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Terra Nullius: The Aborigines in  
Australia

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Terra Nullius: The Aborigines in Australia

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By  
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## Abstract

This thesis explores the relationship that has developed over the past 200 years between the Aboriginal people and the people of Australia. It looks at the reasons as to why and how Australia remained a "*Terra Nullius*", or land belonging to no one, for so long, when in fact it is proven that the Aborigines had been on the land prior to colonization. This paper investigates the Aboriginal people's struggle for ownership and ties to the land that was taken from them by the British in 1788. It also looks at the lifestyle of the Aboriginal people prior to British colonization and the effects that came from colonization. It highlights three major events that have occurred which are unique and demonstrate the ongoing struggle of the Aboriginal people. Those three important events are the "Stolen generation", or a government policy that forced the removal of Aboriginal children from their homes, the Mabo case, or the largest fight that went to the High Court to prove Aboriginal ownership to the lands in Australia, and the 2008 Apology made by Prime Minister Kevin Rudd to the Aboriginal people. Through the examination of these major events and the past history this paper will highlight the distinctive relationship that exists still today in Australia and what can be done to mend the divided country of Australia in the future.

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## Introduction

Australia is the smallest mainland continent in the world. It has a population of around twenty one million people. It is a democratic nation and like many others was colonized by the British. In many ways its history is common and very similar to many other nations; however, in some respects it is very different. One of those important differences is going to be the focus of this paper. “Australia [differs] only in being more extreme- both in the extent to which it denied aboriginal peoples any recognition in building a modern democratic nation and in its lateness in moving to overcome this moral flaw in its national development” (Russell 50). Australia’s relationship with its indigenous people has been an ongoing struggle since colonization. This paper aims to explore how colonization by the British was so different from that of other nations such as the United States. It also aims to examine the history of Australian laws, the stolen generation, the *Mabo* case, and the 2008 apology to the Aboriginal people. From analyzing all of Australia’s past and understanding the effects of past events the paper will provide a direction in which the future of Australia may lead in its struggle with its relationship to its indigenous people.

### British Colonization

Australia was colonized in 1788 by Great Britain. In Australia at this time there were estimated to be between 300,000-750,000 native inhabitants occupying this vast land. In other examples of British colonization, the native peoples of the land were always acknowledged, whether it was by peaceful treaties or harsh periods of conflict. Britain was never able to ignore the indigenous people of the lands they colonized. In Australia, however, the acknowledgment of these indigenous peoples did not occur.

English Common law and many settlement rules at the time forbid the colonization of any colony already settled by “Christians”, it also stated that it was not acceptable to take over lands that were already inhabited by any peoples whether they were Christian or not, unless one did so by treaty or force, however, “forcing or inducing native peoples to succumb to the sovereignty of a European state by conquest or treaty never meant denying that native peoples had been organized societies with their own laws and system of government” (Russell 41). In regard to many civilizations that were colonized such as North American and Canada, the native people were recognized and acknowledged. In North America they had a multitude of different Indian groups that spoke many different languages. In Australia they encountered “hundreds of Aborigines speaking at least 200 mutually distinct languages”. (Daunton and Halpern 46) Most of the Aborigines in Australia, however, simply defined themselves “according to their specific clan relationship to land and kin, and were divided from one another”. (Daunton and Halpern 46) The British recognized the North American Indians and the Australian

Aborigines in two totally different ways. Although the idea of a *terra nullius*, or a land belonging to no one, may have been thought of in relation to colonizing the Americas, it never legally nor politically prevailed. They saw the Amerindians as an organized society with rules and regulations, while in Australia they saw the Aboriginal people as barbaric, unorganized, with no system of laws or rules. Australia was the only nation colonized by the British that was declared a *terra nullius*, and remained such both legally and politically from 1788 to 1992.

When the British colonized North America it was not an option to ignore the native societies that were in place. Instead the aim was to have a “successful intercourse with the Amerindians” (Russell 43). Treaties and peaceful relations existed between the British and Amerindians. These treaties established trade, military alliances, and also resolved boundary issues. “By entering into formal treaty relationships with native peoples, European states recognize these peoples as organized political societies with a proprietary interest in the lands they used and occupied” (Russell 44). Due to this fact there was no room to have the *terra nullius* doctrine present. This was not the case in Australia when the British arrived in 1788. Instead of being recognized and entering into treaties with the British, the Aborigines were treated like savages and denied any right or ownership to the lands they had solely inhabited for so long.

### Australian Laws/ History from Federation to Present Day

The British crown ruled Australia from 1788 until 1901, at that time the six major colonies decided to federate into one democratic government. Australia is an independent nation, however, the Queen appoints a Governor-general to “speak” for her. The elected Australian government chooses this person.

Aboriginal people were considered a dying race when the federation of states occurred in 1901 and it was decided that the aborigines would not be counted in the census. The power over aboriginal people was given to the six individual colonies, which were now referred to as states. This continued until 1967 when a majority of Australians voted to include them in the census.

The Australian constitution that was formed in 1901 included only a few rights that were scattered throughout its contents. Aboriginal rights were totally unrecognized in the constitution. Aboriginal people were treated negatively as the parliament and federal government were denied power to legislate in any Aboriginal affairs. Each state was able to have its own policy on how they would deal with their Aboriginal population.

