Indigenous law and lore pre-1788 – Extended

1. Definitional challenges

The nature of Aboriginal and Torres Strait Islander law and lore prior to 1788 is difficult to describe. First, because so much time has passed since Lieutenant James Cook's voyage up the eastern seaboard in 1770. Aboriginal and Torres Strait Islander law has since evolved, in particular because of the disruptions of colonisation. For example, classical principles of law concerning the descent of title to land changed in response to colonial dispossession, as communities were forced to adjust to severe depletion of their populations, or attempted eradication through genocidal murder and disease. Such evolution sits uneasily with contemporary legal requirements, adopted in Native Title cases like Yorta Yorta in 2002, that laws must remain substantially unchanged and mostly uninterrupted from their pre-1788 form, for Native Title to be recognised.

Second, Aboriginal and Torres Strait Islander legal systems differ significantly from contemporary Australian law, which makes translation and comprehension across cultural divides especially challenging. The Australian Law Reform Commission grappled with this challenge when in 1986 it reported on "the recognition of Aboriginal customary laws". The report noted that defining a system in one culture in the terms of another may entail misleading terminologies and concepts.

Third, Aboriginal and Torres Strait Islanders law before 1788, unlike Western law, was not written down in statutes and court judgments. Rather, the law was communicated orally and today must be discerned through historical records and anthropological evidence. Traditional societies that still exist in remote parts of Australia also provide contemporary evidence of the pre-1788 system, demonstrating that the skeletal principles of the classical system still persist in contemporary forms.

2. A government of laws and not of men

In the 1971 Gove Land Rights Case (*Millirrpum v Nabalco*), Justice Blackburn described the classical system of Aboriginal and Torres Strait Islander law and custom. After assessing the evidence of the laws and customs practiced by the Yolngu people of North-East Arnhem Land, Justice Blackburn concluded as follows:

> The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which ... was remarkably free from the vagaries of personal whim or influence. If ever a system could be called 'a government of laws, and not of men', it is that shown in the evidence before me.

This describes a system where law is transcendent and not the product of human institutions. The law and lore are as much spiritual as worldly. They entail rights and duties that apply to community members, and are upheld by elders who transmit this knowledge to younger generations.

3. Customary laws versus codified laws

Aboriginal and Torres Strait Islander customary laws are very different to codified laws in the Western system. While the Western law requires institutions like parliaments and courts to make laws and enforce them, Aboriginal and Torres Strait Islander customary laws are the result of long observance and practice. They are inherited from the Dreaming (explained below) and transmitted over generations in the cultural memory of each society. This also means that customary laws, unlike the Western law, cannot be changed by contemporary humans through institutional procedures. They are beyond the reach of people seeking law reform for political purposes. This is what it means to have a government of laws and not men. However, customary laws can evolve, while remaining anchored in the past through precedent, practice, ritual and tradition.

4. The moral basis of the law in religion

All systems of law, religious and secular, have their foundations in a moral system. Just as Judeo-Christian religion is the basis of English and European laws, Aboriginal and Torres Strait Islander religions are the basis of customary laws. The Dreamtime or the Dreaming, or the Story Time as it is called in some parts of Australia, forms the moral basis of the customary law. Traditional Aboriginal and Torres Strait Islander religions were animistic,which means the creation stories that form the spiritual history of Aboriginal and Torres Strait Islander societies do not distinguish between human and animal actors in the ancient past. These spiritual actors created the world in the Dreamtime. The customary law comes from the Dreamtime, not from present day institutions or governments.

