

***Mabo*—through the eyes of the media (Part II): The land fund legislation[©]**

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1. Introduction

In *Through The Eyes of the Media (Part I): A Brief History of the Political and Social Responses To Mabo v. Queensland*,¹ we chronicled the political and social responses to the High Court's historic *Mabo* (No. 2)² decision declaring the Australian common law recognition of native title to lands traditionally occupied by Aboriginal and Torres Strait Islander peoples. The period under review was the critical 18 months from the Court's June, 1992 decision through to the passage of the Commonwealth *Native Title Act* in December, 1993.

We indicated that the initial monograph was part of a longer, ongoing work tentatively organised in three parts.³ We also set out our research methodology:

We employ the 'lens' of the print media to examine the land rights debate. We rely primarily on Australia's national newspaper, *The Australian* (and *The Weekend Australian*), which provided comprehensive coverage throughout the time period under review and *The West Australian*, the only daily newspaper in Western

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1 Meyers, G.D. and Muller, S.C. 1995, *Through The Eyes Of The Media (Part I): A Brief History Of The Political and Social Responses To Mabo v. Queensland*, ELPC Contemporary Issues Paper No 1/95, Environmental Law and Policy Centre, Murdoch University.

2 *Mabo v. Queensland (No 2)* (1992) 175 CLR 1.

3 *Through the Eyes Of The Media (Part I)* fn. 1 at 1. The essay at hand is part II and focuses on the debate surrounding adoption of "land fund legislation", while part III will chronicle the High Court Challenge to the *Native Title Act 1993* (Cwlth).

Australia, the state where perhaps more native title claims will be filed and the state in which, perhaps most controversy has been generated.

We focus our attention on the print media for two reasons. First, the central aspects of the case and the initial responses to the *Mabo* decision were widely reported Second ..., the media, particularly daily newspapers, played a vital (and to some, controversial) role in informing the Australian public about the 'process' of coming to grips with *Mabo*.⁴

While extensive media reporting of the *Mabo* process has generally been appropriate, as well as valuable, arguably it has also been superficial, contributing little to the in-depth public understanding of the political, social, cultural, economic and legal issues included in 'settling' native title for Indigenous Australians.⁵ Left unresolved is whether media reporting has shaped public opinion following the *Mabo* decision or whether it has merely reported prevailing sentiment.⁶ In sum, the media has been a primary source of information on the High Court's *Mabo* decision and the legislative response to the decision, but has 'failed to clarify what were certainly complex and contradictory issues.'⁷

Despite the alleged failure of the media to adequately address the legal foundation of the *Mabo* decision or its benefits and the alleged media focus on negative criticisms by conservative politicians and resource industry representatives,⁸ or even the perceived failure to come to grips with Indigenous cultural perspectives,⁹ the reportage provides a valuable historical record of the land rights debate.¹⁰

This essay continues the chronicle of the land rights debate in Australia. It focuses on the debate accompanying the adoption of 'land fund' legislation to assist Indigenous Australians, otherwise unable to assert native title to lands, acquire land in which they can pursue their economic interests and social and cultural traditions.

The remaining part of this essay reviews the events leading to passage of land fund legislation. Significant milestones in the 'debate' include: the introduction of legislation in June 1994; the changes in leaderships of the Parliamentary Opposition parties (the Liberal /

4 Id at 3.

5 Id at 8-9.

6 Id at 4.

7 Meadows, M. 1994, 'Lost Opportunities: The Media, Land Rights and *Mabo*', No. 71 *Media Information Australia*, 100, 106.

8 Bartlett, R.H. 'Native Title: Universal, Long-established and a Boon to Resource Development' proceedings of the Indigenous Rights: A Beginning conference (Foundation for Aboriginal and Islanders Research Action, Brisbane, Queensland, August 26-27, 1993).

9 Meadows, M., fn. 7.

10 *Through the Eyes of the Media*, fn. 1 at 9.

National Coalition), the first, prior to the introduction of legislation and the second, late in the debate in early 1995; the referral of the original Bill to a Senate Select Committee in November, 1994 (and its report in February, 1995); and the introduction of a revised Bill on February 28, 1995. Both these latter two 'events' were accompanied by or precipitated a threat of a double dissolution of Parliament, that is, an early general election in which all seats in both houses of Parliament would be up for election.

Finally, we very briefly review the provisions of the land fund legislation passed by Parliament. As with *'Through the Eyes of the Media (Part I)'* our intent is not to review in any depth the substance of the Act, rather it is to chronicle the process of creating the legislation.

2. The land fund debate

Background

When Parliament passed the *Native Title Act (NTA) 1993* (Cwlth), it foreshadowed in Part 10 of the Act, the adoption of future legislation to create a land fund to assist Aboriginal and Torres Strait Islander peoples to acquire and manage land. Section 201 of the NTA reads:

201. (1) A National Aboriginal and Torres Strait Islander Land Fund is established.

Purpose of Fund

- (2) The purpose of establishing the Fund is to assist Aboriginal peoples and Torres Strait Islanders:
- (a) to acquire land; and
 - (b) to manage the acquired land in a way that provides economic, environmental, social or cultural benefits to the Aboriginal peoples and Torres Strait Islanders.

Operation of Fund

- (3) The regulations may make provision in relation to:
- (a) the kinds of payments that are to be made into and from the fund; and
 - (b) the circumstances in which such payments may be made; and
 - (c) the persons who are to operate the fund; and
 - (d) the investment of money standing to the credit of the fund; and
 - (e) the keeping of accounts in relation to the operation of the fund; and
 - (f) reporting on the operation of the fund; and
 - (g) any other matter relating to the nature and operation of the fund.

