



## **IKC101 Indigenous Cultures, Histories and Contemporary Realities**

### **Module 3: Contemporary Realities**

#### **Native Title and Heritage Protection**

Module 3 introduces you to a number of issues that impact upon or are of concern to contemporary Indigenous Australians. This week covers the topics of Native Title and Heritage Protection.

This topic of study is focused on achieving the following **outcome**:

- outline a range of contemporary issues which impact upon Indigenous Australian peoples and communities

This topic is divided into the following **sections**:

- Dispossession and terra nullius
- From terra nullius to native title: the Mabo case
- Responses by governments: the Native Title Acts
- Native title settlements
- What is cultural heritage?

#### **Checklist**

- Read *Module 3* Optional: Read *Optional Readings x 5*
- Complete the *Learning Activity x 1*



## Dispossession and *terra nullius*

### Key idea

*Terra nullius* is Latin term meaning 'land belonging to no one'. Although this term was not initially used to justify the British colonisation of Australia, it later became central to the legal fiction upon which non-Indigenous sovereignty over Australia was based.

Land, as we have learned throughout this subject, is central to Aboriginal identity, wellbeing and economic development. It is the source of life, law and religion. The right to land has been an issue of much concern for Indigenous Australians since the time of colonisation and the dispossession of ancestral lands. This week we explore the nature of Indigenous rights to land under the Native Title Act and the issue of heritage protection.

### Reflection

Here is a quote to consider:

"Aboriginal people were dispossessed of their land parcel by parcel, to make way for expanding settlement. Their dispossession underwrote the development of a nation and the acts and events by which this dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation" (Mabo (No.2) per Deane and Gaudron JJ, p109, quoted in Human Rights and Equal Opportunity Commission, 1998, 3).

In light of what you have learnt this semester, what do you think dispossession meant for Indigenous people?

On setting sail for what is now known as Australia, Captain Cook (who was Lieutenant Cook at the time) was directed to take possession of the continent, or parts thereof, with the 'consent of the natives' if he found the land to be inhabited. Cook's journals, like those of the later members of the First Fleet in 1788, clearly records the sighting of a number of Indigenous inhabitants. Cook nevertheless claimed Aboriginal Australia on behalf of the British Crown without seeking any agreement from the inhabitants.

It was not until 1889 that the Privy Council in London retrospectively drew on the doctrine of *terra nullius* in seeking to clarify the legal basis of the British claim to sovereignty over the Australian continent. *Terra nullius* was the now discredited international doctrine of law which stated that territory inhabited by people who do not have, according to European standards, a recognised social or political system was considered land belonging to no-one.



## From *terra nullius* to native title: the Mabo case

### Key idea

Native title is the recognition by Australian law that some Indigenous people have rights and interests to their land that come from their traditional laws and customs. Recognition of native title was established by the 1992 High Court decision in the Mabo case which rejected the doctrine that Australia was *terra nullius* at the time of British colonisation.

In May 1982 Eddie Koiki Mabo and two other Murray Islanders, David Passi and James Rice, instituted action against the Queensland government on their own behalf and that of their respective family groups. They asserted that since time immemorial the Meriam people had continuously occupied and enjoyed the islands and had established settled communities with a social and political organisation of their own.


The Murray Islands, or Islands of Mer, are the most easterly and among the most northern of the islands of the Torres Strait and were annexed to the Colony of Queensland in 1879. In an endeavour to subvert the Meriam peoples claim, the Queensland government introduced the Queensland Coast Islands Declaratory Act (1985) which effectively extinguished native title on the islands. This legislation was found to be contrary to the Racial Discrimination Act (1975) and subsequently overturned in *Mabo v State of Queensland (No 1)* in 1988. The case was now set to proceed to the second and final stage.



