McGauran, called for Rick Farley's resignation and accused the NFF of having 'turned its back on its own rural constituency'.

5Brennan, Frank. 'The future Mabo makes', *Eureka Street*, v.3 (6), August 1993: 13.

The response of major newspapers was mixed. On 4 September the *Canberra Times* editorial called the proposed legislation 'a sensible balance'. The *Australian*'s Padraic McGuiness argued that all the Commonwealth was doing was anticipating High Court clarification of the law and 'erecting yet another tier of administrative and quasi-judicial bureaucracy which will create another army of white parasites upon the Aborigines'. On 9 September the *Age* reported Dr Coombs calling the proposal 'a step back because they reduce and restrict some of the rights that the Mabo judgment asserted Aborigines now have'.

The State Premiers were divided in their initial response. The Queensland Premier, Mr Goss, believed the proposed legislation 'a workable, national response', but called for more talks on the question of compensation. The WA Premier, Mr Court, condemned it as unworkable and reaffirmed an intention to press ahead with State legislation. The Tasmanian Premier, Mr Groom, also expressed caution and the NSW Premier, Mr Fahey, also affirmed an intention to introduce its own legisation.

Criticisms from the mining industry spokespeople (such as Lauchlan McIntosh and Grant Watt) and the Coalition Front Bench (John Hewson, Ian McLachlan) included that the legislation usurped State powers over land management, would lower standards of proof, would invite ambit claims by giving the right of negotiation and compensation to native title claimants as well as proven holders, would delay the granting of mining licenses, would not grant a company an automatic right to mine once the tribunal had cleared their exploration licence, and would jeopardise investment by allowing native title to be revived after the expiry of the mining lease.

Criticisms from advocates of Aboriginal rights (such as Lois O'Donoghue, Peter Yu, Michael Mansell and Henry Reynolds) included that the legislation was not accompanied by measures (such as a National Land Acquisition fund) to benefit those who have already been dispossessed and had their native title extinguished, did not provide for the coexistence of native title with short term leases, gave native title holders insufficient control over development on their land, and gave the State or Territory Government the option of setting up their own tribunals and the ability to allow mining on native title in 'the State interest'.

The Prime Minister assured critics that in his second reading speech on the Bill he would be outlining plans for a social justice package which would include a land acquisition fund and which would be introduced in the autumn session next year. ATSIC continued to call

for the inclusion of the social justice package in the Mabo legislation and on 7 September key ATSIC board members met separately with ALP backbenchers, Australian Democrats leader Cheryl Kernot and the WA Green Senators to put their position.

At the first National Indigenous Business Economic Conference held in Alice Springs from 5-9 September the proposition that native title land be used to raise finance for business ventures was discussed. Lois O'Donoghue called this 'a dangerous path' for Aborigines to travel but John Ah Kit, executive director of the Jawoyn Association (which had accepted inalienable freehold title to some land as part of the Mt Todd gold mine deal) argued that 'If Aboriginal people decide they want a form of freehold native title that allows their land to be bought and sold so they can help build an economic future for their children that should be their right.'

On 8 September Peter Reith returned to the Federal Opposition's front bench as Shadow Special Minister of State (with a brief to speak on Mabo) and Daryl Williams, the Shadow Attorney General, questioned the constitutional basis of the Government's proposed legislation (the Commonwealth power to make special laws for the people of any race might be limited by the States' general constitutional responsibility for land management).

On the same day there were developments in many state capitals. In the SA Parliament a report was tabled on the likely impact of Mabo which found that Acts governing mining at Roxby Downs and Santos' Stony Point's Liquification project would be invalid if found to be inconsistent with the Commonwealth Racial Discrimination Act (on the grounds that they deprived native title-holders of their interests in the land without compensation). In Queensland, Father Frank Brennan strongly criticised that State's exclusion of Aboriginal people from vital discussions and the consistent subordination of Aboriginal interest to corporate interests. In New South Wales, Mr Fahey sent a letter to the Prime Minister suggesting the Commonwealth's proposed legislation exceeds the implications of the High Court's decision and would seriously impede developments (there was no time limit for claiming native title, the granting of mining leases might be delayed seven months, native title could be revived after the expiry of a mining lease and native title claimants could negotiate before establishing their native title).

