

Week 4: Mabo's case and its impact on Australian law

I. The Doctrine of *Terra Nullius* and English Law's Reception

The core premise that governed the introduction of English law to Australia was the doctrine of *terra nullius*.

A. Justification for Settlement

- **Definition:** *Terra nullius* literally means 'the land of no-one'. It was applied either to uninhabited land or to land inhabited by people considered, then, to be '**too primitive**' to have a system of law or any established or recognizable proprietary relationship to land.
- **Acquisition Method:** The British justified their acquisition of the Australian continent on the basis of this enlarged notion of *terra nullius*. This method of acquisition of sovereignty was called '**settlement**' in English common law.
- **European Legal Context:** European nations generally understood that a people could be considered civilized only if they had a recognizable legal system, including principles about land ownership, which often required agriculture and reflected **contemporary European notions of property ownership**.
- **Ignoring Indigenous Systems:** Since the nomadic Aboriginal groups encountered were **not seen as 'owning' land** and were not perceived as having a political culture or system of law, their rights were "**utterly disregarded**".

B. Legal Effect of Settlement (Reception of English Law)

- The common law position, established in **Cooper v Stuart (1889)**, was that Australia had been settled.
- **Transplantation:** The legal effect of settlement was the **application of the English common law** to the new Colony of New South Wales. All laws in force in the British colony were immediately in force in the settled colony.
- **Reception Date:** English law, including common law, equity, and statute law, was transplanted on **26 January 1788**.
- **Crown Title:** As the British brought English property law with them, they also brought the concept of '**ultimate**' or '**radical**' title. This concept, derived from the feudal system, meant that the land on which they settled **belonged to the Crown**. All subsequent ownership was then derived from an original grant from the monarch.
- **Consequences:** This application of English land law, occurring under the fiction of *terra nullius*, meant that Indigenous customary law was largely ignored, resulting in a "**destructive effect on the First Nation peoples**".

II. The *Mabo* Challenge: Overturning the Fiction

In *Mabo v Queensland (No 2)*, the High Court rejected the core premise of *terra nullius* and redefined the relationship between English common law (via the Crown's title) and pre-existing Indigenous rights.

A. Judicial Findings Against *Terra Nullius*

- **Sovereignty Unchallenged:** The Court confirmed that Britain's sovereignty over Australia **cannot be challenged in an Australian municipal court**. This act of State, known as the acquisition of territory, is distinct from the municipal law question of property ownership.
- **Fictional Basis:** Six members of the High Court agreed that the previous view that Australia was *terra nullius* at the time of British settlement **was wrong**. The theory that Indigenous inhabitants had no proprietary interest was dependent on a discriminatory denigration of Indigenous social organization and customs. The Court

I. Statutory Interpretation Methodology, Rules, and Maxims

This category covers cases defining the modern purposive approach, using extrinsic and intrinsic aids, and applying common law maxims like *ejusdem generis*.

Case Citation	Doctrine/Issue	Core Rule / Finding
<i>CIC Insurance Ltd v Bankstown Football Club Ltd</i> (1997) 187 CLR 384	Modern Approach & Context	High Court confirmed that the modern approach insists the context be considered in the first instance (not just when ambiguity arises). Context includes the existing state of the law and the mischief intended to be remedied.
<i>Project Blue Sky v Australian Broadcasting Authority</i> (1998) 194 CLR 355	Contextual Interpretation	The process of construction must always begin by examining the context of the provision being construed. Interpretation requires reading the Act as a whole .
<i>Deputy Commissioner of Taxation v Clark</i> (2003) 57 NSWLR 113	<i>Ejusdem Generis</i>	Confirmed that more than one word of specific meaning is generally required to establish a genus. Application is rarely justified , as general words must be determined by the whole context, scope, and purpose of the statute.
<i>Canvan Coals v Federal Commissioner of Taxation</i> (1974)	<i>Ejusdem Generis</i>	Interpreted the phrase "Railway, road, pipeline or other facility" to exclude a storage facility , confining "other facility" to those that allowed goods to be moved or passed through.
<i>Craig Williamson v Barrowcliff</i> ****	Consistent Use	Held it is a fundamental rule of construction that any document should be construed as far as possible by assigning the same meaning to the same words wherever those words occur .
<i>Chappell v Associated Radio Co</i> ****	Legislation Always Speaking	If items not known at the commencement of an Act fell within its words on a fair construction, they

I. Statutory Interpretation Doctrine (Methods, Aids, and Machinery)

Legislation	Rule / Principle	Relevant Section(s)
Acts Interpretation Act 1901 (Cth AIA)		
Purposive Construction Mandate	Interpretation that would best achieve the purpose or object shall be preferred (equivalent to literal meaning giving way to purpose).	s 15AA
Intrinsic Aids (Material Parts)	All material from and including the first section to the end of the last section, and any Schedule , is part of an Act.	s 13(1)
Constitutional Construction	Construction is subject to the Constitution; Act must be valid to the extent it is not in excess of power.	s 15A
Substantive Enactment	Every section of an Act shall have effect as a substantive enactment without introductory words.	s 12
Extrinsic Aids	Authorises use of material (reports, debates, EM) to confirm meaning OR to determine meaning if ambiguous/absurd.	s 15AB
Grammatical Forms	Where a word is defined, its grammatical forms and parts of speech have corresponding meanings.	s 18A
References to Ministers	Rules for identifying which Minister is referenced in a provision.	s 19
Machinery of Government (MoG)	Rules for substituted reference orders related to authorities in Commonwealth agreements.	s 19B, s 19C
Saving MoG Acts	Saving the validity of acts done by authorities during MoG changes.	s 19D
Repeal/Revoke Power	Power to make an instrument includes the power to vary or revoke it.	s 33(3)