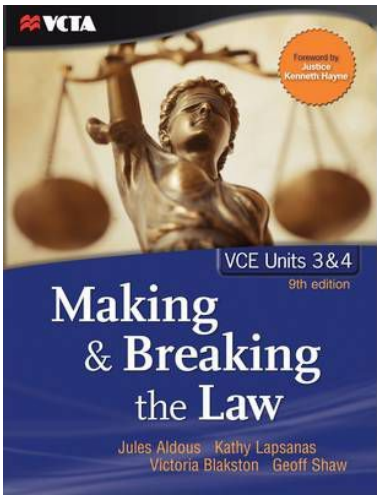


Aldous, J., Lapsanas, K, Blakston, V. & Shaw, G. (2010). *Making and breaking the law*. South Yarra: VCTA.

Folio exercise

Activity

Making judgments on abortion

Read the article 'Why has the law about abortion been so slow to develop?' and answer the following questions.

1 Briefly summarise the law concerning abortion prior to 2008. How has this been affected by judicial decision? Why do you think parliament left it to the courts to decide when an abortion was unlawful?
2 'Making and interpreting laws on abortion have been notoriously difficult.'
   a What do you think are the weaknesses of relying on court interpretations to determine when an abortion has been unlawful?
   b If the community became dissatisfied with the way in which the courts have interpreted these laws, what action could be taken? What would be the effect?
3 It has been suggested that the independence of courts makes them the best law-maker to deal with controversial and divisive issues such as abortion.
   a What are the strengths of including the courts in the law-making process?
   b Do you agree with the above statement? Why/why not?

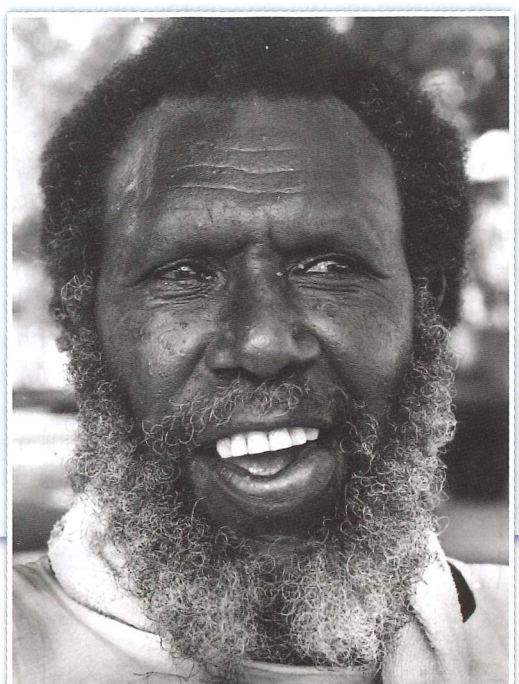
Case file

What is native title?—a landmark case

For more than 200 years it was considered that Australia at the time of British settlement was a land without settled inhabitants or settled law. Under the legal concept of *terra nullius*, the new settlers claimed ownership of the land.

Mabo Case

In 1982, Eddie Mabo from the Murray Islands started a court action against the Queensland Government. This court action involved a claim to the right of ownership over the Murray Islands. The Murray Islands are a group of three islands in the Torres Strait. They had been claimed as British territory by Captain Bligh in 1792, and Queensland became responsible for their administration in 1879, at which point the islands were considered to have become part of Australia. The Meriam people, who are indigenous to the islands, continued to live there in the traditional way. They maintained their communities, lived by their traditional beliefs and customs, and settled disputes between members of the community according to customary law.



Eddie Mabo

In 1985, the Queensland Government passed the *Coast Islands Declaratory Act*. This Act claimed that all rights to the land had passed to the Crown in 1879, that native title to the land did not exist, and that the Meriam people were not entitled to any compensation for the loss of their land. The Act was based on the concept of *terra nullius*.

