Reflecting on Mabo

‘So, I’m ready when you are.’ The young woman looked from one man to the other over the top of her glasses and clicked her pen encouragingly. Emily was dressed in a crumpled linen shirt, denim jeans fashionably torn at the knees and sneakers, her long dark hair tied back in a loose knot.

They were sitting at Ron Castan’s round table in Aicken Chambers on the corner of Little Bourke and Queen streets in Melbourne. Both men were barristers in decompression mode after a long day in the Federal Court. Neither was thrilled to be interviewed by a bright young thing studying media and legal studies. But she was the daughter of a family friend, so Ron had persuaded Bryan Keon-Cohen to come in and help.

Sunlight splashed onto a large pile of white files stacked along the wall marked ‘Mabo’ – all carefully titled and numbered. Through the glass wall, skyscrapers and cranes loomed above the urban bustle. Streets throbbed with people going about their everyday business, walking and talking into their phones or sitting on benches chatting as they sipped afternoon coffee.

About five foot ten and slight of build, Ron had a narrow face and a full head of brown hair speckled with grey. He wore his robe comfortably, and his barrister’s wig lay where it had been tossed on the settee. Now he sat up straighter, turned to the girl and said, ‘Where would you like to begin?’

‘So, Ron, I know how smart you are – everyone does – so let’s start with your education. And yours,’ she added, turning to Bryan.

Bryan was a few inches taller and slightly heavier, with thick dark hair and moustache and direct dark eyes. He sat in his shirtsleeves, his robe and wig cast in an untidy pile on a vacant chair.

‘Well, Emily, I went to Carey Grammar,’ said Ron.

‘And I went to Scotch around the time Ron was finishing school,’ said Bryan, ‘then we both studied law at the University of Melbourne, both joined the Victorian Bar and Ron took silk in 1980.’ It was clear Bryan wanted to hurry things along.

‘Took silk – that’s becoming a queen’s counsel?’

‘Indeed.’

Emily finished scrawling notes and said, ‘Have we missed anything between university and taking silk, Ron, Bryan?’

‘I worked as a tutor and lecturer at the Monash Law School, and after four years at Monash, I worked with the Australian Law Reform Commission with a particular focus on the recognition of Aboriginal customary law within the Australian legal system.’

‘OK, hang on while I get all that down…’ After several moments she turned to Ron Castan. ‘Your turn, Ron. I know you were president of the Council for Civil Liberties, and secretary of the Victorian Aboriginal Legal Service. What else before Mabo?’

Bryan was quick to answer on Ron’s behalf. ‘Ron was a well-respected barrister in Australia’s legal community, as I’m sure you know. He played a leading role in the Tasmanian Franklin Dam environmental case in the High Court, but his major claim to legal fame was as senior counsel in the *Mabo* case, with me as his junior.’ His words were swallowed by a rasping cough as he fumbled for a handkerchief and spat into it. ‘Sorry,’ taking a deep breath and giving Ron a straight look. ‘You know your phone call changed my life, don’t you?’

Ron shook his head and pushed back in his chair.

‘It’s true. I was sitting in my chambers waiting for the phone to ring. I thought, *I’ve been here, a baby barrister, six weeks and two days, unknown, unloved and unpaid*.’

Ron grinned and Emily chuckled.

‘I’ve been thinking about that day and what followed,’ Bryan said, shoving his handkerchief back in his pocket. ‘And about Eddie Mabo.’

Ron nodded, suddenly serious.

‘I often think about him,’ Bryan continued. ‘Eddie was a true reformer. He saw far into the future and deep into the past.’

‘Hang on, you two. Let me start a new page.’ Emily flipped over a leaf and scrawled ‘Mabo’ at the top. ‘OK, so, tell me about Eddie Mabo.’

‘His mother, Annie Poipe Mabo, died when he was a baby, Emily, and his father, Robert Zezou Sambo, gave Eddie for adoption to his maternal aunt and uncle, Maiga and Benny Mabo. That’s the traditional way on Mer – its name in the local language – or Murray Island as we white fellas like to call it.’

‘Four of the five plaintiffs lived on Murray Island,’ Bryan added. ‘And Mabo lived in Townsville.’

Ron nodded.

‘Tragic that the cancer got him before the High Court handed down its decision,’ Bryan said gruffly.

Ron’s eyes glistened and he blinked a few times. ‘He was the driving force in the case. Without him, none of it would have happened.’

‘So, what did happen?’ Emily asked.

‘Yes. I often wondered what prompted Eddie to run the case,’ Bryan said.

Ron shrugged. ‘I suspect he was inspired by his father’s leadership in the Torres Strait Maritime Industry strikes – that was in 1936, the year Eddie was born. He also resented the discriminatory regime imposed by the *Queensland Aboriginal Protection Act*.’

Bryan nodded. ‘Killoran’s Law.’

‘Hold on,’ Emily said, ‘Killoran’s Law…yes?’