All but Part 10 (consisting entirely of section 201) of the NTA became effective on January 1, 1994 following Royal assent to the Act on

December 24, 1993.¹¹

Following a brief respite during the Christmas/New Year/Summer (Southern Hemisphere) holiday season, the Labor Government indicated in early 1994 that it was proposing to introduce legislation to implement section 201 of the NTA.

The Coalition 'entered' the debate on a positive note, with the former Opposition Aboriginal Affairs spokesman, Peter Nugent stating that a Coalition government should not cut Aboriginal affairs spending and should support the principle of a land acquisition fund.¹² Mr Nugent was quick to point out that his ideas had not yet been supported by shadow Cabinet or the party caucus, and he also foreshadowed major changes to the operation of Aboriginal and Torres Strait Islander Commission (ATSIC) under an Opposition government.¹³

In late April, submissions were made to the Cabinet Native Title Sub-Committee on how the fund should work, and on appropriate funding levels. The three major proposals examined by the Committee came from ATSIC, the Kimberley Land Council (KLC), and the Department on Prime Minister and Cabinet.¹⁴ At the same time, the National Farmers Federation (NFF) called for the fund to be administered independently of ATSIC.¹⁵ Rick Farley, NFF executive director suggested that the land fund management board be based on the model of the Aboriginal and Torres Strait Islander Development Corporation which is set up under the ATSIC Act as a statutory authority independent of ATSIC. Initially it appeared that the Department of the Prime Minister and Cabinet favoured a similar approach, as did several Aboriginal land councils and other organisations which called for an independent statutory authority with emphasis on regional organisations. They argued that regional organisations would be able to provide the land fund recipients with commercial, investment and marketing advice.¹⁶ ATSIC, however, wanted control of the fund,¹⁷ asking the Government to allocate a total of \$1.7b over 15 years. In late April, the Government decided to adopt

11 See *Native Title: Legislation with Commentary by the Attorney-General's Legal Practice C1*, (Australian Government Publishing Service, 1994) and 'The Land Fund and Social Justice Package' (1994) 3 (No. 69) *Aboriginal Law Bulletin* 6.

12 'Lib backs Aboriginal land fund', *The Australian*, March 22, 1994, p. 6, cols 1-6.

13 Ibid.

14 'Three major submissions for decision', *The West Australian*, April 16, 1994, p.13, cols 2-3.

15 'Make land fund separate: NFF', *The West Australian*, April 16, 1994, p. 13, cols 1-3.

16 'Discord looms over land fund,' *The West Australian* April 18, 1994, p. 13, cols 1-5.

17 Ibid.

the Department of the Prime Minister and Cabinet's proposal for the structure and administration of the national land fund.¹⁸

In early May, Federal Minister for Aboriginal Affairs Robert Tickner called on the Opposition to support the establishment of the national land fund, and urged the Liberal Party to distance itself from National Party moves to block funding for the Aboriginal Land Acquisition Fund.¹⁹ The Opposition was also sharply criticised by ATSIC for its opposition to the fund, with ATSIC deputy chairman, Charlie Perkins stating that the Coalition's stance ran counter to the process of reconciliation.²⁰ In response, Peter Nugent claimed that the Government had not shown that the land fund would have any significant benefit in improving Aboriginal well-being. He stated that the Opposition's opinion was that money should only be allocated where there was a demonstrable need for the improvement of Aboriginal health, housing, education and economic development.²¹ As a report in *The Australian* noted, this statement contradicts comments made by Mr Nugent that the Coalition should support the principle of a land fund.²²

In mid-May, the Government announced that the land fund would get about \$1.46b over 10 years,²³ \$200m in the first financial year, and \$124m a year indexed in real terms after that. The fund would be administered by the Indigenous Land Corporation (ILC) set up under the ATSIC Act. (The long-term aim is to make the fund self-sustaining and to ensure this, only \$25m of the \$200m allocated in 1994-1995 can be used to buy land, with the balance to be invested.)²⁴ Prime Minister Keating stated that the ILC would provide financial, commercial and management services and advice and would take over ATSIC's land acquisition functions from 1995-1996.²⁵

Shortly after the Prime Minister's announcement, former Coalition Leader Dr Hewson promised to dismantle the proposed land fund if his party won government.²⁶ He was immediately criticised by the Prime

18 'Fund rebuff for Aborigines', *The West Australian*, April 26, 1994, p. 8, cols 1-5.

19 'Coalition urged to support land fund', *The Australian*, May 2, 1994, p. 4, col. 7.

20 'Coalition attacked over land fund role', *The West Australian*, May 4, 1994, p. 28, cols 1-2.

21 'Libs to oppose Aboriginal land fund', *The Australian*, May 4, 1994, p. 5, cols 1-6.

22 Ibid.

23 'Aborigines to get \$1.5B for property', *The West Australian*, May 11, 1994, p. 3, cols 1-3.

24 Ibid.

25 Ibid.

26 'PM slams Coalition pledge to ditch land fund', *The Australian*, May 13, 1994, p. 2, cols 3-6.

Minister who claimed that the Liberal Party had become a 'snarling, miserable, little rump' without any policy on Aboriginal and Torres Strait Islander Affairs.²⁷ Keating also indicated that the Federal Government intended to explore legislation to protect the fund from any future changes.²⁸ Church groups also attacked the Coalition's 'proposal' to repeal the fund.²⁹

After the first change in Liberal leadership (in June, 1994), the new Leader of the Opposition, Alexander Downer, attempted to distance himself from Dr Hewson's comments that the Coalition would try to dismantle the fund if elected to government.³⁰ However, Downer did not promise to retain it and, continued to maintain his opposition to the fund.³¹

Debate over the structure and administration of the fund continued, and a meeting between Aboriginal groups and Keating resulted in the Prime Minister agreeing to give Aborigines more control over the proposed fund.³² The Prime Minister agreed to modify the land fund plan to extend the number of administrators to include more Aborigines.³³

Legislation introduced in Parliament (The Original Bill)

On June 30, 1994, the Federal Government formally unveiled its legislation establishing the Aboriginal Land Acquisition Fund and the Indigenous Land Corporation to oversee its administration.³⁴ In introducing the legislation (ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994) to the House of Representatives, Prime Minister Keating said the land fund would 'provide moneys to enable Aborigines and Torres Strait Islander people to acquire and maintain land in a sustainable way to provide economic, environmental, social and cultural benefits'.³⁵ In response, ATSIC called for widespread support of the legislation, and, not surprisingly, the Opposition continued to take a contrary stance.

