

Student resource sheet

Introduction to native title

In the past few decades, Aboriginal and Torres Strait Islander peoples have been engaged in struggles to establish native title agreements. The historic legal decisions to recognise certain land rights of the Mabo and Wik peoples have been interpreted by the Australian public as victories for Indigenous Australians who are seen to be 'reclaiming' their territory. This simplistic and inaccurate view of the legal and political situation is challenged by the Native Title Conference presentations explored in this program of study.

At the conference, the complexities of the issues surrounding the fight for land justice are explored. A variety of perspectives are presented that reveal the ways in which the rights of Indigenous Australians have been articulated within a legal system imposed upon them by people with alternative histories and alternative worldviews. Thus Indigenous Australians have been brought into conflict over Country – legal and social conflict, as well as conflicts with pastoralists, miners and other users of the land and waters of Australia.

While it is true that agreements can be and have been negotiated, the ways in which those agreements satisfy or fail to satisfy the needs of Indigenous Australians and both the letter and the spirit of the law of the Commonwealth of Australia, remain in question. In the wake of the native title decisions of past years, it has never been more important to continue efforts to come to a greater understanding of the legal and moral implications involved in recognising Indigenous peoples' connection to their land through their own laws for this generation and subsequent generations of Indigenous Australians.

Key Doctrines

Land rights

The term 'land rights' has passed into common usage in Australia. In this depth study, we use the term to refer to the rights of Aboriginal and Torres Strait Islander peoples to possess, use, access and otherwise deal with land collectively, according to their own laws and customs. Indigenous peoples have been affected profoundly by dispossession in terms of their self-determination, cultural and religious identity, economics, kinship and personal sense of belonging.

Native title (known in various countries as Aboriginal, Indigenous, Customary or Original Indian title)

Under Australian common law, Indigenous peoples may have certain rights on land under their own laws and customs. These rights are recognised and protected by the law but are also vulnerable to being extinguished by government. While the law recognises that native title may exist in any part of Australia, the requirements for proof that it applies to a particular area are significant and burdensome. Generally the claimants must provide evidence of a continuous system of law and custom that gives rights to land and is handed down from generation to generation since before colonisation. Native title is an area of comparative law, where legal precedent underpins new cases. Indigenous peoples were not considered, let alone involved in the formulation of Australian property law which dates back to the nineteenth century.

Terra Nullius

The international law doctrine of terra nullius has undermined the land rights of Indigenous Australians until the Mabo decision. This notion comes from the Latin phrase for 'land belonging to no one'. The notion of terra nullius holds that territory that has not been previously held under the sovereignty of any nation (or which has been relinquished by a previous owner) is open to settlement by any power that asserts sovereignty through occupation.

Legalities

Compensation

The High Court determined that native title could be extinguished by any act of a government. They said that until a law preventing racial discrimination (*The Racial Discrimination Act 1975*) was passed, governments could extinguish native title without consent and without compensation.

Official bodies

In Australia, native title cases are brought before the Federal Court of Australia, then pass on to the High Court at the appeal stage if required. Once native title has been recognised by the court, the claimants must set up a corporation (Prescribed Bodies Corporate) to hold and manage it. The National Native Title Tribunal (NNTT) mediates between claimants and state governments and any other parties with interests in the land with the intention of reaching an agreement about whether native title exists rather than litigating before the court.

The Native Title Act (NTA)

After the Mabo decision, Australian law codified the ruling by establishing the Native Title Act in 1993.

Extinguishment

Native title can be extinguished under Australian law by legislation that has a clear and plain intention to extinguish past Acts that are inconsistent. Native title rights can be extinguished individually, that is, some rights are extinguished while others remain intact. This allows native title to coexist with other forms of land tenure in Australia.