

# Periodic Peaks of Progress: Applying Bell's Interest Convergence Theory to the *Mabo* decision

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We seem destined, as Bell puts it, for periodic peaks of progress followed by valleys of regression. Once every blue moon the stars line up, and the system grants us a seeming victory for reasons of its own.<sup>1</sup>

## Introduction

### The interest convergence theory and the Emancipation Proclamation

One of the defining moments of Abraham Lincoln's presidency was when he granted freedom to thousands of Southern slaves during the American Civil War. This historic act also served the interests of white policymakers. It was because of its value to whites, Derrick Bell suggests, that the United States' first gesture towards black civil rights occurred. Bell's explanation is as follows: Although he opposed slavery, Lincoln believed the Civil War had been waged to maintain the American Union and was not about the morality of slavery.<sup>2</sup> However, by late 1862, after almost eighteen months of fighting, the North was no closer to winning the war. Lincoln's advisers suggested that emancipating the slaves would serve Northern interests in two respects: first, it would interrupt the Southern rural economy which relied entirely on slave labour; second, the North could increase numbers in its army by encouraging newly freed slaves to enlist.<sup>3</sup> This analysis is what Bell terms 'interest convergence'. He says:

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<sup>1</sup> Richard Delgado, 'Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law' (1994) 143 *University of Pennsylvania Law Review* 379, 409.

<sup>2</sup> In a letter to the Editor of the *New York Tribune*, Lincoln wrote: 'My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery.' Quoted in Derrick A Bell, *Race, Racism and American Law*, (2<sup>nd</sup> ed, 1980) 4 [hereinafter Bell, *Racism*].

<sup>3</sup> *Ibid*, 5.

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.<sup>4</sup>

Bell's best known use of this theory is his analysis of *Brown v Board of Education* in which the United States Supreme Court held that segregated educational facilities violated the Constitution.<sup>5</sup> Bell suggests that school segregation was ended because it furthered the interests of white policymakers in fighting communism, not because American society underwent a 'moral epiphany'.<sup>6</sup> He says that in *Brown*, as with most steps toward racial equality in the United States, the 'white self-interest motivations' were seldom acknowledged,<sup>7</sup> rather the change in policy was said to be for the benefit of black people.<sup>8</sup>

Part I describes the interest convergence theory in the context of the *Brown* decision and discusses Bell's theory about what is likely to follow such landmark events. Bell says first, blacks will focus on the remedy obtained, rather than the factors which lead to it, and will celebrate the remedy as proof that the society is just and eventually all injustice will end. Second, the remedy will often provide benefits which prove to be of symbolic rather than substantive value. Third, whether or not the remedy does confer a benefit on blacks, it will be seen by poor whites as an unearned gift and a threat to their status and subsequently opposed.<sup>9</sup> For instance, the Emancipation Proclamation was followed immediately by political backlash towards Lincoln and the Republican Party and anger from Northern whites at being drafted into fighting a war which they now saw as being fought to free slaves.<sup>10</sup>

According to Bell's theory, advances toward racial equality do not happen because they are just or altruistic. Rather, they occur because they secure political and economic interests. Bell's analysis of *Brown* argues that this is what occurred in the United States. It is interesting to analyse whether this has also happened in other settings, such as Australia. Part II assesses the High Court's decision in *Mabo v Queensland (No 2)*<sup>11</sup> and subjects it to Bell's interest convergence analysis. The purpose of this analysis is to provide an alternative assessment of a landmark on the road to racial equality by examining its impact on the interests of those other

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<sup>4</sup> Derrick A Bell, 'Brown v Board of Education and the Interest Convergence Dilemma' (1980) 93 *Harvard Law Review* 518, 523 [hereinafter Bell, *Interest Convergence*].

<sup>5</sup> *Brown v Board of Education of Topeka* 347 US 483 (1954) at 495 [hereinafter *Brown*].

<sup>6</sup> A phrase used by Delgado to describe the alternative in Bell's theory: Richard Delgado, 'Crossroads and Blind Alleys: A Critical Examination of Recent Writing about Race' (2003) 82 *Texas Law Review* 121, 128.

<sup>7</sup> Bell, *Racism*, above n 2, 436.

<sup>8</sup> Bell says Lincoln's letter to the *New York Tribune* was an exception: *Ibid*.

<sup>9</sup> *Ibid*, 7-8.

<sup>10</sup> *Ibid*, 6-8.

<sup>11</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 [hereinafter *Mabo*].

than the affected group and looking at responses to it. Prior to *Mabo*, Australia was facing growing international criticism in regard to the treatment of its Indigenous peoples. Unlike other common law countries, Australia had not recognised native title and, despite its work in United Nations human rights forums, it faced a barrage of criticism from international human rights organisations about the conditions of its Indigenous peoples. When the *Mabo* decision was handed down six months before the United Nations International Year of the World's Indigenous Peoples and in the midst of Sydney's bid for the 2000 Olympic Games, the world was watching.

Part III assesses the reaction to the *Mabo* decision in light of the three factors which Bell suggests will follow an interest convergence and argues that they occurred in the aftermath of *Mabo*. Part IV addresses the implications of the interest convergence theory. According to Bell's theory, if policymakers do not perceive a benefit, change will not come, which suggests that justice will require patience. Prior to both *Brown* and *Mabo*, African American and Indigenous activists used international forums to draw attention to the poor conditions of their communities in their respective countries. This suggests that rather than waiting for an interest to arise, it may be possible to generate one.

## Part I – The Interest Convergence Theory

Bell states the interest convergence theory as:

The interest of blacks in achieving racial equality will be accommodated only when it converges with the interest of whites. . . . Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle- and upper-class whites. Racial justice—or its appearance—may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.<sup>12</sup>

Bell sees this theory as definitively illustrated by *Brown*:

The *Brown* decision represented an unstated understanding that legally-sanctioned segregation no longer furthered and in fact was now harmful to the interests of those whites who make policy for the country.<sup>13</sup>

### *Brown v Board of Education*

In the United States slavery was replaced by a system of legally sanctioned race-based segregation known as 'Jim Crow'. In *Plessy v Ferguson* the Supreme Court said 'separate but equal' facilities did not violate the Constitution<sup>14</sup> and segregation became part of life for African

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<sup>12</sup> Bell, *Interest Convergence*, above n 4, 523.

<sup>13</sup> Bell, *Racism*, above n 2, 436.

<sup>14</sup> *Plessy v Ferguson* 163 US 537 (1896), 549.

Americans, particularly in the Deep South. In 1954 the Supreme Court handed down the *Brown* decision which held:

[I]n the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.<sup>15</sup>

This was not the first occasion that segregation in public schools had come to the Court's attention,<sup>16</sup> but it was the first time the Court did not simply require that separate black schools be made equal to white schools.<sup>17</sup> It went beyond this and mandated the desegregation of public schools.<sup>18</sup> The *Brown* decision also gave momentum to the campaign to desegregate other public facilities.<sup>19</sup>

Bell says the *Brown* decision can be better understood by considering the decision's value to whites and its impact on interests other than those of black school children and their parents.<sup>20</sup> In particular, Bell examined the interests of 'those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation.'<sup>21</sup> While Bell believes that there were whites for whom moral reasons were enough motivation for ending segregation, there were not enough of them to bring about such radical change.<sup>22</sup>

In relation to *Brown*, Bell identified three interests. The first two are political and the third is economic. First, from the federal government's perspective, a decision that segregation was unconstitutional had political value both in fighting communism and in winning the hearts of newly liberated Third World peoples by giving immediate credibility to democracy.<sup>23</sup> Bell notes this benefit was referred to by the National Association for the Advancement of Colored People ("NAACP") in its arguments in *Brown*, and also in the federal government's *amicus curiae*

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<sup>15</sup> At 495 per Warren CJ.

<sup>16</sup> See Bell, *Racism*, above n 2, Chapter 7 for the history of the efforts black parents had made to secure effective schools for their children since 1850, particularly at 437.

<sup>17</sup> Bell, *Interest Convergence*, above n 4, 524 and n 32.

<sup>18</sup> In *Brown v Board of Education of Topeka (Brown II)* 349 US 294 (1955), the Supreme Court considered the implementation of *Brown I*. The case was returned to the District Court with the requirement that the plaintiffs be admitted to public schools on a non-discriminatory basis 'with all deliberate speed', 757.

<sup>19</sup> Eg golf courses in *Holmes v City of Atlanta* 350 US 879 and beaches, bathhouses and swimming pools in *Mayor of Baltimore v Dawson* 350 US 877. For discussion of the sequence of events which led from *Brown* to the civil rights legislation of the 1960s, see Michael J Klarman, 'Brown, Racial Change, and the Civil Rights Movement' (1994) 80 *Virginia Law Review* 7.