Terra nullius means that Australia was settled as an 'empty land'. The British did not recognise any existing legal system or government structure of the Indigenous people. Therefore, they didn't recognise the need to make a treaty for the settlement of the land.

The Meriam people claimed that they had a right to their land under native title. Eddie Mabo (representing the Meriam people) asked the High Court to declare the Queensland law to be invalid because it was inconsistent with the *Racial Discrimination Act 1975* (Cth), as the Meriam people had not been paid just compensation for the loss of title to their land. The Queensland Government argued that the common law of *terra nullius* applied.

High Court—changing the principle of *terra nullius*

In June 1992, the High Court of Australia handed down a decision about the ownership of the Murray Islands. The High Court changed the common law of *terra nullius*. The decision of the High Court was that 'native title' did exist.

The decision was handed down by the full bench of the High Court (seven justices). The judgment took over 200 pages. A 6–1 majority decided that native title did exist when there is a continuous link between the current inhabitants and their pre-invasion ancestors. Some laws and customs associated with the area might have changed but native title exists, provided that the general connection between the Indigenous people and the land remains.

Native title is lost if the group ceases to exist, or ceases to exercise its laws and customs associated with the area, or if its contact with the land ceases.

Parliament responds

A series of native title claims were subsequently lodged with the courts. The High Court decision caused concern among a number of groups and industries throughout Australia. Industrial bodies involved in the development of land or natural resources, such as mining companies, were concerned that the deciding of native title should not be left to the courts. Court action can be time-consuming, and the costs and damages awarded can be difficult to calculate. Farmers, particularly holders of leasehold title, wanted the Commonwealth Government to clarify the High Court's decision.

Clearly, the rights and responsibilities of individuals in relation to native title needed to be clearly stated. To develop the law through the common law would mean a number of cases being heard by the High Court. This would be a very long and expensive process.

On 22 December 1993, the *Native Title Act* was passed. It came into effect on 1 January 1994.

The *Native Title Act*

The *Native Title Act* aimed to provide recognition and protection of native title. It established ways in which future dealings affecting native title may be determined, and set up the mechanism for determining claims of native title. Features of the Act include the following.

- Land that is owned by people cannot be claimed for native title. In other words, property such as homes, shops, factories and farms cannot be claimed under native title. (This applies to all land purchased from the Crown prior to 1993.)
- Indigenous Australians can claim native title to Crown lands where there has been a continuous occupation of the area claimed. Native title may be granted where there is a lease. Indigenous Australians can negotiate regarding the conditions of the lease but cannot veto it.

- A system of native title tribunals was set up. These tribunals operate at both state and federal levels.
- Limitations are imposed on the situations in which native title can be extinguished.

Aboriginal groups can only gain native title by lodging a claim with a state or Commonwealth tribunal. The Act sets up a Commonwealth tribunal for determining native title claims. Aboriginal groups have the option of lodging these claims with either a state or a Commonwealth tribunal.

The *Wik Case*

In December 1996, the High Court handed down a judgment on a case brought before the court by the Wik people of Cape York Peninsula. The Wik people had made native title claims to pastoral lands on the peninsula. The court was asked to determine whether native title actually existed on those leases. The High Court found, in a 4–3 decision, that native title and pastoral leases could coexist. However, they held that where there is a conflict in the two types of title, the pastoral lease would prevail.

The decision reopened many of the questions raised by the *Mabo Case* decision. In 1998, the Commonwealth Parliament amended the *Native Title Act* to further clarify the rights of Indigenous people and leaseholders.

Folio exercise

Activity

Understanding native title

1 What was the legal principle of *terra nullius*?
2 What was the role of the High Court in determining whether native title existed?
3 Justice Brennan stated:

> *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 fiction by which the rights and interests of indigenous inhabitants in land were treated as nonexistent was justified by a policy which has no place in the contemporary law of this country.*
>
> ***Mabo and Others v. State of Queensland* (No. 2) (1992) 175 CLR 1**

a What factors do you think the High Court took into consideration when deciding whether the common law concept of *terra nullius* should be applied?