‘Yes,’ Ron agreed. ‘And he was unhappy about the Murray Island Council’s decision to ban him over petty crimes he committed as a teenager.’

Emily glanced up, but Ron continued.

‘In 1975, the Council imposed conditions on his return home to be with his dying father – he had to steer clear of politics.’

‘Outrageous.’ Bryan scowled.

‘Indeed. Eddie always believed that Joh Bjelke-Petersen had a hand in that decision.’

‘How do I spell that? J-o-e…?’

‘No, J-o-h,’ Bryan spelt out the name. ‘It wouldn’t surprise me at all,’ he snorted.

‘Do you remember when he described defying the ban? How he sailed a boat to the island, but arrived too late to see his father, who had already died?’

‘Yeah,’ Bryan said. ‘His family had tried to get across to Mer, but the Queensland authorities wouldn’t permit it, so the kids never met their grandfather. I’ll always remember how he broke down in court when they played that tape of his father’s voice. The Queensland’s lawyers did it for some reason, as part of their case.’

Emily glanced up from her notebook, shocked.

'It was cruel and underhand,' said Ron. 'But anyway, Eddie was working as a gardener at James Cook University in Townsville when Professor Henry Reynolds explained to him that Australian law didn't afford Torres Strait Islanders any traditional rights to their islands and surrounding seas. The land he thought he owned under Merian custom and tradition was actually owned by the Crown.' He paused and cleared his throat while Emily's pen flew across the paper. 'That's where it all started.'

'The land rights issue was emphasised when the Fraser government was negotiating the Torres Strait Treaty and sought to redraw Australia's maritime border with Papua New Guinea,' Bryan added.

'When was this?' Emily asked.

'It was signed in 1978 from memory,' Ron said, 'and negotiations triggered the issue of traditional land rights as well as traditional rights to areas of the open sea.'

'I don't understand,' said Emily.

'Traditional proprietary rights already had the force of law in Papua New Guinea, and underpinned the land tenure system there,' Ron explained.

'Whereas in Australia, the fiction of terra nullius did away with traditional land rights at the moment of colonisation. For the Torres Strait that happened formally in 1879, when the Islands were annexed by Queensland,' Brian added.

'I get it.'

'This is before I came on the case,' said Bryan, 'so feel free to fill me in too.'

Ron nodded. 'Before the final Mabo decision of 1992, Australian common law concerning Indigenous land rights was different from other British colonies, especially the United States, New Zealand, and Canada. Two judgements by Chief Justice John Marshall of the US Supreme Court in 1823 and 1831 recognised pre-existing traditional land rights. In those cases, Marshall ruled that those rights endured after colonisation by the British Crown.'

'Didn't President Andrew Jackson just ignore those rulings when he expelled the Cherokee and Choctaw tribes from Georgia to Oklahoma … the so-called Indian Territory?'

‘The so-called Trail of Tears,’ Ron confirmed. ‘However, the legal precedent remained. That same principle was followed at the International Court of Justice in its ruling on the status of Western Sahara, in 1975. The ICJ condemned the concept of so-called terra nullius as an invalid justification for conquest and colonisation. By Morocco in that case.’

‘But the British claimed Australia as legally unoccupied land, as a blank slate, didn’t they?’ Emily said, chewing her pen.

‘Yes indeed,’ Ron agreed. ‘And before 1992, our courts rejected arguments for traditional land rights at common law. In 1889, the Privy Council in London upheld the principle that no valid land law existed in New South Wales prior to 1788. That ruling was upheld in numerous decisions concerning property rights in Australian law.’

‘Obscene,’ fumed Bryan.

Emily nodded; head bent over her notebook.

‘A prominent QC at the time, Ted Woodward, from Ballarat—’

‘And Melbourne Grammar,’ Bryan added.

‘Ted Woodward argued the leading case on land rights in the *Gove* case, decided in 1971 in the Northern Territory Supreme Court. He argued, for the Yolngu people of Arnhem Land, that Australian common law included a doctrine of communal native title. He argued for pre-existing traditional land rights originating from the community’s prior occupation, customs and traditions. And he contended those rights survived British colonisation and should be enforceable under Australian law.’ Ron sat back and waited for Emily to catch up.

‘Like the Marshall rulings in the US,’ said Bryan.

‘Yes,’ Ron replied. ‘But in *Gove*, Justice Blackburn ruled that no such doctrine was valid in Australian law. He wrote that while customary law and rights to land founded on custom and tradition did exist on the evidence before him, he was bound by English common law, which had arrived with the British in the Northern Territory, and South Australia, which controlled the Northern Territory until 1911.’

‘Sounds like a thin excuse to me,’ Bryan muttered.

‘Precisely. Blackburn ruled that traditional rights to land, still recognised and existing amongst the Yolngu people in 1971, did not constitute proprietary

interests and did not create land rights recognisable by the Australian common law.'