The High Court of Australia played a very large role in shaping the laws and the Australian constitution. It has never been shy to veto laws that exceeded the powers given to the states or commonwealths. Australia, however, was far behind that of the United States and even Canada in many legal aspects including the discretion of judges and judiciary power.

In 1881, George Thornton MLC was appointed the first New South Wales Protector of Aborigines. The NSW Aborigines Protection Act existed from 1909-1943, after that it was abolished and replaced by the Aborigines Protection Board. This became the NSW Aborigines Welfare Board in 1943. The Board administered government policy, dictated where Aborigines could live and work, how they could get around, their personal finances and their parenting skills. They really did not have a lot of options for work, and normally were relatively very poor. This board was also responsible for the displacement of aboriginal children from their families, which will be discussed in detail later in the paper.

In 1962 Aborigines were given the right to vote in federal elections. Due to the fact that they were still considered wardens of the state, they could not vote in state elections. It was not until the 1967 referendum that the Aboriginal people became legal citizens of Australia. This referendum also gave the commonwealth legislative power over Aboriginal affairs.

Even as citizens, however, Aboriginal people continued to be treated as much less than humane. They remained the poorest group of people in Australia and although they were now considered to be citizens and could vote in federal elections, there was a very small population that actually participated.

In 1992 the *Mabo* case, a property rights case, was decided and the *terra nullius* doctrine was overturned. This case will also be discussed later in the paper. It was one of the most important events in the history of Australia that actually benefited the

Aboriginal people. The last major event was the recent 2008 Apology made, by Kevin Rudd, the Australian Prime Minister, to the Aboriginal people.

## The Aborigines

When the British saw the Aborigines as “small in number, wandering nomadically with no fixed territory, and with no recognizable system of laws and customs” (Short 1) they decided to apply the “terra nullius” doctrine which meant “land of no one” to this vast continent of Australia. This doctrine was based on John Locke’s 17<sup>th</sup> century notion of property ownership. It stated that since the natives had no “investment in the soil” then they had no claim to it. The British recognized this land as a land belonging to nobody, which gave them complete ownership over it and the right to treat the land as their own with no regard to the Aboriginal people. In some instances they acknowledged sovereignty by the Aborigines over the land but never ownership. In acknowledging sovereignty they would sometimes refrain from getting involved in Aboriginal affairs, letting Aboriginals deal with their own issues and problems.

In order to understand the relationship or lack thereof between the British and Aborigines, it is important to understand the life of the Aboriginal people prior to British colonization and also to understand how the British have treated other native peoples prior to and during the colonization of Australia.

An article by D. Sutherland Davidson provides great insight into the life of the Aboriginal culture prior to colonization. It is the majority of background information used for this section.

The political structure that was in place before the British arrived was very simple. The largest political unit was called a horde; it consisted of a group of about 35

closely related relatives who occupied a certain specific territory, over which they had complete autonomy. Of the estimated 300,000 Aborigines, there were estimated to have been between 7,000 and 8,600 independent political entities. “The hordes are patrilocal and, as a result of the prevailing cross-cousin basis of marriage whereby the proper mates automatically are not members of the same horde” (Davidson 650). Patrilocal means that after marriage, the bride moves to live with her new husband’s family and due to the fact that most hordes are made up of the same family, the bride and groom would be from different hordes. The head of the horde is simply a headsman whose power is quite minimal, due to the fact that there are no political entities where his power need be enforced. This is mainly due to the fact that hordes are sovereign and they are the highest power. There tends to be a hereditary tradition to the role of headsman, however, it is not mandatory. There appears to be no difference between the headman’s family and the others in the horde. The more important role would be that of the council of elders, who assist the headsman. The council is composed of middle aged and older men within the horde. They have no real power but were able to influence the horde with their wisdom and their ability to control public opinion. Although the terrain across Australia is very different, it really had no bearing on the populations of the hordes. They continued to consist of small groups of around thirty members. The territory, however, which they controlled, was definitely different depending on the location. The control of territory ranged from 20 square miles to 6,000 square miles. The horde property was divided into small parts of territories owned by a family or individual. The boundaries were normally based on natural features of the terrain. Some “artificial” markings were used but they were not common. The trespassing of people was strictly not allowed, however, this was

not often enforced due to the fact that most close by were neighbors and family. Since all males in the horde were closely related, many ended up being family. Many members roamed all over their family's lands. The boundaries of the territories seemed to have been in place for generations and they rarely changed. The boundaries were never altered for the expanding of a population. Therefore the population was controlled and kept to around 35 members. The most common way of controlling the population was infanticide. Infants were killed in order to keep the population from rising. Based on these strict population requirements taken by the individual hordes, makes it easier to estimate that there were around 300,000 aborigines prior to colonization. It is, however, still impossible to know, because there was no census for any specific region. Many believe that there were more Aborigines in Australia, however, once the British arrived disease spread across the country and killed many, prior to British explorers even encountering the majority of these Aboriginal hordes.

