

- Transferred ownership of certain lands to aboriginal people and provided a foundation for land right claims based on outcomes that are different from those for native title
- 1992 – High court reconsidered the issue
 - Mabo v Queensland
 - Crown did not acquire exclusive possession of all Australian land
 - Recognised that indigenous people occupied the land prior to Colonisation
 - Colonisation did not vest in the Crown exclusive legal possession of all Australian land but only ultimate land ownership.
 - Included Torres strait island of Mer – where Mabo belonged
 - The land could be occupied, used and claimed by indigenous people who possessed the land before Colonisation

7.2.2 Native Title Rights (P 392)

- A right to use the land in accordance with the claimants customs
- Comes from traditional laws and customs of indigenous people in relation to their land
- Ongoing nature that gives indigenous people title
- Affords indigenous claimants a continuous right to use their land in accordance with their traditions
- For a native title to be legally recognised, indigenous claimant must prove:
 - They had an ongoing connection with their traditional lands since Colonisation
 - Their connection is determined by their own laws and customs that gives them right to their land
 - There has been no extinguishment of their rights
- Can be extinguished in the following ways:
 - Prior 1975 – Crown through legislation
 - Where there is a grant of land to a third party that is inconsistent with a right to enjoy native title
 - Where there are laws by which the crown acquires full beneficial ownership of land previously subject to native title
 - Where common law will not recognise native title in fact
 - Where claimants fail to establish the required continuity of connection between the laws

7.3 Developments since Mabo (P 393)

7.3.1 Legislative Response (P 393)

- Native title Act 1993 (Cth)
 - Reflected the heated negotiations between Commonwealth Government and miners, pastoralists, various other primary production industries, states and indigenous reps
 - Governs the recognition, limitations and definitions of native title, and established the procedure for making native title claims
- Jango v Northern Territory of Australia [2006] FCA 318
 - Claimant group has a right to compensation where native title is found by a court to be extinguished by a government after enactment of the Racial Discrimination Act
- Other features of the Native Title Act:
 - Recognition of communal native title
 - Prescription of the circumstances for extinguishment of native title
 - Formation of national system for processing native title claims over land without exclusive possession

- Create of the national native title tribunal to mediate between claimants and respondent parties
- Legal recognition of the native title representative bodies to present claimants

7.3.2 Wik and Further Legislative Response (P 394)

- *Wik Peoples v Queensland (1996)*
 - Determined that native title is not necessarily extinguished by the grant of pastoral lease, and that native title can coexist with other interests in land
 - Where the two are inconsistent, non-native-title holders rights with prevail
- Native Title Amendment Act 1998
 - Limited native title rights, listed numerous instances of extinguishment, including crown acts, public works, etc
 - Once extinguished, there can be no revival
 - Made it harder for indigenous people to submit customary evidence – a greater amount of supporting information is now required
- Yorta Yorta Federal Court Trial
 - Determined that native title did not exist over Crown land and water in the claim area along Murray river in NSW and VIC
 - Tide of history (Colonisation, etc) had washed away the Yorta Yorta community traditional laws, languages and customs and thus their evidence for native title claims
- 2002 – High court upheld abovementioned decision
 - native title almost impossible in the settled regions of Australia

7.4 Other Forms of Recognition of Indigenous Rights to Land (P 397)

- These forms of land rights have limitations:
 - Confined areas where indigenous people can claim land rights under legislation
 - Powerful interests determining the terms of negotiated agreements
 - Long periods for time required to settle claims under legislation or agreement

7.4.1 Indigenous Land Rights Legislation

- Involves granting common law and title of indigenous people
- Distinct from native title whereby indigenous title is recognised
- The Aboriginal Land Rights (NT) Act 1976 (Cth)
 - Recognises aboriginal rights to land in conformity with the common law property system
 - Successful claim will result in:
 - Absolute ownership with some restrictions
 - Communal title over land
 - The land being administered by representative bodies
 - Veto rights of the traditional owners to mining activity or reasonable compensation
 - Royalties being paid if mining is approved
 - Possibility for native title rights to be exercised
- Legislative provides a higher form of title over native title but there are shortcomings:
 - Generally, only vacant Crown land can be granted
 - Land is rarely commercially valuable

- Processing claims can take a long time

7.4.2 Negotiated Outcomes for Indigenous Land Rights (P 400)

- Between indigenous people, government, mining companies, etc
- Agreements are voluntary with a view to reaching a consensus position on native title and competing land interests
- Are made with respect to land access, etc
- Can take a long time to process (up to 10 years)
- Known as Indigenous Land Use Agreements

7.5 Ongoing Non-Recognition of Customary Law (P 402)

7.5.1 Judicial Reluctance to Recognise Indigenous Criminal Law (P 402)

- After Mabo, litigants went to the HC alleging that indigenous people who commit crimes within their communities should be tried by their own laws, rather than common law
- Coe v Commonwealth (No. 2)
 - Coe argued that her tribe had continuing native title rights and sovereignty claims
 - High court rejected the argument as there was no native title rights due to the prevailing statutory
- Walker v New South Wales (1994)
 - Involved a criminal defendant who brought his case to the HC, alleging customary laws can coexist with common law in the same way native title coexists with the common law property system
 - The court considered there was no analogy between customary laws by the enactment of criminal statutes

7.6 Alternative Paths for Incorporating Customary Law Into the Common Law (P 403)

- Law Reform Commission Proposals on Customary Law
- Attempts to take customary law into account in criminal cases
 - Indigenous Peron's belief that their act was unlawful under customary law will not suffice as a full defence
 - Walden v Hensler
- 2007 – federal government passed legislation to remove cultural considerations in sentencing
- Government initiatives in customary sentencing process
 - Circle sentencing – a formal mechanism where elders, the victim, the offender and their law, family members of the offender and victim, prosecutor and magistrate sit in a circle to discuss and decide upon a sentence by consensus
 - Specific indigenous courts

7.7 Treaty and Sovereignty Rights (P 409)

- When land is already inhabited, usually a treaty is negotiated
- Since Terra Nullius overturned in Mabo, the issue of whether a treaty should be negotiated has been revived