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The First Aboriginal Land Rights Case

John Fogarty and Jacinta Dwyer

It is 40 years since the first land rights claim by Aboriginal people was instituted in Australia. It was dismissed: *Milirrpum v Nabalco Pty Ltd* (1971) 17FLR 141 (the Nabalco case). This loss was a great disappointment to those who had devoted their lives to claims that Indigenous Australians had land rights at the time of British settlement and that where those rights still existed they should be recognised and the land returned to that community.

Less thought was given then to the longer term consequences for Aboriginal people if those claims were successful. What would be the consequences to present and future generations? What if minerals were on the land or were later discovered? It was difficult then to comprehend the future value or impact of mining.

Land claims were directed solely to the return of the land to that community so that they could commence or recommence their previous lives there. But as history passed through to the 1960s, this seemed to face overwhelming difficulties.

Aboriginal people continued to be surrounded by the modern world, with all its advantages and disadvantages. If they were to live on their own land they would now require considerable outside assistance — schools, health, employment — all of which are difficult to develop in the outback. Where

paid work is not regularly available, issues of welfare will remain. They also have to confront the many disadvantages of western society — alcohol, drugs, petrol sniffing and support from welfare. How would these changes affect the younger and perhaps better-educated generation?

Any suggestion then that Aboriginal people should receive compensation instead of their land, or give up part of their land for grazing or mining were overwhelmingly rejected. The claims were clear cut — a return to their former and in a sense 'primitive' lifestyle — the life of centuries past, but assisted by the society around them.

In a more practical sense, could this communal land be divided between individual owners who may wish to use it for purposes that are different from communal use, such as individual homes or industry?

The Nabalco decision was the subject of strong criticism. However, no appeal was taken to the High Court, which appeared surprising and disappointing, but which is explained in more detail later.

The purpose of this article is to provide a brief history of some aspects of Nabalco largely from the perspective of the plaintiffs' lawyers and the interplay of some unusual events, which seemed to be part and parcel of those proceedings. In particular, the emphasis is largely upon two of the four lawyers who acted for the plaintiffs, namely, Sir Edward Woodward and Mr Frank Purcell. The other members were Mr John Little, then of the Victorian Bar, and, from shortly after the case was instituted, myself (John Fogarty).

Woodward and Purcell had different backgrounds and their legal careers were quite separate until they each became involved in this claim. But from then on and for many subsequent years, each devoted great skill and energy to Aboriginal issues, and in doing so each made singular contributions to land rights generally and to the wider social issues that were inevitably involved.

At the time the Nabalco proceedings were being considered it would not be unfair to say that neither Woodward nor Purcell knew much about those claims. However, they were both driven by a determination and dedication to take every possible step to preserve the rights of Aboriginal people to their land, which had existed for so many centuries and which had been trampled upon by grazing and farming, by developing towns and cities and, in later years, by mineral exploration.

Woodward was the dominant counsel in Nabalco. He prepared the claim in simple terms, played a detailed role in the selection of witnesses and the tactics to be adopted, and was responsible for maintaining the case in court in good order, including leading most of the major witnesses.

Purcell became involved in this case because the Methodist Mission, which conducted missions in the Northern Territory, asked his firm to investigate land rights and institute proceedings.

Purcell's tasks seemed never ending, especially as he had little outside assistance. These responsibilities included many visits to Yirrkala, intensive discussions with potential witnesses and supporters, organising witnesses between Yirrkala and Darwin, finding accommodation, and employing numerous interpreters because of the differences in language and dialect. It was to him that everybody looked when administrative or organisational problems developed.

In addition, he was responsible for what seemed endless negotiations with public servants in Canberra over issues of fees and accounts. In particular, this involved living expenses for the lawyers, which necessarily included a liquor component. Canberra had a belief that we devoted a great deal of our time and their money on refreshments, a suggestion, which was wide of the mark. Various formulas were employed to assess this great issue. They showed that we were badly provisioned. Eventually the matter was dropped.

It became apparent to me shortly after I joined the other lawyers that there were deep-seated differences in the manner in which the plaintiffs' case should be conducted. The claim was based upon prior possession of particular land over the centuries, and witnesses were selected in order to establish those issues. John Little felt that there were other issues which should be included: the suppression of Aboriginal tribes by British forces, especially in the early years of settlement; the consequences, if any, which flowed from the abolition of slavery in the United Kingdom in the early 19th century; and, as the case developed, the suggested failure to explain fully the importance of some of the New Zealand cases.

Nine years after the judgment in Nabalco land rights, proceedings were instituted in the High Court of Australia by Eddie Mabo and two other members of the Murray Islands community in respect of their land in those islands: the Mabo proceedings.

The Mabo land is situated in the Murray Islands at the eastern edge of Torres Strait and Australian Territory. It is quite atypical of most of Australia. The Meriam people had occupied and owned the land according to their own laws and customs for generations before colonisation and since.