5. The allocation of rights and duties

The purpose and function of Aboriginal and Torres Strait Islander customary law is to allocate rights and duties to the members of the society. These entitlements and duties concern access to and responsibilities for the spiritual and material resources available to the society. Such rights and duties are mediated through a system of kinship that structures the society and provides the basis of government. The chief features of the rights and duties conferred under Aboriginal law include:

a. **Descent of title:** Individuals and subgroups held various entitlements in respect of land according to kinship and rules of descent.

b. **Social relationships, norms and behaviour:** Customary laws prescribed and proscribed the full range of social relationships and associated norms and behaviour, including marriage, sexual relationships, the upbringing of children, the initiation of youth and so on. These customary laws were often highly prescriptive and detailed, governing things like the proper behaviour with in-laws.

c. **Resources and livelihood:** Customary laws determined access to natural resources on lands to which individuals and clan groups held rights.

d. **Language:** Languages attached to territory and were 'owned' by the owners of the territory to which these languages were attached. Individuals and groups were always multilingual, capable of communicating in their own languages as well as that of their neighbours. Customary law stipulated the rules of language custody and usage in particular contexts.

e. **Cultural knowledge and practices:** Customary laws governed the custody and transmission of cultural knowledge, both in terms of the responsibilities of teachers and learners. Secret and sacred knowledge and the persons, time and occasion for disclosure of that knowledge - such as the initiation of young males – were all matters covered by customary laws.

Uluru, Australia
Source: IStock

f. **Sacred places, symbols and objects:** Customary laws governed access, behaviour and knowledge associated with sacred places, symbols and objects that formed the religious-cultural domain of the life of Aboriginal and Torres Strait Islander societies.

g. **Kinship:** At the centre of Aboriginal and Torres Strait Islander societies were elaborate systems of kinship that were far more complex and prescriptive than those of modern societies. Systems varied across the country.

h.**Regional law and song-lines:** Customary laws were not confined to distinct groups but transcended them. Local laws would also apply to regional neighbours. Song-lines telling of the mythic journey of ancestors across the landscape are continental in scope, binding groups across regions to a common mythology. Their observance and transmission is the subject of customary laws and lore.

Like any law, Aboriginal customary law entailed sanctions for breach of the law. Punishments could entail shame, banishment, corporal punishment, wounding or death. Controlled and ritual violence was the means of enforcement of the law, in common with other systems.

Land Rights and Native Title

When Australia was colonised, it was treated by the British colonisers as 'terra nullius', meaning 'land belonging to no one'. There was no recognition that the relationship between Aboriginal and Torres Strait Islander peoples and their lands and waters was one of 'ownership'.

Aboriginal people and Torres Strait Islanders were often removed from their lands, and those lands were granted or sold to others or used for government purposes. Sometimes they were moved onto missions in other locations. One consequence was that many Aboriginal and Torres Strait Islander people ended up living for generations on lands that were not their traditional country.

Milirrpum v Nabalco

In 1963 the Yolngu people objected to 300 square kilometres of their land being cut off for use as a bauxite mine. At first, they petitioned the Commonwealth Parliament by sending two bark petitions to the Commonwealth Parliament. They objected to the lack of consultation and wanted their voices to be heard by Parliament. A parliamentary committee inquiry recommended compensation and the protection of sacred sites. But the mining proceeded.

The Yolngu then turned to the courts instead. They sought a declaration in the Northern Territory Supreme Court that they were entitled to occupy and enjoy their lands, to the exclusion of others, including miners. Justice Blackburn handed down his judgment in 1971 in a case called *Milirrpum v Nabalco*.

Justice Blackburn accepted that the Yolngu people had a 'subtle and elaborate system of social rules and customs' which provided a stable order of society. He said that if 'ever a system could be called "a government of law, and not of men", it is that shown in the evidence before me.' However, he felt constrained by a precedent set in the case of *Cooper v Stuart* in 1889, which had applied the doctrine of terra nullius, not to recognise a form of native title as part of Australian law. He also had difficulty in reconciling the type of relationship that Aboriginal and Torres Strait Islander people have with their lands and waters, including the spiritual relationship (which he found was 'well proved'), with the Australian legal definition of property interests in land. The idea of 'property' was understood in different ways by the two different legal cultures.