On and between 8 and 10 September several Aboriginal leaders, including Aden Ridgeway of the NSW Lands Council and Terry O'Shane of the National Coalition of Aboriginal Organisations echoed the warning of historian Henry Reynolds, that growing frustration at

the lack of progress on the Mabo issue and social justice concerns could spill over into violence.

On 9 September a joint meeting of the Caucus Aboriginal and Torres Strait Islander Committee and the Social Justice Committee resolved to hold continuing discussions with the Aboriginal representatives from the Eva Valley meeting to explore possible changes to the Government's Mabo response. Some Caucus members were concerned at the ability of the States to decide the membership of the new courts and tribunals, others with the late inclusion in the package of a right for States to override tribunal decisions in the 'state interest' as well as the previously mooted 'national interest'. Senator Margaret Reynolds questioned limiting the revival of native title to after the expiry of mining leases alone and questioned the need for Aborigines to prove native title rather than for governments to prove that it had been extinguished. On the same day farmers pledged an unlimited portion of the Australian Farmers Fighting Fund to fight the Wik claim and other Mabo-style claims.

On 10 September the Aboriginal Legal Service of WA, on behalf of about 700 Martu people from the East Pilbara-Western desert area, lodged a claim in the WA Supreme Court for 200,000 sq km of land (mostly crown land) which included the Ruddall River national park (from which the WA Government had recently approved the excision of the CRA proposed Kintyre uranium mine site) and a long stretch of the Canning Stock Route.

On 10 September a lawyer for the NSW Aboriginal Land Council, Andrew Chalk, claimed the NSW Government's draft Mabo legislation 'shames Australia and confirms the worst fears of Aboriginal people' by limiting the time in which a claim could be made, not automatically allowing legal representation, excluding many areas from claim and requiring claimants to prove 200 years of physical occupation.

On 12 September the executive director of the Australian Council for Overseas Aid, Russell Rollason, warned that Australia's standing could suffer internationally if the Government kept on its present course and contravened the International Convention on the Elimination of All Forms of Racial Discrimination- adherence to which had distinguished Australia from countries such as South Africa. Similarly, on 15 September the director of the Cape York Land Council, Noel Pearson, claimed that the paragraph of the Commonwealth's 'Outline of Proposed Legislation', which states the Bill would facilitate the validation of past grants 'notwithstanding any other law (including the Racial Discrimination Act)', revealed a Commonwealth intention to suspend the *Racial Discrimination Act* in

relation to the validation of all land titles before June 1993 and to breach its international obligations. He called the 'Hollway Committee' proposal a denial of human rights to a section of the Australian community and suggested 'Certainty can be achieved without breaching or suspending the Racial Discrimination Act, but what that requires is case by case negotiation'.

On the same day the Greens, the Australian Democrats, the Australian Conservation Foundation, the Wilderness Society and Greenpeace issued a joint statement criticising the Commonwealth Government's proposed legislation and urging the Government to ensure that any Aboriginal community with a claim to native title would have the opportunity to have its claim tested and, if valid, recognised.

In early September Dr Forbes, reader in law at the University of Queensland argued in a paper released by Institute of Public Affairs entitled 'A Native Titles Club', that native title tribunals would not provide a speedy, impartial and cheap solution to Mabo.

Another law academic, Professor Nettheim of the University of New South Wales, in an unpublished but widely circulated paper entitled 'The Commonwealth Government's Proposed Legislation on Native Title' argued that the 27 October 1992 promises to 'encourage negotiation between parties', to 'give support to strategic test cases' and to have 'ruled out amending the Racial Discrimination Act to override the effect of the Mabo decision' had not been fulfilled. He noted that in its September 1993 draft legislation the Government had backed away from its June 1993 principles that only titles granted since October 1975 need validating, that 'Native title should be preserved to the maximum extent possible', that 'the response of governments to Mabo should go beyond immediate land management issues' and that the legislative package should include a national land acquisition fund, a revenue equivalents scheme in respect of resource development on Aboriginal land, and transfer of Aboriginal reserves to Aboriginal interests.