Eddie Mabo, Bonita Mabo and the legal team.  
Source:  
<http://www.alicespringsnews.com.au/2012/06/14/native-title-to-become-national-path-to-indigenous-land-aquisition/>

Following ten years of struggle, the final decision of the High Court of Australia in the case of *Mabo v State of Queensland (No 2)* was handed down on the 3rd June 1992, shortly after the death of Eddie Koiki Mabo. The High Court Justices determined that the Meriam people were entitled to the "possession, occupation, use and enjoyment of the island of Mer". In other words, the High Court recognised the native title of the Meriam people. (*Mabo v State of Queensland (No 2)*, paragraph 97). If you are interested, the full judgement is available here:

<http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html>



In this decision, the High Court rejected the doctrine that Australia was *terra nullius* at the time of British colonisation. The Justices held that the common law title of Australia recognises a form of native title to land, with sovereignty residing in the Crown as a consequence of the doctrine of 'settlement'. The Court determined that the pre-existing rights of Indigenous Australians to ancestral land survived colonisation and still survive today in certain circumstances. The High Court ruled that Indigenous people may have certain rights to particular areas of land and water which originate in their traditional ownership. Further, native title exists in accordance with the laws and customs of Indigenous people:

- where those people can prove they have maintained their physical connection with the land and/or waters
- where their title has not been extinguished by legislation or any action of the government which shows a clear and plain intention inconsistent with the continued exercise of native title rights.

That is, native title rights must be proved both by evidence of continuous physical connection AND by evidence of the continuous practice of the 'traditional' laws and customs specific to the native title claimants.

### **Native Title Legislation is different to Land Rights Legislation!**

Earlier in the subject we briefly considered the events leading up to the *Aboriginal Land Rights (Northern Territory) Act 1976*. There are fundamental differences between land rights and native title. Land rights are rights created by the Australian, state or territory governments. Land rights usually comprise of a grant of freehold or perpetual lease title to Indigenous Australians.

By contrast, native title arises as a result of the recognition, under Australian common law, of pre-existing Indigenous rights and interests according to traditional laws and customs. Native title is not a grant or right created by governments. The source of native title rights and interests is the system of traditional laws and customs of the native title holders themselves (National Native Title Tribunal, 2013).

Native title was not invented in the Mabo case decision, but had major ramifications for the law and the was fundamental in bringing it to the public's eye. Rather, the decision recognized rights which had existed for tens of thousands of years.

Generally speaking, native title must give way to the rights held by others. Native title rights and interests may include rights to:

- live on the area
- access the area for traditional purposes, like camping or to do ceremonies
- visit and protect important places and sites
- hunt, fish and gather food or traditional resources like water, wood and ochre
- teach law and custom on country.

In some cases, native title includes the right to possess and occupy an area to the exclusion of all others (often called 'exclusive possession'). This includes the right to control access to, and use of, the area concerned. However, this right can only be recognised over certain parts of Australia, such as unallocated or vacant Crown land and some areas already held by, or for, Indigenous Australians.



## Responses by Governments: the Native Title Acts

### Key idea

After the High Court's Mabo decision, Australian governments have passed a series of Native Title Acts, firstly to set up a system to determine Native Title and later to restrict Native Title claims by Indigenous people.

The *Native Title Act (Cth)* was introduced by the Keating Labor government in 1993 and came into operation on 1st January 1994. The Act recognises the common law principle of native title, as established by the High Court Mabo (2) decision. It gave validity to past grants of interests in land or waters made invalid because of native title. The Act also sets out the structures by which native title claims can be determined, and it provides a framework for future dealings affecting native title. The Act also established the Native Title Tribunal, whose functions include the determination of claims asserting the existence of native title.

The four major aims of the Native Title Act (1993) were:

- (a) to provide for the recognition and protection of native title; and
- (b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title; and
- (d) to provide for, or permit, the validation of past acts invalidated because of the existence of native title. (Commonwealth of Australia, Native Title Act 1993, Section 3)

### Amending the Native Title Act

In March 1996, the conservative Howard Coalition government came to power and set in train its policy to amend the Native Title Act to make it, it said, 'more workable'. The proposed amendments presented in the government's '10-point plan' raised heated debate, particularly among the Indigenous community. The High Court of Australia's ruling in the Wik case in December of 1996 escalated the debate. The High Court determined that native title can and does co-exist with pastoral leases to the extent that pastoral lease rights prevail over those of the native title holders.