While these High Court proceedings were still pending the Queensland Government passed the *Coastal Islands Declaratory Act 1985*. It declared that the relevant islands were 'freed from all other rights, interests and claims of any kind whatsoever and became the waste land of the (Queensland) Crown', and that no compensation was payable by reason of this provision. This would have ended the Mabo claim. But its validity was challenged as contravening the Commonwealth *Racial Discrimination Act 1975*. The High Court, by a majority of four judges to three judges upheld that objection. Thus, by the slenderest majority, the land claim was able to proceed.

In 1992 the decision in Nabalco was overruled by the *High Court: Mabo v Queensland (No . 2)* (1992) 175CLR 1 (the

Mabo case) and land rights were established. Where native title had existed before European settlement (from time immemorial) and had not subsequently been extinguished by the sovereign State by actions that disposed of the freehold or through leasehold title, which was incompatible with pre-existing native title, that title continued.

It introduced a new jurisprudence and new ways of land usage. It also introduced an even greater surprise to the general community with their belief that long-established land ownership could not now be challenged in this way. Others argued that while it might have application to the facts in Mabo, with its particular land ownership system and the extensive use of gardens, it could have no application to the barren lands of Australia.

The High Court made clear that that was not the case — Mabo applied generally. And that has since been illustrated by a number of decisions of the Federal Court. For example, in *Kogolo v State of Western Australia* (2007) the land was 83 square kilometres of unallocated Crown land in Western Australia (about the size of Tasmania). No grazing or mineral claims had been made in this desolate area. The existing and previous native title was well established. The trial judge concluded his judgment by saying:

> It (the decision) determines that this is your land … that is based upon your traditional laws and customs and it always has been. The law says to all the people in Australia that this is your land and that it always has been your land.

The Mabo hearing had been transferred to the Queensland Supreme Court to ascertain the evidence and facts. That seemed to take a long time, partly because of distance and partly because a number of other land claims were then lodged there. However, as it turned out, that period was important because of significant changes in the membership of the High Court during that time.

Originally, most people saw land rights claims as directed to the land taken by settlers in the early years of settlement. But two centuries of history now presented great obstacles to that view.

Instead, the major issue was largely to become mineral exploration. Rather like the world of oil, vast mineral wealth seems to be found mostly in desolate regions that no outsider had sought and which it was thought could safely be left to the local people to look after in some general way.

The huge cost of mineral exploration and development may produce great wealth but may also be confronted by land rights or other ownership as, for example, the current mineral disputes in Eastern Australia. The initial attitude of many companies and governments has been to brush these claims aside, using gun-boat diplomacy or the combination of corporation/government expedience.

An obvious example of this was the argument that the ceremony in Sydney on the settlement of New South Wales in January 1788 terminated any rights which the long-term inhabitants may have possessed, rendering them traitors to their own country and justifying the enforced occupation of their land.

Mineral exploration, particularly in Western Australia, exposed this in all its harshness — the prospect of instant wealth from something dug from the ground is more important than the rights of people who have lived there for thousands of years.

The plaintiffs

For thousands of years Aboriginal hordes (here often referred to as the Yolngu) had lived from generation to generation in an area referred to as Yirrkala, on the eastern side of the Northern Territory adjoining the Gulf of Carpentaria. Matthew Flinders named the overall region Arnhem Land after a Dutch ship, *Arnhem*, which had explored the Gulf in the 17th century.

It is now recognised the hordes of Aboriginal people made their way to Australia thousands of years ago, the chance result of a series of voyages over a great length of time.

In the context here the word 'horde' is used to describe a small group of persons owning a particular area of land in common, the boundaries of which were known and recognised by the occupiers and other hordes. This group may also be referred to as a band or tribe. Other hordes of Aboriginal people, nearby and across Australia, led their lives in the same way on lands claimed to be and recognised by other Indigenous Australians as their particular country. They were born to that land and remained intensely attached to it throughout their lives. To deprive an Aboriginal person of that land was to condemn them to a kind of death.

Aboriginal Australians were and are a unique society. Each band maintained a strict relationship with its land, neither surrendering it nor expanding it, although it may grant permission to another band to enter the land temporarily and share its produce. So far as can be known there are no indications of tribes attempting to occupy other lands or of wars or invasions.

The Aboriginal people had no knowledge of other lands or peoples. Except for one or two particular areas, they had no long-term visitors. Very occasionally a ship would pass its shore and was observed by those who happened to be there at that time.

The major exception relates to the Yolngu. For several hundred years the Macassans (from Sulawesi in Indonesia) visited the northern coast and in particular around Yirrkala each year to fish for beche de mer. This involved seamen camping on the shoreline with the permission of the Aboriginal people, engaging Yolngu people in work and, on occasion, taking a few Yolngu with them to their own homes during the off season.

As time went on small groups from other countries came during the fishing season, including a small number of Japanese.

