Rewriting history 1

Mabo v Queensland: the decision

Mark Gregory

The landmark decision of the High Court in Mabo is explained and analysed along with its impact on the legal framework within which Aboriginal claims to their land are assessed.

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The decision in *Mabo v State of Queensland* rejects the doctrine of *terra nullius* which until now has been the orthodox legal view of the British settlement of Australia. The view that in 1788 Australia was *terra nullius* — land belonging to no-one — while attracting increasing criticism in recent years, had never been squarely decided by the High Court of Australia. *Mabo* firmly rejects *terra nullius*, and confronts other important issues regarding the last two centuries of European settlement of Australia.

The terra nullius doctrine

During the centuries of European colonial expansion, the acquisition of new territories was governed by rules agreed among the colonial powers. New territory was acquired by conquest, by cession (the voluntary handing of territory from one government to another by treaty and sale), or by settlement. Settlement was the discovery and occupation of uninhabited lands by the colonial powers. Increasingly, the European powers came across lands not held by themselves, but inhabited by natives considered primitive by the Europeans. Among themselves, the colonial powers agreed that such territory could be acquired by settlement. That is, the land was considered to be *terra nullius* despite the existence of indigenous populations. This extended notion of *terra nullius* has been the orthodox view of the colonisation of Australia at least since *Attorney-General v Brown* (1847) 1 Legge 312. Despite its acceptance among colonial powers and many lawyers, the extension of *terra nullius* to inhabited lands has been controversial since at least Blackstone's time. Blackstone said:

> so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilising mankind.[1]

As will be seen in the discussion of the *Mabo* decision, *terra nullius* was not applied in all British colonies. In particular it was not applied in colonies acquired by conquest or cession.

The Murray Islands

The Murray Islands are the easternmost of the Torres Strait Islands. The group consists of three islands. Mer, or Murray Island, is the biggest. About a kilometre to the south lie the two smaller islands, Dauer (also spelt Dauar or Dawar) and Waier. The total land area of the islands is about nine square kilometres.

The people of the Murray Islands are known as the Meriam people. They are Melanesian and probably came to the Islands from Papua New Guinea. The population has fluctuated between about 400 and 1000. About 400 now live on the islands, with more scattered through other Torres Strait islands and elsewhere.

The Murray Islands were annexed to Queensland in 1879. From the earliest stages of outside contact with the Meriam in the 1830s, European infiltration of customary society has been minimal. Few foreigners have lived among the Meriam, who retain a strong sense of identity.

The land-use practices among the Meriam are distinctive. From before European contact, it seems, they have maintained a garden system with plots held by individuals or family groups. As an 1898 Cambridge anthropological study reported:

> Queensland has not affected native land tenure which is upheld in the Court of the Island. In a few instances it is not impossible that English ideas, especially of inheritance are making themselves felt. There is no common land and each makes his own garden on his own land at his own convenience.[2]

Even before annexation to Queensland in 1879, some European contact had occurred. The London Missionary Society had been active on the Islands since about 1871, and in 1882, following annexation, a lease of two acres on Mer was granted to the Society. Also in 1882, the rest of the Islands were 'reserved' for the Islanders, restricting further land acquisitions by outsiders. The reservation of the Islands was re-effected under a new statutory scheme in 1912. In 1931, leas-

es of the two smaller islands, Dauer and Waier, were granted for the purposes of a sardine factory. These leases were restricted so as to disallow interference with the Islanders' customary gardening and fishing activities. Factory buildings were erected, and although the initial leases were for 20 years, the leases were forfeited in 1938 to allow the Islanders completely unrestricted access.

In 1939 the reserved lands of the Islands were put under a trust arrangement, which continued under the new *Land Act* 1962 (Qld), dealing with Crown Land, reserves and so on.

Background to the decision

In 1982 some Islanders sought a declaration before a single High Court judge that their garden plots remained their own property. They argued that annexation, and the subsequent leases, reservations and trusts effected by the Queensland Government, had not destroyed their traditional title to the land. Because of the importance of the underlying issues, the case was referred to a full court of seven. During the course of argument it became apparent that the court could not declare for the individual claimants, in the absence of argument from other individual Islanders who may have had competing claims. However, the bigger issue of the rights of the Islanders as a whole native community, as against the State of Queensland, remained.