Prime Minister Gough Whitlam pouring soil into the hands of traditional owner Vincent Lingiari | Mervyn Bishop | 1975
Source: Museum of Applied Arts & Sciences

Land rights pioneer and artist Roy Marika | Yirrkala | mural by Mike Makatron and Cam Scale Source: Rirratjingu Aboriginal Corporation

Statutory land rights

One consequence of the failure of the claim in the *Milirrpum* case was that Aboriginal and Torres Strait Islander people shifted their focus back to politicians and Parliaments as a means of obtaining recognition of their rights to their lands and waters. In 1973, Justice Woodward was appointed to inquire into how Aboriginal land rights should be established in the Northern Territory. The Commonwealth Parliament has full legislative power to make laws with respect to territories under section 122 of the Commonwealth Constitution. Accordingly, it had power to address the issue in the Northern Territory, without the problems that would have arisen if it tried to interfere with State land titles.

While work was proceeding on this, the Whitlam Government also granted back to the Gurundji people in the Northern Territory a pastoral lease over their traditional lands. Vincent Lingiari and other members of the Gurindji people had walked off the Wave Hill station in 1966, seeking proper wages and conditions. The dispute then turned into one concerning reclaiming their land. In 1973 the Wave Hill lease was surrendered and divided into two – one for the Vestey Brothers who had been running the Wave Hill station and the other for the traditional owners. In August 1975, Prime Minister Whitlam visited and handed over the lease deeds to Vincent Lingiari, marking the occasion by pouring a handful of soil into his hands. This gesture was a symbolic reversal of Batman's 'treaty' with the Wurundjeri people in Victoria in 1835, when they had poured soil into Batman's hand.

Northern Territory land rights

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) was passed in December 1976, with bipartisan support. It provided the first comprehensive system of land rights, conferred by statute, in Australia. Prior to that, the Pitjantjatjara people in South Australia had been granted their lands by statute in 1956, but this was on a one-off basis. It did not extend to other South Australian Aboriginal peoples.

The *Aboriginal Land Rights (Northern Territory) Act* provided for the transfer of existing Aboriginal reserves to Aboriginal Land Trusts, to be held on behalf of their traditional owners and also for the transfer of vacant Crown land, when claimed by its traditional owners. Land Councils were established to represent the claimants and an Aboriginal Land Commissioner was also established to determine claims. The title given to land was 'inalienable freehold title'. It gave Aboriginal people the same level of ownership as anyone else who owns property, except that it could not be sold or mortgaged and was owned collectively.

Under this Act, at least 50% of the Northern Territory is now owned by Aboriginal peoples. In 2006 changes were made to permit the creation of individual property rights in townships on Aboriginal land.

Murray Island dancers. Source: Frank Hurley, National Library of Australia

New South Wales land rights

The State of New South Wales enacted its own land rights legislation in 1983. The *Aboriginal Land Rights Act 1983* (NSW) allowed claims to be made to Crown land by Aboriginal Land Councils. These represent Aboriginal people currently living in the area, rather than those who traditionally lived there. No traditional connection with the land needs to be established. It was recognised that many Aboriginal people had been removed from their traditional country for generations and that this should not further disadvantage them by impeding their access to land in the area in which they live. The freehold title to the land is granted to the relevant Aboriginal Land Council, which is empowered to sell it, unlike in the Northern Territory.

Native title rights versus land rights

Native title rights were first recognised by the High Court in the *Mabo* case in 1992. It accepted that Australia's common law recognises the rights of Aboriginal and Torres Strait Islander peoples to their traditional lands and waters, but that these rights may be extinguished by statute.

Native title rights are now governed by the *Native Title Act 1993* (Cth). They are different from land rights, because they originated in traditional Aboriginal or Torres Strait Islander law, as recognised by the common law, rather than statute. Native title gives a communal title, whereas land rights can (in some cases) give individual titles to land. In NSW, for example, land rights land can be sold, but native title land cannot be sold.

Sometimes land rights and native title rights conflict, as the traditional owners may be different from the people who live in a location now and hold land rights there.

