

The Mabo ‘Vibe’ and its Many Resonances in Australian Property Law

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But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millennium ... Law is that which licences in blood certain transformations while allowing others only through unanimous consent.¹

Introduction

This chapter explores the pervasive, enduring and radical influence that the High Court’s 1992 decision in *Mabo v Queensland (No 2)*² (*Mabo*) has had on Australian property law. The topic of changes internal to this technical area of legal doctrine might appear to have little direct bearing on the much larger question of native title as a ‘vehicle for change and empowerment’ that this book addresses. But the future prospects for native title both in the courts and on the ground are still, even after more than two decades, dependent on what the High Court held in that case, as the recent *Akiba* decision clearly demonstrates.³ No less significant is the fact that the increasingly widespread popular acceptance, and even embrace, of the decision has been an important source of support for legislatures and policy-makers as they have, if only in fits and starts, moved to affirm native title over that intervening period of time. The argument developed below is that the extent of this impact is not simply due to the decision in favour of the Indigenous appellants. It is also directly traceable to the legal and historical narratives articulated in the reasoning of the majority of the court. The decision greatly advanced justice for Indigenous Australians by providing a compelling moral case, beyond the strictly doctrinal exposition, for taking meaningful steps to remedy the many past wrongs inflicted by the denial of native title over two centuries.

For the purposes of this analysis, I am drawing on a broad definition of property law. This body of law represents not merely the conventional set of technical legal rules that mark out the rights and duties of owners of property, and the various formal mechanisms for its transfer and fragmentation but it also includes the underlying values that the rules express and foster. Those values extend beyond professional interpretations of

1 Robert M Cover, ‘The Supreme Court, 1982 Term, Foreword: Nomos and Narrative’ (1983-1984) 97 *Harvard Law Review* 1, 9.

2 (1992) 175 CLR 1.

3 *Akiba v Commonwealth* (2013) 250 CLR 209.

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