27 Ibid.

28 'Tickner aims to guard land fund', *The West Australian*, June 16, 1994, p. 12, cols 4-5.

29 'Churches warn Libs on land fund', *The Australian*, June 15, 1994, p. 1, cols 1-2.

30 'Downer hedges on land fund', *The Australian*, June 16, 1994 p. 1, cols 3-5; p. 2, col. 3.

31 Ibid.

32 'Aborigines win greater control of land fund', *The Australian*, June 17, 1994, p. 5, cols 1-2.

33 Ibid.

34 'PM unveils laws for Aboriginal land fund', *The West Australian*, July 1, 1994, p 13, cols 1-3.

35 'PM introduces land fund Bill', *The Australian*, July 1, 1994, p. 3, cols 1-6.

In July 1994, the Australian Medical Association (AMA) joined the chorus supporting the land fund legislation. The AMA called on the Opposition to reverse its decision to oppose the land fund, in order to begin the process of remedying the crisis in Aboriginal health.³⁶ Mr Downer also came under pressure from his backbench, with the majority of the Coalition's Immigration, Ethnic, Aboriginal and Torres Strait Islanders Affairs Committee accepting a proposal to amend the land fund legislation, rather than oppose it.³⁷ In addition, senior members of the Coalition's right faction indicated that they might in fact support the land fund pending key amendments.³⁸

As a result of mounting pressure the Coalition watered down its opposition to the Bill in late August, agreeing to support amendments to the proposed legislation.³⁹ Mr Downer agreed in principle with a submission made to Cabinet by the new Opposition Aboriginal Affairs spokeswoman, Chris Gallus. Ms Gallus outlined amendments to the legislation which would link the fund directly to improving Aboriginal health, housing and education, as well as buying land. In accordance with this proposal, land would only be granted to Aboriginal and Torres Strait Islanders if an improvement to the health of the community, its housing and economic viability could be demonstrated.⁴⁰

Aboriginal groups condemned the Opposition's 'amended' position, stating that the land fund should deal with providing land only.⁴¹ The Government, Australian Democrats, and the Western Australian Greens also reacted negatively.⁴² The editorial staff at *The West Australian* were highly critical of Opposition moves, calling the amendments foreshadowed by Mr Downer, a 'shallow attempt to make the coalition appear responsive while appeasing its conservative elements'.⁴³ The editorial supported the Government's insistence on the land component remaining predominant.

Following the Government's refusal to accept any of the 37 amendments proposed by the Opposition, the Coalition restated its

36 Ibid.

37 'Downer faces land fund pressure', *The Australian*, August 26, 1994, p. 2, cols 2-4.

38 'Coalition may back land fund', *The Weekend Australian*, August 27-28 1994, p. 2, col. 3.

39 'Downer agrees to land fund changes', *The West Australian*, August 30, 1994, p. 4, cols 1-4.

40 'Coalition seeks land fund law checks', *The Australian*, August 31, 1994, p. 4, col. 7.

41 'Aborigines brand fund proposal derogatory', *The West Australian*, August 31, 1994, p. 4, cols 3-5.

42 'Opposition land fund plan looks doomed', *The West Australian*, p. 4, cols 3-5.

43 'Division mars Aboriginal debate', *The West Australian*, August 31, 1994, p. 10, cols 1-3.

intention to vote against the legislation.⁴⁴ At the same time the Western Australian Greens called the \$1.4b allocation paltry and pathetic, but indicated that they were unlikely to follow the Opposition line. Instead they vowed to lead their own fight for more money, faster delivery of funds for land acquisition and less government control via new amendments to the Bill due for debate in the Senate in the middle of October.⁴⁵

According to one prominent poll,⁴⁶ public support for the land fund legislation was sharply divided. The 'Saulwick Poll', conducted by Irving Saulwick and Associates on August 31, 1994, surveyed 1,000 voters who were contacted nationally by telephone.⁴⁷ The poll found that a majority (47%) opposed the idea of a Government-established fund to buy land, as opposed to 40% who were in favour of it. Liberal Party (60%) and National Party (66%) voters were overwhelmingly against the fund, with the strongest support coming from New South Wales (45%), followed by South Australia (44%) and Victoria (43%). In the Northern Territory, 86% of people polled were opposed to the fund while in Western Australia and Queensland, more than 60% opposed its establishment. As a comparison just over 50% of voters felt the *Native Title Act* was fair to Aborigines.

Tuesday, September 6 witnessed the second reading speech of the Bill, but when the Parliament rose for a two-week recess on Thursday, it was still a long way from reaching agreement. As a backdrop to the

44 'Coalition hits back after fund rebuff', *The West Australian*, September 1, 1994, p. 4, cols 1-4.

45 'Land fund too small, say Greens', *The West Australian*, September 2, 1994, p. 6, cols 4-5.

