

# A Case Overview

**Case Name & Citation:** Mabo and Others v. Queensland (No. 2) (1992) 175 CLR 1

**Court :** High Court of Australia

**Sitting Judges:** Mason C.J; Brennan; Deane, Dawson, Toohey, Gaudron and McHugh JJ

**Name of Parties:** Mabo and Others as the *Plaintiffs* and The State of Queensland as the *Defendants*

**Date of Judgement:** 3<sup>rd</sup> June 1992

## **Case Overview:**

Mabo and Others and The State of Queensland was a High Court native title, constitutional and real property law case involving a series of claims by the Meriam peoples for native title of the Murray Islands – a series of Islands Annexed to the Colony of Queensland.<sup>1</sup> The High Court upheld these claims and also commented that comparable principles should be applied to circumstances regarding the Aboriginal people on mainland Australia. The High Court's decision fundamentally changed the manner in which land law was interrupted in Australia, predominately due to the fact that it reversed the historical doctrine of '*terra nullis*' on which the basis of all previous British possession of land claims in Australia were based. The decision formally recognised the original and traditional customs and rights that the Meriam people had established in relation to Murray Islands. Through this action, the High Court added the legal doctrine of native title into Australian Law and confirmed that native title did pre-exist in Australia before it was colonised by the British in 1788. In recognising this prior land right, the High Court additionally held that Indigenous Australians continue to own any fraction of land in Australia which has not had its native title legally removed. Immediately preceding the decision, the Federal Government of Australia introduced the *Native Title Act 1993*<sup>2</sup> which attempted to clarify the High Court's judgment, and provide a clear and definitive legislative interpretation that Indigenous Australians could use in order to could acquire recognition for land which within their native title rights.

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<sup>1</sup> Mabo v Queensland (No.2) (1992) 175 CLR 1, 1.

<sup>2</sup> Native Title Act 1993 (Cth).

## Procedural History:

On 20<sup>th</sup> May 1982 Eddie Mabo, David Passi, James Rice and others brought an action against the State of Queensland and the Commonwealth of Australia in the High Court for the purposes of claiming land rights to the Murray Islands based upon their local custom and traditional native title. The initial claim was extensive, including declarations that the plaintiffs were the full and rightful owners of the Murray Islands land, and that the rights placed upon the people of these lands were unlawful in the 'absence of law of Queensland which expressly provides for such impairment without the payment of compensation'.<sup>3</sup> The successive defence filing from the State was swift and vigorously denied the existence of any land rights claimed by the plaintiffs.

In the period from 1982 through the 1985 numerous arguments were heard by both the plaintiffs and the defendants in a number of Queensland court appearances involving submissions and interpretation of evidence. It wasn't until the 26 February 1986 that Queensland Government filed their official defence which was subsequently followed by the Commonwealth defence filing on the 5<sup>th</sup> March 1985. In addition, on the 9<sup>th</sup> April 1985 the *Queensland Coast Islands Declaratory Act 1985 (Qld)*<sup>4</sup> was debated and passed in the Queensland Parliament which declared that the Islands 'annexed to Queensland were vested in the Crown in right Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland.'<sup>5</sup> The state filed an amended defence on the 24<sup>th</sup> May 1985 which included specific references to the newly enacted legislation. Consequently, the plaintiffs raised serious objections over the newly amended State defence involving references to the Act, and on 27<sup>th</sup> February 1986 Gibbs C.J. remitted 'all issues of fact raised by the pleadings, the particulars and further particulars to Supreme Court of Queensland for hearing and determination.'<sup>6</sup> The hearing commenced on 13<sup>th</sup> October 1986 before it was adjourned by Moynihan J. on the 17<sup>th</sup> November 1986 in order for the High Court to hear the relevant objections.