'But that's the same argument we addressed in Mabo twenty years later,' said Bryan.

'Exactly,' Ron confirmed. The loss in the *Gove* case led Whitlam to ask Ted Woodward for advice on how traditional land rights in the Northern Territory might be recognised in law. That was back in 1972. His *Woodward Reports* led to the introduction of a land rights bill into parliament shortly before the Whitlam government fell at the end of 1975. The matter was revisited by the new Fraser Liberal government, leading to the introduction of the *Northern Territory Land Rights Act* in 1976 – the first of its kind in Australia. But it looked as though the common law denial of native title rights would stand indefinitely.'

'OK. Too much information. Give me a minute, or ten!' Emily laughed and continued to scrawl. 'I'll have to get you to check this, Ron,' she added. 'I've missed half of it.'

'Bjelke-Petersen must have been chuffed about *Gove*,' said Bryan.

'Over the moon,' Ron agreed. 'The Queensland government wanted to cancel the rights of Aborigines and Islanders to reside on public land reserves under a scheme that had been in force since 1912. But there were positives as well.'

Emily raised her head and pushed back in her chair. 'Like what?' she asked.

'In the NT, the failure of *Gove* led to a more sympathetic attitude towards Indigenous land rights and increased political agitation and critical academic writing around this great country of ours.'

'Amazing…the Territory government not being the most progressive in Australia,' Bryan marvelled.

'Yes. Thank goodness the Commonwealth government has had power to pass laws with force and effect in the Northern Territory.' He glanced at Emily and added, 'Called the Territories power, Constitution, s. 126. Heard of it?'

She shook her head and kept writing.

'Since the referendum of 1967 – with 90 per cent approval if you don't mind – the Commonwealth has had power to pass laws concerning Indigenous people in all jurisdictions.'

‘And what about Eddie as a person?’ Emily asked, weary of the legal references.

‘Of course, Eddie was an activist,’ Ron said, ‘a man of great courage and quiet determination. He had a deep commitment to correcting historical wrongs. I think it is fair to say he was a fighter for equal rights … a rebel, a free thinker, and a restless spirit.’

‘He was also a family man who sought to advance the interests of his children and the broader Australian Indigenous community,’ Bryan interrupted. ‘He and his wife, Bonita, founded the country’s first black primary school, in Townsville. He also led his community in Queensland politics, from the ’67 Referendum to…well, to Mabo,’ Bryan smiled.

‘He achieved a lot,’ Ron agreed, then smiled. ‘But don’t forget he was also an accomplished performer of Meriam songs and dances.’

Emily smiled back.

‘It hasn’t been smooth sailing since the High Court’s decision, though. Ever since, there’s been a lot of scaremongering by conservative journos and politicians.’

Ron shrugged. ‘It’s a sad indictment that so many Australian people are willing to play politics with other people’s lives. It’s mean-spirited and nasty.’

‘Joh Bjelke-Petersen?’ Bryan snorted. ‘Nasty should have been his middle name in view of all the obstacles he put up to stymie Indigenous land rights.’

‘He was no friend of ours,’ Ron agreed. ‘Murray Island and other parts of the Torres Strait had been reserved by law for use by the Aboriginal and Torres Strait Islander inhabitants of Queensland since 1912. But then, early in 1981, Bjelke-Petersen announced his intent to repeal that legislation and de-gazette the various Torres Strait Islands as reserves. One of his many attempts to marginalise the Aboriginal and Torres Strait Islander peoples.’

‘Really?’ Emily looked from one to the other.

‘Really,’ said Ron. ‘And then Bjelke-Petersen announced during the 1982 election campaign that his government would legislate to revoke the reserves and issue Deeds of Grant in Trust over reserve land to Aboriginal and Islander Councils.

‘They were called ‘DOGITs…’

‘I don’t understand,’ Emily said.

‘Well, the devil’s in the detail,’ Ron replied. ‘The former reserves – still Crown land – were to be in trust for the benefit of Aboriginal and Islander people by the community councils.’

‘What’s wrong with that?’ Emily asked.

‘It sounds OK, doesn’t it?’ said Bryan, ‘But there’s some sleight of hand behind the scenes. The land is tied up in a trust, so the traditional owners can’t claim it as theirs. No land claims. And the councils were empowered, for example, to lease the traditional owners’ land to white fellas for, maybe, commercial development, even without the traditional owners’ consent.’

‘Aah, I see,’ Emily said.

‘Hang on, it gets worse,’ Bryan continued. ‘The Minister for Land, if you don’t mind, held overriding powers to approve, or cancel, a lease of DOGIT areas.’

‘No wonder they were concerned,’ Emily muttered.

‘But the Merian people of Murray Island refused to accept a DOGIT,’ Bryan continued. ‘They argued the land wasn’t the government’s in the first place so how could they give it to a trust? The Merian was the only community in the Strait to reject a DOGIT.’