<sup>20</sup> Bell, *Racism*, above n 2, 437.

<sup>21</sup> Bell, *Interest Convergence*, above n 4, 525.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, p 524.

brief in *Brown*.<sup>24</sup> Second, the decision offered reassurance to black World War II veterans, who were facing discrimination and violent attacks in the South, that notions of equality and freedom for which they had fought overseas would be given meaning in their own country.<sup>25</sup> At first this seems to be in the interests of African Americans. In a discussion of Bell's theory, Delgado explains that the concern was that veterans 'were unlikely to return meekly to the former regime of menial jobs and segregated facilities . . . [so] the prospect of serious racial unrest loomed.'<sup>26</sup> Thus, this was also a political interest – protecting whites by preventing a black revolt. Finally, there were those who recognised that the South could not move away from being a rural, plantation society and become fully industrialised while it remained divided by state-sponsored segregation.<sup>27</sup>

Bell accepts that the Supreme Court did not identify that the interests of white policymakers had influenced its decision. He says that *Brown* was 'the outward manifestation of unspoken... subconscious judicial conclusions'.<sup>28</sup> It is acknowledged that it would have been imprudent of the Court to suggest it was motivated by international reactions to United States policy and not simply by the Constitution. Dudziak notes that Cold War ideology permeated the broader culture of which the judges were part and it is 'unlikely that these ideas did not inform the Court in a manner similar to that in which they informed actions of the executive branch during the period.'<sup>29</sup>

### **The Reaction to *Brown***

In his text *Race, Racism and American Law*, Bell extended the interest convergence theory. He claimed that *Brown* could be characterised by three additional features that emerge after the black and white interests have converged. First, blacks and their white allies focus more on the relief obtained than on the underlying interests, without which the relief may not have been granted. The relief is seen as proof that the society is a just one and as hope that eventually all racial problems will be solved.<sup>30</sup> Second, the relief often provides African Americans with benefits which, when measured by their actual potential, are of symbolic rather than

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<sup>24</sup> Bell, *Racism*, above n 2, 437-438.

<sup>25</sup> Bell, *Interest Convergence*, above n 4, 524. See James T Patterson, *Brown v. Board of Education*, (2001) 3-4 for the opinions of some of the veterans.

<sup>26</sup> Richard Delgado, 'Explaining the Rise and Fall of African American Fortunes – Interest Convergence and Civil Rights Gains' (2002) 37 *Harvard Civil Rights-Civil Liberties Law Review* 369, 372.

<sup>27</sup> Bell, *Interest Convergence*, above n 4, 524.

<sup>28</sup> *Ibid*, 523.

<sup>29</sup> Mary L Dudziak, 'Desegregation as a Cold War Imperative' (1988) 41 *Stanford Law Review* 61, n 299.

<sup>30</sup> Bell, *Racism*, above n 2, 7.

substantive value. The excitement and promise following the *Brown* decision was followed by disappointment when desegregation did not benefit as many black children as expected.<sup>31</sup> On the sixth anniversary of *Brown* no African American child in the Deep South attended a racially mixed school and four years later more than 98 per cent still attended segregated schools.<sup>32</sup> Bell says:

the racial injustices visited upon blacks are so immense, and the effort required to bring amelioration of the condition in any of the several areas of concern... is so great, that when a barrier is breached, the gain is eagerly accepted as proof of progress in the long, hard struggle to eliminate racial discrimination.<sup>33</sup>

Third, whether or not the benefits have substance, they are perceived by whites as an unearned gift and a 'betrayal of poor whites'.<sup>34</sup> This perception leads to white backlash and opposition, both politically and violently.<sup>35</sup> White opposition to *Brown*, and later to the dismantling of other vestiges of Jim Crow, was strong and violent. Lynchings, church bombings and brutal retaliation to peaceful civil rights protesters were all part of the backlash.<sup>36</sup> In 1957 in Little Rock, Arkansas the massive resistance to school desegregation resulted in the federal government deploying the army to ensure nine African American children could enrol peacefully at school.<sup>37</sup> Bell explains the reason for such reactions:

Poorer whites, viewing any remedy for blacks as an unfair preference, will challenge all racial remedies, even those which, sooner or later, improve their status as much or more than that of blacks.<sup>38</sup>

### **Support for Bell's Interest Convergence Theory**

When Bell first articulated his analysis of *Brown* he was met by scepticism and outrage and the theory was regarded by some as 'the jaded speculation of a civil rights warrior who had given up on the promise of America'.<sup>39</sup> However, in 1988 Mary Dudziak set out to demonstrate that there was a relationship between Cold War politics and the *Brown* decision. After an in-depth historical analysis, Dudziak found that prior to *Brown* the discrimination and violence African Americans suffered was not unknown to the international media.<sup>40</sup> Instances of racism toward

<sup>31</sup> Delgado, above n 1, 410.

<sup>32</sup> Cass R Sunstein 'Did Brown Matter?' *The New Yorker*, 3 May 2004, 103.

<sup>33</sup> Bell, *Racism*, above n 2, 7.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, 8.

<sup>36</sup> On this era see Juan Williams, *Eyes on the Prize: America's Civil Rights Years 1954-1965* (1987). See also Michael J Klarman, 'How *Brown* Changed Race Relations: The Backlash Thesis' (1994) June *The Journal of American History* 81.

<sup>37</sup> Williams, *ibid.*, Chapter 4.

<sup>38</sup> Bell, *Racism*, above n 2, 443.

<sup>39</sup> Delgado, above n 26, 373 and n 38.

<sup>40</sup> Dudziak, above n 29, 80-93.

black dignitaries visiting America made the news overseas<sup>41</sup> and the Soviet Union was exploiting the United States' weakness through its propaganda.<sup>42</sup> When the Justice Department became aware of this, it began filing amicus curiae briefs in civil rights cases, hoping for actual change to counter Soviet criticism.<sup>43</sup>

Bell's 'opposition to the traditional liberal approach to racism' is regarded as central to the development of Critical Race Theory<sup>44</sup> and the Harvard Law Review article in which he proposed the interest convergence theory is regarded as one of the formative writings of that movement.<sup>45</sup> The interest convergence theory has been applied in other contexts, such as by Delgado to offer an explanation for the demise of the civil rights movement in the decade following *Brown*.<sup>46</sup>

Considering that Bell's theory has been accepted as a useful theoretical approach for examining racial equality landmarks, it seems appropriate to apply it to the Australian context to a superior court decision about race relations of equal importance to that of *Brown*, the High Court's decision in *Mabo v Queensland (No 2)*.

## **Part II - *Mabo v Queensland* and the Interest Convergence Theory**

In *Mabo* the High Court found that Aboriginal and Torres Strait Islanders had existing rights recognised by the common law of Australia. Similarly, *Brown* altered the status of African Americans, finding them constitutionally entitled to equal treatment under the law. Bell quotes Judge Robert L Carter's description of the position of African Americans after *Brown*: no longer supplicants, 'seeking, pleading, begging to be treated as full-fledged members of the human race.'<sup>47</sup> This description could also be applied to Australia's Indigenous peoples after *Mabo*.

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<sup>41</sup> The Haitian Secretary of Agriculture was told that for 'reasons of color' he could not stay at a hotel in Biloxi, Mississippi where he had been invited to attend a conference, nor could he eat his meals with other conference attendees: id, 90-93.

<sup>42</sup> Ibid, particularly discussion at 88-90.

<sup>43</sup> For discussion of such cases see id, 103-114.

<sup>44</sup> Kimberlé Crenshaw, Neil Gotanda, Gary Peller, Kendell Thomas (eds), *Critical Race Theory: The Key Writings that Formed the Movement* (1995) xx.

<sup>45</sup> Ibid.

<sup>46</sup> Delgado, above n 26. Delgado has theorised that when the movement moved from prayer and non-violence to radicalism and Black Panther nationalism, it was terminated by the majority and replaced with 'programs more attuned to America's majority interests' such as affirmative action. Delgado, above n 6, 129-130.

<sup>47</sup> Judge Carter is a former NAACP General Counsel. Quoted in Bell, *Racism*, above n 2, 384.