Although the horde was the greatest political unit, it was “desirable to apply the term tribe in a non-political sense to groups of hordes which are recognized by the natives, themselves, as cultural, dialectic and geographical units, each with a name” (Davidson 664). Although it differs from other tribes in the world in the sense that it lacks a centralized government, it is still nonetheless a tribe. Each horde was politically autonomous it did not reach out to conquer other's territory or create alliances with one another. Each was content with its territory and took great pride and belief in its lands. Hordes had very strong ties to the land where they were born, and felt that the spot where they were born was where their spirit would return when they died. Aborigines will often stay with their land until they are basically forced out. They feel such ties to the land that

they will not explain or give a tour of the land that is not part of their territory, because they do not belong to that land and it is sacred to another. Each piece of land is different and unique and it is not acceptable to explain a land with which one does not feel a bond.

The system that was in place in Australia for the Aborigines was very different from others in the world. With all of the small hordes living with complete sovereignty, they have learned of the advantages from one another. In Australia one may find the “beginning of International Law” (Davidson 665) It is not known how many tribes that there were; it is estimated that there were 10 hordes to a tribe, and roughly 7,000-8,600 tribes that existed in Australia. The numbers of hordes vary as they are spread out through the continent of Australia.

Another interesting aspect of this time period during colonization was that the Aboriginal system of living was considered to be a “crude culture as that of the hunting and wild food collecting” was frowned upon by many British. Demographics, however, show that in some areas around Australia, the Aborigines survived much better and were able to sustain their population much more efficiently than that of the British.

## The Stolen Generation and Assimilation

From the years 1910 to around 1970 there was a legal policy in place that allowed for the removal of Aboriginal and Torres Strait islander children from their families.

Although it was only legal between these years, it is known to have happened prior and after the years of 1910-1970. One source claims that the first “Native institution at Parramatta was [established] in 1814 and set up to ‘civilise’ Aboriginal children.”

(Conference of Education Systems Chief Executive Officers)

Welfare boards, churches and various other organizations took part in this process. The Aborigines Protection Board or the APB was responsible for running and operating the process that allowed them to remove these children without parental consent or a court order. The process removed Aboriginal children from their families, placed them first in institutions, and later placed them with white families. “Children were taken from aboriginal parents so they could be brought up ‘white’ and taught to reject their aboriginality.”(Reconciliation) The white Australia policy was very much in place and strong at this time and these organizations and boards felt as though they were saving these children. Between these years of 1910-1970 “it is estimated that between one in three and one in ten aboriginal children were forcibly taken from their families, transported across the vast continent, and placed in state or church run institutions, or with white foster or adoptive parents.” (Celermajer 2) Taking the children out of their homes was thought to be the easiest way to break children from ties with their families and culture. They were often moved across the country, their names were often changed and parents were given no information about their children. The APB at the time argued that they removed children because of neglect or for the better safety of the children. It

has been argued, however, that this process of “breaking the connection between parents and children was the shortest route to killing their culture”. (Celermajer 2) It was often argued at which age it was optimal to remove a child; the most common ages were at birth, two years of age, or four years of age. All of the states had different policies, although they all were very similar.

In Queensland and Western Australia “the Chief Protector used his removal and guardianship powers to force all Indigenous people onto large, highly regulated government settlements and missions, to remove children from their mothers at about the age of four years and place them in dormitories away from their families. They sent the children off the missions and settlements at about 14 to work. Indigenous girls who became pregnant were sent back to the mission or dormitory to have their children. The removal process then repeated itself.” (Human Rights Commission)

This totally destroyed the typical Aboriginal way of life, because normally Aborigines would never leave the territory that belonged to them. This process not only destroyed family life but it also destroyed a lot of their culture.

Another process was to change the definition of being “Aboriginal”. In New South Wales and Victoria, “people with more than a stipulated proportion of European ‘blood’ were disqualified from living on reserves with their families or receiving rations.” (Human Rights Commission) This tactic, however, did not work quite to the government’s advantage because these people were not considered to be part of the European race, therefore it was hard for them to get jobs or mix into society. They often lived in small poor shanty communities in the outskirts of town, but not on Aboriginal reserves. So instead of them going from Aboriginal to being part of the Australia society, they remained in the middle belonging to neither group and being even more alienated.

Another very common tactic was the removal of Aboriginal females into domestic works. “Apart from satisfying a demand for cheap servants, work increasingly eschewed

by non-Indigenous females, it was thought that the long hours and exhausting work would curb the sexual promiscuity attributed to them by non-Indigenous people.”

(Human Rights Commission)

The camps and facilities that held these indigenous people were often small and had limited funding. In the Northern Territory, Western Australia and Queensland, which contained the largest population of indigenous people, the states spent the least per capita on indigenous people. So with a lack of funding, the camps had a very minimum supply of food, water, and medicine. They lacked staff, which caused many people to become sick and malnourished. This caused people too often to die very early in life.

Another purpose for the removal of children and separation of families was to try to mix the Aboriginal race with the white European race. They eventually hoped to eliminate the Aboriginal race altogether. “Therefore their idea was to keep the pure blacks segregated and absorb the half-castes into the white population.” (Human Rights Commission) A half-caste would be a person who was mixed, and normally lighter skinned than an Aborigine.

Although eventually this process of mixing occurred in all parts of Australia, it took a longer time to reach certain islands around the coast of Australia closer to Tasmania.