‘Wow!’

‘Eddie was politically astute and active,’ Ron said. ‘As co-chair – with Noel Loose – of the Townsville Treaty Committee, he was one of the organisers of a conference on land rights and race relations at James Cook University in 1981 – the university where he worked. That conference really got things going.’

‘It certainly did,’ agreed Bryan. ‘Eddie spoke, Henry Reynolds spoke, Nugget Coombs, Marcia Langton…’

‘A lot of the speakers focused on land rights and self-management in relation to the Queensland Aboriginal and Island Reserves and their uncertain future,’ Ron explained.

‘At the conference Eddie spoke about the traditional education received from his aunt and uncle, who’d adopted him,’ said Ron. ‘He argued that the traditional land ownership and inheritance system should be transferred away from Queensland to the Commonwealth.’

Bryan smiled. ‘That’s right. Other speakers declared support for the traditional ownership of the Meriam people over their island, and the Island

Advisory Council made it clear that the Indigenous residents wanted freehold title to the land and control over their own affairs.'

'At the conference, Barbara Hocking floated the idea of a High Court challenge to see if that court would rule on native title. Greg McIntyre, a lawyer then with the Aboriginal and Torres Strait Islanders Legal Service in Cairns, argued that an Aboriginal community with traditional links to a region would have a good claim to exclusive use.'

'Afterwards, didn't the Murray Islanders hold an in-camera meeting?'

Ron nodded. 'Dr Nugget Coombs, Eddie Mabo, Father Dave Passi, Greg McIntyre, Barbara Hocking and others all met behind closed doors. They emerged to announce that Murray Islanders would pursue a land rights case with Eddie Mabo as the leading plaintiff. Greg McIntyre became the instructing solicitor and Barbara Hocking was retained as well. But where were you, young man?'

'I knew nothing about this talk fest, having just signed the Bar Roll a few weeks before. As I said, I was sitting in my chambers, alone, unloved, unpaid – remember?'

'Oh, yes, and then I rang you – correct?'

'You got it. Then we drafted the Statement of Claim.'

'Yep,' Ron confirmed. 'Greg McIntyre filed it in the High Court Registry in Brisbane in May 1982. But it was a living document. We amended it and reamended it, much to the frustration of my secretary, Glenda McNaught. These were the stone age days when state-of-the-art technology was an IBM golf-ball typewriter.'

'Golf-ball typewriter?' said Emily, confused.

They laughed.

'The last amendment was triggered on the final day of the High Court hearing in 1991 when Chief Justice Mason suggested to you that we might consider amending the claim to include all the "Meriam People" as plaintiffs. You remember? We nearly fell off our chairs. And Queensland's counsel went bananas.'

'The Statement of Claim and Writ originally had five Murray Islanders named as plaintiffs,' Ron explained.

‘Yes. Eddie Koiki Mabo; his aunt, Celuia Mapo Salee; retired schoolteacher, James Rice; senior man, Sam Passi; and his brother, Reverend Dave Passi, an Anglican minister, if you don’t mind.’

‘P-a-s-s-y or i?’ Emily asked.

‘Hand it over and I’ll write them down for you,’ Ron said.

‘I remember we made that last amendment overnight in our hotel room,’ Bryan continued. ‘And that was the final order of the Court in its judgment a year later: that “The Meriam people” – not Eddie Mabo or Dave Passi – enjoyed native title. A-may-zing.’

‘Yep. But it was tragic that Eddie and Celuia and Sam Passi all died before the High Court handed down its final ruling,’ sighed Ron. ‘Of course, they also brought the case on behalf of their families, and their relatives were there to witness history.’

‘The Court ruled that the Meriam People were entitled to “possession, occupation, use and enjoyment” of the lands of the Murray Islands,’ said Bryan. ‘We were all chuffed the Court accepted that Murray Islanders have a strong relationship to the land and seas and that it persisted after colonisation.’

‘That was an amazing moment,’ smiled Ron. ‘And do you remember the first time we all went up there, to Murray Island? We were on a research trip in June 1982 – you, me, Greg, and Barbara.’

‘That was a great trip,’ Bryan said. ‘Over three days, we saw the entire island and travelled to Dawar and Waier, two adjacent islands also under claim. I remember how the residents examined the ground in front of their homes every morning for footprints, checking to see whether anyone trespassed during the night – against the laws of Malo.’

‘Malo?’ Emily asked quizzically.

‘The mythical being who gave the Meriam their laws and ceremonies. He came ashore as an octopus,’ said Ron.

Emily raised her eyebrows.

‘The Merian believe the octopus spread its eight arms across the island and they became the boundaries of the eight tribes of Murray Island.’

‘Aha,’ Emily said, making a note.