On December 8<sup>th</sup> 1988, the High Court allowed the demurrer of the plaintiffs and held that 'on the assumption that the plaintiffs could establish the land rights claimed, the State Act was inconsistent with the *Racial Discrimination Act 1975 (Cth)*'.<sup>7</sup> The hearing of the remitter continued on the 2<sup>nd</sup> May 1989 and it wasn't until the 5<sup>th</sup> June 1989 that Moynihan J. dismissed the Commonwealth from any subsequent liability. On the 24<sup>th</sup> July 1989 the Queensland Government closed its evidential briefing and the hearing adjourned for preparation of written submissions by each party. The hearing of the remitter concluded on the 6<sup>th</sup> September 1989, and on the 16<sup>th</sup> November 1990 Moynihan J delivered his determination of facts pursuant to the remitter. It is not until the 20<sup>th</sup> March 1991 that Mason CJ ordered several questions to be reserved for the Full Court of the High Court as per the *Judiciary Act 1903 (Cth) s18*<sup>8</sup>. On the 28<sup>th</sup> May 1991 the Full Court of the High Court sits to begin hearing the relevant considerations. On 12 June 1991 *The Torres Strait Island Land Act 1991 (Qld)*<sup>9</sup> is enacted and the Queensland

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<sup>3</sup> Mabo v Queensland (No.2) (1992) 175 CLR 1 at 5.

<sup>4</sup> *Queensland Coast Islands Declaratory Act 1985 (Qld)*.

<sup>5</sup> Mabo v Queensland (No.2) (1992) 175 CLR 1, 6.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> *Judiciary Act 1903 (Cth) s 18*.

<sup>9</sup> *Torres Strait Island Land Act 1991 (Qld)*.

*Coast Island Declaratory Act 1985 (Qld)*<sup>10</sup> is repealed. On January 21<sup>st</sup> 1992 Eddie Mabo dies in Hospital.

The High Court's Judgement was delivered on the 3<sup>rd</sup> June 1992 with six judges confirming their belief that the Meriam people did have traditional and native tenure over their land – Justice Dawson dissenting. The decision confirmed that the British acquisition of land did not eliminate their title, and that the 'Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland'.<sup>11</sup> Following the High Court Decision in Mabo No. 2, the Commonwealth Parliament passed the *Native Title Act 1993 (Cth)*<sup>12</sup> which become operative on the 1<sup>st</sup> Jan 1994.

### **Core Legal Outcomes:**

The legal arguments presented in the Mabo case were extensive. The fundamental problem that the High Court was being asked to resolve was whether the Meriam people actually had native rights in the Murray Islands, and if they did have these rights – whether Australian law should protect these rights and interests and provide the Meriam people with legal recognition. The majority of the High Court concluded that common law in Australia did actually recognise a derivative of native title through a prior interest in the land which survived the original colonisation of Australia by the British. Additionally, it was concluded that when indigenous Australians have established a clear and definitive connection to a section of land, and this connection has not been removed by any action, decision or legislative reform of the Government which would have interfered with the pre-existing connection - then the common law will recognise the land as native title.

#### *Rejection of Terra Nullius*

The defendants argued that the 1879 annexation of the Murray Islands to Queensland obscured the Meriam people's pre-existing rights in the land, and therefore common law could in no way establish a plausible connection of ownership with the land. This was rejected by the majority of the High Court as there was nothing to suggest there had been clear extinguishment of the land, and there was ample evidence in support of a causal connection between the Meriam peoples and the Murray Islands. This decision effectively rejected the concept of *terra nullius* and supported the plaintiff's claims, *inter alia*, that it did have a pre-existing system of law in place when Australia was colonised which should continue to remain in effect today.

#### *Rejection of universal and absolute ownership*

The majority of the High Court rejected the defendant's submission that the Crown had 'absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands.'<sup>13</sup> The majority also rejected the defendants arguments that the doctrine of tenure was universal such that every fraction of land which was acquired by England was held 'mediately or immediately of the King who is the Lord Paramount'<sup>14</sup>. Brennan J. commented that 'the doctrine of tenure applies to every Crown grant of an interest in land, but not to rights and interests which

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<sup>10</sup> *Queensland Coast Islands Declaratory Act 1985 (Qld)*.