46 'Most oppose land fund plan', *Sydney Morning Herald*, September 5, 1994, p. 2, cols 2-4. The reliability of polling is discussed by Macquarie University Associate Professor of Politics Murray Goot in 'Polls as science, polls as spin: Mabo and the miners' (1993) 65 (No. 4) *Australian Quarterly* 133. He notes that such polling is problematic, often producing varying or contradictory results because, 'many respondents have little of no information on which to base a judgment; forced to chose, they may be easily led': id at 153. In other words '[p]eople may speak through the polls but only when the polls ask them, only in response to questions framed by the polls and only through the words allowed by the polls; in short, only in the polls "terms"': id at 182.

47 Questions included: It is some time now since the High Court made its Mabo judgment and Federal Parliament passed the *Native Title Act*. The Act allows Aborigines to claim ownership of land with which they have had continuous association since white settlement and which is not otherwise leased or owned. Firstly do you think this is fair to Aborigines / or goes too far / or does not go far enough? And since the Act was proclaimed, do you think Aborigines have in the main made sensible land claims / or extravagant land claims / or don't you know enough about what has happened?

debate, Julie Butler, writing in *The West Australian* noted that the idea of government spending to help Aborigines obtain and manage land was not in fact a new one, and outlined the existing Federal Government land-buying programs administered by ATSIC, and the Aboriginal Lands Trust established by the Western Australian Government.⁴⁸

Parliament may have been in recess, but political positioning regarding the land fund legislation continued unabated. While the Bill seemed to be bogged down in political debate, the Coalition claimed it was softening its stance and seeking more co-operation with the Government as opposed to 'major changes' to the Bill.⁴⁹ During the Parliamentary recess, several Western Australian Aborigines claimed that they had not been properly consulted over the funding of the Bill, and were highly critical of the communication between ATSIC, the Kimberley Land Council (KLC) and many Kimberley Aborigines.⁵⁰ In addition, ATSIC claimed that the Coalition's proposed amendments to the legislation tore away at the integrity of the Bill and the negotiation process which created it.⁵¹

Shortly after returning from the Parliamentary recess, the Senate Committee reviewing the Bill split, on party lines (three Liberals and three Labour), on whether the legislation should be amended.⁵² The three Labor members tabled a report recommending that the legislation be passed, and the three Liberal members tabled a dissenting report claiming that the Committee had heard serious concerns over the set of the fund and the ILC. The Opposition maintained its position regarding changes to the Bill in the Senate, and stated it would consider supporting amendments proposed by the Western Australian Greens.⁵³

The Western Australian Greens were sharply criticised by the Prime Minister for their stance on the land fund bill.⁵⁴ The Greens had decided to oppose the Bill on the grounds that it was paternalistic and needed a larger budget. Prime Minister Keating claimed the two Green senators were not representing the majority views of Aboriginal and Torres Strait Islanders, and urged them to consult more widely with

48 'Land fund bogs as parties bicker', *The West Australian*, September 7, 1994, p. 14, cols 1-5.

49 'Coalition softens land fund stance', *The Australian*, September 14, 1994, p. 5, cols 3-5.

50 'Land fund not discussed', *The West Australian*, September 24, 1994, p. 28, cols 1-4.

51 'ATSIC attacks Downer over land', *The Australian*, September 27, 1994, p. 7, cols 1.

52 'Party-line split over land Bill', *The West Australian*, October 11, 1994, p. 32, cols 3-4.

53 Ibid.

54 'PM hits Greens over land fund'. *The Australian*, October 12, 1994, p. 2, cols 6-7.

Aboriginal groups before rejecting the legislation. Like the debate surrounding the NTA and the Budget,⁵⁵ the Greens once again came under serious pressure, although Senator Chamarette said that, 'compared with our experience in the lead-up to the Native Title Bill, we are under very little pressure to pass this legislation'.⁵⁶

The Federal Government delayed debate in the Senate on October 20 in an attempt to find common ground with the Opposition, the Greens and the Democrats.⁵⁷ The talks resulted in the Government and the Greens supporting amendments to the Bill, increasing the chances of passage despite opposition from the Coalition.⁵⁸ The Government also signalled it would be willing to support a number of Opposition amendments to the Bill if these amendments did not change the substance or heart of the legislation. This move signalled a far more conciliatory approach by the Government as it attempted to get the legislation through the Parliament.⁵⁹

This conciliatory approach was short lived. The Federal Government threatened to abandon the land fund legislation when a 'most dispossessed' amendment was proposed by the Liberals on the recommendation of the New South Wales Aboriginal Land Council.⁶⁰ The amendment proposed that if any dispute arose over the allocation of the fund's resources then preference should be given to the most severely dispossessed Aborigines. Senator Evans stated that abandonment of the land fund legislation was an option to be 'very seriously considered by the Government if the Bill becomes more unworkable'.⁶¹ The Government was joined in its opposition to the amendment by the KLC. KLC chairman Peter Yu noted that, 'any attempt to establish a hierarchy of dispossession creates a mine field of problems that will have serious repercussions for Aboriginal people for generations'.⁶² Mr Yu then organised a nation-wide telephone conference call between Aboriginal groups in an attempt to break the political deadlock over the Bill.⁶³

55 *Through the Eyes of the Media (Part I)* fn. 1 at 109-110.

56 *Ibid.*

57 'Evans agrees to land Bill amendments', *The West Australian*, October 20, 1994, p. 34, cols 2-3.

58 'Agreement struck on land fund', *The Australian*, October 20, 1994, p. 4, cols 4-6.

59 *Ibid.*; and see also, 'Keating considers change to land fund', *The Australian*, October 21, 1994, p. 3, cols 1-2.

60 'Labor threat to abandon land fund', *The West Australian*, October 22, 1994, p. 6, cols 3-4.

61 'Blacks' land fund changes "unworkable"', *The Weekend Australian*, October 22-23, 1994, p. 4, cols 1-2.

62 *Ibid.*

63 'Blacks in land fund crisis talks', *The Australian*, October 24, 1994, p. 4, cols 1-5.