In 1985, three years after the action began, the Queensland Government tried to stifle the Islanders' claims by purporting to retrospectively extinguish any native land rights which may have survived annexation in 1879, by way of the *Queensland Coast Islands Declaratory Act* 1985 (Qld) (the 1985 Act). The High Court of Australia held that, on the assumption that the Islanders' rights had survived to the present, this legislation was invalid to the extent that it purported to extinguish those rights, as it was inconsistent with the *Racial Discrimination Act* 1975 (Cth), under s.109 of the Commonwealth Constitution.[3]

The assumptions on which the 1985 Act was invalidated, however, still had to be tested in the substantial action. Had the Islanders' customary land system survived annexation and subsequent actions, to be recognised and protected under Australian common law?

Overview of the decision

The main issue was whether annexation by Queensland in 1879 extinguished the Islanders' native land title. A majority of six held that the native title did survive annexation. The majority consisted of Brennan J, with whom Mason CJ and McHugh J agreed. Deane and Gaudron JJ joined in a judgment, and Toohey J wrote a separate judgment. Dawson J was the dissentient on the main issue. This article focuses mainly on Brennan J's judgment, as it also embodied the opinion of the court on minor issues.

The next question was whether any post-annexation activities had extinguished the native title. The same six judges held that extinguishment was within the powers of the Queensland Government, but that it had not occurred on the Murray Islands, with the possible exception of the two acres leased to the London Missionary Society and some other areas.

The effects of annexation

All of the judges took the view that the acquisition of new lands by a sovereign state is an act of state which cannot be challenged in the courts.[4]

But while the courts cannot challenge the Crown's sovereignty, the effects of that acquisition of sovereignty are open to question as a matter of municipal law (Brennan at 18). Thus the accepted view that the British Crown's acquisition of sovereignty in 1788 also effected an acquisition of all the land in eastern Australia, to the exclusion of Aboriginal title, was open to review. Similarly with the extension of sovereignty to the Torres Strait Islands in 1879.

Some explanation of the distinction between acquisition of sovereignty and acquisition of territory, or title, is required. The Crown acquired sovereignty in eastern Australia, by an act of state, in 1788. Under the common law principles of the time, this settlement brought with it so much of English law as was applicable to the new colony. One aspect of this introduced law was the legal fiction that all land is owned ultimately by the Crown. All private land, even a fee simple — freehold title — is theoretically not full ownership because the Crown has an ultimate title, or radical title — the underlying title on which all other titles are based. The Crown's radical title to all land is a unique feature of English land law, and when English law arrived with the settlers in 1788, the Crown acquired not only sovereignty, but radical title to the land.[5]

But acquisition of sovereignty and radical title does not necessarily mean acquisition of full ownership of territory. Quoting McNeil,[6] Toohey J said:

> [Sovereignty] is mainly a matter of jurisdiction, involving questions of international and constitutional laws, whereas [acquisition of title, or territory] is a matter of proprietary rights, which depend for the most part on the municipal law of property. Moreover, acquisition of one by the Crown would not necessarily involve acquisition of the other.

The majority judges started from the proposition that the Crown had acquired this radical title as part of its sovereignty. They then set about questioning the orthodox assumption that not only radical title, but full ownership of all the land had vested in the Crown in 1788.

Brennan J took a number of approaches. First, he noted the view of the colonial authorities and early settlers in Australia that Aborigines were too primitive to have their land usages recognised by the common law. Greater understanding of Australia's indigenous peoples, aided by anthropological study, has exploded this anglocentric view. Brennan J asserted also that the old ideas were unacceptable in contemporary Australian society and so took the view that: '[a]s the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case' (at 27).

In making this choice Brennan J firstly examined the feudally-based doctrine of tenures, which he saw as one of the fundamental structures of our system of land law. However, nothing in the doctrine of tenures compelled the logical conclusion that the Crown acquired more than radical title upon acquisition of sovereignty (at 32-6, esp. 34).

Brennan J then surveyed cases from other jurisdictions concerned with British colonial practices. Where Britain had acquired sovereignty by conquest or cession, it had been established in a string of Privy Council decisions that, in general, native title rights were to be protected.[7] Brennan J held that the protection offered in these cases should not be limited to conquered and ceded colonies, but should be 'taken as the general rule of the common law' (at 40). The result was that 'a mere change in sovereignty does not extinguish native title to land' (at 41).