<sup>11</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 15.

<sup>12</sup> *Native Title Act 1993 (Cth)*.

<sup>13</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 25.

<sup>14</sup> *Ibid*, 46.

do not owe their existence to a Crown grant'<sup>15</sup>. Thus, it was accepted by the majority that the Crown acquired a radical title - as opposed to an absolute title - upon the acquisition of any land, and that this radical title would be subject to native title rights in the instance that the relevant native title rights had not been justifiably or previously extinguished.

### **Conclusion:**

The *ratio decidendi* of the Mabo case was definitively narrow when the bulk of *obiter* is removed. The majority of High Court fundamentally concluded that:

- i. the Meriam People were directly descended from those described in the evidence from early European records.
- ii. The acquisition of sovereignty by the British Crown purports to a radical title as oppose to a absolute title in the instance that native title is not extinguished, and the rights and interests of the Indigenous people still exist.
- iii. Native Title in respect to a particular fraction of land - regardless of its classification by common law – is preserved in accordance with the traditional rights and customs of the aboriginal people who have a clearly defined causal connection with the land.
- iv. Native title could be extinguished by Governmental power if there was a clear and transparent intention to do.

Thus, the clear outcome from the decision was that the Court limited native title to circumstances where no extinguishment of native title had occurred, and there was an evidentiary association between the indigenous people which was distinctly defined by a causal connection with the land. Furthermore, it was the opinion of the Court that the British Crowns acquisition of sovereignty over Australian land did not immediately remove native title from the indigenous population. Instead, the Crowns sovereignty extended to a beneficial ownership and was restricted to areas where no native title had previously existed. Consequently, the Court ruled that the Crowns radical title authorized the Crown to acquire land or delegate it to others, but where native interests still existed under native law or custom then native title still exists in the land.

Interestingly, the majority of the High Court also expressed the observation that the same principles should apply to mainland aborigines in respect of native title. This was a eccentric finding due to the fact that no such argument had been presented to the court during the case and nor did the defendants seek clarification on this issue. In addition, it was emphatically clear that Meriam people were not a nomadic people such as the majority of mainland indigenous people, and it was this lack of nomadic movement which clarified their connection with the land. Consequently, this moot point forced the Federal Government - along with all the States - to clarify the position on native title, and as a direct result the *Native Title Act 1993*<sup>16</sup> was enacted on the 1<sup>st</sup> January 1994.

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<sup>15</sup> Mabo v Queensland (No.2) (1992) 175 CLR 49.

<sup>16</sup> *Native Title Act 1993 (Cth)*.

# An Comparison of Deane and Dawson JJ

## I. Introduction

On 3<sup>rd</sup> June 1992 the High Court of Australia released its *Mabo and Others v. the State of Queensland (No. 2)*<sup>17</sup> decision. Deane JJ, in agreement with majority of the Court established that the Meriam people were the traditional owners of the Murray Islands, and that ‘the common law of this country recognizes a form of native which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that the entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title’<sup>18</sup>. The fundamental difference between Justice Deane JJ and Justice Dawson’s decisions was the elucidation of whether common law should ‘be interpreted as developing in a normatively evolutionary fashion’.<sup>19</sup> Deane JJ was willing to support the fact that it was in Australia’s preeminent interest to recognise the traditional native title rights and customs of the Meriam people, and he upheld the notion that they had maintained their pre-existing legal rights and connection to the Murray Islands even after Britain’s annexation of their territories. In dissent, Dawson J refused to accept that contemporary Australia should have to be held accountable for any historical or political wrongdoings, and while he was remorseful for the actions undertaken by the Colonial authorities of the past – he was of the opinion that ‘the responsibility, both legal and moral, lies with the legislature and not with the courts’<sup>20</sup>.