### From *Milirrpum* to *Mabo*

While in the United States there was long history of the Supreme Court failing to overrule segregation in public schools, prior to *Mabo*, whether or not native title rights existed had not been litigated before the High Court and had arisen elsewhere in only one case,<sup>48</sup> *Milirrpum v Nabalco*. In that decision, Blackburn J rejected the claim that native title was part of the common law of Australia.<sup>49</sup> In reaching this decision his Honour felt bound by an earlier authority that upon the Crown's acquisition of sovereignty over a colony, all land became the property of the Crown, and that it was the source of all title.<sup>50</sup> The *Milirrpum* decision was criticised in Canada for its misinterpretation of native title. In *Calder v Attorney-General for British Columbia*, the Canadian Supreme Court said some of Blackburn J's propositions were 'wholly wrong'.<sup>51</sup>

Australian commentators observed that Australia was out of step internationally in not acknowledging Indigenous rights.<sup>52</sup> Native title was recognised in the United States in 1823<sup>53</sup> and Indigenous land rights were protected as early as 1763 in eastern Canada.<sup>54</sup> Since *Milirrpum*, Canada had constitutionally entrenched aboriginal treaty rights<sup>55</sup> and in New Zealand, the Treaty of Waitangi was given statutory underpinning.<sup>56</sup> International opinion also developed in the period between the *Milirrpum* and *Mabo* decisions. In the *Advisory Opinion on Western Sahara* in 1975 the International Court of Justice said that inhabited land could no longer be regarded as terra nullius.<sup>57</sup>

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<sup>48</sup> *Mabo* at 101 per Deane, Gaudron JJ.

<sup>49</sup> 'the doctrine [of native title] does not form, and never has formed, part of the law of any part of Australia.' *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 244-245.

<sup>50</sup> At 245. Blackburn J held himself bound by obiter dicta in *Attorney-General v Brown* (1847) Legge 312; 2 SCR (NSW) App 30; *Cooper v Stuart* (1889) 14 App Cas 286 at 291; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 428 and 439; *NSW v Commonwealth (Seas and Submerged Lands Act Case)* (1975) 139 CLR 337, 438-9. On the development of the common law from *Cooper v Stuart* through to *Milirrpum* and *Mabo*, see Barbara Hocking, 'Aboriginal Law Does Now Run in Australia' in Susan Phillips, R Barlett, B Hocking (eds), *Essays on the Mabo Decision* (1993) 67.

<sup>51</sup> *Calder v Attorney-General for British Columbia* (1973) 34 DLR (3d) 145 per Hall J, Laskin and Spence JJ concurring, 218.

<sup>52</sup> See comments by Paul McHugh, Garth Nettheim, Peter Jull and Henry Reynolds, quoted in John Gardiner-Garden, 'Aboriginality and Aboriginal Rights Internationally' in Department of the Parliamentary Library, *Mabo Papers*, AGPS, Canberra, 1994, 87-88.

<sup>53</sup> In *Johnson v McIntosh* (1823) 8 Wheaton 543.

<sup>54</sup> By the Royal Proclamation of October 7, 1763.

<sup>55</sup> *The Constitution Act 1982* (Canada), ss 25, 35.

<sup>56</sup> *The Treaty of Waitangi Act 1975* (New Zealand).

<sup>57</sup> *Advisory Opinion on Western Sahara* [1975] 1 ICJR 12, 39. See also *Mabo* at 40-41 where Brennan J discusses that if a doctrine no longer commands general acceptance, the common law concepts that rest on it can no longer be supported.



The High Court hinted that it was prepared to consider land rights in *Coe v Commonwealth* when it unanimously recognised that *Milirrpum* was 'an arguable question if properly raised.'<sup>58</sup> However, given that most Indigenous peoples' history is one of dispossession, forced removal and relocation, a suitable case required unique circumstances. In May 1982 three Torres Strait Islanders, including Eddie Mabo, commenced litigation against Queensland. Their claim, on behalf of the Meriam people, was that their traditional title to the Murray Islands in the Torres Strait had not been impaired by the annexation of the islands in 1879 by Queensland or by any later developments. After a decade of litigation, which included an attempt by the Queensland government to enact retrospective legislation to extinguish any native title rights,<sup>59</sup> the *Mabo* decision was handed down on 3 June 1992.

In the 6:1 decision, with Dawson J dissenting, the High Court held that the pre-existing rights of Indigenous peoples survived British sovereignty, provided Aborigines or Torres Strait Islanders had maintained their traditional ties to the land in question and the title had not been extinguished by later government action. The decision also overturned the notion that the doctrine of terra nullius had ever applied to Australia. Brennan J found that the characterisation of the Australian continent as terra nullius 'depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs.'<sup>60</sup> And later:

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.<sup>61</sup>

As to whether the common law could be based on concepts which had been rejected by the international community, Brennan J said:

If it was permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.<sup>62</sup>

The remainder of Part II considers the first part of Bell's theory – whether there was an interest convergence prior to the *Mabo* decision. Bell argues that the *Brown* decision occurred because it secured, advanced or did not harm the political and economic interests identified by policymakers. Part II identifies the political and economic interests that the *Mabo* decision

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<sup>58</sup> *Coe v Commonwealth* (1979) 53 ALJR 403 at 408 per Gibbs and Aickin JJ, 411 per Jacob J, 412 per Murphy J.

<sup>59</sup> The legislation was overturned by the High Court. See *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

<sup>60</sup> *Mabo*, 40.

<sup>61</sup> *Ibid*, 42.

<sup>62</sup> *Ibid*, 41-42.

helped to secure or advance. First, Australia's political interests, particularly on the international stage. Prior to *Mabo*, Australia faced growing criticism, at home and abroad, about the conditions of its Indigenous peoples. Second, Australia's economic interests. The international community's scrutiny of Australia's Indigenous peoples came in the midst of Australia's three consecutive bids to host the Olympic Games. The *Mabo* decision showed that Australia was doing something to address the conditions of its Indigenous peoples and the government actively promoted the decision on the international stage. Finally, *Mabo* did not harm other economic interests, namely real property and the resource industry.

## Australia's Political Interests

### Australia's Participation in International Human Rights Forums

Prior to *Mabo*, Australia was working hard on the international stage to protect human rights: it signed international instruments;<sup>63</sup> it was critical of abuses in other countries;<sup>64</sup> and its governmental representatives were 'at the forefront of some of the most helpful developments' for the world's Indigenous peoples.<sup>65</sup> Australia saw itself as a 'world leader in its efforts to overcome the problems facing its indigenous people'<sup>66</sup> and it pledged support for the activities of the United Nations Working Group on Indigenous Populations ("WGIP"),<sup>67</sup> which was established in 1982 as a forum for Indigenous peoples.<sup>68</sup> In speeches made in international forums, governmental representatives acknowledged the prior

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<sup>63</sup> For example, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on Civil and Political Rights.

<sup>64</sup> For example, it described the apartheid regime of South Africa as an 'abhorrent policy' at the United Nations General Assembly: 'Racial discrimination and self-determination', Statement by the Ambassador to the United Nations, Mr Michael Costello, to the Third Committee at the United Nations General Assembly, New York 13 October 1988. Reprinted in *Australian Foreign Affairs Record* vol 59 no 10 October 1988, 426.

<sup>65</sup> Garth Nettheim, 'Indigenous Rights, Human Rights and Australia' (1987) 61 *Australian Law Journal* 291, 299.

<sup>66</sup> News Release issued by the Minister for Aboriginal Affairs Mr Clyde Holding MP 23 July 1984, *Australian Foreign Affairs Record* vol 55 no 7 July 1984, 750.

<sup>67</sup> See Speech by the Minister for Aboriginal Affairs Mr Clyde Holding MP to the United Nations Working Group on Indigenous Populations in Geneva on 30 July 1984, *Australian Foreign Affairs Record* vol 55 no 7 July 1984, 760. The Brief for the Australian Delegation to the United Nations Working Group on Indigenous Populations, Sixth Session, Geneva 1 August - 5 August 1988 (July 1988, Canberra) describes the government's attitude towards the WGIP as 'one of encouragement and cooperation', 6.

<sup>68</sup> The WGIP includes government 'observer delegations' of which Australia is one.

inhabitation of Australia by Indigenous peoples,<sup>69</sup> affirmed support for Aboriginal land rights<sup>70</sup> and promised to address historical wrongs.<sup>71</sup> However, in a 1988 brief the Australian government acknowledged that the 'internationalisation of Aboriginal and indigenous issues' was a 'double edged sword' because, while it gave momentum to federal policies to improve the situation of Indigenous peoples, it 'exposes Australia to international criticism.'<sup>72</sup>

In 1987 and 1988 this criticism materialised when a series of reports by international organisations condemned Australia's human rights record in regard to its Indigenous peoples. Until then, Australia had dodged international criticism. Commentators suggested this was one reason why the conditions of Indigenous peoples had not been addressed.<sup>73</sup> It is necessary to examine the reports by international organisations in more detail to ascertain how significant they were for 'society's policymakers'.<sup>74</sup> The forums the reports were presented in and the media coverage they received are also relevant.

