

AUSTRALIAN PUBLIC LAW CASE NOTES



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Sample

Mabo v Queensland (No 2) (1992) 175 CLR 1

- Court details

Full Court of the High Court of Australia

- Procedural history

This case came after another High Court case *Mabo v Queensland (No 1)* 1986 64 ALR 1. This case was a special application to the High Court.¹

- Facts

The action which brought about the decision had been led by Eddie Mabo from the Meriam people (from the Murray islands in the Torres Strait). They commenced proceedings in the High Court in 1982, in response to the *Queensland Amendment Act 1982* (Qld) which established a system of making land grants on trust for Aboriginals and Torres Strait Islanders, which the Murray Islanders refused to accept.²

The action was brought as a test case to determine the legal rights of the Meriam people to land on the islands of Mer, Dauar and Waier in the Torres Strait, which were annexed to the state of Queensland in 1879. Prior to British contact the Meriam people had lived on the islands in a subsistence economy based on cultivation and fishing. Land on the islands was not subject of public or general community ownership, but was regarded as belonging to individuals or groups.³

In 1985 the Queensland Government attempted to terminate the proceedings by enacting the *Queensland Coast Islands Declaratory Act 1985* (Qld), which declared that on annexation of the islands in 1879, title to the islands was vested in the state of Queensland "freed from all other rights, interests and claims whatsoever". In *Mabo v*

¹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

² Ibid.

³ Ibid.

Queensland (No 1) (1988) the High Court held that this legislation was contrary to the *Racial Discrimination Act 1975* (Cth).⁴

The plaintiffs sought declarations, inter alia, that the Meriam people were entitled to the Murray Islands "as owners; as possessors; as occupiers; or as persons entitled to use and enjoy the said islands".⁵

- Issues

The plaintiffs argued for a possessory title by reason of long possession.⁶

The Queensland government argued that when the territory of a settled colony became part of the Crown's dominions, the law of England became the law of the colony and, by that law, the Crown acquired the "absolute beneficial ownership" of all land in the territory.⁷

- Reasoning / Decision (commentary)

Five judgments were delivered in the High Court, by Brennan J, Deane and Gaudron J, Toohey J, Dawson J, and Mason CJ and McHugh J.⁸

The decision was based on the findings of fact made by Justice Moynihan of the Supreme Court of Queensland; that the Murray Islanders had a strong sense of relationship to the islands and regarded the land as theirs. All of the judges, except Justice Dawson, agreed that:

- there was a concept of native title at common law;
- the source of native title was the traditional connection to or occupation of the land;

4 Ibid.

5 Ibid.

6 Ibid.

7 Ibid.

8 Ibid.

- the nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs; and
- native title could be extinguished by the valid exercise of governmental powers provided a clear and plain intention to do so was manifest.⁹

Rejection of terra nullius

The decision recognised that the indigenous population had a pre-existing system of law, which, along with all rights subsisting thereunder, would remain in force under the new sovereign except where specifically modified or extinguished by legislative or executive action. The Court purported to achieve all this without altering the traditional assumption that the Australian land mass was "settled". Instead, the rules for a "settled" colony were said to be assimilated to the rules for a "conquered" colony.¹⁰

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⁹ Ibid.

¹⁰ Ibid.