Professor Nettheim further noted that the proposed legislation will often unnecessarily extinguish native title, that it would validate even those pre-1975 grants which may have extinguished native title in breach of a statutory prohibition (whereas if a pastoral lease was extinguished by a grant which seemed to exceed the statutory power of the State at the time, the pastoralist remains entitled to challenge the validity of the grant), that it severely damages the integrity of the Racial Discrimination Act and that Australia may risk condemnation at the international level. His recommendations included the

following: the land management legislation and social justice package should proceed through Parliament at least as cognate bills; the provisions for State bodies and State governments to decide on development projects on native title land should be deleted; the possibility that native title is asserted as part of a trespass or ejectment proceeding should be accommodated; validation should not include explicit extinguishing of native title; courts should be allowed to determine the degree of inconsistency between a granted interest and native title; validation provisions should relate only to possible invalidity caused by the combination of the existence of native title and the Racial Discrimination Act, that is, only to post-October 1975 grants.

On 13 September Mick Dodson joined those who were critical of the Government's plan to suspend the operation of the Racial Discrimination Act, seeing irony in the Commonwealth using the power given to it in the 1967 referendum to detract, in the International Year of the World's Indigenous People, from rights laid down by the High Court. Neville Bonner, the former Queensland Senator, speaking at the launch of the Australian Catholic Social Justice Council's report, *Recognition, the Way Forward*, called on the parliaments of Australia to 'stop playing silly buggers'.

On the same day Peter Reith, now the Shadow Special Minister of State, suggested that the cost of compensation could easily amount to billions of dollars, argued that this cost will have serious consequences for State budgets and called on the Government to release its costing of Mabo compensation and the foreshadowed social justice package.

On 14 September Ian McLachlan, Shadow Minister for National Development, argued that Professor Reynolds' warning of violence by Aborigines might fuel violence against Aborigines, that the States should be left to decide what rights and access to resources they provide their Aboriginal communities, and that a Constitutional amendment affirming States as the only source of title to land may be appropriate. On the same day the SA Premier, Mr Arnold, claimed the Federal Government was being discriminatory in offering native titleholders a right to object to development which other titleholders in Australia did not enjoy.

On 15 September in the course of a National Press Club address Pat Dodson, the chairman of the Council for Aboriginal Reconciliation, suggested that the Mabo judgment may end up a pyrrhic victory, that what Aboriginal people understood by native title may end up bearing 'little resemblance to what is eventually enshrined in the laws', and that the Government should not feel ashamed to admit it has made

mistakes. On the same day members of the Eva Valley working group issued a press release expressing outrage at the Attorney General's apparent preparedness to 'deny the protection of the Racial Discrimination Act to indigenous Australians'.

By 17 September opposition to the Government's draft legislation seemed to harden in some Aboriginal quarters. The Central Land Council director, Kumanjai Ross, criticised the validation and tribunal provisions in the draft legislations and argued that the onus should not be on Aborigines to prove they hold native title, but on miners and pastoralists to prove the Aborigines did not. Representatives of the Eva Valley working group meanwhile declared that the working group would henceforth be focusing on the plan to suspend the operation of the Racial Discrimination Act.

On 19 September Peter Reith argued in an article in the *Canberra Times* that it was wrong to suggest that the validation of titles is discriminatory (as compensation was to be paid where appropriate), that an international observer could not justifiably criticise Australia on these grounds and that senior Government Ministers were allowing the debate to drift. Later the same day the Federal Attorney-General spoke out in defence of the Government's proposed legislation, arguing that from 30 June 1993 onward 'there is no question of the Racial Discrimination Act not applying'.