### The Anti-Slavery Society

Dr Julian Burger of the Anti-Slavery Society<sup>75</sup> visited Australia in 1987 at the invitation of Aboriginal organisations. In addition to visiting Aboriginal communities<sup>76</sup> Dr Burger met with federal and state governments, churches, unions and the Australian Mining Council. His report, *Aborigines Today: Land and Justice*, was presented to the United Nations Commission on Human Rights on 19 January 1988.<sup>77</sup> Subsequently, it was presented to the Australian Government, the

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<sup>69</sup> Speaking at the United Nations on 13 October 1988, Michael Costello described terra nullius as a 'legal fiction'.

<sup>70</sup> 'The Australian Government recognises the prior occupation and ownership of Australia by Aboriginal and Torres Strait Islander people. . . [The Australian Government] is committed to ensure a consistent national approach to land rights for Aboriginal people.' Holding, above n 67.

<sup>71</sup> Eg 'Australia will leave undone nothing that can be done to right this great wrong of our past.' Costello, above n 64, 427.

<sup>72</sup> Brief for the Australian Delegation to the United Nations Working Group on Indigenous Populations, Sixth Session, Geneva 1 August - 5 August 1988 (July 1988, Canberra) 6.

<sup>73</sup> See eg 'World Focus on Aborigines', *The Sydney Morning Herald*, 19 January 1988, 10.

<sup>74</sup> The terminology used by Bell: see above n 12 and 21.

<sup>75</sup> The world's oldest human right organisation, based in London, which is active in both the United Nations and Amnesty International: 'Report Calls for New Rights for Aborigines' *The Sydney Morning Herald*, 17 March 1988, 3.

<sup>76</sup> Time constraints did not allow Dr Burger to visit the Torres Strait, though he met with representatives from the communities: Julian Burger, *Aborigines Today: Land and Justice*, Anti-Slavery Society, London 1988, 45.

<sup>77</sup> David Langsam, 'Report to UN Blasts Australia', *The Sun Herald*, 10 January 1988, 33.

International Labour Organisation<sup>78</sup> and tabled at the Commonwealth Heads of Government Meeting (“CHOGM”) on 13–15 October 1987.<sup>79</sup> In January 1988 parts of the report were incorporated in the second part of *The Last Dream*, a documentary by John Pilger about the living conditions of Australia’s Indigenous peoples. It screened on British television as part of Australia’s Bicentenary celebrations on the day Burger’s report was released internationally.<sup>80</sup>

In the report Dr Burger said that Aboriginal people seemed ‘as badly off as they have ever been’<sup>81</sup> and while in the 1970s there was substantial progress in the relationship with the federal government, he found the 1980s was a period of ‘growing disenchantment with government.’<sup>82</sup> He reported that living conditions were some of the worst in the world,<sup>83</sup> with housing generally sub-standard and some areas as bad as anything in the slums of Calcutta.<sup>84</sup> He found Aboriginal people experienced racism and discrimination in their everyday lives, some towns more closely representing America’s Deep South than ‘multiculturalism’.<sup>85</sup> The Anti-Slavery Society told the United Nations Commission on Human Rights that urgent action was needed to address these problems, including the federal government acknowledging the prior occupation and ownership of Australia by Aboriginal people and their right to self-determination. It recommended national land rights legislation to allow Aborigines to claim Crown land, own it collectively and to deny access to mining companies. Finally, it called on the government to investigate ‘with vigour’ Aboriginal deaths in custody.<sup>86</sup>

### The United Nations

Professor Erica Daes, Chairperson of the WGIP, visited Australia in December 1987 and January 1988 at the invitation of the Aboriginal and Islander Legal Service and with financial assistance from the federal government. The purpose of her visit was to review the human rights situation of Aboriginal and Torres Strait Islanders and to identify the

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<sup>78</sup> Above n 75.

<sup>79</sup> Tony Hewett, ‘Report on Aborigines to Embarrass Aust’, *The Sydney Morning Herald*, 9 October 1987, 1.

<sup>80</sup> Langsam, above n 77. *The Last Dream* screened on the ABC in February 1988: David Clark, ‘Pilger’s Uncertain Dream has the substances of an Uncertain Consomme’, *The Financial Review*, 8 February 1988, 12.

<sup>81</sup> Burger, above n 76, 67.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, 36.

<sup>84</sup> *Ibid.*, 40.

<sup>85</sup> *Ibid.*, 49.

<sup>86</sup> Statement on Behalf of the Anti-Slavery Society for the Protection of Human Rights at the United Nations Economic and Social Council Commission on Human Rights 39<sup>th</sup> Session, Geneva 1 September 1987, reprinted in *id.*, 103.

issues that needed to be addressed by the WGIP.<sup>87</sup> Like Dr Burger, Professor Daes visited Indigenous communities and met with Aboriginal legal, educational and medical organisations.<sup>88</sup> In her final report Professor Daes said 'Australia's original inhabitants... (are) living in poverty, misery and extreme frustration.'<sup>89</sup> After finding amongst Indigenous peoples poor health and education, the loss of traditional life, and high rates of unemployment and of deaths in custody, she concluded that 'Australia stands in violation of her international human rights obligations relating to non-discrimination and unequal treatment in general.'<sup>90</sup>

Professor Daes' interim findings while visiting Australia received coverage by the media<sup>91</sup> and excerpts from her final report were published in the *Sydney Morning Herald* on 5 August 1988. Her findings met with criticism. She was accused of being 'a do-gooder',<sup>92</sup> 'a UN busybody' and 'a 35-day expert'<sup>93</sup> who should 'mind her own business' and concentrate on human rights violations in her own country.<sup>94</sup>

### Other Reports

Alarmed by the number of Aboriginal deaths in custody during 1987, Amnesty International listed Australia in its annual report about human rights violations.<sup>95</sup> Released in October 1988, this was the first time Australia was listed in the report,<sup>96</sup> and it was included for the same reason the following year.<sup>97</sup> In December 1989 a report by the United

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<sup>87</sup> Erica Irene A Daes, *Confidential Report on Visit to Australia 12 December 1987 - 2 January 1988 and 7-22 January 1988*, United Nations, 1988, 5.

<sup>88</sup> 'Prof Daes Toured Australia for Report' *The Sydney Morning Herald*, 5 August 1988, 4.

<sup>89</sup> Daes, above n 87, 12.

<sup>90</sup> *Ibid.*

<sup>91</sup> See eg Tony Hewett, 'Madame Daes Asks Why Redfern Wasn't Cleaned Up', *The Sydney Morning Herald*, 16 December 1987, p 5; Tony Hewett, David Langsam, 'Blacks' Rights Abused, UN Told', *The Sydney Morning Herald*, 18 January 1988, 1.

<sup>92</sup> By John Gayler, Chairman of the ALP Federal Caucus Committee on Aboriginal Affairs: see Norman Abjorensen, 'Backlash Over Blacks', *The Sydney Morning Herald*, 23 January 1988, 60.

<sup>93</sup> By Graeme Campbell, member of the ALP Federal Caucus Committee on Aboriginal Affairs: *ibid.*

<sup>94</sup> By Chris Miles, Opposition spokesman on Aboriginal affairs: see Tony Hewett, 'UN Report 'Commends' Aboriginal Initiatives', *The Sydney Morning Herald*, 6 August 1988, 2.

<sup>95</sup> *Amnesty International Report 1988*, Amnesty International Publications United Kingdom, 1988, 148-149.

<sup>96</sup> Kim Langley, 'Amnesty Report Lists Australia for Human Rights Violations', *The Sydney Morning Herald*, 6 October 1988, 2.

<sup>97</sup> *Amnesty International Report 1989*, Amnesty International Publications United Kingdom, 1989, 160-161.

Nations Association of Australia said Australia's performance in human rights was 'steadily deteriorating.' Author of the report, Chris Connolly said '[t]he days when Australia was a leader of the movement, rather than a follower, appear to be over.'<sup>98</sup> At CHOGM in October 1991 a report by the Commonwealth Human Rights Initiative criticised human rights breaches in most of the Commonwealth countries. However, it mentioned Australia significantly more than other developed countries, mostly in relation to its treatment of Aboriginal people.<sup>99</sup>

In October 1987 a Royal Commission was established to examine 99 Indigenous deaths in custody which occurred between January 1980 and May 1989. In its final report, released in 1991, the Royal Commission found there was an over-representation of Indigenous peoples in custody which was largely due to the 'disadvantaged and unequal position in which [they] find themselves in society - socially, economically and culturally.'<sup>100</sup> The federal government acknowledged that the 'world is watching' how it dealt with the Commission's recommendations. Speaking at the United Nations, the then Minister for Aboriginal Affairs, Robert Tickner, recognised that the WGIP, Amnesty International and other non-government organisations would be monitoring the implementation of the recommendations of the Royal Commission.<sup>101</sup>

### Indigenous Activism

During this period Indigenous activists used international forums to voice complaints about the conditions in Australia. For example, at the Fifth Session of the WGIP in August 1987 Helen Boyle reported the high imprisonment rate and alarming number of Aboriginal deaths in custody and called on the federal government to inquire into these deaths. She criticised the government for the extraordinary amount of money it spent investigating the disappearance of a white baby, Azaria Chamberlain, compared to the money spent on investigating an Aboriginal death.<sup>102</sup> Ms

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<sup>98</sup> Paul Chamberlin, 'Australia Slipping on Human Rights' *The Sydney Morning Herald*, 11 December 1989, 2.