‘We came away with a much clearer understanding of their traditional connection to the land. We saw schools of sardines swimming offshore, with Islanders in hot pursuit, throwing nets and spilling the fish, scrambling and shimmering, across the sand. It was a living, breathing community,’ said Bryan. ‘We visited the village of Las where Eddie Mabo grew up with his adoptive parents. Where he’d claimed traditional lands and fish traps inherited from Benny Mabo under “ailan kastom”.’

‘Not according to Bjelke-Petersen and his bureaucrats instructing their lawyers,’ Ron growled. ‘I remember that Queensland’s first response to our claim, late in 1982, was to issue a summons in the High Court to strike out the whole of the Statement of Claim, arguing there was no reasonable cause of action.’

‘Bloody outrageous,’ said Bryan, ‘and it took them six months to do that! But the matter never came to argument because both parties – their lawyers and our team … you, me, Greg and Barbara – asked for time to confer. Remember, we crowded into chambers on the sixth floor of the High Court building and ultimately agreed that the summons would be deferred, and that instead, both sides would set out to prepare a mutually agreed Statement of Facts that would avoid a difficult and expensive trial and provide a basis to draft questions of ultimate legal issues for a Full Court ruling.’

‘That was quite a mammoth task,’ mused Ron.

‘Hold on,’ said Emily. ‘*This* is a mammoth task. I can’t get it all down. It’s too much.’ She looked dolefully from one lawyer to the other.

‘Hang on,’ said Ron. ‘I’ve got a dictaphone somewhere. You can use that and take notes later.’ He got up and rummaged around his desk. ‘Aha! Here, try this,’ handing over the machine. ‘That’s the record button, there.’

‘Where were we?’ said Bryan. ‘I know…it took us over a year to draft our “Facts”, but the Bjelke-Petersen mob then reneged and refused to agree.’

‘They did.’ Ron scowled. ‘So, at the Directions Hearing in November 1984, Chief Justice Gibbs instructed us to deliver an amended Statement of Claim by the 19th of December 1984. Queensland and the Commonwealth were scheduled to deliver their Defence in the following February.’

‘And in the middle of all this we went to Murray Island for our second visit.’

‘Yeah, in March 1983,’ Ron nodded. ‘But drafting and redrafting our Statement of Facts took a long time because we had to address everything since the 1890s – all the statutes, regulations, by-laws, and court proceedings – about administering the Torres Straits. And in the early 1900s, a Murray Island Community Court was established. It kept a record of local proceedings. The Court met on Mer from time to time to adjudicate civil and criminal disputes.’

‘What kind of disputes?’ asked Emily.

‘Everything from the trivial to the serious,’ Ron replied. ‘Some of them were ridiculously paternalistic, like violating curfew or fraternising with girls. Others were more serious criminal and civil matters.’

‘I remember, during that second research trip, we found a bundle of dirty old papers that were handwritten reports of cases heard over eighty years in that court. They included disputes over inheritance and land use. That meant real documentary evidence of legal disputes on Mer that were resolved according to traditional laws and customs.’

‘Yes, that was a real find. We brought the papers back to Melbourne for detailed examination,’ said Ron.

‘Much to Queensland’s annoyance,’ Bryan snorted.

‘Yes, indeed,’ Ron agreed. ‘Over the following year we transcribed and indexed those documents and tendered some in evidence during the trial.’

‘But Justice Moynihan was less than impressed,’ recalled Bryan. ‘He thought the Murray Island Court merely reflected the importance of social harmony by attempting to reconcile conflicting parties by agreement.’

‘Which I always thought was a pretty stupid argument because isn’t that the role of every court in history?’ Ron asked rhetorically. ‘But during the trial there were thirty-four Meriam or Murray Island witnesses giving evidence. Twenty-five for us and nine for Queensland.’

‘We sat for a long time,’ Bryan recalled. ‘There were more witnesses from both sides, including, for Queensland, the long-time Director of the Department in charge of “Native Affairs” – Paddy Killoran. I cross-examined him, actually,’ Bryan turned to Emily with a grin. ‘All about “Killoran’s law”. Devastating it was – for him or both of us, I’m still not sure!’

Ron nodded. ‘Sixty-seven hearing days, I think, for the so-called “Trial of Facts” only. But I still remember taking a deep breath as I opened the case for the plaintiffs with Eddie as our first witness.’

‘And after our opening, you went back to Melbourne, while McIntyre and I carried on,’ Bryan said. ‘But you arrived, on call, for various crises, especially the final argument about admissibility of traditional evidence.’

Bryan reached for the water carafe and poured them all drinks. He took a mouthful and continued. ‘Queensland and the Commonwealth were both there in force, especially Queensland. They had so many lawyers and advisers at the bar table there was hardly space to sit.’

Light from the setting sun poured through the floor-to-ceiling window and gilded the room.

Ron shifted in his seat. ‘While they brought out the big guns, we barely survived on legal aid, and often relied on pro bono lawyers, law students, spouses – your wife, June, for example, herself a lawyer, she sat with you in court when you appeared, alone, for three or four weeks. And even the children of our legal team provided logistical and secretarial help in Brisbane,’ said Ron. ‘Real David and Goliath stuff.’