The other majority judges took approaches similar to Brennan J in respect of the effects of acquisition of sovereignty.

The effect of post-annexation activities

While the majority decided that native title in the Murray Islands and in Australia generally had not been extinguished upon annexation or acquisition by the Crown, the question remained whether subsequent actions by people or governments have impaired the native title. In answering this aspect of the case, the Murray Islanders fared better than most mainland or Tasmanian Aborigines.

The majority agreed that the power to extinguish native title exists. It can be done either legislatively, or by executive action. Toohey, Deane and Gaudron JJ, while conceding that non-statutory extinguishment by the Crown was effective, saw it as a wrongful use of power.

On extinguishment by the Crown, Brennan J asserted that '[s]overeignty carries the power to create and to extinguish private rights and interests in land within the Sovereign's territory' (at 46). A valid grant of land by the Crown binds the Crown, and the grant cannot be taken away without clear legislative authority. However, as native title is not granted by the Crown, the Crown can extinguish it without statutory authority. A clear intent by the Crown would be required (at 46-7).

If the Crown treated the land as its own, dealing with it in a way inconsistent with continuing native title, this would be clear enough to extinguish native title. Crown grants of estates to settlers constitute such inconsistent dealings. Thus the lease of two acres to the London Missionary Society in 1882 necessarily extinguished the native title because it is 'inconsistent with the continued right to enjoy a native title in respect of the same land' (Brennan at 49). Although temporary, a lease is inconsistent with continued native title in Brennan J's view, because 'the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominion' (at 49). Brennan J felt that reservation of lands for public purposes such as roads or other capital works may similarly extinguish native title, although reservations may be consistent with continuing native title, such as reservation for a national park, for example (at 51).

On the Murray Islands most of the government acts have not manifested such a clear intent. In particular, the history of reservations and appointments of trustees is not inconsistent with continuing native title, but rather tends to protect native interests by making sale of interests in the land to non-Islanders difficult (e.g. Brennan at 46-9).

The six majority judges did not finally decide the effect of certain other transactions. There was some doubt as to the validity of the lease over Dauer and Waier, but if valid, Brennan J thought it would have extinguished native title on those islands, despite its later forfeiture, and its special conditions preventing interference with Islanders' customary fishing and gardening (at 52-4). Deane and Gaudron JJ inclined to the view that this lease did not extinguish native title. There had been suggestions that other parcels on Mer had been set aside for a school and other administrative buildings. The judges declined to make a final determination on the effect of these.

Toohey, Deane and Gaudron JJ offered more protection to native title-holders in general, and the Murray Islanders in particular. Like Brennan J they agreed that native title was subject to extinguishment by the Crown, by a grant inconsistent with the continuance of native title. Importantly, though, Toohey, Deane and Gaudron JJ held that if common law native title is wrongfully extinguished, for example by an inconsistent grant, without clear and unambiguous statutory authorisation, then that extinguishment is compensable by damages. However, the native title-holders would have had to seek such damages within the applicable limitation periods, which in almost every case of Crown grant Australia-wide would now have expired. Moreover, for most of Australia's post-settlement history, the Crown has been immune from claims for damages. In practice, then the Crown has achieved the wrongful dispossession of vast tracts of Australian land, and now is immune from legal action (at 67-71).

The source of the difference over the issue of compensatory damages between Brennan J on the one hand, and Toohey, Deane and Gaudron JJ, on the other, is not entirely clear. Brennan J expressed the view that native title is recognised and protected by the common law, that its extinguishment is a serious consequence (at 46), and that if unextinguished it remains 'legally enforceable' (at 50). Yet in the result Brennan J held that no compensation is payable for the extinguishment of native title (see Mason and McHugh at 1). On this view, native title does not seem a very valuable right.

Toohey, Deane and Gaudron JJ also differed from Brennan J on the scope for legislative extinguishment of native title. Because these three judges viewed native title as a valuable proprietary right, they felt it was protected by the general common law presumption that rights cannot be legislatively diminished without clear and unambiguous words. A further presumption is that property rights cannot be infringed without compensation, unless the legislation clearly intends to deny compensation. Native title is thus on par with other common law property rights when it comes to compensation for infringement.