The month of September offered two examples of the Mabo debate arousing media interest in academic studies of Aboriginal and Islander peoples. Robert B. Edgerton's study of the Kaiadilt in the Gulf of Carpentaria and the Tasmanians entitled *Sick Societies* was credited with exposing the myth of primitive harmony while Dr Donald Pate's analysis of ancient Aboriginal bone collagen was credited with exposing the myth of Aboriginal nomadism.[6]

On 20 September the Federal Court ruled that Mabo-style native title could co-exist with the *Aboriginal Land Rights (NT) Act 1976* and so it was not unlawful for the Minister for Aboriginal Affairs, Mr Tickner, to grant freehold title to land near Lake Amadeus under the Act to without the consent of the native title holders.

On 23 September the *Australian Financial Review* published extracts from a letter dated 16 September which the Office of the Cabinet in Brisbane sent to PM&C in Canberra. Modifications which the Queensland Government was recommending to the Commonwealth's

6 *The Canberra Times*, 11 September 1993 and *The Sydney Morning Herald*, 22 September 1993.

proposed legislation included the following: allowing mining leases which have a major impact on land to extinguish native title; requiring native-title claimants to establish their or their ancestors' 'physical connection' with the land; using existing State compensation regimes for loss or impairment of native title; capping compensation at the level appropriate for freehold land; and setting a sunset period for native-title claims of 12 or 15 years. The Coalition front benchers Peter Reith and Peter McGauran both said the letter showed the Government needed to go back to the drawing board.

On the same day the federal parliamentary leader of the National Party, Tim Fischer, called Aborigines ungrateful and calculated that the $1.3 billion the Commonwealth spent on the slightly more than 250,000 Aborigines worked out at approximately $5,000 a head. He also broke ranks with Dr Hewson by supporting the calls for a referendum on Mabo.

Expressing concerns of a different kind were the many Church groups (e.g. the synod of the Uniting Church), Aboriginal representatives, academics (e.g. Professor David Lea) and former Government advisers (e.g. Dr Coombs and Greg Crough) who argued that the proposed legislation should be delayed. On 23 September Mr Tickner foreshadowed recommending to the Prime Minister when he returned from overseas that introduction of the legislation be delayed to allow time for more discussions. AMIC chief, Lauchlan McIntosh, and Queensland Premier, Wayne Goss publicly opposed further delays.

On 26-28 September approximately 600 Aborigines from all around the country met at a sports ground in Canberra to discuss their response to the Mabo decision and the Government's proposed legislation. In the course of the three days: federal politicians were condemned for hypocrisy on human rights and for not listening to Aboriginal views; there was a march to Parliament House; the dot mosaic in the Parliament's forecourt was symbolically removed; and the Government was called on to delay introducing its legislation. The meeting culminated in a decision to step up the campaign against the Government's proposed legislation, to appeal directly to the Queen to refuse Royal assent for the Bill, to challenge the legislation, if it was passed in its present form, in the International Court of Justice or the High Court, and, most controversially of all, to possibly appeal to for a boycott of the Sydney Olympic Games (several Aboriginal athletes expressed support for the Aboriginal cause but not an Olympic boycott).

While the Aborigines met, Federal Cabinet met to finalise the Commonwealth response to Mabo. The Caucus Aboriginal and

Torres Strait Islander Affairs Committee and the Caucus Social Justice Committee had written to the Prime Minister requesting that he delay the introduction of the native title legislation by one month. Former Prime Minister Mr Whitlam was reported to have sent a letter to a senior official in PM&C suggesting there were many aspects of the proposed legislation which, in his view, would be challenged. On 28 September the Prime Minister explained to the ALP Caucus the Cabinet's decision to consider the final draft of the legislation on 5 October and to introduce it to the Parliament on 18 October.

For the Government's legislation to clear the Senate the Government was clearly going to have to win the support of either the Coalition (by better accomodating the interests of the States) or the Australian Democrats and Greens (by better accomodating the interest of Aboriginals). In the last days of September the Federal Government came under strong pressure from both sides.

