The implications of the *Mabo* decision

On 3 June 1992 the highest court of Australia declared by a majority of six to one 'the lands of this continent were not terra nullius or practically unoccupied in 1788'. On that day the Australian legal system came of age. The political system may take a bit longer. **Fr Frank Brennan, SJ** ***a barrister and former director of Uniya, a Christian social research centre, presents this analysis.***

Although the British Crown asserted sovereignty over those deemed to be barbarians in 1788, it was barbaric then, as it is now, to presume sovereignty automatically wiped the slate clean of native land title. A court established by the sovereign may not have power to canvass

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the validity of the assertion of sovereignty over new territory but it does have the duty to ensure equal protection of the law for those holding property within the territory. When Eddie Mabo commenced his litigation in 1982, many Australians still saw land rights as a one-off special welfare measure. The defendant State's premier, Sir Joh Bjelke-Petersen, saw it as part 'of a long range communist plan to alienate Aboriginal lands from the Australian nation so that a fragmented north could be used for subversive activities by other countries'. Land rights is now legally classifiable as the restitution, recognition and compensation of property rights.

The High Court has placed its hands more firmly on the development of the Australian common law, which is now out of the clutches of the Privy Council. The High Court judges have declared, 'here rests the ultimate responsibility of declaring the law of the nation.' This was the first time the judges of our highest court had the opportunity to rule on the unwritten law of the land. They have not done so in primitive isolation from developments in international law and the common law of other countries. Nor have they been unhistorical. Rather than inventing a legal fiction, they have simply destroyed one. Not only would it have been unseemly to drive indigenous occupiers of the Torres Straits into the sea upon the assertion of British sovereignty, it would have been unlawful.

Governor Phillip may have asserted British sovereignty over the eastern part of the Australian continent on 26 January 1788 but he did not thereby automatically increase unencumbered Crown landholdings by another half continent. Native title to the lands continued until the new sovereign dealt with the lands in a manner inconsistent with the continuation of native title. Even after 205 years of unmitigated pastoral, colonial and mining expansion, there are still large areas of vacant Crown land especially in Western Australia. It is traditional Aboriginal law which determines the Aboriginal titleholders of such land. Like international law, the traditional law or custom is not frozen as at the moment of establishment of a colony.

Terra nullius was clear and simple; it was also unjust and discriminatory. The law of the land is now more complex and more just. Though the High Court has ruled that there is no

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guaranteed right to compensation for extinguishment of native title by a State government, public servants and politicians will have to recognise native title as they would any other title to land. Wiping out native title without compensation will pass muster only if other title could be so extinguished in the same circumstances. Increasingly, developers, pastoralists and miners will have to deal with Aborigines on an equal footing. Governments will have to treat with them to effect the workable compromises for land

use according to Aboriginal law and the common law.

The High Court has removed the legal basis for the continued dispossession of Aborigines retaining traditional affiliations with their lands. The Court has not undone the injustices of the past. It has set the foundations for just land dealings in the future. By recognising the existence of Aboriginal law and land rights, the Court has provided a jurisprudential basis for the calls by Aborigines for self-determination on their lands. Eddie Mabo's influence will be felt on the Australian mainland as much as it is now on Murray Island. He died before the court gave judgment. The judgment stands as a vindication of his rights and as a tribute to his stand.

The legal background

Eddie Mabo was a member of the Merian people, the traditional owners of Murray Island and surrounding islands and reefs in the Torres Strait. The islands in the strait were annexed as part of the colony of Queensland in 1879. In 1982, Mabo and four other Islanders commenced action in the High Court of Australia seeking a declaration of their traditional land rights. They claimed that the islands had been continuously inhabited and exclusively possessed by their people who lived in permanent settled communities with their own social and political organisation. They conceded that the British Crown became sovereign of the islands upon annexation but claimed continued enjoyment of their land rights until those rights had been extinguished by the sovereign. Further they claimed that their rights had not been validly extinguished and that their continued rights were recognised by the Australian legal system.

The State of Queensland attempted to defeat the claim by the passage of the Queensland Coastal Islands Declaratory Act 1985 which was 'to allay doubts that may exist concerning islands forming parts of Queensland'. The Act declared that, upon the islands being annexed, they were 'vested in the Crown in

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right of Queensland freed from all other rights, interests and claims of any kind whatsoever'. It provided that no compensation would be paid for rights retrospectively taken away.

In 1988, the High Court ruled this Act was contrary to the Commonwealth's Racial Discrimination Act 1975. On 3 June 1992 the High Court upheld the Islanders' claim to native title. The fiction of *terra nullius* had allowed the European community of nations to expand their colonial horizons with minimal concern for indigenous peoples. In the eighteenth century, the common law took its lead from international law. In *Mabo* three judges acknowledging their law-making role said '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'. The court ruled that the Crown's acquisition of sovereignty could not be challenged in Australian courts. Though the Crown acquired a radical title to land within its territory, native title to land continued unaffected until it was extinguished by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title.

The implications

There are many Aboriginal groups who see the *Mabo* decision as a door which has been left slightly ajar by the High Court, now waiting to be prised open by a series of test cases and political agitation. There are miners and pastoralists who see it as a door to be firmly closed before further uncertainty is caused. The decision is more a window of opportunity which will remain open but within very strict confines buttressed by an Aboriginal land claims process in each jurisdiction of the Commonwealth. There is greater consistency with precedent and certainty of limitation in the decision than many commentators have indicated. The skeleton of principle of the common law has been maintained at some cost to dispossessed Aborigines.

Sovereignty is non-justiciable; the classification of the Australian colonies as 'settled' is now beyond dispute in Australian courts. Compensation for past dispossession, prior to the passage of the Racial Discrimination Act 1975, was payable only if the statutory scheme for dealing with wastelands and Crown lands did not exclude it expressly or by implication, and could be sought only within the relevant Statute of Limitations periods. Extinguishment of native title by valid Crown grant of a State to other parties prior to 1975 did not, of itself, found an action for compensation.

Vacant Crown land and public reserves may still be subject to native title. Native title holders will continue to enjoy the rights commensurate with their 'ownership', enjoying the twofold protection of the Constitution precluding acquisition of property on unjust terms and the Racial Discrimination

Act, the latter rendering unlawful actions which discriminate against persons on the basis of their race thereby impairing the enjoyment of their human rights in any field of public life, including the right to own property in association with others, the right to inherit, and the right not be arbitrarily deprived of property.

The Racial Discrimination Act overrides any offending State or Territory legislation ensuring that the law since 1975 accords protection to native title holders equal to that of other title holders with similar rights of use and access, whatever their race. The High Court has shown no willingness to extend the concept of fiduciary duty beyond the bounds of the duty owed by the Crown to a third party at arms length enjoying discrete legal rights to property. The Court has no intention of entertaining theories of sovereignty or classification of colonial beginnings which divide or diminish the sovereignty of national institutions established under the Constitution. While lawyers investigate the limits of fiduciary duty and compensation claims, it is imperative that governments set up claims processes in all jurisdictions so that native title holders may be granted a secure and certain statutory title to their lands without extinguishment of native title. It will be in the interests of miners and pastoralists, as well as Aborigines, that there be a notification procedure whereby claims to native title can be registered and in time determined.

The failure of the Prime Minister and Premiers to reach agreement on the implementation of Mabo at the June 1993 meeting of the Council of Australian Governments now requires that each State give due recognition to native title. The States though sovereign in the matter of land management are restricted by the High Court's decision and the Racial Discrimination Act such that they must deal with native title holders in their jurisdiction in a racially non-discriminatory way.