Toohey J offered the most protection for the Murray Islanders. Toohey J believed that the legislative power of Queensland to extinguish native title was further limited by a fiduciary obligation in the Crown to deal with native title in the interests of the native title-holders.[8]

A further limitation on the legislative extinguishment of native title, agreed by all six majority judges, was that state legislation must not be inconsistent with valid Commonwealth legislation. If inconsistency is found, the state legislation is invalid by operation of s.109 of the Constitution. The majority had in mind particularly the *Racial Discrimination Act* 1975 (Cth). They did not decide certain questions of inconsistency in the present case, but left it as a general limitation on states' powers to extinguish native title.

All of the majority judges agreed that the Murray Islands are not Crown land. The Islands had been reserved for the Islanders as far back as 1882, and their status as reserves had been continued under subsequent legislation. Under the most recent Crown lands legislation, the *Lands Act* 1962 (Qld) (as amended), excluded land 'reserved or dedicated for public purposes' from the definition of 'Crown land'. This was sufficient to encompass the Murray Islands (Brennan at 47).

The nature and content of native title

The majority judges stated that the concept of native title is a very flexible one. Its content will depend on the 'traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.[9] Old ideas, that some native customs were so

primitive as to be incapable of recognition by the common law, are redundant. Very often native title is a communal title, based on membership of a tribe or other group, with no concept of individual entitlement. But this is not a necessary feature, and the Murray Islanders are an exception. Aspects such as inheritance of rights under native title, or transfers of rights, or the entitlement to hold title, will depend on the laws and customs of the natives (Brennan at 44).

Deane and Gaudron JJ referred to this special kind of title as 'common law native title' (at 65). This terminology captures its essence as derived from and conforming to indigenous custom, but protected by the introduced common law. While other majority judges used different terminology, the concept is essentially the same. Importantly, though, Deane and Gaudron JJ noted three limitations of common law native title. First, it is only alienable, outside of the traditional group, to the Crown. This is known as the Crown's right of pre-emption, and is an established common law rule, perhaps deriving from a desire to protect indigenous peoples from exploitation. The second limitation of common law native title is that it is something less than an estate in land, according to ordinary common law notions. It is more in the nature of a personal interest. However, given the flexibility of content of native title, both Deane and Gaudron JJ, and Toohey J, remarked that it is inappropriate to try to make it conform conceptually with well-known common law notions. It is better to accept that it is a *sui generis* interest, which the passage of time, and the circumstances of local custom, will vary.[10] The third limitation is the one already discussed: native title is susceptible to unilateral extinguishment by the operation of an inconsistent Crown grant, although the majority judges differed on the rightfulness of such Crown action.

The implications for the rest of Australia

The discussion above has mainly been applicable not only to the Murray Islands, but to Australia in general. Points of difference, such as the individual land holdings by the Islanders, and the relative lack of intrusion by outsiders, have been noted. At places in their judgments, the judges in *Mabo* made some general comments about the implications of the decision for Australian Aborigines in general.

It is important to realise that the general thrust of the majority judgments — that an acquisition or extension of sovereignty to an inhabited settled colony does not, of itself, extinguish native title — is equally applicable to the spread of Crown sovereignty throughout Australia from 1788, as it is to the annexation of the Murray Islands in 1879.[11] But from that point, different histories develop. Mainland Australia and Tasmania gradually fell under the inexorable tide of European expansion. Most of the land in Australia has been granted by the Crown to settlers, or set aside for public works such as roads. Such usages are inconsistent with continued native title, and so extinguish it. 'Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement' (Brennan at 50). Like the Murray Islands, 'there may be other areas in Australia where native title has not been extinguished and where Aboriginal people, maintaining their identity and their customs, are entitled to enjoy their native title' (at 50).

Toohey J made the point that 'nothing in this judgment should be taken to suggest that the titles of those to whom land has been alienated by the Crown may now be disturbed'. In other words, white Australians can sleep easily.