The Yolngu people learnt little from their contact with the Macassans. The Yolngu had no inventions, improvements or trade goods; they lived continuously on their own land, hunting animals and collecting fruits during the seasons, camping from time to time in accordance with the availability of food and to carry out religious rituals. They grew no crops and raised no herds.

Their religious belief was that at the time of the 'Dreaming' a spirit ancestor moved through a particular area and designated as sacred certain animals, birds, inanimate objects and people. Each tribe belonged to a particular spirit and held fast to its teachings and lore.

The society was patriarchal and the older men held unique powers and were responsible for secret ceremonies, religious knowledge and corroborrees. The obligation of adherence by tribal members to these matters was unchallenged.

A further difficulty in determining the structure and membership of individual tribes was that a fundamental basis of at least those who lived in this area was what might be described as 'moieties', that is, people and things were designated in a definite and immutable way, which affects every aspect of their lives, including membership of a particular tribe.

The struggle in more recent years by Aboriginal people to maintain their way of life and beliefs illustrates their extraordinary determination in the face of what seemed impossible odds, based upon legal rules of which they had no understanding and which were contrary to their previous existence.

The settlers and government treated Indigenous Australians as nomads with no attachment to particular land and who made no use of it in any discernible way. They were

regarded as 'uncivilised', with a strange religion and customs. Settlement by whites and dispossession of Aboriginal people were seen as inevitable symbols of western progress. It was an example of evolution on a sweeping scale.

In any event, the view generally taken by settlers was that any indigenous rights to land were brought to an end on British settlement, not the later actions of settlers. If correct, this enabled the British government to acquire by settlement what it could not have acquired by conquest (where pre-existing land rights are recognised).

Nabalco

In 1931 the government proclaimed a substantial portion of Arnhem Land an Aboriginal reserve. This was an area of approximately 96,000 square kilometres stretching from the sea at the north-east corner of Arnhem Land and the Gulf of Carpentaria to the Roper River in the south and the Alligator River in the west.

In the years leading up to the 1960s, significant exploration had taken place in the Territory, in the course of which Nabalco discovered huge quantities of bauxite near Yirrkala and adjacent areas. Yirrkala was part of Yolngu land and is in the middle of the Aboriginal reserve. The government excised an area from the reserve and granted a 12-year mining lease to Nabalco. Any concept that an Aboriginal reserve gave that land a permanent place in Aboriginal life was quickly brought to an end.

Although Nabalco is generally referred to as a Swiss company, it had from the beginning a substantial number of Australian shareholders. It is now part of Rio Tinto Alcan Gove.

Members of the Methodist Mission assisted the Aboriginal people with a petition in English and Gumatj, which was sent to the Federal Parliament. It set out their historic rights to the land and the irreparable damage that would occur if the lease was granted. This beautifully prepared

petition is still to be found in a position of honour in the Federal Parliament.

However, it had very limited success. A Parliamentary Committee rejected any concept of revoking the lease or returning the land to the Aboriginal people. It recommended payment of small royalties. This was rejected by the Yolngu, whose emphasis was solely on the retention of their land. Hence this case.

Bauxite is the mineral form of aluminium. It is normally found in a layer three to five metres deep, about half a metre under the topsoil. To mine it, the topsoil and vegetation are removed (and dumped nearby). The bauxite is transferred to a local power station that refines it into aluminium. The process is large scale and extraordinarily damaging to the area no matter how carefully approached. But in fact little concern was paid to the religious and other aspects of the land to Aboriginal people.

At the later land rights hearing one saw the bitter tears of elders who explained the loss of sacred sites, pushed aside by indifferent machine operators and without any discussion with the local people.

The cost of setting up and running this site was and is very substantial with difficult terrain and weather. The results to investors had been most satisfactory in past years, but as is indicated later, its future profitability now appears uncertain.

Settlement of Australia

On 25 January 1788, Governor Phillip, Commander of the new Settlement of New South Wales, ordered the King's proclamation be read. It was primarily directed to the establishment of a penal settlement to replace penal settlements in other colonies that were closing their doors to English convicts.

In addition, the King was greatly taken not only by the discovery of new lands but also by the flood of information

about the natural world through Sir Joseph Banks, which had a significant impact upon scientific thinking. The Empire should seize the opportunity to continue this acquisition of knowledge.

The Instructions to Governor Phillip appointed him to be 'our Captain General and Governor in Chief of our territory called New South Wales' which territory was to extend up and down the eastern coast and 'including all the islands adjacent in the Pacific ocean' (within designated latitudes), and 'in all of the Country Inland to the Westward as far as 135th degree of east longitude, reckoned from the Meridian of Greenwich …'.

The settlement, therefore, extended in three directions. The first included the whole of the eastern coast of Australia so as to avoid the possibility of another European settlement along that coast, and corresponded with the decision of Captain Cook, who on 22 August 1770 at Possession Island, 'took possession of' the whole of the eastern coast of Australia in the name of George III. Secondly, it encompassed all 'islands adjacent' within the designated latitudes and aimed at avoiding the possibility of a foreign settlement to Australia's immediate east.