In 1937 the first Commonwealth-State Native Welfare Conference was held, and attended by representatives from all the states except Tasmania and the Northern Territory. The main purpose of this meeting was to figure out what to do with their “Aboriginal problem.” This was the very first time in the history of Australia that Aboriginal affairs were discussed at the national level. Each Chief Protector discussed

his plans about how the mixed population would eventually blend into the non-indigenous populations. They adopted the idea of absorption. This meant that “the destiny of the natives of aboriginal origin, but not of the full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.” (Human Rights Commission) The Human Rights Commission stated, that “efforts of all State authorities should be directed towards the education of children of mixed Aboriginal blood at white standards, and their subsequent employment under the same conditions as whites with a view to their taking their place in the white community on an equal footing with the whites.” (Human Rights Commission)

These policies were assigned to begin to “assimilate” indigenous people of mixed descent, rather than “merging”. Merging was considered to be a “passive process of pushing indigenous people into the non-indigenous community and denying them assistance; assimilation was a highly intensive process necessitating constant surveillance of people’s lives, judged according to non-indigenous standards.” (Human Rights Commission) Assimilation was considered to be a socio-cultural model. Although the Aboriginal culture was still seen as unimportant by non-indigenous people, the government began to see the Aborigines as almost equal to poor white people, who needed welfare to find their place in society. This thought was geared toward forcing Aborigines into the European culture and also causing them to abandon their own.

New South Wales became the first state to shape their indigenous child welfare system according to the new model of assimilation. After 1940 the general child welfare law handled the removal of Indigenous children, however, once the children were

removed they were still treated differently from non-Indigenous children. Some indigenous institutions were given a financial boost after 1941 along with the extension of the Commonwealth child endowment to the children, which were paid to them instead of the parents.

Under the new general child welfare law, indigenous children had to be found to be neglected, destitute, or uncontrollable to be removed from their homes and families. The courts were much faster to apply these terms to children in indigenous families over non-indigenous children. This was probably a result of the fact that the definitions of these acts were based on the non-indigenous interpretations.

They also considered poverty to be neglect. It was not until 1966 that indigenous people had claim to social security benefits. Before that, indigenous families were not able to rely on government aid during hard times. Other states began to follow in the footsteps of New South Wales in the late 1940's, changing the policies of their welfare boards to include indigenous children in their case loads. The indigenous children, however, were still being treated differently. Although the laws had changed, groups of Aborigines were still being removed from their families. Social workers insisted that children were being neglected based on their poverty level. There have been stories of the social workers going through cupboards and looking at the amount of food in a household to determine the level of poverty and in turn neglect.

At the third Native Welfare Conference in 1951, the new Federal Minister for Territories, Paul Hasluck, urged that the states be consistent in their treatment of

Aboriginal people. Australia's promotion of human rights looked terrible at the international level. The conference agreed that assimilation was the main aim of native welfare measures. Agreeing that "assimilation in practical terms, in the course of time, it is expected that all persons of aboriginal blood or mixed blood in Australia will live like other white Australians do." (Human Rights Commission)

In the 1950's and 1960's an even greater number of indigenous children were removed from families, for neglect and also to attend schools. Many of them were adopted at birth. The large increase in removals, however, put great amounts of stress on the institutions and more children were placed with non-indigenous foster families. The identities of the indigenous babies were easily destroyed and often changed when they were adopted.

By the 1960's it was clear that assimilation was not working effectively, and indigenous people were not being accepted into society. Indigenous people were not willing to give up their culture and many had no interest in assimilating into the non-indigenous society. The definition of assimilation was changed in 1965 at the Native Welfare Conference to include a small element of choice. It stated that "the policy of assimilation seeks that all persons of Aboriginal descent will choose to attain a similar manner of living to that of other Australians and live as members of a single community." (Human Rights Commission) In 1967 a Federal office of Aboriginal affairs was established and gave grants to the states for the Aboriginal welfare programs. Assimilation was legally discarded as the policy, although many organizations still tried to assimilate aborigines into society.

The Whitlam Labor Government was elected in 1972. They believed in Aboriginal self-determination, which provided the means for indigenous people to receive funding to challenge the removal of children. Legal services began representing children in court and the number of removals dropped. In Victoria, the first Aboriginal and Islander Child Care Agency (AICCA) were established and began to offer alternatives to removal. Eventually programs such as AICCA and others similar to it merged into The Child Welfare Organization which oversaw all cases dealing with child abuse and neglect.

A paper delivered in 1976 at the First Australian conference directed attention to the larger numbers of Aboriginal children who were being removed and placed by non-Aboriginal social workers. It also showed how this was not consistent with the self-determination policy and it was also harmful to the indigenous children. Growing awareness continued and more organizations began to advocate for the proper care of Aboriginal children. A reappraisal of the removal process and placement was forced by various organizations in the 1980's and the family tracing and reunion agency Link-Up (NSW) Aboriginal Cooperation was established. These indigenous services formulated the Aboriginal Child Placement Principle and fought for it to be incorporated into the state and territory welfare departments. It is now incorporated into most states and with the exception of Tasmania and Western Australia where it is a little differently formulated.

The total number of children estimated to have been removed is impossible to calculate. A national survey done in 1989 found that almost half of the Aboriginal

respondents had been separated from their parents, while only 7% of the non-indigenous population had been separated. It is assumed that most indigenous families have, in fact, been affected in one generation or another.