‘Your daughter Melissa and her partner, Robert Lehrer, were critical,’ Bryan said. ‘They even rented a flat in Brisbane, got hold of a photocopier and began organising the Murray Island witnesses. They arranged travel bookings from Mer and helped find accommodation in Brisbane. They also drove them from the airport to my rented house in Brisbane to rehearse their testimony – and eat dinner, cooked by June – and sometimes redraft their witness statements before appearing in court the next day.’

Ron smiled as he remembered. ‘I guess you could say it was a bit of a family effort.’

‘Indeed, it was,’ grinned Bryan, ‘and I’m guessing – you paid up-front, for all that?’

Ron grinned but remained silent. Then, ‘As you know, funding over the decade was a nightmare. Greg made countess applications to Canberra for legal aid.’

‘Indeed,’ Bryan said. ‘And I remember how I used to meet the Meriam witnesses for a given day at McDonald’s Family Restaurant on George Street. Each morning, in “McDonald’s Chambers” our witnesses would prep for court.’ He exchanged a grin with Emily. ‘I could have rented chambers in town – but legal aid was tight, and I couldn’t afford it.’

‘The logistics were complicated,’ smiled Ron. ‘But Melissa and Robert did a tremendous job. Without them there wouldn’t have been witnesses or a trial.’

‘You should be very proud,’ said Bryan.

Ron smiled. ‘But it was messy,’ he continued. ‘Queensland brought forward several Meriam residents who contested Eddie Mabo’s claims.’

‘They also called a historian, a genealogist, and a compiler of myths and legends and tendered forty-two volumes of photocopied departmental files.’ Bryan rolled his eyes.

‘Yeah,’ said Ron. ‘They tried to bury our case. Those files included the entire administrative history of Mer and genealogies that recorded generations of Meriam People. On the basis of the death certificates of Robert Sambo, Benny and Maiga Mabo, they even argued that Eddie Mabo was not adopted.’

‘Desperate times, desperate measures,’ Bryan snorted. ‘And then there was Bjelke-Petersen’s legislation. I remember one evening in April 1985, I was at home and the phone rang. It was a Labor politician in the Queensland parliament who warned that Bjelke-Petersen was going to introduce legislation designed to kill off the Mabo case. He asked whether I could draft some speaker’s notes since he had to go into the Queensland parliament and speak in opposition to what Bjelke-Petersen called the “Queensland Coast Islands Declaratory Bill”.’

‘That was a nasty piece of legislation,’ Ron said. ‘It would have retrospectively abolished traditional rights to land throughout the Torres Strait since colonisation in 1879, and without compensation.’

‘Yeah, it was bad,’ Bryan agreed. ‘And when the Libs joined the Nationals to vote in favour, it passed on a strict party-line vote. Labor MP Thomas Burns described it as a cowardly act by a government not prepared to face the independence and integrity of the High Court.’

‘But the whole business had a comic side,’ grinned Ron. ‘The debate got rather heated, with the Deputy Premier accusing us of being “Melbourne University do-gooders” who were leading the poor ignorant Islanders down the garden path.’

‘Do-gooder is a title I wear with pride.’ Bryan smiled.

‘So then Bjelke-Petersen’s government submitted an Amended Defence based on the newly passed *Declaratory Act 1985*. We decided to proceed anyway and issued proceedings in the High Court seeking to nullify the Declaratory Act on the grounds that it was contrary to the Commonwealth’s *Racial Discrimination Act* of 1975 and thus, under s. 109 of the Constitution, of no force or effect.’

‘And we won,’ Bryan chortled. ‘The Court heard arguments in March 1988 and in December it ruled in our favour – by the slimmest majority, four to three. So Mabo survived – by a whisker. That ruling was *Mabo v Queensland No. 1*. It ruled that Queensland’s Declaratory Act was invalid because, as provided in our Constitution, Section 109, it contravened the federal Racial Discrimination Act, by removing legal rights to property from Indigenous people while leaving the property rights of non-Indigenous people unchanged.’

‘But then Father Dave Passi and his brother Sam suddenly announced they wanted to withdraw from the case,’ said Ron. ‘That was a real problem because Father Dave was an important plaintiff and witnesses. The trial judge found that of the original forty-five named, mapped and claimed areas, traditional rights had survived in only four.’

Bryan nodded. ‘And Father Dave’s claim in the village of Zomared was one of them.’

‘But a year or so later, Father Dave spoke with anthropologists, who apparently explained that his reasons for withdrawing were unfounded. He’d feared he could be ordered to pay Queensland’s costs, for example. And so, to our delight, he decided to carry on,’ Ron smiled. ‘We lodged an application for his readmission to the case. Of course, Queensland objected, but Justice Moynihan allowed him to re-join, which proved critical in the end. Father Dave gave vital evidence about his claim to land and the traditional and spiritual life of the Meriam People.’