Thus, this paper seeks to analyse the decisions of Justice Deane JJ in agreeing with the majority of the High Court, and the rationale behind Justice Dawson’s dissent. It will examine the logical reasoning behind the respective Justices decisions, and provide a contrasting analysis of the manner in which both judgements are seemingly focused on the contemporary outlook for the Australian political landscape as opposed to narrowly focusing on the provision of justice for the Indigenous people. Additionally, an examination of the apparent struggle that both the Justices had in determining whether the land rights of the Meriam people were extinguished after Britain’s annexation of the Murray Islands during the acquisition of title in Australia will be undertaken, and an analysis of their concluding remarks of both Justices will also be explored.

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<sup>17</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

<sup>18</sup> *Ibid*, 15.

<sup>19</sup> Russell, Peter H, *Recognising Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (UNSW Press, University of New South Wales, 2006), 250.

<sup>20</sup> *Ibid*, above n 17, 175.

## II. A Comparison of Judgements

The nature of common law and its overall construction were fundamental to both Justice Deane JJ and Dawson J's respective conclusions in *Mabo*<sup>21</sup>. It is apparent from the conclusions reached by Deane JJ and Dawson J that their respective interpretations of common law and their understanding of the previous judgements set out by their predecessors in Imperial law native title cases are, predominately different.

### *Deane JJ*

Deane JJ was of the opinion that upon the establishment of the 'new British Colony by settlement, they brought the common law with them.'<sup>22</sup> Deane JJ's interpretation of the law suggested that common law native title existed across all respective lands which were acquired under British sovereignty from first moment the British settled in Australia in 1788. Deane JJ formulated the opinion that common law native title was 'merely a personal right unsupported by any prior or presumed Crown grant of any estate or interest in the land'<sup>23</sup>, which consequently implied that native title was able to be extinguished by a Crown grant in circumstances which were contradictory with native title. While this was his ultimate position, he struggled with earlier precedents set down in English law which suggested that 'common law native title recognised by the law of a British Colony was no more than a permissive occupancy which the Crown was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for traditional purposes.'<sup>24</sup> Deane JJ dismissed the judgement of the Privy Council in *Attorney General (Quebec) v Attorney-General (Canada)*<sup>25</sup> as 'inconsistent with the notion that the common law native title was no more than a shadowy entitlement to occupy or use the relevant land until the Crown saw fit to terminate it'.<sup>26</sup> His Honour referred to the supporting arguments of the Privy Council in *Nireaha Tamaki v. Baker*<sup>27</sup> and the comment by Chapman J. in *Reg v. Symonds*<sup>28</sup> which suggested that native title must be "respected, (and) cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers".

### *Dawson J*

In stark contrast, Dawson J's interpretation of the law differed immensely from the arguments presented by Deane JJ with the majority of his conclusions upholding the precedents set in previous imperial cases and Privy Council decisions. In fact, the majority of Dawson J's judgement refers to the historical formation of sovereignty in Australia, and it's consistency in providing no recognition of native title over land. His honour was clear in his opinion that 'the plaintiffs failed to establish any custom by which they could be said to have inherited rights over the land which they claim'.<sup>29</sup> Although Dawson J, in dissent, did not reject the notion that Britain's annexation could still derive native title rights, he suggested that 'whether, in any

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<sup>21</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

<sup>22</sup> *Ibid*, 79.

<sup>23</sup> *Ibid*, above n 21, 89.

<sup>24</sup> *Ibid*, above n 21, 90.

<sup>25</sup> *Attorney General (Quebec) v Attorney-General (Canada)* [1921] 1 A.C., 406.

<sup>26</sup> *Ibid*, above n 24.

<sup>27</sup> *Nireaha Tamaki v. Baker* [1901] A.C., 579.

<sup>28</sup> *Reg v. Symonds* [1847] N.Z.P.C.C., 390.

