Factsheet

The Mabo Decision 2022

ANTAR

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The common law of this country[1] would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous inhabitants of the Australian colonies as people too low in the scale of social organisation to be acknowledged as possessing rights and interests in land.[2]

In *Mabo v Queensland (No 2),* the High Court of Australia overruled two centuries of injustice. Before Mabo, Australian law ignored the pre-colonial property rights of Aboriginal and Torres Strait Islander peoples. In Mabo, the Court ruled that Australian law could recognise Aboriginal and Torres Strait Islander peoples' rights and interests in land.

Mabo was a watershed moment in Australian law and Australia's relationship with First Nations peoples. In his Redfern Speech[3] delivered later that year, Prime Minister Paul Keating lauded the judgement, declaring that it "establishes a fundamental truth, and lays the basis for justice". The decision led to the passage of the *Native Title Act* in 1993, which sets out a national system for the recognition and protection of Aboriginal and Torres Strait Islander peoples' rights to land. Now 30 years since Mabo, it is estimated that "Aboriginal and Torres Strait Islander peoples' rights and interests in land are formally recognised over around 40 per cent[4] of Australia's land mass." However, compromises and subsequent amendments leave many people wondering whether the *Native Title Act* fulfils the 'promise of Mabo'.[5]

[1] HIGH COURT OF AUSTRALIA - MABO AND OTHERS v. QUEENSLAND (No. 2)
[2] Ibid.
[3] Paul Keating Speech Transcript
[4] Indigenous Affairs - Land & Housing
[5] The promise of Mabo is yet to be realised

Terra nullius

Aboriginal and Torres Strait Islander peoples have occupied the Australian continent for at least 60,000 years. Organised in distinct political communities, First Nations peoples were bound together by a system of customary law that governed their relationships to each other and to Country. When the British arrived and colonised the continent, they ignored the pre-existing systems of law that had directed these societies for tens of thousands of years. In what became known as *terra nullius* (land belonging to no one), the British simply ignored the rights and interests of First Nations peoples.

The supposed legal basis for this approach was the 1889 decision of *Cooper v Stuart*. In this case, the Privy Council – then the highest Court for Australia – held that when the British arrived, the Australian continent was "a tract of territory practically unoccupied, without settled inhabitants or settled law".[6] This was factually incorrect, but it set in place a legal framework that continued until the 1990s.

The decision

Aboriginal and Torres Strait Islander peoples contested this position. In petitions, protests and litigation, First Nations peoples fought against the imposed legal system, calling for recognition of their rights to land. However, it was not until 1992 that the High Court was squarely confronted with this issue.

In *Mabo v Queensland* (No 2), the High Court was asked whether Australian law could recognise the land rights of the people of Mer (Murray Island) in the Torres Strait. The High Court said: yes. The Court rejected the position from *Cooper v Stuart*, holding that the Australian continent was neither empty of people nor of or laws. The court rejected the idea that *terra nullius* "was an appropriate legal foundation for Australia and renounced it as a legal fiction".[7] It

[6] (1889) 14 App Cas 286, 292.
[7] George Williams and Harry Hobbs, Treaty (Federation Press, 2nd ed, 2020) 209.

was out of step with both historical fact and basic principles of international law and justice.

The High Court said that the acquisition of sovereignty by the British did not displace First Nations peoples' land rights. Australian law could recognise native title. However, the Court also placed strict limits on native title. It held that Australian law can validly extinguish First Nations peoples land rights. Doing so did not even give rise to compensation at common law. In other words, unlike other property rights, Aboriginal and Torres Strait Islander peoples 'would not be compensated for the loss of their land'.[8]

The court also set out how native title could be found. First Nations groups would need to satisfy two requirements to have their rights and interests in lands and waters recognised by Australian law.

1. They must continue to acknowledge and observe their traditional laws and customs and therefore maintain the necessary connection to their traditional Country; and
2. They must demonstrate that their native title has not been 'extinguished' by law or government action

The response

Mabo (No 2) was immediately recognised as momentous. Guugu Yimidhirr lawyer Noel Pearson remarked that the decision "represents a turning point in the history of Australia since white 'settlement'", and "compels the nation to confront fundamental issues concerning the Indigenous people of Australia, issues which have been largely avoidable to date".[9] Lois O'Donoghue, the first Chairperson of the Aboriginal and Torres Strait Islander Commission agreed, arguing that the decision imposed 'a strong moral obligation'[10] on the Country:

[8] George Williams and Harry Hobbs, Treaty (Federation Press, 2nd ed, 2020) 210.
[9] Noel Pearson, '204 Years of Invisible Title' in Margaret Stephenson and Suri Ratnapala (eds), Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law (University of Queensland Press, 1993) 75, 89
[10] The Mabo debate - a chronology

> to ensure that Australia's Indigenous peoples who have maintained links to their traditional lands are given every opportunity to have those links recognised.[11]

Prime Minister Paul Keating agreed, noting that Mabo (No 2) "gives Australia a tremendous opportunity to get its relationship with the Aboriginal and Torres Strait Islander people right".[12]

Keating believed that legislation was the best way "to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management".[13] After several months of difficult negotiation, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth).[14]

In the Torres Strait, 3 June 1992 – the day the High Court handed down its judgement – is commemorated as Mabo Day in honour of Eddie Koiki Mabo.

[11] Cited in John Gardiner-Garden, 'The Mabo Debate – A Chronology' (Parliamentary Research Service, Background Paper No 23, 1993) 2.
[12] John Laws, Interview with Paul Keating, Prime Minister of Australia (Radio Interview, 17 June 1993) <https://pmtranscripts.pmc.gov.au/release/transcript-8895>.
[13] Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2878 (Paul Keating).
[14] Native Title Act 1993

Email: hello@antar.org.au
Phone: 02 9280 0060

PO Box 77
Strawberry Hills NSW 2012

With thanks:

This background report was authored by
Dr Harry Hobbs, Research Consultant.

ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.

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