‘And remember, he was an ordained Anglican priest. I led his evidence with him dressed in his clerical robes – dog collar and all. This was during the second phase of the trial, after we survived *Mabo* (No. 1) when the meat of the issue was

debated. That began in May 1989, when Eddie Mabo was on the stand for another two days. He was then cross-examined, after which the trial continued for another sixty or so days of evidence, from us and Queensland. Final submissions to the trial judge were made on the 5th and 6th of September 1989.'

Emily opened her mouth to speak, but Ron interrupted. 'Yes, and I recall that Justice Moynihan accepted our request to reconvene on Murray Island for three days and take evidence from sixteen witnesses who were too frail to travel. He stated that his court's visit to Mer in May 1989 was very helpful to our case.'

Bryan nodded. 'Even Moynihan conceded that the visit gave him a much better understanding of island life and property claims.'

'Yeah, but it also uncovered opposition by some Islanders to Eddie Mabo's claims,' Ron said.

Bryan shrugged. 'I remember the Queensland legal team stayed in a hot, cramped, ugly-looking barge anchored fifty metres offshore. The sight of them clambering into a dinghy each morning wearing their robes was hilarious.'

'Like a Marx Brothers comedy skit or something out of Monty Python,' grinned Ron.

Emily chuckled.

'But, on a more serious note, I've been asked over the years why the Commonwealth didn't participate in the final High Court hearing in May 1991 to oppose the claim.'

'I'm not following,' said Emily.

'Let's see if Bryan can explain,' Ron said.

'Well, in June 1989, we and the Australian Solicitor General, Gavin Griffith QC – from Melbourne by the way – agreed that all claims against the Commonwealth would be deferred until the case concerning Queensland's areas was resolved by the High Court. So, Moynihan ordered that the Commonwealth be dismissed from the proceedings. That's one reason they didn't participate, Emily.'

'OK, I think I understand.'

'A second likely reason – I'm guessing here, understand – is that the politicians saw, as usual, political complications and just didn't want to take a stand in open court, for or against Queensland and the whole lands rights question, you see?' Bryan continued. 'Under our laws, when a constitutional issue is raised – for

example, here, the impact of colonisation, whether Queensland after 1879 enjoyed sovereign powers to deal with Indigenous people – then the Commonwealth, states and territories have a right to intervene and present argument to the Court, they do this often, but not in Mabo.'

'Back to Eddie's case,' Ron said. 'They claimed traditional rights to thirty-six specified areas in and around the three Murray islands, and on the Great Barrier Reef.'

'And all of them were knocked back by Moynihan,' growled Bryan. 'All offshore claims and claims to land areas on Dawar and Waier islands were rejected. Moynihan found positive rights to one residential block, in the village of Zomared, claimed by Father Dave, and three garden blocks claimed by James Rice.'

'But even Moynihan's findings of fact about James Rice's claims were unclear,' Ron said. 'That meant our best case was hanging on that single block claimed by Father Dave. And Judge Moynihan ruled that Dave Passi's lands were a collective holding including brothers and sisters, reflecting Murray Island's social structures predating European contact.'

'Moynihan's rejection of Eddie's claim was pure rubbish,' Bryan growled. 'He was the biological son of Robert and Poipe Sambo. Eddie's mother died shortly after he was born and he was adopted, per Islander custom – "Ailan Way" – by his maternal uncle, Benny Mabo. He grew up on Mer as a member of Benny Mabo's family and he claimed to have inherited traditional land through his adoptive father.'

'Yes, it was total nonsense,' Ron agreed. 'Moynihan ruled that the question of whether Eddie was adopted by Benny and Maiga Mabo was disputed, which cast doubt on his status as their heir.'

'That's so unfair,' said Emily.

Bryan nodded. 'Yeah, Queensland's counsel, Margaret White, argued that Eddie Mabo wasn't really adopted, that he lived with Benny Mabo and his family on an informal basis so that his adoptive parents could claim extra social security payments to which they weren't truly entitled.'

'That was pretty low,' Ron said quietly, 'even for Bjelke-Petersen.'

'But their arguments proved effective,' said Bryan ruefully.

‘True,’ agreed Ron. ‘Moynihan ruled that while some Murray Islanders acknowledge there is Mabo land on the islands, he wasn’t prepared to find that Eddie was adopted by Benny and Maiga Mabo. He went on to state that Eddie was quite capable of tailoring his story to whatever shape he perceived would advance his cause in any forum.’

‘In essence,’ Bryan barked, ‘Moynihan called Eddie a liar and announced he wouldn’t accept his evidence in a matter where self-interest might be at play, unless it was supported by other creditable evidence.’