<sup>99</sup> Pilita Clark, 'Our Human Rights Record Criticised', *The Sydney Morning Herald*, 18 October 1991, 2.

<sup>100</sup> Royal Commission into Aboriginal Deaths in Custody, *National Report Vol 1*, AGPS, Canberra, 1991, 1.7.1.

<sup>101</sup> The Minister said, 'Nations are aware that Australia's Aboriginal and Torres Strait Islander people still suffer continuing disadvantage and injustice, which must be addressed.' 'Aboriginal Issues Must be Addressed, UN Told', Statement on 1 August 1990 by Minister for Aboriginal Affairs, Mr Robert Tickner, *The Monthly Record* August 1990, 577-578.

<sup>102</sup> Statement by Helen Boyle, Chairperson of the Committee to Defend Black Rights (Australia) at the United Nations Working Group on Indigenous Populations, Fifth Session, Geneva, reprinted in Burger above n 76, 94. This submission prompted the WGIP to announce Professor Daes would visit Australia in 1987 to examine the

Boyle also went to London where she made similar submissions to Amnesty International which agreed to raise the issue of Aboriginal rights with the federal government.<sup>103</sup> At the same WGIP Session Paul Coe, Chairperson of the Aboriginal and Islander Legal Service, urged members of the United Nations to boycott Australia's Bicentenary celebrations in protest against the abuse of Indigenous peoples.<sup>104</sup> He told the Group that the most fundamental abuse was the federal government's belief in terra nullius which, he maintained, gave it moral justification for denying the recognition of Aboriginal land rights.<sup>105</sup>

In April 1992, on behalf of three Aboriginal nations, Aboriginal lawyers wrote to the Secretary-General of the United Nations seeking an advisory opinion from the International Court of Justice on whether in 1788 Australia belonged to no one or to Indigenous peoples, and on their right to self-determination.<sup>106</sup> The advisory opinion did not succeed because representatives of 'Aboriginal nations' do not have the capacity to seek an advisory opinion directly from the Court, but its request was another means by which Aboriginal leaders sought to 'internationalise' their conditions.

Australia's Indigenous people exploited the media's interest in them during the Bicentenary in order to draw attention to their living conditions, and in the first weeks of 1988, Aboriginal issues featured prominently in the news.<sup>107</sup> For example, in January an Aboriginal tent embassy was erected at Mrs Macquarie's Chair in Sydney to draw attention to Aboriginal land rights and self-determination.<sup>108</sup> The Sydney Morning Herald reported that over two days 'hundreds of curious Japanese tourists' and foreign media had visited the embassy.<sup>109</sup> In the United Kingdom, The Times reported that 30,000 Aboriginal people were expected to take part in a protest in Sydney on Bicentenary Day, 26

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situation: Tony Hewett, 'Aborigines Find Allies Abroad', *The Sydney Morning Herald*, 1 September 1987, 17.

<sup>103</sup> Ibid.

<sup>104</sup> Tony Hewett, 'Call to UN: Boycott the Bicentenary', *The Sydney Morning Herald*, 14 August 1987, 4.

<sup>105</sup> Hewett, above n 102. See also *Mabo* at 69 where Brennan J refers to the appropriateness of identifying the actions of governments which dispossessed Indigenous peoples of their land in order to dispel the idea that it was the common law that did so by deeming the continent terra nullius.

<sup>106</sup> Graham Williams, 'Aborigines Seek UN Ruling on Land' *The Sydney Morning Herald*, 3 April 1992, 8.

<sup>107</sup> See eg n 73, 108, 109.

<sup>108</sup> Lyal Munro, Tent Embassy Spokesperson, quoted in *The Sydney Morning Herald*, 18 January 1988, 1.

<sup>109</sup> 'Tent Embassy: We Shall Not Be Moved', *The Sydney Morning Herald*, 18 January 1988, 1.

January 1988.<sup>110</sup> In fact, only 15,000 marched peacefully through the Sydney streets, but it was one of the biggest demonstrations since the Vietnam War.<sup>111</sup> The celebratory events of the day were reported by the international media and many included reference to ‘the Aborigines’ protest’ at their past and present treatment.<sup>112</sup> With the world’s attention focused on Australia, one newspaper suggested that if Prime Minister Bob Hawke did ‘something really dramatic’ for Aboriginal people in 1988, it might be for ‘pre-emptive diplomatic reasons’<sup>113</sup> rather than for domestic reasons.<sup>114</sup> Another suggested that if the world takes an interest in the alarming number of Aborigines who had died in custody since 1982, then ‘white Australia might also take a genuine interest in the subject’ and subsequently, in the conditions affecting Aborigines.<sup>115</sup>

### **The Government’s use of the *Mabo* Decision**

The High Court’s decision in *Mabo* did not go unrecognised by the international media.<sup>116</sup> Nor did the federal government fail to use the decision on the international stage. Less than two months after the decision the then Minister for Aboriginal Affairs, Robert Tickner, told the WGIP it was time for Australia to ‘fast-track’ its proposed treaty with Aboriginal peoples. He cited the *Mabo* decision as one of the reasons for speeding up the process.<sup>117</sup> The decision came on the eve of the United Nations International Year of the World’s Indigenous Peoples in 1993. At its Australian launch on 10 December 1992 Prime Minister Paul Keating spoke about the importance of *Mabo*, calling it one of the ‘practical building blocks to change.’ He addressed historical injustice, the current conditions of Indigenous peoples, and his government’s role in the

<sup>110</sup> *The Times*, 18 January 1988, 6.

<sup>111</sup> Louise Boylen, ‘Protesters March to a Different Beat’, *The Australian Financial Review*, 27 January 1988, 3.

<sup>112</sup> See eg Michael Bociurkiw, ‘Celebrations, protests, crowds mark Australia’s bicentennial’, *The Globe and Mail*, 27 January 1988, A1; Mark Fineman, ‘Ultimate Aussie party - 200 years after a hard beginning, nation celebrates’, *The Los Angeles Times*, 27 January 1988, 6A; ‘Australia’s Birthday Bash / 200 Years Since British Settled In’, *The San Francisco Chronicle*, 27 January 1988, A11; ‘Australia at 200’, *The Globe and Mail*, 30 January 1988, D6.

<sup>113</sup> Warren Osmond, ‘New Achilles Heel for Australian Diplomacy’, *The Sydney Morning Herald*, 25 January 1988, 16.

<sup>114</sup> See above n 73.

<sup>115</sup> ‘Reflections on Nation-Building’, *The Sydney Morning Herald*, 26 January 1988, 12.

<sup>116</sup> Eg ‘Australia: ‘Native’ Land Titles Recognized – with Catches’, *Inter Press Service Global Information Network*, 8 June 1992; Eric Nelson, ‘Australia’s Aborigines Fighting Back After Years of Oppression’, *The San Francisco Chronicle*, 15 July 1992, A11; ‘Process Is Planned on Aboriginal Land Rights’, *The Asian Wall Street Journal*, 28 October 1992, 4.

<sup>117</sup> A second reason given was the high degree of political support for a treaty: Amanda Meade, ‘Time to Speed Black Treaty, says Tickner’, *The Sydney Morning Herald*, 29 July 1992, 4.



reconciliation process and said, 'our success in resolving these issues will have a significant bearing on our standing in the world.'<sup>118</sup> The Prime Minister's address was relayed to the United Nations' New York launch of the International Year.<sup>119</sup> It provided the world with assurance that Australia had begun to address the issues faced by its Indigenous peoples in a profound way and to give effect to the international instruments it was party to.

### **Australia's Economic Interests**

Bell states that following an interest convergence the remedies obtained 'will secure, advance, or at least not harm societal interests deemed important.'<sup>120</sup> The following discussion presents three of Australia's economic interests. First, the economic interest that was secured or advanced by the *Mabo* decision – Sydney's bid for the 2000 Olympic Games. Second, the economic interests that were not harmed by the decision – the country's real property structure and the resource development industry.