The pressure on the Green senators also continued, and they were warned by Aboriginal Affairs Minister Robert Tickner that the Federal Government would negotiate only within certain limits.⁶⁴ The following day the Greens responded that they would consider supporting the legislation if Aboriginal groups could reach consensus on the issue.⁶⁵ Aboriginal groups had organised to meet in Melbourne the following week after the earlier telephone conference ran out of time. As a result of these meetings, Aboriginal leaders asked for more than the \$1.1b already allocated for the land fund.⁶⁶

Meanwhile, on November 8, the Senate passed an amendment to the legislation (unsuccessfully sought by the Opposition in the House of Representatives) that limited the purchase of land and grants of money under the Government's land fund to likely improvements in the welfare of Aboriginal communities.⁶⁷ The Government and Democrats opposed the amendment, but the Coalition and Greens voted together to ensure its passage. These changes altered the substance of the Bill to such an extent that the Government stated it would not accept it in that form and that it must either be redrafted or resubmitted to the Senate.⁶⁸ The Government foreshadowed that it would implement an emergency fund administered through ATSIC's current structures as the most likely option when and if the Bill returned unchanged to the House of Representatives.⁶⁹

Aborigines were still split over the amendments. ATSIC Chairperson Lois O'Donoghue reaffirmed her organisation's support for the initial legislation, while other Aboriginal representatives, particularly the New South Wales Land Council and a federation of 14 land councils from Queensland, a legal group in Tasmania and representatives in Victoria and South Australia, called on the Government to accept the latest amendment to the Bill.⁷⁰

At other amendments were considered by the Senate, the Federal Government renewed its threats to reject the amended Bill.⁷¹ One of

64 'Greens warned on deal limits', *The West Australian*, October 24, 1994, p. 32, cols 1-4.

65 'Greens reassess land fund vote', *The Australian*, October 25, 1994, p. 8, cols 6-7.

66 'Aborigines ask for more money', *The Weekend Australian*, November 5-6, 1994, p. 11, cols 7-8.

67 'Welfare tag on fund', *The West Australian*, November 9, 1994, p. 10, cols 1-4.

68 'Senate sends land fund Bill back to drawing board', *The Australian*, November 9, 1994, p. 2, cols 6-7.

69 Ibid.

70 'Land fund Bill amendments split Aborigines', *The Australian*, November 10, 1994, p. 5, cols 1-5.

71 'Senators' changes hold key to land fund', *The West Australian*, November 11, 1994, p. 20, cols 2-4.

the main changes to the Bill was a provision requiring national and regional plans for purchase and management of land affected under the legislation, as well as for wider consultation in their formation, and for their tabling in Federal Parliament. The changes were supported in principle by the Government, but not in the proposed form which would allow Aborigines to sell granted land without Government approval.⁷²

Given the Government's concern with the passage of the Bill, it repeated its decision to consider interim funding for the fund, while Aboriginal Social Justice Commissioner Mick Dodson called for talks with the Government to prepare a second Bill.⁷³ He was wary of a repeat of divisions between Aboriginal groups over the amendments.⁷⁴

In mid-November, the Federal Government concluded that the changes to the Bill forced in the Senate by the Greens and Opposition were unworkable, and that the Bill would be returned to the House of Representatives and restored to its original form.⁷⁵ On November 16 Senator Chamarette prevented an impending final vote on the legislation when she won backing for a motion seeking \$3m additional funding for administration of the fund. This vote sent the Bill back to the Lower House because the Senate cannot change Government spending allocations.⁷⁶ The Government, however, failed to indicate whether it would compromise when the Lower House rejected the Senate request and returned the Bill to the Senate.⁷⁷

At this point in the debate, the issue of a double dissolution of Parliament was first raised.⁷⁸ The Federal Coalition stated it would

72 Ibid.

73 'Interim land fund money now likely', *The Weekend Australian*, November 12-13 1994, p. 4, cols 4-6.

74 See: 'Land fund a cause divided', *The Australian*, November 16, 1994, p. 15, cols 1-5; and 'Changes to land Bill Immoral: Yu', *The West Australian*, November 14, 1994, p. 29, cols 1-2.

75 'Green, Lib land fund changes rejected', *The Australian*, November 17, 1994, p. 2, cols 1-2.

76 'Greens Bill bid foiled', *The West Australian*, November 18, 1994, p. 6, cols 1-4.

77 Ibid.

78 The issue was foreshadowed as early as November 16, see: 'Green, Lib land fund changes rejected', *The Australian*, November 17, 1994, p. 2, cols 1-2. The issue came to the forefront in late November when the Government's Senate Leader, Senator Gareth Evans warned of the threat of a double dissolution election: see 'ALP threatens Libs with early poll', *The Australian*, November 29, 1994, p. 1, cols 2-8. A double dissolution election is effected under s. 578 of the Constitution. If the House of Representatives passes a Bill and the Senate rejects it, fails to pass it, or passes it with unacceptable amendments, and if this process is repeated after a lapse of three months, then the Government May ask for both houses to be dissolved, for elections to be held, and for a joint sitting of Parliament to pass the Bill.

back down over its amendments because it feared it would trigger an early (unwinnable) election.⁷⁹ Chris Gallus, Opposition Spokeswoman for Aboriginal Affairs, said the Coalition would support the Bill to ensure that a double dissolution was not triggered.⁸⁰ In response, a spokesman for the Prime Minister said the Government would welcome the backdown over the amendments, regardless of the motivation.⁸¹

The Senate Select Committee established—a double dissolution election foreshadowed

A double dissolution election to take place as early as April 1995 was again foreshadowed when the Bill was referred to a Senate Select Committee to consult nationwide with indigenous peoples over their concerns about the legislation.⁸² At the same time the Federal Government stated that it was likely to abandon its plans for interim funding,⁸³ and publicly stated that the threat of double dissolution was one of last resort. The Prime Minister said that the Federal Government was still prepared to negotiate with the Opposition and Western Australian Greens in an attempt to secure the passage of the land fund legislation.⁸⁴

The referral of the land fund legislation to the Senate Select Committee posed problems for the Government if it intended to use that referral as a 'trigger' for a double dissolution election. Section 57 of the Australian Constitution (disagreement between houses) provides in the relevant part that:

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives. But such dissolution shall not take place within six months before the date of expiry of the House of Representatives by effluxion of time.