In 1995 The Commonwealth Attorney General established the National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their families. This report done by the Human Rights Commission provides much of the background information in this section. The Human rights Commission found that children removed from their families are more likely to come into contact with the police as they get older, more likely to have a lower self-esteem, depression and mental illness, and they have a hard time relating to their Aboriginal culture.

The government's response to this report was that many State and Territory Governments have apologized and in 1999 the Commonwealth passed a statement of regret for the past practices that were in place. They also announced a package aimed at reuniting families and enabling Aboriginal people to access records and archives with historical information about themselves and their families that in all the years past were kept from them.

The drastic effects that this removal had on many generations of Aborigines are often forgotten. Many people today in there thirties and forties have no idea who their parents, brothers or sisters are nor do they have any idea where they are located. People have no idea where they are from or what their real names are. Compared to other indigenous relationships, Australia is very far behind. Removal of children lasted

primarily until the 1970's, although in some cases it existed until the early 1980's. This process is impossible for many people to forget and they are never likely to forgive.

## The Mabo Case

*Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to the English-Settler Colonialism* provides great insight into the life of Eddie Mabo, the colonization of Australia by the British and its relation to other Indigenous resistance, and into the 1992 High Court decision. This monograph is where most of the background information for this next section of this paper is correlated from.

Eddie Mabo was born on Mer Island in the Torres Strait on June 29<sup>th</sup>, 1936. Mer Island is one of the three islands that separate Australia from Papua, New Guinea. He grew up in the village of Las, a northeast corner of the island. Mabo grew up participating in the island traditions such as dances and ceremonies; his people used this to mark seasons and to show rights of passage. He learned myths and stories about how the islands were created and about the sacred powers and Mabo's laws. He learned of the traditions of his people and their connections to the lands. He also, however, was taught Christianity, which became an integral part of islander culture. On this island the indigenous tradition and western culture were very much intertwined. No such integration of the two cultures was seen on the mainland at this time.

Mabo was exiled from the island of Mer in 1953, because he was caught drinking heavily and "being with a woman". Since the islands at the time were thought of as reserves for natives, these actions were not permitted. The second offense was also highly immoral in his culture. After his limited exile he returned home to Mer and continued to work. It was not long though before he decided to voyage to the main lands of Australia. Mabo did most of his work between Townsville and Cairns, where he met his wife

Bonita. They were married in 1959, and permanently moved to Townsville a few years later with their two children.

When Mabo moved to Townsville he got involved with Aboriginal politics. Eddie became to be a very intelligent and politically active member of the Aboriginal and Torres Strait Islanders. He eventually became the key man who fought until his death for the rights of Aboriginal people. Eddie founded the first Aboriginal School in Australia to “achieving national prominence as the successful principal plaintiff in the landmark High Court ruling on native title.” (Cunningham 1) He also became the secretary of the Aboriginal Advancement League in Townsville, this group organized the 1967 inter-racial conference, and they sent delegates to meetings and began to form a “pan-Australian” movement.

One of the challenges Mabo faced was that the mainland idea of politics was completely different from the island politics. The islanders had a lot more westernized culture intertwined with their own, whereas the mainlanders were more closed minded and less willing to cooperate. The mainlanders felt that although both they and the islanders were Aboriginal, they were in no way the same people and should not be put in the same category; this difference forced Mabo to leave the Aboriginal Advancement League.

Mabo began working at James Cook University and took advantage of the library and the resources that it offered. He made friends with teachers, became a regular speaker in classes dealing with race relations and began attending education conferences. At a conference in 1973 he made a big scene, about the fact that these white teachers were

teaching mostly aboriginal and Torres Strait Islander children. He banged and yelled and said things like “Why the hell would they want to be taught by racist people like you?” Mabo established the Townsville Black Community School, which aimed to teach both Aboriginal culture and western culture. During these years working for the school and fighting for it at council meetings, Eddie, gained national recognition, and was appointed to Australia’s Aboriginal Arts Council and the National Aboriginal Education Committee. He became the President of the Council for Rights of Indigenous people, was the president of the Yumba Meta Housing Association from 1975-1980, and stayed involved in the Black Community School. He fought for the Torres Strait Islanders on the Aboriginal Acts Board, worked with various education groups to raise money, and became a well-known national figure in black Australian circles. He was intelligent, enthusiastic, and strong, and was never known to back down.

In 1973 Mabo planned a visit back to his home, Murray Islands, to do oral research and introduce his family to their relatives there. However, he was not allowed back. The Murray Council refused him entry into the islands saying that the visit by Mabo would create problems for the people.

It was not until February of 1977 that Eddie Mabo finally returned to Mer Island. In 1974 when he heard his father Benny Mabo was ill, he applied for permission to visit and it was granted on one condition, that Mabo would never undertake political affairs during his visit there. This to Mabo was not acceptable so he returned in 1977 without permission. Although Mabo never got arrested he was greeted with much suspicion and

opposition to his political activism. It was during this visit that he decided to fight for the land rights of his home in the white-man's court.

By the time Eddie Mabo began his battle, the Australian High Court still had never, unlike other common law courts in North America, recognized an Aboriginal right of any kind. The only attempt made by Aboriginal people to fight for their rights legally in court in regard to their land led to the negative decision of *Milirrpum* in 1970.