The *Mabo* Case

The Islands

The Murray Islands, comprising the islands of Mer, Waier and Dauar, are located in the Torres Strait, north-east of the tip of Cape York in Queensland. Their status is unusual in a number of ways. First, they were not originally claimed as part of Australia, as they are closer to Papua New Guinea. But a desire by the British to control the sea lanes in the Torres Strait led Queen Victoria to empower the Governor of Queensland to 'annex' certain islands up to sixty miles from the Queensland coast.

Annexation meant that they became part of the colony of Queensland and subject to Queensland law. This was confirmed by the *Queensland Coast Islands Act 1879* (Qld).

This late annexation meant that unlike the mainland of Australia, there was written evidence of the operation of the local land law prior to annexation.

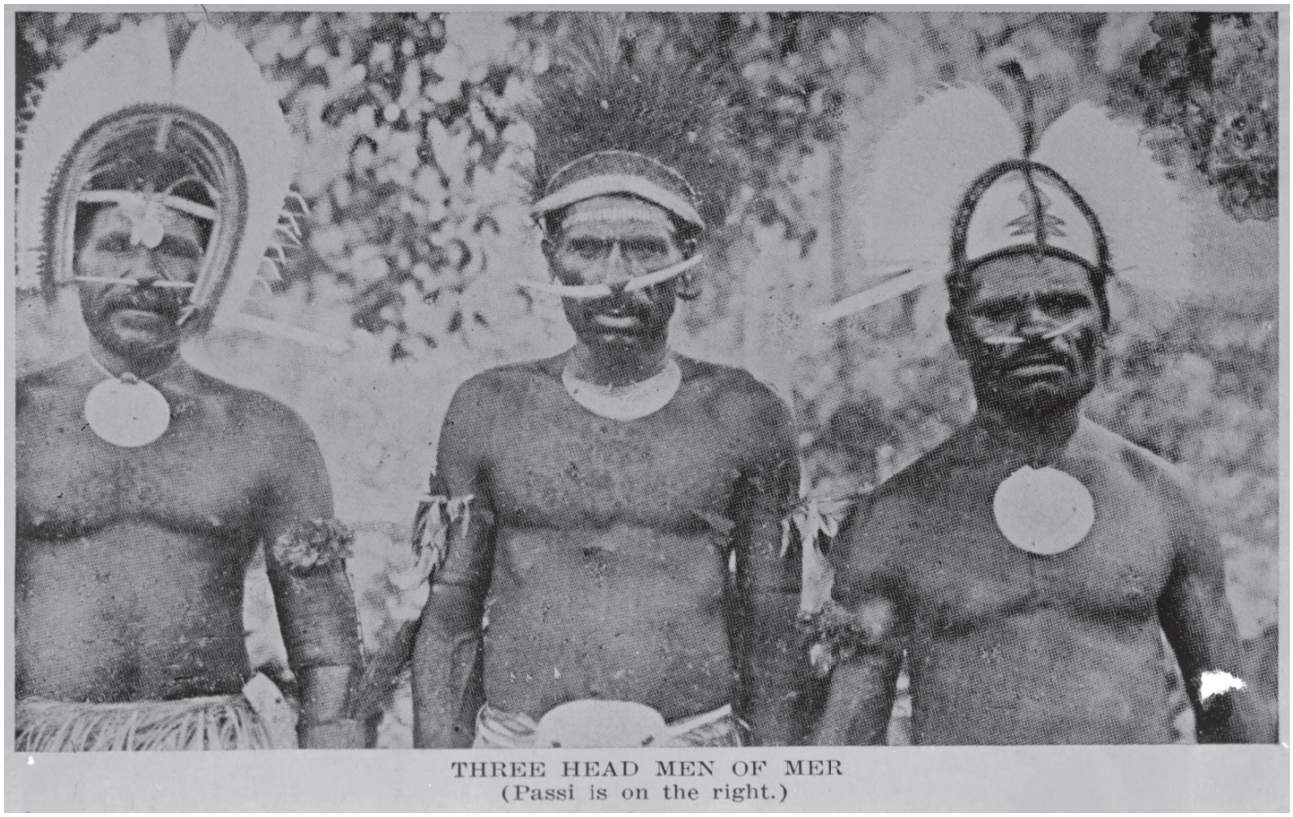
Second, the form of land ownership exercised by the Meriam people was very similar to the British system, with individuals having exclusive rights to fenced off areas of land in which they grew plants and food. This made it much easier for courts to 'recognise' a more familiar form of land ownership.