### **Sydney's Bid for the 2000 Olympic Games**

The announcement in September 1993 that Sydney would host the 2000 Olympic Games was the culmination of three consecutive attempts by different Australian cities to win the Games.<sup>121</sup> In November 1990 Sydney was selected as the Australian city which would bid for the Games<sup>122</sup> and a multi-million dollar campaign was launched to lure the Olympics to Australia. In addition to the profile and prestige the Games would bring to the country, it was predicted to have enormous economic benefits. Costing \$1.4 billion to host, it was expected to bring at least \$1 billion and up to \$13 billion profit from tourism and foreign television rights. Staging the Olympics would create 100,000 jobs in the decade

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<sup>118</sup> Paul Keating, *Redfern Speech*, 10 December 1992. Full text available at [www.keating.org.au](http://www.keating.org.au) (last accessed 10/1/08). Similar sentiments were expressed in *Mabo* at 109 per Deane and Gaudron JJ. The dispossession of Indigenous peoples was described as 'the darkest aspect of Australia's history.' Further, 'The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.'

<sup>119</sup> Meade, above n 117.

<sup>120</sup> Bell, *Interest Convergence*, above note 4, 523.

<sup>121</sup> Brisbane failed in its attempt to win the 1992 Games, and in 1988 it joined Sydney and Melbourne in a quest to be the Australian city put forward for the 1996 Games bid: Ann Arnold, 'Bid for '96 Olympics: Sydney or Melbourne?', *The Sydney Morning Herald*, 11 May 1988, 70; Philip Clark, 'Sydney Opens Bid for \$1.8bn Olympics', *The Sydney Morning Herald*, 26 August 1988, 3. Melbourne was eventually selected for the 1996 bid but it lost to Atlanta: Milton Cockburn, 'Melbourne Mourns as Atlanta Gets the Gold', *The Sydney Morning Herald*, 19 September 1990, 1.

<sup>122</sup> Peter Robinson, 'An Olympic Con Game', *The Sun Herald*, 18 November 1990, 31.

leading to 2000 and, following the Games, 1.5 million visitors were expected to visit Australia.<sup>123</sup>

Early in the campaign, Beijing, Berlin and Sydney were named as the top contenders.<sup>124</sup> However, Beijing's bid was continually marred by international opposition to China's human rights record, its lack of democratic institutions and the recent Tiananmen Square massacre.<sup>125</sup> Given the unease with which Beijing's bid was treated and the internal protests against Berlin's bid,<sup>126</sup> it was seen as essential to have the community behind Sydney's bid. In particular, the Sydney Bid Committee regarded Aboriginal support as crucial.<sup>127</sup> In the same way as they capitalised on the international interest in Australia's Bicentenary only a few years before, Indigenous leaders used Sydney's Olympic bid to publicise Indigenous peoples' circumstances. For example, in October 1991 the NSW Aboriginal Legal Service presented International Olympic Committee (IOC) members with a letter that criticised Australia's treatment of its Indigenous peoples, which it believed should disqualify Sydney from hosting the Games.<sup>128</sup> The letter read in part:

The racial overtones that have disqualified South Africa [from the Olympic Games] are repeated a hundred fold here in Australia....White Australia has competed at a number of Olympic Games when the black Australians at home were not only not given a vote but were not counted as humans. Those members of an ancient race had an official status that hovered. . . somewhere between a white and a wombat.<sup>129</sup>

The *Mabo* decision was handed down fifteen months before the IOC was to vote on which country would host the Games and, as outlined above, it was widely publicised by the Australian government at the international level.

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<sup>123</sup> See quotes from Bruce Baird MP, NSW Minister for Transport (later Minister for the Olympic Bid) and Sydney Lord Mayor, Alderman Frank Sartor, in Sam North, 'Share The Olympic Spirit', *The Sydney Morning Herald*, 16 July 1992, 2.

<sup>124</sup> Karen Bishop, 'Sydney in Top Three in Bid for Olympics' *The Sydney Morning Herald*, 21 September 1991, 9.

<sup>125</sup> In 1989: Sam North, 'Ten Reasons Why Sydney Won't Win the Games', *The Sydney Morning Herald*, 6 May 1993, 17; 'Olympic Games - Peking's Bid under Scrutiny', *The Independent*, 18 July 1992, 51.

<sup>126</sup> Bishop, above n 124.

<sup>127</sup> Tony Hewett, 'Aboriginal Group Splits Support for 2000 Olympics', *The Sydney Morning Herald*, 24 October 1992, 24.

<sup>128</sup> A similar campaign was launched closer to the IOC's final decision in October 1992. For international coverage of this campaign see 'Olympic Games - Outback Setback', *The Guardian*, 29 October 1992, 19.

<sup>129</sup> Tony Hewett, 'Blacks Step up Challenge to Games Bid', *The Sydney Morning Herald*, 19 October 1991, 11.

### **Real Property and Resources**

Despite initial hysteria, the *Mabo* decision did not harm Australia's economic interests, in particular the country's property structure and the resource development industry. Although there were outbreaks of 'Mabo madness' – a term coined by the media to describe the public's fear, which bordered on hysteria, that all property titles were under threat – native title, as it stood in *Mabo*, does not harm the structure of real property in Australia.<sup>130</sup> As Mansell states:

The judgment... has been carefully framed to give recognition to some Aboriginal interests over traditional lands while at the same time offering no offence to white land owners.<sup>131</sup>

This is because most of the titles which 'white land owners' hold, in particular grants of freehold and leases conferring exclusive possession, will have extinguished native title.<sup>132</sup> For similar reasons *Mabo* did not harm the mining industry or threaten its interests.<sup>133</sup> This is considered further below.

The preceding discussion suggests that the *Mabo* decision did not simply come about because of a 'moral epiphany' in Australian society, and that a contributing factor was the value the recognition of native title held for society's policymakers. One difficulty with the interest convergence analysis of legal history is that it may be seen to be unbalanced in its approach by only presenting factors which point to a convergence of interests. However, neglecting other information is not to deny that there were other factors at work, nor is identifying these interests intended to diminish the High Court's pronouncement. Interest convergence offers a partial explanation: it provides another lens through which the *Mabo* decision can be viewed and subsequently assessed.

### **Part III – Applying Bell's Theory to the Aftermath of *Mabo***

Recall that Bell suggests three factors will follow landmark steps towards racial equality: the minority will see the remedy as proof the society is just, rather than looking at how it was obtained; the remedy will provide benefits which are symbolic rather than substantive; and whether or not the remedy does confer a benefit on the minority, some members of the

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<sup>130</sup> It is acknowledged that the *Native Title Act 1993* (Cth) and subsequent court decisions have substantially modified this area of law.

<sup>131</sup> Michael Mansell, 'Australians and Aborigines and the Mabo Decision: Just Who Needs Whom the Most?' in Phillips *et al*, above n 50, 50.

<sup>132</sup> *Mabo* at 69 per Brennan J.

<sup>133</sup> 'Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (for example, authorities to prospect for minerals).' *Ibid*.

majority will perceive it as an unearned gift, a threat, and oppose it. In Part III each of these factors are applied to the Australian context immediately following *Mabo*. This discussion considers native title law as it stood after *Mabo*. The effect of the subsequent legislative scheme, the Native Title Act 1993 (Cth), which regulates native title, is not considered.

### Initial Responses

Bell says the first factor following an interest convergence is that the focus is on the relief obtained, rather than the interests that lead to it. In the aftermath of the *Mabo* decision, many Indigenous leaders and legal commentators praised the decision as the first step toward reconciliation. Pat Dodson, the then Chair of the Council for Aboriginal Reconciliation, said the decision was received by the Council 'in a spirit of joy and celebration'.<sup>134</sup> At the 1992 Session of the WGIP George Mye told the Group the High Court's decision 'infused the Aboriginal and Torres Strait Islander people of Australia with a new sense of pride and purpose.'<sup>135</sup> *Mabo* was celebrated for confirming an Indigenous group's pre-existing right to land, rather than creating a new right. It was celebrated for recognising something inherent, which was seen differently from other initiatives as it was not a government 'handout', and it related to land and the spiritual connection to land is integral to Indigenous cultures.

### Symbolic not Substantive Relief

Bell says the remedy obtained will provide benefits which are symbolic rather than substantive. Despite hopes that *Mabo* was the first step toward reconciliation, there were Indigenous leaders who criticised the Court's decision. Noel Pearson called it a 'pragmatic compromise... between the rights of so-called settlers and the rights of original inhabitants.'<sup>136</sup> Paul Coe said it was 'restricted in application and offers no hope to the vast majority of Aboriginal people'.<sup>137</sup> This view was shared by Mick Dodson when he spoke at the WGIP the month after the decision:

For the vast majority of indigenous Australians the *Mabo* decision is a belated act of sterile symbolism. It will not return the country of our ancestors, nor will it result in compensation for its loss.<sup>138</sup>

<sup>134</sup> Quoted in John Gardiner-Garden, 'The Mabo debate - a chronology', above n 52, 148.