Finally, and most significant for present purposes, was the extension of settlement through 'all the country Inland to the Westward' as far as the 135 degree of east longitude. This was a line which traversed virtually through the centre of Australia but which seemed to have no connection with any then or now known aspects of Australia. Significantly here, it divided what was later to become the Aboriginal Arnhem Land Reserve into two portions; the eastern portion (which included the land the subject of the Nabalco claim 200 years later) and the balance unclaimed and for the time being free of British or other settlement.

On the face of it, this line of western demarcation seems entirely incongruous. It is a straight but otherwise haphazard line through unknown land and representing nothing in

particular except that it virtually divided the continent in half by following the 135° of east longitude.

But at that time nobody knew what lay beyond the Blue Mountains. It would take over 100 years before any person travelled from the south to the north of Australia or from the east to the west.

In 1824, Britain extended its military outposts to Melville Island and the Coburg Peninsula. These, however, were outside the area of settlement of New South Wales. That line was then altered to 129° east (which later corresponded with the eastern boundary of Western Australia). The additional land then became part of New South Wales and included the whole of the 'Northern Territory'.

After that the various colonial boundaries were established, occupying the whole continent. In 1863, South Australia took control of the Northern Territory, including Arnhem Land.

From 1911 the Northern Territory was administered by the Commonwealth until self rule in 1978.

These matters had an importance in land claims. It was accepted that Britain acquired Australia by settlement and the European convention was that no other such country could challenge that. It also gave the sovereign State the sole right of acquiring the soil from the occupants.

The defendants in the Nabalco case argued that native land rights did not exist in Australia. If they did exist, they were terminated by settlement.

The argument for the Aboriginal people was the reverse, land rights were and are part of the laws of Australia; no relevant settlement abolished those rights, although they may be abolished by actions of government which were inconsistent with their continued existence. Their rights were not extinguished in 1788 or afterwards, they were impaired but remained.

The proceedings and appeal

The land claim proceedings were instituted in the names of three Aboriginal people: namely, Milirrpum, elder of the Rirratjingu clan; Munffaraway, elder of the Gumatj clan; and Daymbalipu, an elder of the Djapu clan who represented that clan and also acted on behalf of 11 other tribes who claimed interests in the land.

The proceedings could have been issued either in the Supreme Court of the Northern Territory or in the High Court of Australia. The reasons for choosing the Supreme Court, and later for not appealing to the High Court after the adverse judgment were both referred to by Woodward in his memoir One Brief Interval.

The reasons for selecting the Supreme Court were that he was:

> … confident that the resident Judge, Mr Justice Richard Blackburn, would give us a patient and fair hearing …. I would have been confident of a reasonable hearing (in the High Court) from Victor Windeyer or Douglas Menzies, but I was very doubtful about the other five.

The reasons for not appealing to the High Court were set out in the following paragraphs:

> I took the view that what we had achieved before Justice Blackburn was sufficient to provide a basis for land rights legislation. And I was afraid that if we went to the High Court, we would not only lose the appeal, but may also have cold water poured on Blackburn's finding that there was a coherent system of Aboriginal law relating to land. I had this view confirmed a few months later when I was told that Chief Justice Barwick had been heard to say that our native title claim was 'a lot of nonsense', or words to that effect.
>
> My view was supported by John Fogarty and Frank Purcell, and so our clients were advised to pursue a political rather than a legal, solution to their needs.

Many felt that the issue was so important that a last desperate appeal was justified. It must have required great strength of character by Woodward to reach those strongly held views and that they were put into effect. This was especially so because it was not possible to make those views public at that time. The result was strong criticism from many quarters, but without a public explanation in response.

The view was to keep 'alive' those findings of Justice Blackburn that were favourable to the plaintiffs and Aboriginal people generally, and avoid the risk of an emphatic rejection by the High Court of land rights as a concept.

As it turned out, it also meant that when Mabo did come before the High Court about 20 years later, the membership of that court had changed notably.

These conclusions had a quick political response, with the appointment of Woodward to sit as a Royal Commissioner into Aboriginal land rights, but then, of course, confined to the Northern Territory. He held extensive meetings across the Territory and his report covered in detail the issues involved.

The decision not to appeal was doubly effective. It resulted in the immediate appointment of a royal commission into these matters, and the Mabo hearing in the High Court was free of the risk of a prior rejection of land rights by an earlier and less sympathetic High Court.

Nabalco and Mabo

If one looked at these two cases from the outside as prospective land rights claims, it would be difficult not to accept that the Nabalco seemed to have a greater chance of success. It was set deep in the Australian outback in an area that had been occupied by the same bands of Aboriginal people for great lengths of time. Their law and customs about the land remained as they had been previously, and until the 1970s they had had little contact with non-Aboriginal people.

The Murray Islands were at the very edge of the eastern border of Australia. They too had their own law and customs about land, and they also carried on their life and the use of their land in ways which also went back many centuries.