Third, the land was continually occupied by the Meriam Islanders and from 1912 was permanently reserved by law for their use. Apart from a lease to the London Missionary Society and another for a sardine factory, there were no competing land grants that might have wiped out ongoing native title.

The start of the litigation

In May 1982, Eddie Mabo, Reverend David Passi, Sam Passi, James Rice and Celiuia Mapo Sale, commenced a legal action claiming rights to the land of, and waters surrounding, the Murray Islands.

School children, Murray Island, Torres Strait, 1905
Source: National Library of Australia



Three head men of Mer | c. 1933
Source: Ion Idriess glass plate negative collection, National Library of Australia

They stated that since time immemorial the Meriam people had continuously inhabited and exclusively possessed the Murray Islands and parts of the surrounding sea and seabeds, in accordance with their laws, customs, traditions and practices. They acknowledged that the British Crown had obtained sovereignty over the Islands when they were annexed by Queensland. But they claimed that their traditional native title rights had survived that change in sovereignty. They argued that they had continued to possess and use their lands and waters and no action had been taken to extinguish their rights. They sought a declaration of the Court recognising their ongoing rights.

The *Mabo (No 1)* Case

In response to this litigation, the Queensland Parliament passed the *Queensland Coast Islands Declaratory Act 1985* (Qld). It declared that at the time of annexation of the Murray Islands, all pre-existing property rights in them were extinguished and no compensation was payable. Mabo and the other claimants argued that the Act was invalid because it breached the *Racial Discrimination Act 1975* (Cth). The High Court heard this challenge in the first *Mabo v Queensland* case, known as *Mabo (No 1)*. The Court held by a narrow majority of four to three that if native title rights existed (which had not yet been decided), then the *Queensland Coast Islands Declaratory Act* would have arbitrarily deprived people of those rights, contrary to the *Racial Discrimination Act*.

Under section 109 of the Constitution, Commonwealth laws override any inconsistent State laws to the extent of the inconsistency. The consequence was that Commonwealth's *Racial Discrimination Act* overrode the *Queensland Coast Islands Declaratory Act*, leaving it inoperative and therefore incapable of extinguishing native title rights.

The findings of fact by Justice Moynihan

Before the High Court could decide whether the law recognised native title rights, the facts needed to be determine about claims to land on the Murray Islands. The task of determining the facts was referred to Justice Moynihan of the Queensland Supreme Court.

He handed down a three volume judgment on 16 November 1990. He found that Eddie Mabo himself did not have any rights to land (as he had not been adopted as the heir of Benny Mabo). But as Dave Passi and James Rice did have such rights, the case continued to run in the High Court.

Beach scene showing three men catching sardines while two women wait to carry the catch away, Murray Island Source: Frank Hurley Collection, National Library of Australia

The Mabo (No 2) Case

By the time *Mabo v Queensland (No 2)* was heard by the High Court, Celuia Mapo Salee had died in 1985 and Sam Passi had discontinued his involvement in 1988, later dying in 1990. This left just Eddie Mabo, Father Dave Passi and James Rice as the plaintiffs. As Eddie Mabo was found not to have any relevant property rights (and also died in 1992 before the judgment was handed down), the case rested on the claims of Passi and Rice. It is still known as the *Mabo* case, because his name was the first listed when the case started, and this wasn't altered.

A majority of the Court, comprising Chief Justice Mason and Justices Brennan, Deane, Toohey, Gaudron and McHugh, concluded that the common law of Australia recognizes a form of native title right to land, which survived the acquisition of sovereignty over the Murray Islands by the Crown in 1879. While the Crown acquired the 'radical title' to the land (meaning the root title from which all other title springs), the common law recognised the existing native title rights. These were vulnerable to extinguishment if the Crown exercised its sovereign powers in a way that was inconsistent with continuing native title. This could occur by Parliament legislating to extinguish it or the government granting ownership or exclusive possession of the land to another, such as a grant of freehold title to land (eg most privately owned blocks of land).