<sup>135</sup> George Mye, Commissioner for the Aboriginal and Torres Strait Islander Commission, quoted in Frank Brennan, 'Mabo and its Implications for Aborigines and Torres Strait Islanders' in MA Stephenson, Suri Ratnapala (eds), *Mabo: A Judicial Revolution* (1993) 45.

<sup>136</sup> Noel Pearson, 'From Remnant Title to Social Justice' in Murray Goot, Tim Rowse (eds), *Make a Better Offer - The Politics of Mabo* (1994) 179.

<sup>137</sup> Paul Coe quoted in 'Australia: 'Native' Land Titles Recognized - with Catches', *Inter Press Service Global Information Network*, 8 June 1992.

<sup>138</sup> Mick Dodson speaking on behalf of the Northern Land Council, Aboriginal and Torres Strait Islander Commission - The Australian Contribution to the United Nations

The basis for such criticism was twofold. First, the decision did not assist the majority of Indigenous peoples. Of the total Indigenous population, no more than one third lived in rural areas and of those very few lived in the isolated, remote areas necessary to fulfil the requirements in *Mabo*,<sup>139</sup> and those who were dispossessed could not benefit at all.<sup>140</sup> Pearson asked, 'how is the country going to acknowledge the rights and the titles that have been lost to date - the 90 to 95 per cent of rights that have been extinguished across the continent?'<sup>141</sup> It would seem the answer to this was with compensation from the Crown for land that was taken. Although the court did not need to address this question in *Mabo*, the majority was of the view that there was no obligation at common law to compensate Indigenous peoples whose title was extinguished before 1975 when the Racial Discrimination Act was enacted.<sup>142</sup>

The second reason was that those who met the requirements necessary to establish native title were not granted a title equal to 'white' titles. Native title does not equate to ownership. It is the right of native titleholders to occupy and enjoy the land in continuation of traditional practices. Mansell described the title as a 'meagre Aboriginal form of rights over land' such that 'Indigenous peoples' interests in land are something less than the interests of Europeans'.<sup>143</sup>

### Opposition to the Decision

Finally, Bell suggests that whether the relief granted is substantive or symbolic, it will be perceived by whites to be an unearned gift which must be opposed. Not all whites will be opposed, Bell says; there will be those for whom racial equality is adequate justification for such relief.<sup>144</sup> For others it will be seen as a threat to their status, particularly, Bell says,

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Working Group on Indigenous Populations, Tenth Session 20-31 July 1992, Geneva, 35.

<sup>139</sup> Michael Mansell, 'The Court Gives an Inch but Takes Another Mile', (1992) 2(57) *Aboriginal Law Bulletin* 4, 6.

<sup>140</sup> To establish native title, an Indigenous community must show a continuous connection with the land in question, including maintaining traditions and customs connected with the land, and that its title has not been extinguished: *Mabo* at 70 per Brennan J, and 110 per Deane and Gaudron JJ. The communities which are likely to be able to establish that connections will be those located in remote areas who retained that connection because the land was not taken to facilitate population growth or for mining. Thus claiming commercially valuable land in built-up urban areas is practically impossible. O'Hair suggests that one reason the common law recognised native land rights in 1992 was that 'what land there is left to bicker over [now] is not regarded as particularly valuable to the bulk of the population.' RB O'Hair, 'Searching for a Golden Thread' in Stephenson *et al*, above n 135, 72.

<sup>141</sup> Pearson, above n 136, 179.

<sup>142</sup> *Mabo* at 15 per Mason CJ and McHugh J expressing agreement with Brennan J.

<sup>143</sup> Mansell, above n 139, 6.

<sup>144</sup> Bell *Racism*, above n 2, 438.

for lower-class whites who relied on the expectation that white elites would protect their entitlement to a place in society which was superior to blacks.<sup>145</sup> In Australia immediate backlash did not come simply from poor whites. Rather, opposition came from those who perceived *Mabo* as a threat to their interests and status, and those who perceived native title as another ‘benefit’ given only to Indigenous peoples.

The most immediate criticism came from within the mining industry, from mining chief Hugh Morgan. In July 1992, Morgan criticised the ‘naïve adventurism’ of the High Court and judgments written in the ‘language of the guilt industry, coupled with a highly selective interpretation of Australian history.’<sup>146</sup> In October he went further, saying the High Court had ‘plunged property law into chaos and given substance to the aims of communists and Bolsheviks to give Aborigines land rights.’<sup>147</sup>

Some of the non-Indigenous population reacted with what was termed ‘*Mabo* madness,’ fuelled by rumour, exaggeration and speculation about what the decision meant. In essence, this reaction was based on an ungrounded fear that a small percentage of the Australian population could lay claim to fifty per cent of the continent, the territorial sea and the contiguous sea.<sup>148</sup> *Mabo* madness was intensified by dramatic events, such as the South East Queensland Aboriginal and Islander Legal Service announcing in December 1992 that it would claim the central business district of Brisbane, a claim it subsequently withdrew.<sup>149</sup> A 1994 comment by radio host Alan Jones encapsulates *Mabo* madness and illustrates the way some saw native title as a benefit:

For some time now, a small group of Australians – our indigenous people – have been seeking the spoils of Australia’s hard-won gains out of all proportion to their numbers or their entitlement. . . Aborigines, important Australians that they are, still only constitute a mere 1.5 per cent of the populations. Yet, they already own 16 per cent of Australia.<sup>150</sup>

Opposition also surfaced in Western Australia and Queensland, although in different forms. One reason a major locus of opposition arose in Western Australia was that it was the state with the largest area open to

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<sup>145</sup> Ibid.

<sup>146</sup> G Hughes, ‘High Court Failed Nation with Mabo, Says Mining Chief’, *The Australian*, 1 July 1993, 1-2.

<sup>147</sup> Margaret Easterbrook, ‘Morgan a Bigot Over Land Rights, Says PM’, *The Age*, 14 October 1992, p 15. See also Paul Chamberlin, ‘Mining Head Angry over Land Judgment’, *The Sydney Morning Herald*, 13 October 1992, 6.

<sup>148</sup> See LJM Cooray, ‘The High Court in Mabo: legalist or l’égotiste’ in Goot *et al*, above n 136, 93 expressing this, particularly in regard to Western Australians.

<sup>149</sup> Tim Rowse, ‘How we got a Native Title Act’ in Goot *et al*, above n 136, 113.

<sup>150</sup> Quoted in *The Sunday Telegraph*, 6 June 1994, cited in Andrew Markus, ‘Between Mabo and a Hard Place’ in Bain Attwood (ed) *In The Age of Mabo* (1996) 90.

native title claims due to the amount of land not held under freehold title.<sup>151</sup> Queensland faced a similar dilemma and, like Western Australia, it had strong connections to the mining industry. Facing pressure from the mining and pastoral industries, the Western Australian government tried to block the effect of the Native Title Act 1993 (Cth) which followed the *Mabo* decision.<sup>152</sup> Initially the state enacted the Land (Titles and Traditional Usage) Act 1993 (WA) which extinguished native title and substituted it with 'rights of traditional usage', which were subordinate to other interests. It subsequently commenced a High Court challenge to the validity of the Native Title Act. However, the High Court held that the Act was valid<sup>153</sup> and the Western Australian legislation was inoperative under s 109 of the Constitution for being inconsistent with both the Native Title Act and s 10 of the Racial Discrimination Act 1975 (Cth).<sup>154</sup>

The following year, a second locus of opposition arose, this time in Queensland. Pauline Hanson was elected to federal Parliament in 1996 on the basis of a number of controversial platforms, including her objection to the special treatment Indigenous peoples supposedly receive.<sup>155</sup> Hanson won the seat of Oxley as an Independent, taking the safest Labor seat in Queensland and scoring the highest swing in the country.<sup>156</sup> Jupp said that although she was not overtly racist, Hanson, and subsequently the One Nation party she founded, appealed to racist sentiments,<sup>157</sup> and she was able to express them in simple language.<sup>158</sup> Her maiden speech is indicative:

I am fed up with being told, 'This is our land.' Well, where the hell do I go? . . . I will work beside anyone and they will be my equal but I draw the line when told I must pay and continue paying for something that

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<sup>151</sup> Ibid, 93. The state was also without land rights legislation after the mining community opposed it in the 1980s.

<sup>152</sup> Western Australia had been a locus of opposition for similar reasons before. In 1984 the Hawke government's proposal to introduce national rights legislation faced opposition from the mining industry and was subsequently abandoned: Garth Nettheim, 'Native Title Fictions and 'Convenient Falsehoods'' (1998) 4(1) *Law/Text/Culture* 70, 75. The same year the Western Australian Chamber of Mines spent more than one million dollars on a campaign against the government's land rights bill, which was eventually defeated by the Legislative Council: Scott Bennet, *Aborigines and Political Power*, Allen & Unwin, Sydney, 1989, 56.