In 1997, the government presented its Native Title Amendment Bill (1997). The amended Act severely restricts Indigenous rights in favour of those of non-Indigenous pastoralists and other economic interests.



## Native Title settlements

### Key idea

It was estimated that only approximately 5% of the Indigenous population would benefit from the first *Native Title Act* due to the severity of dispossession in most parts of the country.

Indigenous communities may now be involved in Native Title claims to reach settlements regarding their country. However, only a small proportion of Indigenous Australians are in a position to make a native title claim. The claims process can take years to reach a conclusion. As noted above the evidential requirements are very high, while the rights gained may be very limited even if the case is successful.

In February 1994, the Yorta Yorta people were one of the first Indigenous groups in mainland Australia to make a native title claim. This was to be a key case in terms of revealing the extent of the requirements to gain native title. Many Yorta Yorta people had been forcibly relocated from their ancestral lands during the 19<sup>th</sup> and 20<sup>th</sup> centuries. Against great odds, some had maintained physical connections with their country. Even so, the judge in this case argued in his decision that they had not maintained their 'traditional' laws and practices and were thus precluded from making a native title claim. The determination by Justice Olney in 1998 ruled that the 'tide of history' had 'washed away' any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants.

In making his determination, Justice Olney relied on some very dubious sources of historical information and a narrow definition of what constitutes 'traditional' laws and customs. The final 2002 High Court decision in this case confirmed the strict requirements of continuity of traditional laws and customs for native title claims to succeed.

This was not quite the end of the story. In 2004 the Victorian government reached a cooperative agreement with the Yorta Yorta people that included recognition of public land, rivers and lakes throughout north-central Victoria.





### *Optional Further viewing*

Watch a clip of the Quandamooka people's settlement to gain rights to their land on Stradbroke Island and other islands off the Queensland coast. Their Native Title claim was settled in 2011 after a process taking 16 years.

ABC News Victoria (ABC1 Melbourne); Traditional owners win 16-year battle: The Federal Court has granted the Quandamooka people native title rights to 90 per cent of North Stradbroke Island off Brisbane's coast [online]. Time: 19:14; Broadcast Date: Monday, 4th July 2011; Duration: 2 min., 6 sec.

<http://ezproxy.csu.edu.au/login?url=http://search.informit.com.au.ezproxy.csu.edu.au/media;dn=TEV20112705346;res=TVNEWS;type=wmv>

### *Learning Activity*

#### **Native Title**

#### **Consider the following questions**

Think about your knowledge of Indigenous Australian history since colonisation. What might be some of the difficulties that Indigenous people could have proving their Native Title?

What are some of the rights that may be included under Native Title?

Where does native title come from and how is it different from other forms of Australian property rights?

Share your ideas on the Forum.



## References

Commonwealth of Australia (1993). *Native Title Act*. Available here:  
[http://www.austlii.edu.au/au/legis/cth/consol\\_act/nta1993147/](http://www.austlii.edu.au/au/legis/cth/consol_act/nta1993147/)

Furphy, S.(2010). "Our civilisation has rolled over thee": Edward M Curr and the Yorta Yorta native title case'. *History Australia* 7 (3): pp. 54.1 to 54.16. DOI: 10.2104/ha100054.

Human Rights and Equal Opportunity Commission (1998), c Sydney: HREOC. Available here:  
[https://www.humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/native\\_title\\_report\\_98.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/native_title_report_98.pdf)

*Mabo v State of Queensland (No 2)* (3rd June 1992). The judgement is available here:  
<http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html>

National Native Title Tribunal (2013). Exactly What is native title. Available here:  
<http://www.nntt.gov.au/Information%20Publications/Native%20Title%20an%20overview.pdf>

Sculthorpe, Dr Gaye (1997). Human Rights and Indigenous Australians: Language and Cultural History, Speech to the Australian Reconciliation Convention. Available here:  
<http://portsea.austlii.edu.au/au/other/IndigLRes/car/1997/4/sculthor.html>

**You have finished Module 3 Topic 4!**