The ability of Australia's indigenous people to create their own cultural identity and social reality is shaped profoundly by the Australian legal system in various ways. The 1992 Mabo decision of the Australian High Court 'created' a right to land tenure for Australia's indigenous people. This 'right' has been further explicated by federal legislation in the post-Mabo era, in and around law. This essay analyzes the 1992 Mabo decision in the context of governmental, judicial, and wider social responses to indigenous issues. At several sites, it examines 'indigenous rights' discourse to illustrate the shifting meaning of 'rights' in legal currency in the indigenous debate. The essay suggests that the 'rights' discourse of legal liberalism has not yet provided meaningful plurality in the recognition of indigenous rights.

INTRODUCTION

The British colonists of 1788 declared Australia *terra nullius*, meaning an unowned and uncultivated wasteland with no recognizable social organization. White settlement brought with it the English common law. Australia's Aborigines and Torres Strait Islanders became subjects of the English king.

During the early years of white colonization of Australia, over 20,000 indigenous people were killed in frontier conflict - fighting generally involving small groups of pastoralists (HREOC 1991: 37-39). Many massacres of Aborigines in the early colonial period came through declaration of martial law, used to justify 'necessary force' if the indigenous population did not comply with removal onto settlements or missions.

Within 20 years of white settlement, Australia's mainland Aborigine population of 750,000 had been reduced to 150,000. Death occurred mainly through smallpox, hunting, sporadic massacres, and deliberate poisoning (Heilpern 1993: 7). The present population of the Aborigine and Torres Strait Islander people is about 250,000, less than one percent of the national population of Australia.

In common with the Canadian colonial period, legally-sanctioned kidnapping of Aborigine children from their parents and communities took place systematically, so that they might be 'civilized' by white communities. This form of racist violence continued in parts of Australia until the 1960s, and has become an important political and legal issue for indigenous people in Australia in the 1990s.1

The modern Aboriginal civil rights movement took shape in the 1960s. In 1967, the Australian Commonwealth Constitution (the Constitution of the Australian federal government) was amended to confer full citizenship rights upon Aborigines and Torres Strait Islanders. In 1975, the Federal Government's External Affairs power under the Constitution was used to enact the *Racial Discrimination Act* (RDA). This created the federal offense of unlawful discrimination on the basis of race.
The RDA was relied upon in the legal reasoning of the Justices of the Australian High Court in the 1992 Mabo decision. As well as overturning the doctrine of terra nullius, Mabo held that extinguishment of a Native title interest in land would be unlawfully discriminatory under the RDA if it was not accompanied by compensation. The Mabo High Court decision catalyzed further legal action by the federal government.

**MABO AND ITS LEGAL CONSEQUENCES**

*Mabo*

In 1992, the Australian High Court held that *terra nullius* was not part of the Australian common law. Instead, Native title to land owned by Aborigines prior to 1788 was retained so long as the indigenous people's 'connection' with the land was maintained, and for as long as the Crown (either federal or state government) had not extinguished Native title by anything that was expressly contrary to the existence of that title (such as granting leasehold or freehold title to another). In the Mabo decision, the High Court considered evidence of land ownership and notions of justice and equality that had previously been considered outside the High Court's jurisdiction and its approach to its legal reasoning.

The limited precedent value of Mabo lies in its facts. The findings of fact in the Mabo case at first instance in the Queensland Supreme Court hearing had found that the Meriam people who claimed Native title had maintained a traditional and customary connection with their land since white settlement. The findings of fact of Supreme Court Judge Moynihan included observations of the Meriam people such as 'communal life based on group membership,' 'behaviour regulated by 'social pressures,' people living in 'groups of huts ... organized in named villages,' and 'social cohesion by a constant pattern of example, imitation, and reinforcing behaviour' (Mabo 1992: 4).

Through the High Court judgment and the Australian federal government's subsequent 1993 *Native Title Act*, title to land can now be claimed by those Aborigines who are still able to link their traditional practices to their current practices of land tenure. Naturally, this link becomes difficult, if not impossible, to prove for many indigenous people who have been forcibly removed from their land. A legally enforceable claim for Native title depends upon producing evidence of the 'nature' and 'incidence' of native title, with respect to their current local customs and practices. Even for those Aborigines who have retained their 'traditional' way of life, the predominantly hunter-gatherer economy of mainland Aborigines works against them. Their title to land is less easily transcribed to the Mabo precedent, which considered the more sedentary island lifestyle of the Meriam people of the Torres Strait.

**Post-Mabo Legislation**

Following the Mabo High Court judgment, the Australian federal parliament adopted a three-stage response to the decision. The first stage was enactment of the *Native Title Act* in 1993 to hear claims for Native title to