*Milirrpum* was an unprecedented case in which a community and other people from Cape Gove, which is in the Northern territory, sent in a petition of a bark painting to the house of representatives protesting the government's decision to take part of their ancestral land for a bauxite mine. This attempt had little effect on the decision and the painting is now hanging in the capitol building in Canberra with a message that says "a proud but sad symbol of my people's fight for their land." Having failed they tried to prove, based on common law, that their traditions and ways of life were organized with a specific system that was civilized and had a certain type of order. The courts, however, decided to dismiss the case because it was hopeless. The fight that Mabo was about to embark upon was a difficult challenge; the odds were very much against him.

The litigation of the case took ten years; it began in 1982 and was decided in 1992. The High Court in Australia is the highest level of appeal, which reviews the cases and decisions of the lower courts. In this situation, however, it was very important to the Indigenous litigants that the case did not go to the lower courts, but instead, straight to the High Court to avoid wasting time and to avoid an even longer battle. So *Mabo* ended up

being a delayed appeal of the *Milirrpum* case that was decided by the lower courts in 1970.

There were five Murray Islanders who came together and made their claims as owners on certain plots of land and fishing places. They sought a declaration that would recognize their individual or family ownership of the certain plots of land identified and stop Queensland from proceeding with legislation that denied their ownership. The land plots on the island were easy to identify because each family worked on specific areas of land growing and harvesting or fishing. The plots were decided based on Malo's law, or a long-established oral tradition that Aboriginal people followed in order to establish and regulate property ownership. These traditions were a positive for the islanders because their laws somewhat resembled traditional ownership views of Australians. However, what Mabo and the other litigants were concerned about was the fact that mainland Australian's ties to the land were a bit different. They did not want to succeed in getting their ownership recognized and leave the mainlanders out. Another important difference between the Islanders and some of the mainland Aborigines was that "in order to acquire this group-specific right, they have to demonstrate their 'distinctiveness' by proving their 'traditional, and continuing, physical and spiritual connection' to their land." (Short 497) This was very practical for the Islanders to do because they still occupied the lands they were fighting for, where as many mainland Aborigines had given or lost control of their lands.

There were two defendants in the lawsuit, the Queensland government and real opponent, and the Commonwealth government. It was the Queensland government that

held very strongly to the commitment of the “terra-nullius” doctrine. Although the Commonwealth was generally opposing the Islanders, their opposition was more from a legal professionalism stand point where as the Queensland government was focused on the ideological aspect. The plaintiffs wanted nothing more than recognition of their ownership to the land from the Commonwealth, whereas from Queensland they were challenging the legitimacy of sovereignty over the lands.

Both sides had very strong and well organized representation, although Queensland had funding that the plaintiffs lacked. This did not, however, suppress the Murray Islanders. They had dedicated people such as Eddie Mabo, known by many on the case as the true leader, college students and many legal volunteers who put their expertise to use in many instances simply because of the faith they had in what they were fighting for.

The case of *Mabo and Others v. the State of Queensland and Another* officially began on May 30<sup>th</sup>, 1982, when the claim was filed to the High Court of Brisbane’s registry. The next four years consisted of many hurdles for both sides, and for the litigants to protect the case from being thrown out by the Queensland government. The first attempt by the Queensland government to have the case thrown out was based on the claim that when the Islanders converted to Christianity they had abandoned their traditions. They argued that after the conversion the islanders were now “perfectly harmless and friendly”. (Russell 203) All the litigants had to meet with a High court judge. This happened many times. The main issue that the plaintiffs were facing was that in order for the case to go straight to the High Court, the factual issues of the case had to

be agreed upon by both sides. The High Court (much like the United States Supreme Court) was not a court that would decide on the facts of a case; that was the job of the lower courts.

For the next few years both sides spent time gathering information to try to agree upon the basic facts of the case. The plaintiffs spent time on Mer Island talking to people and seeing how organized and very much in place the Malo law was. The Queensland government refused most of the facts presented and it was decided that there must be a lower court hearing in order to determine the facts. The Islanders were very hesitant to have the case tried in front of a lower Queensland court. The judge ruled that the case be remanded to the Queensland Supreme Court because it was the only lower court with the jurisdiction to hear the case. The judge also made it very clear that both sides understood that the court would be using federal jurisdiction and it would only be deciding the facts, disputes regarding whether an issues was a question of fact or law would be determined by the High Court.

The case began in October of 1986 and was expected to last only four weeks; in the end it took up sixty-seven hearing days and produced 3,489 pages of transcript. The case went on until September of 1989. The case lasted as long as it did because there were objections by the Queensland government to the testimony of the witnesses, and the number of witnesses dropped from the original five to two. One died and two others stopped participating. There were constant objections because the evidence the witnesses used was based on oral traditions and laws passed down through the generations. The government continued to call it hearsay.

In May of 1984 the Queensland government put up a second front in the legislature. They followed through with their threat and repealed the *Torres Strait Islanders Act* which for many years had recognized the Islander's identity and designated the islands as reserves. They replaced it with the *Community Services (Torres Strait) Act 1984*, which "treated the islands like other waste lands of the Crown". (Russell 207) This gave the Community Council more restrictive powers to dictate land ownership and territory of the islands.

