Yugambeh Nation

Name: _____

Date: _____

AGES 15 AND UP · LAW AND IDENTITY

The Real Issue

The words ‘Aboriginal’, ‘Indigenous’, ‘First Nations’, and ‘Traditional Owner’ get used a lot, but what exactly do they mean? It’s a question we’ve been arguing socially, politically, and legally for years now, but as talk of a Voice to Parliament, Treaties and Truth Commissions ramp up, it is only a matter of a time before these issues really come to a head, and by then, there can be a lot of hurt and social harm if these conversations don’t happen now.

So, let’s explore Aboriginality from the wider Australian social and legal standpoint and see the issues that are arising.

Skipping the pseudo-scientific blood quantum systems of the early 20th Century, a lot of people think we’ve got one sorted, they are quick to say ‘Oh, the Commonwealth 3-part test’. In 1978, the Cabinet of the Australian Government offered a three-part definition, based on these three attributes:

And for some time now, this definition seemed to have been set, and was reinforced in Commonwealth v Tasmania in 1983, known as the Tasmanian Dam Case, which defined an Aboriginal person as:

> *“a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he or she lives.”*

Essentially, these two are the same in form and they provided a way for Aboriginal people to be defined by their individual, social, and communal aspects rather than European ideals of race and people, it was a liberation. But a little under a decade later, things would change with Mabo v Queensland (No 2), the Mabo Case.

Mabo was a landmark decision of the High Court of Australia that recognised the existence of Native Title in Australia, Native Title being a form of land title like Freehold Title, that is held by Aboriginal Australians. Native Title is not a general title across the entire continent, just as each houses has a title, each area had its own native title, and just as a house’s title has a particular owner (i.e. the person who brought it), each native title has a particular owner, a group of Aboriginal people whose members communually own that title. Which in the words of Justice Brenann, that membership was defined:

> *Membership of the Indigenous people depends on biological descent from the Indigenous people and on mutual recognition of a particular person's membership by that person and by the elders or other persons enjoying traditional authority among those people.*

So, like the definitions before, there was descent, identification by the person, and recognition by the people, but when it came to that third limb, Mabo differed slightly. Compare the two:

...is accepted as such by the community in which he or she lives.

recognition ... by the elders or other persons enjoying traditional authority among those people.

As you can see, Mabo is more prescriptive than the general Commonwealth definition, and while this case was about a little island on the tip of Queensland, it would have far reaching ramifications across the continent and oceans.

From the Mabo decision came an overturn of the legal doctrine of Terra Nullius, Australian Constitutional Law recognised this new radical title as a burden on the Crown’s supreme title, and legislation was made to deal with how to proceed, as Mabo had only claimed Meriam - the entire continent had to be sorted. The Native Title Act 1993 established that system and reassured everyday Australians that their freehold titles were safe, but it did little to quell the debates amongst Aboriginal people, and as many groups rushed to file claims, the legal space became a battle ground for contested issues stemming from Mabo. Justice Brennan found that the effective test for the existence of Native Title being whether the Indigenous group:

> *has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained...*

Where however, the "tide of history has washed away any real acknowledgement of traditional law and any real observance of traditional customs, the foundation of native title has disappeared" and "cannot be revived"

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THE REAL ISSUE

Who is an Aboriginal person?

Compare the definitions

Part of the test	Commonwealth / Tasmanian Dam Case (1978, 1983)	Mabo (1992)
1. Descent		
2. Identification		
3. Acceptance or recognition: by whom?		

Questions

1. What are the three parts of the 1978 Commonwealth definition?

2. What is Native Title, and how does the article compare it to the title on a house?

3. Why does the article say Mabo is “more prescriptive” than the Commonwealth definition?

4. Why might it matter who has the right to accept someone as Aboriginal?