But this latter land was not 'outback' land in the sense that one traditionally associates with Australia and Aboriginal people; rather it was a lush setting with a history of garden production over many years; in another sense 'foreign' to mainland Australia.

However, the reality was that the claim in Nabalco was dismissed and the claim in Mabo was successful. They had both been conducted by judges who pursued their difficult tasks assiduously, as the judgment in the former case and the report to the High Court in the later case demonstrate.

So what was the difference? There are a number of areas that could be identified as contributing to the different outcomes, but the essential one was the conclusion of Justice Blackburn that 'the doctrine of communal native title … does not form, and never has formed, part of the law of any part of Australia'. That was really the end of that case.

By way of contrast, the conclusions of the High Court were that reliance should be placed on a series of decisions in the United States, Canada, New Zealand and perhaps Africa which, they concluded, established a consistent pattern of land rights in particular circumstances, and that it was appropriate to apply that approach as part of the common law of Australia.

The High Court's conclusion was that there was a concept of native title, but more limited than that claimed by the plaintiffs.

Its source was the traditional connection to or occupation of specific land, which was determined by the character of the traditional connection or occupation. It was not extinguished by settlement, but its content could be extinguished by government provided there was a clear and plain intention to

do so. It can also be extinguished if the clan or group ceases to have connection with the land.

Finally, it should be noted that after the Nabalco proceedings had concluded, Justice Blackburn wrote a confidential memorandum to the government and the opposition suggesting that a system of Australian Aboriginal land rights be considered as being 'morally right and socially expedient'.

No response was received (see National Archives of Australia released December 2001).

The last day

Because closing submissions may take several weeks, it was agreed that the court should sit in Canberra where there was greater access to law reports and other authorities and texts. Purcell instructed a firm of solicitors which practised in the ACT to act for the plaintiffs in conjunction with him.

By the second last day Woodward had finished his submissions and the defendants' submissions were well advanced. Woodward and Purcell both had urgent appointments elsewhere. They told me that they expected that when I had completed the plaintiffs' reply, Little may seek to make further submissions on behalf of the plaintiffs, relating to the three matters he had identified earlier.

They informed me that if Little made that application I was to inform the court that Purcell had already told him that he did not have any instructions to do so, and that if he attempted to do so his instructions were withdrawn, and that I was to reiterate that myself, namely that if he proceeded to do so he had no authority and would need to withdraw as counsel for the plaintiffs.

Neither Woodward nor Purcell expected that the course I was to follow would create any particular difficulty. But I had concerns based on the view that Purcell would not be at court at that time to reiterate the previous discussions and, more fundamentally from my point of view, because I had not

previously heard of a situation where one counsel could dismiss another counsel from the proceedings. Who could dismiss whom? Where did this authority come from aside from the circumstance that I was the more senior counsel?

Prior to the trial recommencing I asked Little what submissions he intended to make, and stated that the first two possible arguments had not been part of the plaintiffs' claim or evidence. On the other hand, considerable time had been devoted to the continued rights of residents in settled land and that included a number of authorities from New Zealand, which we believed may support our case. If Little could add anything worthwhile about the New Zealand cases I did not think that he should be inhibited from doing so if he obtained the leave of the court. However, he declined to tell me what his submissions were.

When I completed the plaintiffs' reply Little made the anticipated application. I immediately informed the trial judge that Little had already been informed by Purcell that he was not authorised to make submissions on behalf of the plaintiffs and that if he sought to do so his instructions were withdrawn, and I repeated that position. Unsurprisingly, the trial judge was amazed at this last-minute turn of events after such a long and exhausting hearing and where the trial had apparently reached its end. Now he was suddenly confronted by this application which, whatever the outcome, could create unexpected difficulties and possible appeal issues.

Counsel for the defendants seemed to be expecting some unusual application at this stage (even if not this particular one). They supported with great gusto Little's submissions that I lacked any authority to inhibit him from addressing the court.

After some disjointed submissions the matter was stood down to enable the parties to consult the library about my capacity to deliver the coup de grace.

In the meantime the Canberra solicitor appeared, having apparently been instructed by Purcell by telephone to do so. He went straight to the point. After identifying himself, he indicated that if Little proceeded with his submissions he would immediately have his instructions withdrawn. Everybody accepted that position. Little indicated that he would not proceed further with his application as he was determined to continue to act for the plaintiffs. The Canberra solicitor departed as swiftly as he had arrived.

Little rejoined me at the bar table as one of the counsel for the plaintiffs as if nothing had happened.

This suggested that once again we were at the end of the hearing. But there was more.

Justice Blackburn then indicated he may have power to grant to Little the opportunity to make submissions on behalf of the plaintiffs as amicus curiae. This produced a clamour of dissent from all parties. Fortunately, that included Little, who indicated that if he was to adopt that course he would have to withdraw from acting for the plaintiffs and he declined to do that. That was the end of the hearing. Judgment was delivered on 24 April 1971. The action was dismissed. There was no appeal.

