Aboriginal peoples and Torres Strait Islanders should be aware that the names of deceased persons appear in the article below.

The importance of Mabo Day

and the *Native Title Act 1993*

Many Australians mistakenly think that native title began with the historic High Court of Australia decision in *Mabo and others v Queensland (No.2)*[1] (the Mabo decision).

However, native title is the recognition of the long-held traditional laws and customs of Australia's Aboriginal peoples and Torres Strait Islanders. These traditional laws and customs have existed and been practised since time immemorial.

All native title cases post-Mabo have been about the recognition of pre-existing and ongoing native title rights and interests by traditional owner groups in different parts of Australia.

British Empire's assertion of sovereignty

At the time sovereignty was asserted by the British Empire it was not uncommon for the colonial power to acquire sovereignty over territories with existing populations, laws and property rights. The rules for determining which rights would be recognised under the new sovereign were a matter for British Imperial law. In part, the rules depended on the distinction between settled and conquered (ceded) colonies.[2]

In a 'settled' or 'desert and uninhabited' colony, the laws of England, if not inconsistent with local circumstances, were imported on acquisition of sovereignty. The doctrine of continuity was thought not to pertain to settled colonies; logically, if there were no local laws then there were no rights of property to respect.[3]

Aboriginal peoples and Torres Strait Islanders were understood factually to have been present at sovereignty in Australia, but their social systems and governance were not recognised by British law—it was, in this sense only, *terra nullius* 'desert and uninhabited'. By the 1860s, it was increasingly accepted that Aboriginal peoples and Torres Strait Islanders were to be treated as British subjects. Thereafter, only common law would apply to govern Aboriginal peoples and Torres Strait Islanders within Australia.[4]

By the 1980s more than 200 years of anthropology and historical study of Aboriginal peoples and Torres Strait Islanders had clearly demonstrated that, far from lacking a system of laws and customs, the Aboriginal peoples and Torres Strait Islanders of Australia had, over tens of thousands of years, developed complex forms of social organisation, including laws relating to ownership and management of land. However, because of the ethnocentric view of the British Empire in 1788, they wrongly believed that the Aboriginal peoples and Torres Strait Islanders did not have a system of land law deserving recognition by the common law. Up until 1992 that remained the law.[5]

The significance of the Mabo Decision

Legal proceedings for the Mabo case began in 1982, when a group of Meriam people, Eddie Koiki Mabo, Reverend David Passi, Celuia Mapoo Salee, Sam Passi and James Rice (who are all now deceased), brought an action against the State of Queensland and the Commonwealth of Australia, in the High Court, claiming 'native title' to the Murray Islands.

When the High Court handed down its judgment on the matter in 1992, the judges acknowledged that, in the face of the historical facts and modern attitudes to human rights, the common law of Australia, in good conscience, could no longer refuse to recognise the native title of the Aboriginal peoples and Torres Strait Islanders of Australia. In effect, the judges said that, knowing what we know now, it would be unjust for the common law of Australia to maintain the fiction that Australia in 1788 was *terra nullius*.[6]

3 June marks the anniversary of the decision which declared that the "Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands".[7] The decision did not give benefits to the Aboriginal peoples and Torres Strait Islanders in the form of rights that they did not have before; rather it belatedly recognised rights to ownership of land which the Aboriginal peoples and Torres Strait Islanders had possessed for thousands of years before 1788.[8]

What is 'native title'?

According to the Mabo decision, the rights and interests that constitute native title have their origins in those rights and interests acknowledged under traditional laws and customs which pre-existed the assertion of British sovereignty. Native title, though recognised by the common law, is not an institution of the common law.[9]

Native title acknowledges that Aboriginal peoples and Torres Strait Islanders have a direct and continuing connection to the land since time immemorial. In addition to this, native title is the legal recognition that they have access to their land and seas to carry out their traditional practices and customs.

Mabo Day, held on 3 June, celebrates the High Court decision which gave legal substance to native title. Report by **Leah Cameron** and **Cassie Lang**.

The laws and customs of Aboriginal peoples and Torres Strait Islanders differ between groups. Just like laws differ between the states of Australia or between countries. Also, as with the laws and customs of all living communities, the laws and customs of Aboriginal peoples and Torres Strait Islanders are not static. They change over time to meet the challenges of the day. Given the significant impact of European contact, it is not surprising that the laws and customs of Aboriginal peoples and Torres Strait Islanders have undergone substantial change over the years.[10]

Native title can be recognised in different ways. Aboriginal peoples and Torres Strait Islanders may be determined to have the right to live on the land; access the area for traditional purposes; visit and protect important places and sites; hunt, fish or gather traditional food or resources on the land or sea and trade them; and teach Aboriginal and Torres Strait Islander laws and customs on the land or sea. In some cases, native title can include the right to own and occupy an area of land or water to the exclusion of all others.

Native Title Act 1993 (Cth)

In response to the High Court's decision, the Commonwealth Government introduced the *Native Title Act 1993 (Cth)* (NTA), which provides a framework for Aboriginal peoples and Torres Strait Islanders to seek recognition over their traditional country. At the time of its introduction to Parliament, the NTA was said to reflect the need to balance Aboriginal peoples and Torres Strait Islanders' interests, the proposals for significant state involvement in the processes under the NTA, and industry concerns for 'certainty' – all within the overarching Commonwealth framework. The NTA was seen as an opportunity "to do justice to the Mabo decision in protecting native title and to ensure workable, certain, land management".[11]

In summary, the NTA:

- prescribes that native title cannot be extinguished except in the manner set out in the NTA
- provides a mechanism regulating activities which affect native title rights and interests
- provides a mechanism by which native title rights and interests can be established and compensation determined
- validates past acts which may be invalid because of the existence of native title rights and interests.

Why is Mabo Day important to Aboriginal peoples and Torres Strait Islanders?

The Mabo decision was a turning point for the recognition of Aboriginal and Torres Strait Islander peoples' rights, because it acknowledged their longstanding and unique connection with the land for the last 65,000 to 80,000 years. It also led to the Australian Parliament passing the *Native Title Act* in 1993.

Mabo Day symbolises the long struggle of Aboriginal peoples and Torres Strait Islanders for recognition as custodians, protectors and knowledge holders of their culture. It also recognises that Aboriginal peoples and Torres Strait Islanders had been dispossessed of their lands piece by piece as the colony grew and that very dispossession underwrote the development of Australia as a nation. This recognition is set out in the NTA preamble.

The Mabo decision has been an inspiration for Indigenous peoples around the world and a platform to secure native title rights and interests over land and seas. Native title and the Mabo decision have encouraged more and more members of the Australian community to pay their respects and acknowledge the traditional owners on the land they stand, work and live.

Although the recognition of native title has brought great gains, there are still many challenges which remain.

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Notes

1 [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992).
2 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth), Report No.126 (2015).
3 Ibid.
4 Ibid.
5 Jeff Kildea, *Native Title: A Simple Guide – A Paper for those who wish to understand Mabo, the Native Title Act, Wik and the Ten Point Plan* (July 1998) Human Rights Council of Australia.
6 Ibid.
7 At [129].
8 Above n5.
9 Above n2.
10 Above n5.
11 Above n2.