On the one side, the Queensland, South Australian, ACT, Northern Territory and NSW governments held out the prospect of co-operation if Commonwealth legislation included more flexible criteria for the accreditation of State Tribunals and more restrictions on the rights of native title claimants to negotiate with would-be developers of claimed land. A leaked Cabinet document prepared by the head of the Government's interdepartmental Mabo committee, Sandy Hollway, clearly recommended the Government seek a deal with some States to isolate the more intransigent states, to avoid the cost of setting up a Commonwealth structure nation-wide, to avoid being blamed for a slow down in development activity and to encourage the States themselves to take account of native title. The leaked document seemed to set the Commonwealth's bottom negotiating line at paying compensation for all extinguishment of native title in the past.

On the other side, the Australian Democrats and WA Greens called on the Government to move in the opposite direction and accommodate ATSIC's concern that the Racial Discrimination Act be applied and a social justice package be detailed before the legislation reaches the Senate. John Ah Kit of the Jawoyn Association added to fears that the issue may be internationalised by declaring that he would not hesitate to use his Chinese ancestry to tell the region of the continuing immaturity of the NT Government and industrial leaders.

The last days of September also coincided with an economics conference at Murdoch University in Perth at which David Godden argued (using neoclassical economic analysis) that the granting of native title to traditional Aborigines landholders, especially if the title

carried rights to minerals, would in the long run benefit both Aboriginal and non-Aboriginal Australians.

October - last minute manoeuvering

On 1 October it became apparent that some sections of Caucus were increasingly uneasy with the direction the Government seemed to be moving. With Commonwealth and State officials meeting in Canberra, there were reports that the Commonwealth was yielding to State demands. The Prime Minister issued a statement to say these reports were untrue. Mr Reith observed that the Prime Minister seemed to be saying one thing to the States and another thing to Caucus, and suggested the legislation might end up being opposed by the coalition for one set of reasons and by the Democrats and Greens for another.

On 2 October the Australian Anthropological Society urged the Prime Minister to ensure that the Mabo legislation was an 'unambiguous and ungrudging recognition of native title'. The Society's President, Nicholas Peterson, feared that Aboriginal concerns were being marginalised and that State tribunals might not be willing to accept the hearsay evidence so important to the Aboriginal people. Among the principles the Society advanced for native title recognition were that hearsay evidence be accepted, that the Commonwealth have the prime power and responsibility in deciding recognition; that native title exist except where clearly demonstrated otherwise; that native title and rights be determined according to the laws and customs of the Aboriginal people connected with the land, and that native title claimants and holders had a right to choose their tribunal.

On 3 October, in a Network TEN 'Meet the Press' interview, Noel Pearson, Director of the Cape York Land Council, was critical of the Hollway committee's approach, suggested there was 'moral scurvy' within the Government, suggested a balance between economic concerns and indigenous rights could be found in the April Peace Plan proposals and said there can be no reconciliation if the Racial Discrimination Act is rolled back. Expressing similar concerns on that same day over the proposed suspension of the Racial Discrimination Act were the Democrat leader Cheryl Kernot, the ALP Queensland Senator Margaret Reynolds, Aboriginal Social Justice Commissioner Mick Dodson and the Aboriginal Affairs spokespeople for the oppositions in Tasmania, WA, NSW and Victoria.

On the same day, Peter Reith, the Shadow Special Minister of State, argued that the Prime Minister's proposals went beyond the High

Court decision and that there was no need for a legislative response from the Federal Parliament except perhaps to roll back the Racial Discrimination Act for the purpose of validating grants. Despite Premier Kennett holding out an olive branch to the Prime Minister, Mr Reith suggested the Opposition would try to refer the Native Title Bill to a Senate committee. While the National Party leader Mr Fischer expressed support for this strategy, former coalition Aboriginal Affairs Minister Mr Chaney said it 'against Australia's interests, against economic interests and against the interests of Aborigines' and suggested the federal Opposition should have been prevailing upon the WA Government to take a different stance. Some weeks earlier another former Coalition Aboriginal Affairs Minister, Ian Viner, had argued that 'human rights must override State rights'.