On April 24<sup>th</sup> of 1985, the Queensland Parliament passed another act called the *Torres Island (Land Holding) Act*, which made island councils give up small parts of the lands to qualified persons in the government. So government officials became owners of certain pieces of lands that previously belonged to the Island Councils. The most hurtful piece of legislation, however, was the *Queensland Coast Island Declaratory Act*, which simply stated that the islands were vested in the Crown and that the islands were free from any other rights or claim to them and they became the wastelands of the Crown; and no payment was to be made to any person that this act may cause grief or loss, even though the government did not consider them to have lost anything since they felt the islanders had no rights to the lands. This bill passed with only two-and-a-half hours of debate in the courts.

With all of these new acts being passed, the government of Queensland was becoming much stronger and was adding more to its defense. In order for the Higher Court to give credence to the claim that the Crown's sovereignty over the islands was burdened by the owner's native title, the Islanders would have to challenge the validity of

the *Declaratory Act*. They filed an objection or “demurrer” to ask the High Court to strike down the law as being beyond the powers of the Queensland Parliament. The High Court decided that the challenge to the *Declaratory Act* would be heard by the entire Higher Court bench. So the fact finding of the original case was postponed in 1987 and the focus turned towards a new battle. If this challenge made by the Islanders to the *Act* failed, then both parties agreed that the Islanders case would be abandoned. The parties also agreed that the rights to the Islanders would be assumed to exist; however, if the challenge failed then all rights would be extinguished by the 1985 *Act*.

There were many ways in which the Islanders tried to show that the Queensland Parliament was wrong and overstepping its boundaries. There was, however, one issue that proved instrumental. This was the argument that the *Act* violated the Commonwealth’s *Racial Discrimination Act*. They argued that it discriminated against the Meriam people’s property rights, which depended on the nature of those rights which was still being decided in the suspended hearing. The High Court in a very close four-three decision found that the *Declaratory Act* was in violation of the Meriam people’s rights and it failed to extinguish the traditional legal rights they had.

This case was more than a victory for the Islander litigation because it exposed the judges to many of the facts and evidence that was being used in the lower court trial. It was evidence that was crucial to the success of their case. The evidence showed how the Queensland government has recognized the Meriam people’s laws and customs many times in the past. Also it provided the court evidence that the Government of Queensland had bought land from traditional land owners on the islands and has recognized the

authority of the Murray Island Native Court to settle certain property issues. It was important for the High Court to hear all of this testimony and it ultimately helped the outcome of the second part of this case.

The fact-finding aspect of the case resumed in early months of 1989. The plaintiffs requested that the trial be moved for a visit to Mer Island, so that the judge could get a feel for what really happened on the island and the history it held. The judge agreed to this request and the whole operation was moved to the Murray Islands. Both teams tried to use this as an advantage to their cases with Mabo and the other islanders taking Judge Moynihan to visit and explain the lands of their history. The Queensland government was trying to find islanders who would testify against Mabo. The Judge was able to see just how particular the islanders were in regard to their lands and how they knew the boundaries and such of each territory. Also the two members who had previously dropped out of the case returned, one as a witness and the other providing essential evidence.

The central issue for the High Court, however, was not in the accurateness of any individual. The High Court was deciding whether or not collectively as Meriam people there was a legal system of land ownership that pre-dated the British Crown and had survived through the annexations and interventions of the Queensland and Australian governments. What seemed to be emerging at the time was that the Islanders had a system of rule-governed practices dealing with property ownership but that it amounted to no more than a way of keeping peace between one another. As the case continued, the Islanders become more exhausted and their resources became depleted. The final

addresses were heard in early September of 1989; the Judge delivered his “*Determination of Facts*” more than a year later on November 16<sup>th</sup>, 1990.

Judge J. Moynihan’s report contained a brief account of the Islander’s history and culture, but overall his report was a disappointment to the plaintiffs. He found most of their evidence to be unreliable and skeptical. Among the plaintiffs he found Eddie Mabo’s testimony to be most unreliable and actually found him not to be a credible witness. Most of the other testimonies fared the same way; the only positive part of testimony was from Dave Passi’s. The reason his testimony was important was because the Judge found that the block of land that he claimed belonged to his family was actually founded on property arrangements, which depended deeply on organizations for generations and that definitely existed since before European colonization. This claim was crucial because it came to a conclusion that he found evidence that “there probably was a collective, operational system for ordering property relations in the Murray Islands before the arrival of the Europeans. That probability does not rest easily with the doctrine of *terra nullius*”. (Russell 217) Although he had a lot to say about the culture, he based it more on the ideals provided by the defense. However, the judge could not reach a finding of fact on whether Meriam property arrangements could be considered an actual system of law. He felt this was not a decision that should be relied upon by a remitter judge, as his job was simply to determine facts not to decide whether property arrangements were a system of law. An important statement issued by Judge Moynihan was this: “They [the islanders] have no doubt that the Murray Islands are theirs”. (Russell 217)

The case was taking an interesting turn, and Eddie Mabo was very displeased. After the Judge basically named Eddie's evidence and Eddie non credible as a witness, the lawyers made a decision to divide the witnesses and have separate lawyers argue their cases. Also the Commonwealth decided to withdraw from the case as the other defendant based on the claim that the plaintiffs were going to defer the claims made on the seas and reefs, which was the only concern of the Commonwealth.