‘Give Margaret White her due. She was effective as a cross-examiner,’ Ron said with grudging respect. ‘She grilled Eddie over six days to great effect. As a result, Moynihan rejected his inheritance claims through adoption. Eddie, of course, was devastated.’

‘So were we,’ Bryan added. ‘But we hoped for a better result at the High Court where we made our final arguments. We hoped that Moynihan’s reasonably positive findings about James Rice and Father Dave might yield a better result.’

‘Despite the best efforts of the Bjelke-Petersen government,’ sighed Ron. ‘At the start of final legal argument before the High Court in May 1991, Queensland continued to argue that all claims should be dismissed due to inadequate findings of fact by Moynihan.’

‘I think we can agree that Joh was beyond determined,’ said Bryan.

‘You’ll get no argument from me,’ Ron grinned. ‘Queensland argued that the plaintiffs failed to establish there was an ordered system of land tenure predating colonisation – in 1879 remember – that remained in force up until the 1980s.’

‘But the High Court blew that argument out of the water six to one, the Victorian Judge Daryl Dawson alone dissenting,’ smiled Bryan. ‘The majority – six of seven judges – ruled that a system of custom and tradition, including rights to land, existed in which all land was considered a communal possession. That is, they declared “the Meriam People” no less, enjoyed traditional rights to the whole island. They were not concerned with claims over blocks of land by any individual plaintiff. That finding, many argue, meant recognition of the Meriam People as a distinct political entity.’

‘That was a great day,’ nodded Ron. ‘I remember sitting in my chambers with a close friend and confidant, Bernard Marin, when I got the good news. I immediately poured us a drink. Bernard congratulated us and said, “This case will create a precedent. It will initiate a whole new body of law”.’

‘So it did,’ Bryan agreed. ‘The High Court was chockers on the 3rd of June 1992. Standing room only. But I had a seat – at the bar table.’

‘We were all nervous as hell,’ Ron recalled with a quick smile to Emily.

Bryan nodded. ‘But as the ruling was read, the atmosphere changed to joy. We exulted that some measure of justice had finally been accorded to the Meriam People.’

‘It must have been amazing,’ said Emily, her eyes bright.

‘Very quickly, the broader implications of the decision became clear,’ said Ron. ‘Native title was recognised by the Keating government’s much-negotiated *Native Title Act 1993,* and – to placate white fella so-called “uncertainty” – Crown titles granted since 1788, over land with, possibly, pre-existing native title, were also acknowledged and protected.’

Bryan’s eyes were moist. ‘I remember taking the lift to chambers on the sixth floor of the High Court building, feeling somewhat numb after that momentous decision. I rang Murray Island, which meant the phone box outside the Council Chambers building. A lady answered, I told her that they had won at the High Court – and she dropped the phone and announced the news, yelling and screaming. A big party on Mer that night – and I wasn’t invited. Outrageous!’

Emily and Ron laughed.

‘I flew back to Melbourne, tossed my briefcase into a corner and went on holiday.’

‘Very well deserved,’ smiled Ron. ‘And, in November 1992, Eddie, posthumously, and Reverand Dave Passi, James Rice and Barbara Hocking were all given Human Rights Awards by the Australian Human Rights Commission.’

‘So much for us two Melbourne University do-gooders,’ Bryan laughed.

Ron smiled. ‘But in the broader sense, the Mabo decision challenged our national sense of self. It forced us to reconsider who we are, where we come from, and whether our treatment of First Nations people on this continent should be seen

– as Justice Deane described in his judgement – as "a national legacy of unutterable shame".'

Bryan nodded and said quietly, 'Resistance to the idea that only some Aboriginal and Torres Strait Islander peoples enjoy some traditional land rights on this island continent is, to my mind, mean-spirited and racist.'

'No argument from me,' Ron replied. 'But sad to say opportunities arising from Mabo for land justice have largely been squandered by our politicians. The policies put forward at the federal, state and territory level tend to sidestep the common law. The whole land title issue has become a Gordian knot that's far too complex for Crown grantees. And land rights schemes are so squeezed for resources that they can't deliver effective services to Indigenous claimants.'

'Even now, decades later, Bjelke-Petersen has a lot to answer for,' Bryan muttered.

'I'm going to look this Bjelke-Petersen guy up,' Emily said.

Suddenly, there was a knock on the door and Ron's long-time secretary, Glenda, walked into the room. 'Nellie rang,' she said. 'She's made dinner reservations.'

Ron looked at his watch. 'I didn't realise the time. It's getting late, let's leave it there. Do you think you have enough, Emily?'

'More than enough,' Emily said with a wry grin. 'I'll get this back to you once I've taken my notes and listened to it about fifty times.'

'Good on you, Emily,' Bryan grinned.

He stood up, they all shook hands, and Bryan stood back to allow Emily through the door first.

Thanks to Bryan Keon-Cohen for his many helpful suggestions and careful review of this story.

Bernard Marin AM
6 March 2024