79 'Coalition to back down on Aboriginal land fund', *The Australian*, November 25, 1994, p. 4, cols 1-3.

80 *Ibid.*

81 'PM hails land fund backdown', *The Weekend Australian*, November 26-27, 1994, p. 12, cols 1-5.

82 'ALP threatens Libs with early poll', *The Australian*, November 29, 1994, p. 1, cols 2-8.

83 'Cash plan for land fund put on hold', *The Australian*, November 30, 1994, p. 2, cols 5-7.

84 'PM offers land Bill talks to avoid poll', *The Australian*, November 30, 1994, p. 2, cols 8.

A number of legal commentators noted that mere referral to a Senate Committee may not in itself constitute the 'failure to pass' legislation required to enable the Government to call an election.⁸⁵ However, one University of New South Wales politics lecturer noted that there was legal precedent for successfully dissolving Parliament on the basis of a hostile Senate referring a Lower House Bill to a Senate Select Committee.⁸⁶ Given that any High Court Challenge to a double dissolution might well consider a variety of circumstances surrounding the Bill's consideration and 'rejection', University of Melbourne Professor of Law Cheryl Sanders characterised the issue as 'a difficult one to call.'⁸⁷

The Senate established the Select Committee on the Land Fund Bill on November 28, 1994 to consult with persons and organisations on the amendments proposed by the Coalition.⁸⁸ Western Australian Liberal Senator Ian Campbell was named Chairman of the Committee, while Western Australian Green Senator Christobel Chamarette was named Deputy Chair.⁸⁹ The Committee travelled over 12,000 kilometres, holding hearings in Canberra, Launceston, Adelaide, Melbourne, Dubbo, Brisbane, Cairns, Darwin, Broome, Perth, and Kalgoorlie, and took testimony from nearly 250 witnesses, most of them Indigenous Australians.⁹⁰

The Committee considered the 67 amendments made in the Senate, as well as 'other matters' which included issues such as the extent of Government consultation regarding the Bill, comments on ATSIC's role, fishing and sea rights, protecting sacred sights, Aboriginal opposition to the Bill, compensation, special needs of mainland Torres Strait Islanders, State/Territory land policies, and the size of the fund.⁹¹

Aboriginal opinion appeared inconsistent, if not divided. Peter Yu, KLC Executive Director, told the Committee that changes to the Bill would undermine the decision-making abilities of Aborigines by

85 'Lawyers raise doubts over double dissolution issues', *The Australian*, November 30, 1994, p. 2, cols 5-7.

86 *Ibid.*

87 *Ibid.* The article also points out that the High Court would not likely intervene prior to the election. Rather any challenge to a law passed by a new parliament would be held after the election.

88 Public Notice, December 3-4, 1994, *The Australian*, p. 20, col. 1.

89 Other members of the committee included Senator Barney Cooney (Labor, Victoria), Senator Chris Ellison (Liberal, Western Australia), Senator Meg Lees (Democrat, South Australia), Senator the Hon Margaret Reynolds (Labor, Queensland) and Senator Judith Troeth (Liberal, Victoria).

90 *Land: Report of the Senate Select Committee on the Land Fund Bill*, vi (The Parliament of the Commonwealth of Australia, February, 1995).

91 *Id.*, see ch. 4.

introducing legal requirements,⁹² and that while the Bill was far from perfect, the KLC supported it and believed it would help dispossessed Aborigines regain access to their land.⁹³ In contrast, Bibbulmun Tribal Group Spokesperson Ken Colburg highlighted the problems some Aborigines had with the Bill and the proposed role of ATSIC in administering the land fund.⁹⁴

The majority report, issued by Senators Campbell, Ellison, Treoth and Chamarette found strong support for the Senate's suggested changes and a mandate to hold their ground on the amendments. The two minority reports, first of Senator Barney Cooney, and second, of Senator the Hon Margaret Reynolds, and Senator Meg Lees both commented that most of the changes were not widely supported and that the original legislation should be upheld.⁹⁵ Senator Lees also noted that the changes would bog the fund down in red tape and that the majority had 'sieved' through the evidence to find support for their views.⁹⁶

The tabling of the report of the Senate Committee evidenced a stark contradiction in Opposition policy. The tabled report claimed evidence of widespread Aboriginal support for the changes recommended to the legislation, but the Opposition suggested that it might vote for the original legislation if the Government did not agree to key amendments.⁹⁷ Chairman Campbell himself stated that after the first round of hearings the majority of Aborigines had given the legislation the thumbs down.⁹⁸

The Federal Coalition stated it would not favour forcing its amendments at the expense of an election trigger,⁹⁹ although, the Coalition promised that 'if worse came to worst', a new Howard Government¹⁰⁰ would legislate the Bill with all amendments intact.¹⁰¹

92 'Aborigines reject changes to Bill', *The West Australian*, January 27, 1995, p. 24, cols 1-5.

93 Ibid.

94 'Aboriginal groups split at hearing', *The West Australian*, January 28, 1995, p. 32, cols 1-2.

95 *Land*, fn. 90 at 177-217.

96 'Opposition sticks to land fund changes', *The West Australian*, February 10, 1995, p. 24, cols 4.