On 4 October Frank Brennan noted that since June the Commonwealth had agreed to many State demands (that traditional owners not have a veto over development on their land, that the Racial Discrimination Act be rolled back, that all non-Aboriginal title back to 1788 be validated, that any remaining native title on pastoral leases be extinguished and that continued public access to beaches and water ways be guaranteed), and that since the release of the draft legislation the mining industry has been 'pulling out all stops' to gain further concessions from the Commonwealth (e.g. curtailing the 'right to be asked').[7] The Australian section of the International Commission of Jurists echoed warnings that there was a risk the Federal Government's Mabo proposals would breach international human rights standards.

On the same day, in a book-launching speech in Melbourne, Mr Tickner made a clear appeal to the Government to change tack on Mabo and to seek the support of the Democrat and Green Senators. He suggested 'The price of conservative support in the Senate ... would be too great to pay' and asked: 'Can you seriously imaging Tim Fischer and Peter Reith backing the Federal Labor Party in passing legislation to override the powers of the Western Australian Government?'

On 5 October the Australian Democrats and WA Greens promised to support the Federal Government's native-title legislation if the bill did not allow the suspension of the Racial Discrimination Act. Over the next day or two those urging the Government to move in this direction included Caucus' Aboriginal and Torres Strait Islander Affairs and Social Justice committees, Pat Dodson, who threatened to resign as chair of the Aboriginal Reconciliation Council, and Marcia Langton of the Cape York Land Council. Philip Toyne, wrote to the Special

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7Brennan, Frank, 'Undermining Mabo', *Age*, 4 October 1993.

Minister of State informing him that it was no longer feasible for him to liaise with moderate Aboriginal groups. Mr Toyne criticised the Government for failing to allow direct Aboriginal input into the ministerial Mabo committee, for failing to develop the social justice package in concurrence with the native title legislation, for deciding to unnecessarily extinguish native title as part of validation of existing titles, and for deciding to validate even pre-1975 land grants.

Also on 5 October AMIC issued a media release reporting that polling they had commissioned suggested 70% public support for the mining industry's stance on Mabo and Dr Hewson restated the Opposition's position that State responsibility for land management and the issue of land titles needed to be protected.

On 6-8 October the Prime Minister was involved in several rounds of meetings with representatives of key Aboriginal groups. The Prime Minister claimed 'encouraging progress was made' with twenty or more outstanding issues being narrowed to three or four (whether the Racial Discrimination Act needs to be suspended, whether other grants need to extinguish native title, whether Aborigines should have a choice of Commonwealth or State tribunals). He was reported suggesting a more focused overriding of the Racial Discrimination Act to validate only some sorts of existing title and suggesting some limits on State power to determine native title. Aboriginal leaders were flatly opposed to any suspension of the Racial Discrimination Act and any explicit extinguishing of native title in the process of validating land titles. By the end of the round of negotiations Lois O'Donoghue, Mick Dodson and Noel Pearson were all reported as accusing the Prime Minister of putting State rights before human rights. Dr Wooldridge suggested in Parliament that there was some inconsistency negotiating with the States to water down native title while at the same time negotiating with the Aborigines to broaden it.

Adding to the debate in this period was the contention of the former NSW Attorney-General, John Dowd QC, that the NSW did not articulate the principles articulated by the High Court and would make successful claims of native title almost impossible.

On 9-10 October the Prime Minister held inconclusive talks with Premier Court in Perth. The possibility of finding a compromise acceptable to the Aboriginals involved in the preceding week's negotiations and all the States and of having legislation introduced on 18 October seemed to slip away.

By 11 October the Government had a dilemma. The drafting changes proposed by Aboriginal leaders would virtually guarantee the

legislation's passage through the Senate on Democrat and Green votes but would have a cost to the Commonwealth in terms of State co-operation (and thus probably also in terms of compensation). The drafting changes agreed to by all States and Territories other than Western Australia would jeopardise the reconciliation process but might eventually see the legislation passed in the Senate with Coalition support. The Prime Minister had said he would like to see the legislation through by Christmas but the date of its finalisation and introduction was still uncertain.

Index to participants in the debate

Aboriginal groups

Governments and heads of governments

Other individuals

Other organisations