<sup>153</sup> With the severable exception of s 12: *Western Australia v Commonwealth* (1995) 183 CLR 373, 377.

<sup>154</sup> Per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

<sup>155</sup> Jupp says these views were widely held in the Liberal and National parties, particularly in Queensland: James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (2002) 128-9.

<sup>156</sup> Of 19 per cent: *ibid*.

<sup>157</sup> *Ibid*, 138.

<sup>158</sup> *Ibid*, 135.

happened over 200 years ago. Like most Australians, I worked for my land; no one gave it to me.<sup>159</sup>

Espousing a plethora of controversial policies,<sup>160</sup> Hanson ‘became a beacon for many who were much more racist than she was.’<sup>161</sup> Jupp paints a stereotypical picture of a ‘typical’ One Nation supporter as:

middle-aged, male, a manual worker, of Anglo-Australian (or sometimes British immigrant) descent, living in a small community, employed, an early school-leaver, a gun owner and a Queenslander.<sup>162</sup>

One Nation’s support peaked in 1998, due in part to the High Court’s decision in *Wik*<sup>163</sup> which fuelled a similar sentiment to the *Mabo* madness seen six years earlier. Of the 89 Legislative Assembly seats contested in the 1998 Queensland election, One Nation won eleven, nine of which were in regional and rural areas.<sup>164</sup> Although One Nation received 1 million votes for the Senate and slightly less for the House of Representatives at the federal election later that year,<sup>165</sup> its popularity and electoral success was limited to Queensland.<sup>166</sup>

#### Part IV – Using Interest Convergence

Applying the interest convergence theory to the *Mabo* decision has shown that on at least one occasion the interests of Indigenous peoples converged with the interests of policymakers and resulted in a landmark for racial equality in Australia. It follows that future steps toward racial equality may also come about when these interests converge. Therefore, the value of interest convergence analysis is not just retrospective. It is

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<sup>159</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 10 September 1996, 3860. (Pauline Hanson, Member for Oxley).

<sup>160</sup> She also had strong views on immigration, particularly from Asia, and on multiculturalism. For an early summary see Hanson’s maiden speech: *Ibid.* For a discussion dispelling the assertions Hanson made about the ‘advantages’ Indigenous people receive, including Hanson’s call for formal equality, see Ruth Bohill, ‘For the Record: Pauline Hanson, Equality and Native Title’ in Bligh Grant (ed), *Pauline Hanson: One Nation and Australian Politics* (1997) 63.

<sup>161</sup> Jupp, above n 155, 131.

<sup>162</sup> *Ibid.*, 134-5.

<sup>163</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1 in which the High Court held that a grant of pastoral lease does not necessarily extinguish native title, thus expanding the amount of land potentially open to claim.

<sup>164</sup> Gerard Newman, ‘1998 Queensland Election’ in *Current Issues Brief No.2 1998-99*, Department of the Parliamentary Library Information and Research Services, 8 December 1998, 1, 4. Newman notes that the election was the first time in Australia’s history that a new political party won a significant number of seats in a lower house of Parliament under a single party member system.

<sup>165</sup> Jupp, above n 155, 135.

<sup>166</sup> For a discussion of the Hanson phenomena in Queensland, see Henry Reynolds, ‘Hanson and Queensland’s Political Culture’ in Tont Abbott (ed) *Two Nations: The Causes and Effects of the Rise of the One Nation Party in Australia*, Bookman Press, Melbourne, 1998.



also a useful tool for Indigenous activists to use in 'determining when the time may be right to strike for change.'<sup>167</sup>

Bell says that racial justice may at times count as one of the interests that are important to policymakers,<sup>168</sup> but Indigenous peoples cannot rely on the regularity of this. Bell's theory suggests that to maximise their chances of success, Indigenous peoples need to establish that a step towards racial equality will either secure or not harm non-Indigenous interests. This strategy was employed in the *Brown* litigation by the NAACP, which argued that ending segregation would provide credibility to the United State's fight against communism.<sup>169</sup> However, in doing this, Indigenous peoples should be aware of a drawback of pursuing interest convergence with the dominant group, which Delgado has identified. He says that in its eagerness to accept what the majority is proposing, a minority group may sacrifice something of too great a value:

one can easily take the short-term view and get so caught up with capturing and exploiting the approaching convergence that one gives away a long-term asset of inestimable value.<sup>170</sup>

The implication derived from the analysis of *Brown* and *Mabo* is that neither occurred because the respective societies underwent a moral breakthrough. Activists working towards racial equality often have an underlying belief that because people are inherently good, discrimination will be overcome with time and effort.<sup>171</sup> Bell suggests that it is because of this belief that minorities will celebrate gains. By saying that *Brown* actually occurred because it was in the interests of society's policymakers, Bell is effectively saying that without these interests being present, steps toward equality will not occur. This implies that minorities will have to wait for equality until circumstances change and policymakers perceive a benefit to pursuing equality. However, justice should not rely on patience. Minorities should not have to wait until the interests converge. To overcome this deficiency, Delgado proposes 'legal

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<sup>167</sup> Delgado, above n 6, 138.

<sup>168</sup> Bell, *Interest Convergence*, above n 4, 523.

<sup>169</sup> *Ibid*, 524.

<sup>170</sup> Delgado's fictional character Rodrigo explaining the drawbacks of interest convergence: Delgado, above n 1, 409. At 413 Delgado discusses how civil rights leaders Paul Robeson and W.E.B. Du Bois were expelled from their communities because their philosophies were too radical and bordered on Communist sympathies. They were traded, he says, to bring about *Brown* but its effects quickly faded and two important leaders were lost.

<sup>171</sup> The most memorable statement of this idealism is Dr Martin Luther King's 'I Have a Dream' speech, given on 28 August 1963 in Washington DC. He said, 'I have a dream that one day this nation will rise up and live out the true meaning of its creed - we hold these truths to be self-evident that all men are created equal.' In contrast, see Derrick A Bell, 'Racial Realism' (1992) 24 *Connecticut Law Review* 363, where he argues that African Americans are unlikely to make serious gains in the legal and political system but it is still necessary that they try to do so.

instrumentalism', the idea that one should use the law like any other tool and resort to it 'only when it promises concrete benefits'.<sup>172</sup> When the majority's self-interest is not present, strategies such as civil disobedience and non-violent protest may be more beneficial. Accordingly, interest convergence becomes one of many tools in the minority activist's armoury.

The circumstances that preceded *Brown* and *Mabo* also suggest that it is possible for a minority to generate an interest convergence. Prior to *Mabo*, Australia's Indigenous peoples had taken to the international stage to draw the world's attention to their situation. Both by inviting international human rights groups to visit Aboriginal and Torres Strait Islander communities and by discussing their conditions in international forums, Indigenous peoples drew the eyes of the world to Australia. Similarly, the NAACP filed a petition with the newly created United Nations Commission on Human Rights, protesting the treatment of African Americans in the United States.<sup>173</sup> Prior to *Brown* the Civil Rights Congress filed an application with the United Nations which stated that the government had violated the Convention on the Prevention and Punishment of the Crime of Genocide in its treatment of African Americans.<sup>174</sup> This suggests that using international opportunities to attack the government will force it to address issues at home. The minority's interest in racial equality converges with the interests of policymakers in protecting the country's reputation.

## Conclusion

Using what he terms interest convergence, Bell has theorised that the United States has taken steps toward racial equality when this secured, advanced or did not harm the interests of policymakers. The application of this theory to the High Court's decision in *Mabo* indicates that it has explanatory power in other contexts. Australian policymakers used the *Mabo* decision politically to show that Australia was addressing the rights of its Indigenous peoples, the decision helped to secure Australia's bid for the Olympic Games and the economic interests that followed, and it did not harm the interests of the mining industry or upset the existing property structure.

Bell suggests that the minority will see the remedy as proof that the society is just, but it will often have symbolic rather than substantive benefits. The reaction to *Mabo* parallels this situation. The decision was hailed by Indigenous leaders as the first step towards reconciliation but it was subsequently criticised for not addressing the needs of the majority

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<sup>172</sup> Delgado, above n 1, 411. See also 387-396.

<sup>173</sup> Dudziak, above n 29, 94-97.

<sup>174</sup> *Ibid.*, 96-99.

of Indigenous peoples. Bell says that some members of the majority will perceive the remedy to be an unearned gift which must be opposed and this was also reflected in the Australian context. Although the recognition of native title did not harm Australia's property structure or threaten resource development, it was opposed on both grounds. Finally, interest convergence analysis has a predictive use for Indigenous activists by assisting them to determine when the time is right to agitate for change. The events preceding *Brown* and *Mabo* also suggest that it is possible to harness the power of international condemnation to generate an interest convergence.