97 Ibid.

98 'Liberals claim land Bill win', *The West Australian*, January 18, 1995, p. 28, col. 4.

99 'Coalition to allow land Bill', *The Australian*, February 10, 1995, p. 1, cols 6; p. 2, col. 6.

100 Ibid. Following a Liberal Party spill, in early 1995, John Howard was elected Leader of the Liberal Party/ Coalition replacing Alexander Downer.

101 Ibid.

The revised Land Fund Bill introduced in Parliament

In late February 1995 the government published a booklet entitled *Aboriginal and Torres Strait Islander Land Fund: An act of good faith* aimed at informing public debate 'by providing concise explanation of the Government's proposals and the philosophical and practical objectives they are intended to achieve. It also seeks to promote active consideration among some of the readers of some of the main issues in dispute between the Government and those in the Senate who would alter the legislation.'¹⁰² The booklet identified a single fundamental objective in the *ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill* (as it was known).

As stated by the Prime Minister in his second reading speech on the Bill:

With the native title legislation, Australia took an historic step by finally acknowledging the truth that Aboriginal peoples and Torres Strait Islanders were the original owners of the continent. In the legislation before the House today, we are giving the spirit of that legislation more tangible expression. We are creating the means by which land may be returned to Aboriginal peoples and Torres Strait Islanders and, with the foundation of their traditions and identity thus partially restored, we trust that they may be able to protect and revitalise their communities, their culture and their heritage.¹⁰³

On February 28, 1995 the Government introduced a new Bill in the House of Representatives¹⁰⁴ based on the original bill introduced in July, 1994 which was still before a Senate Committee. The new legislation included some of the changes made in the Senate where the Labor Government is in the minority.¹⁰⁵ As a result, two separate land fund Bills were simultaneously being considered by both Houses of Parliament.¹⁰⁶ Mr Keating still maintained that rejection of the Bill provided the second stage of a double dissolution election trigger.¹⁰⁷

In early March, the Federal Government deferred the use of the original Bill as the trigger for a double dissolution after the Opposition, with support from independent Senator Brian Haradine, passed the

102 *Aboriginal and Torres Strait Islander Land Fund: An act of good faith* (AGPS, 1995), p. 4.

103 *Id* at 11.

104 'Tickner tries again on land fund Bill', *The Australian*, February 28, 1995, p. 4, cols 6-8.

105 'PM set to test land fund Bill', *The West Australian*, February 28, 1995, p. 29, cols 1-2.

106 'PM has second try at land fund Bill', *The West Australian*, March 1, 1995, p. 4, cols 1-4.

107 'Opposition digs in over revised land fund Bill', *The Australian*, March 1, 1995, p. 2, cols 1-2.

heavily amended original Bill in the Senate.¹⁰⁸ Instead, the Government stated it intended to reject the amended Bill, and restart the process to trigger an election using the new Bill introduced into the House of Representatives, beginning the three month process towards a double dissolution of Parliament.¹⁰⁹

The following day, in a complete turnaround in policy, the Coalition decided not to oppose the new Bill.¹¹⁰ The new Leader of the Coalition, John Howard, stated that this 'backflip' was made out of concern for Aboriginal peoples, as opposed to the threat of a double dissolution,¹¹¹ (although he also said that if the Coalition was elected to government it would pass the amendments). Mr Keating publicly disputed Howard's claims, arguing that the Opposition 'had "backflipped" because the Government had threatened it with a double dissolution'.¹¹² The Coalition was sharply criticised for waiting so long to support the land fund legislation, although its latest move was received 'warmly'.¹¹³ As an editorial in *The Australian* noted, passage of the 'Land Fund Bill is a belated victory for common sense ... [T]he Opposition's decision [i.e. support] is welcome. But it should have been made much earlier'.¹¹⁴

The *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (LFILCA) received Royal Assent on March 29, 1995, and was proclaimed on May 2, 1995 to commence on June 1, 1995.¹¹⁵ The Act establishes an Indigenous Land Corporation (ILC) to assist beneficiaries to acquire and manage land, and is managed by a board of directors, the majority being Aboriginal people or Torres Strait Islanders.

The main functions of the Corporation are stated as land acquisition and land management. Its acquisition functions include purchasing or otherwise acquiring land, granting interests in land to indigenes, granting money for land acquisition, and guaranteeing loans for that purpose.¹¹⁶ In discussing these functions the Government circular *Aboriginal and Torres Strait Islander Land Fund: An act of good faith* noted that '[t]he ILC will not have powers of compulsory acquisition of land, operating instead as a participant in the commercial market for

108 'Land Bill passage prevents double dissolution', *The Australian*, March 2, 1995, p. 6, cols 1-6.

109 Ibid.

110 'Land fund: Howard backflip clears the way', *The Australian*, March 3, 1995, p. 1, cols 1-2.

111 Ibid.

112 Ibid.

113 'Coalition decision on Land Fund Bill', *The Australian*, March 3, 1995, p. 12, cols 3-4.

114 Ibid.

115 *Commonwealth of Australia Gazette* No. GN 18, 10 May 1995, p. 1645.