Recall that Toohey, Deane and Gaudron JJ felt that native title-holders would be entitled to compensation for the extinguishment of their title, whether by Executive act or legislation, unless statutory authority clearly denied compensation. However, because it was also Dawson J's view that there was no entitlement to compensation, a majority of four held that Australia's Aborigines are not entitled to compensation for the wholesale dispossession of their land. The divergence of opinion is of almost no practical significance, however, as Toohey, Deane and Gaudron JJ felt that claims to compensation would almost all be statute barred.

Justice Dawson's dissent

Like the majority judges, Dawson J viewed the acquisition of sovereignty as an act of state, the validity of which is beyond the reach of the courts.

Dawson J's departure from the majority begins with his conclusion that, under English land law principles, the Crown not only acquires radical title upon acquisition of sovereignty, but that from that moment any interests in land are derived from the Crown (at 93). Native title thus cannot continue unchanged, for at the very least it is conditioned by the new radical title. This modified native title could continue but, because it must derive from the Crown, continuance would require the recognition of the Crown. Dawson J continued (at 96):

> whether, in any particular case, a change of sovereignty is accompanied by a recognition or acceptance by the new sovereign of pre-existing rights is a matter of fact. There is no basis for a general presumption either for or against recognition or acceptance.

None of the North American, African and New Zealand authorities surveyed by Dawson J suggested to him that, as a matter of general legal principle, the natives in those places held title otherwise than that of the Crown.

Dawson J then turned to Australia, and found that colonial practice, since 1788, treated Aboriginal rights of title as non-existent. 'What was done was quite inconsistent with any recognition, by acquiescence or otherwise, of native title' (at 106-7). He added (at 111):

> There may not be a great deal to be proud of in this history of events. But a dispassionate appraisal of what occurred is essential to the determination of the legal consequences . . . The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts.

Turning specifically to the Murray Islands, Dawson J felt that the Colony and State of Queensland, by reserving the Islands under Crown lands legislation, displayed a clear purpose of treating the Islands as its own. Reservation was not necessarily inconsistent with recognition, but the practice of the Queensland Government on the mainland in relation to Aborigines and land made it clear to Dawson J that Queensland generally showed no recognition of native title.

The effect of the judgment

The effect for the Murray Islanders is that they have native title protected under Australian law. The nature and content of their title derives from Meriam law and custom, but is protected by Australian common law. In the words of the formal order in *Mabo*, 'the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the Murray Islands'. Excepted from this general

order are the lease of two acres, and of Dauer and Waier, and any other parcels which may validly have been appropriated for administrative or other purposes inconsistent with continued native title.

The Murray Islands are not Crown land. However, the native title is subject to extinguishment by the Parliament or Crown of Queensland, provided any extinguishment is clear and is not inconsistent with the laws of the Commonwealth.

The effect for Australia generally is that the doctrine of *terra nullius* has been dismissed. The new orthodoxy is that, upon acquisition of sovereignty, the Crown obtained only a radical title to land occupied by Aborigines and Islanders. Land not under such native occupancy upon colonisation would have vested in the Crown absolutely.

However, most land in Australia has been dealt with in ways inconsistent with continuing native title, and thus native title has been extinguished in those areas. Similarly, where Aborigines have moved off their land or lost their traditional connection with it, they have lost their native title. Significant amounts of unalienated land in Australia would thus still be subject to claims of native title by traditional occupiers. In many cases, however, the evidentiary burdens apparent in *Mabo* will make litigation of such claims difficult.

It would seem, therefore, that the great value of the *Mabo* decision will not be as a precedent for future litigation. Rather, it marks a paradigm shift in the underlying legal and moral assumptions of European colonisation, and should provide an impetus for political resolution, whether that be reconciliation, treaty or other outcome.[12]