<sup>29</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 160.

particular case, a change of sovereignty is accompanied by recognition or acceptance by the new sovereign of pre-existing rights is a matter of fact.<sup>30</sup> His honour was definitive in his opinion that ‘the Crown in right of the Colony of Queensland, on their annexation, exerted to the full its rights in the land inconsistently with and to the exclusion of any native or aboriginal rights.’<sup>31</sup> For Dawson, it was the sovereign’s willingness to originally recognize native title rights which accounted for the continuation of these rights throughout history. Dawson concluded that indigenous people could not derive a pre-existing native title right merely from a connection to a section of land, and he was definitive in stating that this right could only be conferred upon them through the recognition of a governing sovereign.<sup>32</sup> His honour also looked for support in the decision of Lord Denning of the Privy Council in *Adeyinka Oyekan v. Musendiku Adele*<sup>33</sup>, who stated that ‘in order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown.’<sup>34</sup> While he did accept that there were previous examples throughout history which suggested that native title should be recognised<sup>35</sup>, he was definitive in his stance that the clear and transparent precedent was such that ‘the Crown considered itself to be the owner of the land, unencumbered by any form of native Title.’<sup>36</sup>

### III. A Contemporary Outcome

There is a clear and evident difference between the decisions reached by Deane J and Dawson J in *Mabo* – a difference which is characterized by the majority ruling of the High Court. It is apparent that the manner in which Deane JJ reached his conclusion - in complete contrast to Dawson J’s analysis - stems from the contemporary approach his Honour took in setting aside decisions which were formed during an overly conservative period of British imperialism. Justice Deane’s analysis of the historical precedent in the case, inferred that while he was willing to accept the rulings of his predecessors, he did not agree with the treatment of native title ‘as no more than a permissive occupancy which the Crown was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for traditional purposes.’<sup>37</sup> His Honour agreed with the decision of Chapman J in *Ref. v Symonds*<sup>38</sup>, and approved the decision of the Privy Council in *Amodu Tijani*<sup>39</sup> which held that native title was not ‘merely a permissive occupancy which the Crown could terminate at any time without breach of its legal obligations to the traditional occupants’<sup>40</sup>. Deane also made special note of the communications between Captain Cook and Captain Phillip<sup>41</sup>, the first governor of New South Wales, which specifically stated that ‘the native inhabitants of the Colony would be protected and not subjected to “any unnecessary interruption in the exercise of their several

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<sup>30</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1 at 127.

<sup>31</sup> *Ibid*, 159.

<sup>32</sup> Cunliffe, Emma, *Anywhere but Here: Race and Empire in the Mabo Decision*, 1997, Autumn Edition, Symposium Issue of Social Identities, 18.

<sup>33</sup> *Adeyinka Oyekan v. Musendiku Adele* [1957] 1 W.L.R. 876.

<sup>34</sup> *Ibid*, 880, 788.

<sup>35</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 172.

<sup>36</sup> *Ibid*, 144.

<sup>37</sup> *Ibid*, above n 35, 90.

<sup>38</sup> *Ref. v. Symonds* [1847] N.Z.P.C.C., 390.

<sup>39</sup> *Amodu Tijani* [1921] 2 A.C., 403.

<sup>40</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 92.

<sup>41</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 97.

occupations”<sup>42</sup>, which lead his Honour to the conclusion that the concept of native title had been eroded throughout time. Deane sought to rectify what he called ‘past injustices’<sup>43</sup> through the whole nations ‘acknowledgement of, and retreat from, those past injustices’.<sup>44</sup> His Honour believed that without respite by a qualification of native title through common law in Australia, the social gap between indigenous and non-indigenous people could never be closed.<sup>45</sup>

In dissenting, Dawson J presented an entirely different view to that of Deane JJ which sought to preserve the precedents set throughout the colonial period of Australian history. His Honour presented an entirely idealistic account of the relationship between Australian colonial history and British imperialism, and he was of the unequivocal opinion that that the High Court could not rule in the favour of the plaintiffs despite the regrettable past injustices that occurred against indigenous people. This was affirmed in his concluding remarks which suggested that ‘if traditional land rights (or at least rights akin to them) are to be afforded to the inhabitants of the Murray Islands, the responsibility, both legal and moral, lies with the legislature and not with the courts.’<sup>46</sup> Evidently, it was clear that Dawson refused to allow contemporary Australia to accept the past wrongdoings of its Colonial predecessors, and His Honor reinforced this conclusion by drawing upon century old Colonial case law which supported his decision. Dawson J interpreted the inferences established by Captain Cook, Captain Phillip and the Imperial Government differently to Deane JJ and the majority of the Court by stating that ‘the policy of the Imperial Government during this period is clear: whilst the aboriginal inhabitants were not to be ill-treated, settlement was not to be impeded by any claim which those inhabitants might seek to exert over the land’.<sup>47</sup> Dawson J was definitive in his belief that:

‘The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that, and that is a matter for government rather than the courts.’<sup>48</sup>

It was this unambiguous and transparent belief which led Dawson J’s decision to become one of the criticised<sup>49</sup> of the Courts, since he focused too much on the historical formation of Australia, as opposed to attempting to achieve a formative resolution of policy to bridge the widening disparity between indigenous and non-indigenous people. Deane JJ and the majority of the High Court accepted that while the historical precedents set by their predecessors were valid rulings during a period of strong British Imperialism, they were not confirmative of how the common law should interpret native title today.

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<sup>42</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 97.

<sup>43</sup> *Ibid*, 109.

<sup>44</sup> *Ibid*

<sup>45</sup> Tehan, Maureen, *A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act, 2003*, Vol. 27, Melbourne University Law Review, 523.

<sup>46</sup> *Ibid*, above n 41, 175

<sup>47</sup> *Ibid*, above n 41, 142

<sup>48</sup> *Ibid*, above n 31, 145

<sup>49</sup> Keon-Cohen, *Native Title 15 Years On*, 2007, Issue 3, Native Title Newsletter, Page 2-3



#### IV. Conclusion

It is clear from the comparative analysis of both Deane JJ and Dawson J's decisions, that the conclusion the majority of the High Court reached was the right one. The common law of Australia draws its foundations from the British sovereignty, and it was this sovereignty which sought to control the right to extinguish native title at its own discretion without regard to, or consideration of, the indigenous people. While Deane JJ struggled with the idealistic concepts set out in almost two centuries of imperial case law, he also recognized the inequality that was enforced upon the indigenous people. Deane JJ was of the profound belief that the judicial system must rectify the 'past injustices'<sup>50</sup> of its actions through the whole nations 'acknowledgement of, and retreat from, those past injustices'<sup>51</sup>. Deane JJ's contemporary acceptance of how common law native title should be paved for future generations was consistent with the remaining majority of the High Court, and it is obvious throughout Deane JJ's decision that it was the right one.

Dawson J, in dissent, was wholeheartedly opposed to any construction of common law native title which provided indigenous people with separate rights to the Crown. Dawson J was consistent in his belief that the Crown was the sole sovereign of all land rights in Australia and his decision was littered with historical references to Imperial precedent. Justice Dawson focused his decision on a selective minority of historical judgements which he used to form his ultimate conclusion for dissenting. While it is accepted that in some sense, all history is a selective interpretation of fact, Dawson J failed to recognise the need for contemporary Australia to move forward in its recognition of native title rights to close the widening disparity between indigenous and non-indigenous Australia.

Thus, it is clear that Deane JJ's conclusion – in agreement with the majority of the High Court - was inconsistent with the ultimate notion presented by Dawson J that native title should remain an Imperial conservative construction<sup>52</sup>. By Deane JJ's acknowledgement of the past injustices which were committed against the indigenous peoples, and by providing legal acknowledgement of native title in common law to the Meriam people - he was able to achieve a positive verdict from his original opinion that '[t]he acts and events by which the dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation.'<sup>53</sup> It was through this conclusion that Deane JJ and the majority of the High Court hoped for a closer assimilation between indigenous and non-indigenous Australia.

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<sup>50</sup> *Mabo v Queensland (No.2)* (1992) 175 CLR 1, 97.

<sup>51</sup> *Ibid.*, 109.

<sup>52</sup> Derrida, Jacques "Force of Law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld, David Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992).

<sup>53</sup> *Ibid.*, above n 50, 109