116 LFILCA, s. 191D.

land—and is required to act in accordance with sound business principles in that capacity.¹¹⁷

The management functions include land management activities in relation to indigenous held and corporation held land, making grants of money for management activities, making loans of money for management activities, and guaranteeing loans for the same purpose.¹¹⁸

The establishment of the indigenous Land Fund Corporation

Even after passage of the legislation, controversy continued to follow the establishment of the ILC. In late May, 1995, ATSIC Commission member David Ross was appointed Chairman of the ILC, with Peter Yu appointed as Deputy Chairman.¹¹⁹ These appointments were foreshadowed in mid-May and were met with some hostile responses from certain Aboriginal leaders.¹²⁰ Bibbulmun Tribal Group spokesman Ken Colbung voiced his concerns that Mr Ross would continue ATSIC's bias towards groups in Australia's north, and stated his plan to lobby Finance Minister Kim Beazley against his selection. Mr Beazley had received three other calls from Western Australian Aboriginal groups concerning the appointment.¹²¹

To some extent, these concerns were validated when ATSIC voted to spend \$20 million of its \$24 million appropriation for land acquisition in the Northern Territory.¹²² In response, the New South Wales Aboriginal Land Council labelled this decision 'an abuse of ATSIC's power and unfair to Aborigines living outside the Northern Territory.'¹²³

These concerns were echoed by Northern Territory Chief Minister Marshall Perron who condemned ATSIC's moves to spend most of its land fund over the next two years in the Northern Territory.¹²⁴

117 *Aboriginal and Torres Strait Islander Land Fund: An act of good faith* fn. 102 at 8.

118 LFILCA, s. 191E(1).

119 'Yu to be deputy on new land fund', *The West Australian*, May 31, 1995, p. 34, cols 1-2.

120 'Bias fear in land fund selection', *The West Australian*, May 18, 1995, p. 42, cols 1-5.

121 *Ibid.*

122 'ATSIC to spend \$20m on NT Land', *The West Australian*, May 1995, p. 43, cols 1-3. ATSIC's land acquisition program is to run for two years in tandem with the land fund legislation.

123 *Ibid.*

124 'NT leader attacks buy-up plan', *The West Australian*, May 5, 1995, p. 5, cols 2-5. The move would allow Aborigines to utilise provisions in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) to buy pastoral leases and convert them to freehold title. The provision being subject to a 1997 sunset clause.

Government Senate leader Gareth Evans and Primary Industries Minister Bob Collins also expressed some concern at this move.¹²⁵

On August 30, 1995, the Federal Court overruled ATSIC's funding decision, declaring that it was an improper exercise of its power and discretion, and that ATSIC had misconstrued discussions with the Commonwealth that special consideration be given to Aboriginal land acquisition in the Northern Territory.¹²⁶ As reported in *The Australian*, the decision "sparked open warfare" between Aboriginal groups in the Northern Territory and ATSIC on one side, and the New South Wales Land Council and aligned Aboriginal groups on the other side over ATSIC's role as a provider of land acquisition funds.¹²⁷ The decision also prompted calls by Northern Territory Aboriginal groups to remove the sunset clause in ATSIC's legislation that prompted the original distribution decision, a move strongly opposed by the Northern Territory government and mining interests.¹²⁸

3. Conclusion

In *Through the Eyes of the Media (Part I)*, we assessed the media coverage according to the extent to which the reporting contributed to the in-depth public understanding of the issues involved.¹²⁹ Coverage of the land fund debate was far less volatile, but this could be due to the significantly reduced amount of media attention that the debate attracted. Arguably the issue of the land fund, and broader Aboriginal reconciliation in general, did not attract the same level of attention as the passage of the *NTA* following the *Mabo* decision. Some might suggest that the lack of media focus on the land fund debate was illustrative of declining public interest in the area. In contrast, it might be suggested that the result was expected, and thus generated less real controversy.

Despite the reduction in media attention, the amount of valuable information produced on the land fund debate is still questionable. We argued in Part I that 'the media focused on the political struggle over the decision rather than providing information on the decision and on the formal responses to it'.¹³⁰ This appeared to be repeated in the land fund case as well, and the question again arises as to the 'role of the media as an information provider or as a mouth piece of interested parties.'¹³¹ It

125 Ibid.

126 See *New South Wales Aboriginal Land Council and Ors v. Aboriginal and Torres Strait Islander Commission and Ors*, Unrept, Federal Court, No. N.G. 367 of 1995, Hill J.

127 'ATSIC land fund use ruled improper', *The Australian*, August 31, 1995, p. 2, col. 1.

128 Ibid.

129 *Through the Eyes of the Media (Part I)*, fn. 1 at 125.

130 *Id* at 6.

131 Ibid.

may be argued that it is not the role of the media to provide this information, rather it is the place of Government. However, it is worthwhile repeating the conclusions of Commissioner Fitzgerald Q.C. referred to in Part I. He noted 'that the media was "one of the most important and effective mechanisms for the control of powerful institutions and individuals by reason of its ability to sway public opinion". He recognised that the media had played a large part in exposing corruption, however he was quick to attribute parts of the media as "contributing to a climate of in which misconduct flourished".'¹³²

In his introduction to *Aboriginal and Torres Strait Islander Land Fund: An act of good faith* Robert Tickner notes that '.. it is important that the wider public be properly informed about the issues involved in the legislation'.¹³³ He made this assertion in response to the number of amendments proposed by the Coalition and the Greens that the Government found unacceptable, and, used the statement to provide the basis for producing the booklet, urging those who read it to 'consider the important issues involved and give support to the Government'.¹³⁴ He concludes that, '[i]t would be great tragedy for the country and a cruel blow to the reconciliation process if this opportunity to take another major step forward in meeting the compelling needs of indigenous people was lost'.¹³⁵

The 'tragedy' Mr Tickner referred to was 'avoided' with the passage of the legislation. And yet, the politics of reconciliation between Australian indigenous peoples and Australia's non-indigenous majority remains complex. Whether the Land Fund is a step forward towards economic justice for Indigenous Australian remains to be seen. A Federal election in 1996 may well change the balance of power in Government. And even if the land fund legislation remains unchanged reconciliation still requires many more steps to be taken by all Australians.

132 Id at 4.

133 Tickner, R., *Aboriginal and Torres Strait Islander Land Fund: An act of good faith*, fn. 102 at 2.

134 Ibid.

135 Ibid.