The majority also concluded that the nature of native title to land and the persons entitled to it had to be determined in accordance with the laws and customs of the Aboriginal or Torres Strait Islander people concerned. The Justices were wary about trying to force native title to conform to traditional British concepts of property. Instead, they saw it as unique and thought it should be accepted on its own terms.

One important aspect of native title was that it could not be sold or given to someone outside the group of traditional owners. Only the Crown, because of its acquisition of sovereignty, could acquire native title from its traditional owners. This protected native title from exploitative acquisition by private developers, but it also weakened the ability of native title holders to benefit economically from the development of their lands. Importantly, native title is a communal title to property, rather than an individual title.

Finally, native title could be lost in a number of ways. It could be extinguished by legislation, or the reservation of land for particular public purposes, or the grant of land titles that are inconsistent with the continuation of native title, such as a grant that gives exclusive possession of the land to someone else. Native title could also be lost if the traditional owners failed to carry on traditional laws and customs relating to the land.

This could occur when Aboriginal and Torres Strait Islander peoples were removed from their land and displaced during the colonisation process. The High Court majority in *Mabo* noted, however, that the mere change and development of traditional law and custom would not extinguish native title, as long as it did not diminish or destroy the relationship with the particular land.

It is sometimes suggested that the High Court's rejection of 'terra nullius' is a form of recognition of Aboriginal sovereignty. That is not so. The case was argued on the basis that the British Crown had acquired sovereignty over Australia and that native title continued to exist as part of the 'common law' inherited from Britain. All the Justices in the *Mabo (No 2)* case stated that the sovereignty of the Crown over Australia was an 'act of state' which cannot be challenged in the courts. This is because a court only has status and power as a court because of the acquisition of sovereignty by the Crown. If a court rejected that sovereignty, then the court would not exist, and therefore could not have issued the judgment. The acquisition of sovereignty is a political matter which courts cannot determine.

The High Court in the *Mabo* case accepted that Australia was 'settled' by the British, who obtained 'sovereignty' over Australia, but that their laws recognised pre-existing native title rights to land, until such time as they were extinguished or otherwise lost. These notions of 'sovereignty' and the 'settlement' of Australia remain politically contested.

Post-*Mabo*

After the *Mabo* case, there were public concerns that it could mean native title claims would be made over people's backyards. The High Court had made it clear that grants of freehold title (the main form of home ownership) extinguished native title because they grant exclusive possession to land. But there was uncertainty about whether some other types of interests in land, such as pastoral leases would do so. For example, where vast pastoral leases had been issued in Queensland, they did not grant exclusive possession of the land to the holder of the licence. The High Court in the *Wik* case concluded that the pastoral leases could co-exist with ongoing native title rights, and therefore did not extinguish those rights.

Eddie Mabo at his home on Mer, Murray Islands.
Source: National Archives of Australia

In some cases, the traditional owners of lands and waters were unable to establish that they had continued to exercise their traditional laws and customs in relation to the land and therefore could not establish native title. An example is the *Yorta Yorta* case, where the High Court upheld a finding that native title had ceased to exist because the traditional owners had ceased to occupy their traditional lands in accordance with their traditional laws and customs in the 19th century. Nonetheless, the Victorian Government entered into an agreement with the Yorta Yorta people, involving them in the management of their traditional country.

After the *Mabo* case, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth) to regulate these newly recognised common law native title interests in land. It set up a framework for protecting and recognising native title on land, including the creation of a National Native Title Tribunal and a register of native title interests in land. It clarified the status of past land grants, by validating them. It also established a process for dealing with mining on native title land by way of consultation and negotiation. The validity of this Act was challenged by Western Australia in *Western Australia v Commonwealth*, but the High Court held it was valid. The High Court accepted that the 'race power' in section 51(xxvi) of the Constitution supported the enactment of the *Native Title Act*. The consequence was that any inconsistent State laws were inoperative.