Postscript

The history of Australia is largely the history of land. Aboriginal people were disregarded. No steps were taken to preserve their heritage except occasional reserves or land so far in the outback that no one then wished to be associated with it.

When land rights in Australia were first seriously talked about, the expectation was of a return by Aboriginal people to the 'better' times of the past — living on their own land, controlling their own camps or outstations, regenerating their traditional religious practices, and, perhaps, largely supporting themselves from the land.

For better or for worse Aboriginal people have over the years increasingly directed their lives towards the lives of the rest of Australia. Camps and outstations require education, health, hospitals, a life free of violence, and where meaningful employment is an accepted part of that society. In particular, proper education must be encouraged and advanced.

But the other society also brings with it alcohol, drugs, petrol sniffing and the welfare system, which seems to discourage the search for employment.

The original wave of destruction of Aboriginal life came from grazing and farming, which swept quickly through the arable land. At the end of that period there were still some areas nobody else wanted — largely the barren, desolate outback. As a result some tribes were able to hold to their traditions and way of life. Others were left both landless and also disconnected from the new world.

The battle for land rights has been a long and difficult one, at times gaining support and at times almost disappearing from view. Mabo represented a victory at a time when all seemed to be lost.

By then historic limitations made wide, sweeping changes impossible. Broad general claims for the land that had been taken from them were no longer feasible. They were in effect confined to unallocated Crown land, essentially in the north of Australia.

But Mabo still represents one of the great achievements of our time. It has had a profound psychological impact — recognition by the High Court that this had been their land and for some still is their land; that this was and still is part of the common law of Australia.

Although this decision was initially greeted with scepticism, society has come to recognise the Mabo reality that it is here to stay. It has become part of the language and recognition of the determination of Aboriginal people who struggled

for their rights and the support they received from some within the wider community.

In physical terms the reports of the National Native Title Tribunal give a wider picture. That Tribunal was established under the *Native Tribunal Act 1993* and it records and disseminates information relating to Australia's native title system.

Between 1 January 1994 and 31 December 2010, 140 determinations about native title were registered. In summary, 101 were determinations that native title existed over particular land and 39 that it did not exist over particular land.

As at 31 December 2010, registered determinations of native title covered approximately 1,064,874 square kilometres (or 13.8% of the land mass of Australia). There were 470 registered Indigenous land use agreements (covering 1,155,375 square kilometres or 15% of the land mass of Australia), and 5,167 square kilometres over sea (below the high water mark).

As would be expected, most of these determinations related to Queensland, the Northern Territory and Western Australia, with few in the southern States. No determination has been made in Tasmania.

As at 31 December 2010 there were 458 current applications. They reached their highest number in the early years of the legislation, then gradually lessened, but have increased in recent times.

The major problem is the time between the filing of an application and its determination, being anything up to eight years. This largely reflects the complexities that still remain in these claims, the detailed evidence required, and the limited number of available judges.

The Aboriginal land mass figures appear substantial but it is land that has never been sought by anyone else — unallocated Crown land. The number of claims by miners is small. But those claims have a considerable impact on the world around them. Mining now divides Aboriginal people between

those who have mines and thus possible wealth and those who do not.

As a consequence of the Land Rights Report and Mabo, land councils were established. Galarrwuy Yunpingu, (who, as a young man, was an interpreter at the Nabalco hearing and is a son of Numgurrawuy, one of the plaintiffs at the trial) negotiated in 1978 one of the few agreements (uranium) that provided royalties for the traditional owners. He was named Australian of the Year in 1978. Subsequently he became the acknowledged leader of the Gumatj.

But the problem now is that Aboriginal people are going through this second wave of challenge — mining. Will that complete the destruction of native land or reduce it to the very edges of Australia? Will it divide Aboriginal people between those who have a mineral rich community and those who do not? You can look back now with regret at what happened in the past. Will the same things happen again or is this a different playing field where Indigenous Australians can determine for themselves what they will do with their land?

This second change was at first gradual but has now grown at a rapid rate, where miners are able to offer huge sums of money to mine Aboriginal land.

There is a certain irony about the circumstance that one of the first 'new' areas is again the Nabalco land. On 8 June 2011 in the blistering sun at Yirrkala, the Prime Minister (Ms Julia Gillard), the Indigenous Affairs minister (Ms Jenny Macklin), Galarrwuy Yunupingu, a Rirratjingu elder, Bakamumu Marika, and other traditional land owners signed off on an historic 42-year lease agreement between the traditional land owners and mining giant Rio Tinto — the Rio Tinto Alcan Gove and Traditional Owners agreement and lease.

The culmination of three years of negotiations, it is structured to pay between $15 million and $18 million a year over

the next 42 years depending on the price of bauxite. These monies will be paid into a future fund for the long-term development of the area with a focus on education, employment and economic development. But details of the agreement are otherwise confidential.