References

1. Blackstone, *Commentaries on the Laws of England*, 17th edn (1830), Bk II, Ch.1, p.7.
2. Taken from the judgment of Brennan at (1992) 107 ALR 1 at 14
3. *Mabo v Queensland* (1988) 166 CLR 186.
4. Brennan J at p.20; Deane and Gaudron JJ at p.58; Dawson J at p.92; Toohey J does not expressly state it, but it is implicit in his judgment.
5. Brennan J at pp.32-6; Dawson J at pp.92-3; Toohey J at p.140; Deane and Gaudron JJ at p.60, felt that the feudally-based fiction of Crown radical title may have been inappropriate for the infant colony in 1788. But because it has been treated as applicable for 204 years, it is far too late to reconsider the question.
6. McNeil, Kent, *Common Law Aboriginal Title*, Oxford Clarendon Press, 1989.
7. Southern Nigeria had been ceded to Britain by treaty with local chiefs. Several cases confirmed that the cession did not affect private natives' rights: *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; *Sakariyawo Oshodi v Moriamo Dakolo* [1930] AC 667; *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785. Parts of Southern Rhodesia had been conquered under British auspices. The Privy Council held in *In re Southern Rhodesia* [1919] AC 211 that, as a general rule, natives' rights of property would be presumed to be respected by the conqueror (at p.233). However, in this case the natives' land usages were deemed so primitive as not to amount to rights of private property (at pp.233-5), a view attacked elsewhere in *Mabo*.
8. At pp.156-160. This finding arose from one of the Islanders' alternative claims: that even if they did not enjoy native title, the Crown was nevertheless obliged to act in their interests. Toohey J was also sympathetic to another of the Islanders' alternative claims. This was the idea that, even if their native title had not survived annexation, they had acquired a common law title by length of possession. This claim relied heavily on the central notion of Kent McNeil's book *Common Law Aboriginal Title*. However, Toohey J concluded that this alternative basis of title would be no more beneficial for the Islanders than their success in their native title claim, and so did not finally decide. See at pp.161-167.
9. Brennan J at p.42; see also Deane and Gaudron JJ at p.83.
10. Deane and Gaudron JJ at pp.66-7; Toohey J at p.152.
11. A point made expressly by Toohey J at p.139-40.
12. Some peripheral points of legal interest can be found in the *Mabo* decision. First, it is a striking example of the new confidence in Australia law, to forge its own frontiers. Since abolition of Privy Council appeals culminating with the *Australia Acts* 1986, Australian courts have been free to fashion a distinctly Australian common law. This was expressly noted by Brennan J (at 18) and *Mabo* sees the High Court at the forefront of that development. Second, the judgments are notable for their reliance on scholarly writings in addition to case law. This seems to be a developing practice in High Court judgments. The assistance of academic writers was acknowledged by Deane and Gaudron JJ (at 91) and Kent McNeil's book *Common Law Aboriginal Title* appears to have been particularly useful throughout — see especially Toohey J at p.139.

LEGAL STUDIES

Article 1: 'Rewriting history 1: *Mabo v Queensland*: the decision' by Mark Gregory.
Article 2: 'Rewriting history 2: the wider significance of *Mabo v Queensland*' by Gordon Brysland.

Questions: Article 1

1. Explain the doctrine of 'terra nullius'. In which colonies was this doctrine not applied?
2. According to the majority of the High Court in *Mabo* why did acquisition of sovereignty and radical title not necessarily mean acquisition of full ownership of territory? What were the implications of this for native title?
3. The colonial authorities view that Aboriginal people were 'primitive' had important implications for recognition of native title. How did Brennan J deal with this view?
4. In what circumstances can the Crown extinguish native title? Had this been done on the Murray Islands?
5. What limitations are there on the ability of State legislatures to extinguish native title?

Questions: Article 2

6. What types of interests granted over land might extinguish native title?
7. The author suggests that future land rights claims will depend on two matters. What are they?
8. Do Aboriginal people have a right to compensation when their native title is extinguished? Discuss the different views expressed by members of the High Court on this point.
9. Discuss the wider implications of the *Mabo* decision. In particular, what impact do you think the decision might have on race relations in Australia?

Activities/discussion

Debate the topic: 'That the decision in *Mabo* provides little comfort to Aboriginal people. While recognising native title in theory, the reality is that most land in Australia has been taken away from Aboriginal people without compensation and the High Court decision provides little support for compensation to be paid.'

Essay topic: 'Now that the High Court has decided that native title does exist in Australia it is time to take one more step and recognise Aboriginal customary law for all purposes.'

Research: The claiming of land rights by Aboriginal people is not just about title to property. The importance of the issue lies in the extent to which denial of land rights underpins a whole system of social and economic injustice. Find out as much as you can about the special relationship Aboriginal people have with their land and the impact the denial of land rights has on Aboriginal people.

Further references

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