Topic 10.2
Lesson

AUSTRALIAN CONSTITUTION CENTRE

Land rights, Mabo and native title

Time/Lesson

- 1 hour/ 1 Lesson

Learning Goal

- To revise previous lessons on Aboriginal and Torres Strait Islander rights and test students' understanding of those rights.
- To understand the history of land rights and native title and the distinction between them.
- To explain the role the High Court and Parliament had in recognising and supporting native title in Australia.

Rationale

Students investigate how native title rights were developed through High Court interpretation of the common law and how they were protected by statute (AC9HC10K03_E4). Students investigate the *Mabo* case and the significance of native title and land rights to Aboriginal and Torres Strait Islander peoples (AC9HH10K17_E3)

Success Criteria

Students can evaluate the contributions of the High Court and Parliament to recognising and protecting both native title and land rights of Aboriginal and Torres Strait Islander peoples.

Teaching Reference Documents:

TRD 129 Indigenous law and lore pre 1788 - Extended

TRD 130 Land Rights and Native Title

TRD 131 The *Mabo* Case

Resources

VIDEOS:

- From Little Things, Big Things Grow (6.44)
- Documentary by Reconciliation Australia about the making of the song 'From Little Things Big Things Grow' (9.26)
- News Report on Mabo Day 1992 (2.36)

Tuning In

- Watch the Song "From Little Things, Big Things Grow"
- CLASS DISCUSSION: What was the song about? How do you know this?
- Watch the documentary by Reconciliation Australia about the making of the song 'From Little Things Big Things Grow' about Vincent Lingiari, the Wave Hill walk-out and the return of his traditional lands: https://youtu.be/vut1ntcRMdQ.
- CLASS DISCUSSION:
  - Different tactics were used to achieve land rights. How effective were they?
  - What role do the arts – painting, the bark petitions and music, have to play in spreading an understanding of history, issues and calls to change?
  - Why does the Uluru Statement from the Heart use both words and art to convey its message? Which is the more effective, or are they both effective in different ways?

Teacher Instruction

- **REVISE:** Terra Nullius, UNIT 2, TRD 9, if students don't already understand the concepts in them.
- **READ:** TRD 130 Land rights and native title and TRD 131 The *Mabo* case.
- Draw a timeline on the whiteboard. Have students come up and put the date of important events for land rights and native title, and describe why it was important.
- Discuss the difference between statutory land rights (which are awarded to Aboriginal or Torres Strait Islander people who currently live in a location) and native title (which is awarded to the traditional owners of the land). Could this give rise to conflict? Whose rights should prevail?
- Research what proportion of Australia's land mass is now covered by native title or statutory land rights. What economic benefits are derived from this - eg from mining? How do the limits placed on native title hinder economic development (eg inability to sell or mortgage the land)?
- STUDY the Australian Constitution Centre resources on *Mabo* and discuss the background to the case.

Independent Learning

- WATCH: News Report on Mabo Day 1992
- READ: TRD 131 THE MABO CASE
- Answer these questions:
  - Why were there two *Mabo* cases? What did each decide?
  - How did the High Court justify the recognition of native title?
  - What did the High Court's overturning of 'terra nullius' mean concerning sovereignty in Australia? Why is this important?
- RESEARCH: Using Trove, look at the reaction to the *Mabo* decision in the media. Did the fears that were expressed come to fruition? In retrospect, was the reaction reasonable or ill-informed?

Wrapping it up

- CLASS DISCUSSION: Discuss why lands and waters are so important to Aboriginal and Torres Strait Islander peoples. Note the spiritual dimension as well as the economic importance.

Differentiation

- There are many online resources regarding native title and *Mabo*. Searching for these terms on https://www.abc.net.au/education/ can be useful.

Assessment strategies

- Collect answers to Independent Learning Questions and Research.