However, the agreement may have already run into difficulties; namely, the proposed sale by Rio Tinto of Gove and other alumina operations in Australia and New Zealand. The sale raises some troubling questions. What is the effect of any sale on a purchaser and the Aboriginal people? Is a new purchaser bound by its terms?

A further issue is the profitability of this operation and the impact of an underperforming business on the 42-year lease agreement.

The decision of Rio Tinto to sell its Gove operation is not a positive sign about the future performance of the business and perhaps other long-term agreements with Aboriginal landowners. This is especially so given that buy-outs, takeovers and amalgamations are a common aspect of this industry.

Much of the agreement is confidential. Perhaps legislation or the agreement itself deals with these matters. If not, these issues may create real difficulties.

Rio Tinto was also involved in a landmark agreement in the Pilbara region of north Western Australia announced on 3 June 2011. The agreement was made after seven years of negotiations with five Aboriginal groups and covers an estimated 71,000 square kilometres.

It allows for a doubling of the rate of iron ore mining and directs up to $2 billion dollars to Aboriginal people in direct income over the next 40 years, plus opportunities to start mining-related businesses.

Perhaps the most dramatic recent change has been along the Kimberley coast 60 miles north of Broome. An agreement has recently been made between resources giant, Woodside,

and local Aboriginal people and which was described by the Premier of Western Australia as 'the most significant act of self-determination by an Aboriginal group in Australian history'. It taps into enormous gas reserves at Browse Basin and is likely to result in further development in the future. The agreement provides for payment in excess of $1 billion over the life of the project. It includes a number of infrastructure projects, education and employment, and is considered by the company as likely to have a significant impact upon the Broome area.

In November 2011 the Supreme Court of Western Australia declared that the notice of acquisition by the government to this land was invalid. It can give another notice but this may reopen the whole process again, including the voting by Aboriginal people.

There has been significant opposition to this proposal for some years. A recent vote by Aboriginal people was conducted by the National Native Title Tribunal under the *Native Title Act*. Apparently 300 voted; 168 supported the proposal and 132 were opposed. The number of voters seems small. The breakdown of votes is approximately 60/40. It seems a great pity that this vote was so close. There are still disputes about the process and it still leaves a significant number of Aboriginal people who apparently wish to retain their traditional associations with the land they and previous generations had.

The development faces strong objections from tourism and environmentalists. The Kimberley area is one of the most beautiful and attractive, if somewhat harsh, parts of Australia, with up to 200,000 visitors per annum and rapidly increasing. There is concern that a number of particular tourist attractions may be destroyed or rendered inaccessible as a result of this development and its overall beauty lost.

Broome has a charm that is unique in Australia; many residents fear that mining will rapidly overwhelm this and change it into an area which bears no relationship with its past.

The Federal Environment Minister has recently determined that a substantial portion of this area be heritage listed following recommendations of the Australian Heritage Council. This means that future development in the designated area will require Federal as well as State approval.

For Aboriginal people, the major factor is that it gives them the right to make their own decisions and implement them. It may give them, for perhaps the first time, a right to control major aspects of their future. But that has to be set off against the overwhelming loss of particular land and all that that stands for; the very reasons which led to the land claims.

The capacity of miners to make these offers and develop these projects depends almost entirely on overseas demand. Australia, as an exporter, has frequently suffered the consequences of diminishing demand. Miners are confident this will not occur here in the foreseeable future, but if that were to happen the impact will be severe Australia wide and particularly in those areas which are dependent upon mining, including Aboriginal people.

In addition to these complex issues a further factor has increasingly become the subject of debate and is also an aspect of land rights, namely the welfare system and all that is involved in it.

Introduced subsequent to the Aboriginal referendum and seen as an egalitarian response, it made provision for regular welfare payments and other social services. This approach and its long-term consequences were not the subject of serious debate at the time. But it has increasingly become a fundamental issue, that is, whether it ever was or will be beneficial to Aboriginal people and to society generally.

Political parties have gone to great lengths to avoid discussion of these issues and its future. Essentially the public discussion has come from leading Aboriginal Australians. It is now seen by some of these leaders as a 'poison' to their society,

which must end. The 'poison' appears to refer to the dependence on welfare and the wider cycle of dependence that it perpetuates.

Some Aboriginal community leaders have also suggested that the long-term viability of some remote communities needs to be reconsidered, and that there may be a point at which it is time to 'move on' from these areas that are incapable of developing employment and require the Aboriginal community to be dependent on welfare. These suggestions are fraught with complexity, and a decision in any direction will have a high impact on the lives of many people.

It is difficult to see how this long-established system can now be readily controlled or abolished. Many recipients lack education, and employment is difficult to obtain and has not been encouraged. The general health of many Aboriginal people is chronically bad and in itself demands support.

In the longer term this may be at least partially remedied by a first-class education and the availability of long-term employment. But that will not assist those who have never worked, or the women and children who are dependent upon welfare to survive.

In this context and without being unduly sceptical, it is legitimate to place a question mark against 'company guaranteed employment'. It is now frequently advanced to support the concept of mining, but it is a difficult task to obtain and retain such employees over a significant time. This has been attempted in the recent past but with very limited success.

A further factor is a possible divide between the older and the younger generations. It may be more likely that the older generations wish to retain the land and what belongs to the land, while the younger generations may prefer the cash alternatives that give them access to a wider world.

Mining development may mean employment, escape from the welfare system, and the ability to make one's own way, and

may have an enormous impact on many lives. Or it may do little more than reduce Aboriginal land rights to those areas that have no attractions to miners.

In the past the alternatives were clear — fight for native title or abandon it. Now, if this 'promised' money is properly used it will benefit present and future generations, at least in a financial way. But how are the moral issues to be evaluated? Will it hasten the end of land rights only a few years after those rights were vindicated?

What if ultimately, as has unfortunately happened in the past, substantial royalties are used by communities on consumable items that have no long-term value and are eventually abandoned.

An objective view about these matters is difficult to arrive at without further information. The agreements generally claim confidentiality. The nature of press releases is to emphasise the positives and ignore the negatives. But the following information would be helpful:

- What happens if a particular mine is sold to a genuine third party or the operation is closed down?
- Who are the trustees? This duty is especially difficult, frequently confronting competing tribal interests.
- Who are to be the beneficiaries? Are they confined to the tribes in that particular area or are the benefits to be extended further to include those who do not enjoy such wealth? Will there be a 'some rich, some poor' situation, or can the royalties be spread more widely to those in need?
- What are the controls over payments to individuals for personal or 'family' expenditure?
- Is the money to be applied only for 'local development' and what is 'local development' in this sense?

- If schools and perhaps hospitals are involved, does this include the selection of suitable locations, the cost of construction and the payment of teachers and staff?

These mining agreements also require the companies to protect the environment and restore the land to its original state. In Nabalco this was never done properly. Important religious and other sites were brushed aside by people who had no interest in them. Over time the companies, which control the mines and/or their executives change and there is a consistent failure to carry out this responsibility. It is simply 'forgotten' as time passes.

An overall impression of land rights and its future is complex. Mabo was a remarkable outcome, establishing land rights for some; for the majority, however, history has had the last say — it excluded most Aboriginal people. Thus a complex picture emerges. Some have the land they sought. Some of that land contains mineral wealth. Others, some driven from their land, remain fringe dwellers in their own country.

This is coupled with welfare, chronic unemployment, desperate health, poor education, alcohol and drugs, leading to a general helplessness and making decisions about their lives, their families and their land difficult and conflictual.

It is not possible to predict the longer-term future of land rights. Was it a victory won too late? Has the world changed too much? It is possible that the land will be seen increasingly as an area for Aboriginal people to return to from time to time to perform ceremonies and other cultural traditions rather than as a full-time homeland. The claims of the other world — education, health, employment, consumables — will lessen the land's impact. In a sense, Indigenous Australians may find themselves again drawn between two lives. At least this time some have their land and some may have access to funds to assist them to develop their society in a more positive and purposeful way.

Endpoint

Sir Edward Woodward

After the land rights case Sir Edward was appointed the Commissioner on Aboriginal Land Rights in the Northern Territory. His report, together with the decision in Mabo, constituted the bases upon which the current legislation was developed. From 1973 to 1976 he was a Justice of the then Federal Court. He became Director General of ASIO until 1981, and later Chancellor of the University of Melbourne.

He continued as a consistent advocate for land rights and for steps which would enhance the lives of Aboriginal people, who are as one in acknowledging the tremendous part that he has played.

Sir Edward Woodward died in 2010.

Frank Purcell

Frank Purcell's entry into Aboriginal land rights was unexpected, arising as a consequence of his firm being instructed by the Methodist Mission. During the Nabalco case he devoted his whole life to its development.

When it concluded he continued to campaign for land rights and the improvement of services for Aboriginal Australians, his devotion being almost obsessive. He became one of the leading authorities in this field, and his work covered many parts of Australia. He was acknowledged as a constant and tireless worker for Aboriginal people.

Frank Purcell died in 2008.

John Little

John Little was a member of the Victorian Bar at the time of the Land Rights hearing. He retired from the Bar and went overseas for several years. On his return he has practised as a solicitor in Victoria.

John Fogarty was a Family Court Judge and Head of the Federal Child Support Consultative Group. His other roles include member of the Family Law Council, Chairman of the Victorian Family and Childrens Council and Chairman of the Australian Institute of Family Studies. He was also a Member of the legal team enquiring into Aboriginal Land Rights in the Northern Territory in the 1970s. He is Patron of Family Life.

Jacinta Dwyer is a Victorian solicitor and volunteer lawyer to the Senior Rights Legal Clinic. She served as an associate to the Honourable Justice Fogarty of the Family Court of Australia and practised family law in Melbourne and Canberra in private practice for several years. She has provided legal advice and support to community organisations including the Mirabel Foundation and Womens Legal Service Victoria.