In late May of 1991 the High Court heard the arguments brought by the Islanders and the government of Queensland. It had been ten years since the Islanders had begun to prepare this case to be taken to court and they were ready for justice. Eddie Mabo was confident that justice would be served even with the disappointing fact-finding made by Judge Moynihan. However, the lawyers still had their doubts having to present all the information with many of their evidence and history such as Eddie Mabo's claims being taken out of the case. The judges agreed to hear the two islander witnesses whose claims were seen as somewhat credible. Probably the most important aspect was when one of the judges asked the Island council if they were seeking justice for these individual claims or for the entire island community. The next day the Islanders changed their statement of claim to state that the entire Meriam people collectively had title to their island home. This would prove to be not only essential to the Islanders but for all Aboriginal people in Australia.

After the hearings of the case and the change in claim, now all that was left was to wait for was the decision of the High Court. This, however, was too long to wait for

Eddie Mabo, the real power that kept this case alive for so long. Eddie Mabo died on January 21<sup>st</sup> 1992 of cancer. He would not live to hear the decision of the High Court.

On June 3<sup>rd</sup> 1992, the High Court rendered its decision in favor of the plaintiffs and the people of Murray Islands. In a six to one decision the High Court found that: “The Meriam people are entitled as against the whole world to possession, occupation use and gratified enjoyment of the Island of Mer”. (Russell 247) They were entitled to be the official owners of the Murray Islands. “The Court also held that the native title existed for all indigenous people in Australia prior to the establishment of the British Colony of New South Wales in 1788. This title exists today in any portion of the land where it has not legally been extinguished.” (Allens, Arthur, Robinson 1) It was one of the most exciting days in history for the Aboriginal people of Australia. Finally the courts “recognised that the prior rights of Aborigines and Torres Strait islanders were similar to those of indigenous groups in other parts of the world.” (Native Title 1)

The Mabo case became well known in Australian history in the next few months and Eddie Mabo became even more famous than he already was. This decision led the way for other Aborigines to stand up for what they believed in, and also urged the government to take an interest in Aboriginal affairs.

## The Apology

On February 13<sup>th</sup>, 2008, the Australian government and more specifically Prime Minister Kevin Rudd officially apologized to the Aboriginal people. The apology lasted four minutes with a twenty minute speech that followed. In his speech he said many things among some of the most important were some of the words he said regarding the future:

“Today the parliament has come together to right a great wrong. We have come together to deal with the past so that we might fully embrace the future. And we have had sufficient audacity of faith to advance a pathway to that future, with arms extended rather than with fists still clenched. So let us seize the day. Let it not become a moment of mere sentimental reflection. Let us take it with both hands and allow this day, this day of national reconciliation, to become one of those rare moments in which we might just be able to transform the way in which the nation thinks about itself, whereby the injustice administered to these Stolen Generations in the name of these, our parliaments, causes all of us to reappraise, at the deepest level of our beliefs, the real possibility of reconciliation writ large. Reconciliation across all Indigenous Australia. Reconciliation across the entire history of the often bloody encounter between those who emerged from the Dreamtime a thousand generations ago and those who, like me, came across the seas only yesterday. Reconciliation which opens up whole new possibilities for the future.” (Rudd 4)

There are approximately 450,000 Aborigines in Australia’s population of 21 million and they remain to be the country’s poorest and most disadvantaged group of people. Aboriginal life expectancy is 17 years shorter than the life expectancy of a non-indigenous person. In 1995 The Age newspaper (Melbourne) cited that almost 40 per cent of Aborigines are unemployed. This percentage is even higher if people working on the dole are included. The dole is like the welfare system in the United States. The Age also noted that Aborigines are at a much higher risk of arrest, are more likely to be educated poorly, and have poorer health than that of the general population in Australia. Also it

stated that most incomes of Aboriginal people are less than \$12,000 a year. They also stated that about 75 per cent of Aboriginal people remain emotionally tied to their homelands.

The Australian Bureau of Statistics released a report this past April that showed some improvements in indigenous life, but still showed the wide disparities that Aboriginal people face. The report stated that “There were significant falls in mortality rates for indigenous babies between 1991 and 2005, and there were also falls in the mortality rates of all indigenous people in Western Australia during the same period.” (Australian Bureau of Statistics 1) The report also showed a decrease in the unemployment rate from 20% in 2001 to 16% in 2006. Also the ownership rates for homes increased to 34% in 2006 from 31% in 2001. It also showed although there have been many improvements over the years; good health continues to be a serious problem for Aboriginal people. The mortality rates of indigenous people in certain areas were almost three times the rate for non-indigenous people from 2001-2005. Other findings include that indigenous people were half as likely to complete high school, more than twice as likely to smoke regularly; more than half indigenous people are overweight or obese, in relation to non-indigenous people. Also indigenous people face many barriers in gaining access to health services or primary care.

Rudd also made a special point to single out the “stolen generation” and give a special apology for all the harm that the removal caused both the children and the families involved. He felt that the apology was necessary to begin to repair the issues and problems that have occurred for so long between the Aborigines and the Australian

society. Rudd apologized for the past years in which Australia has discriminated against the Aborigines as a people. They were also invited to give a traditional welcome at the official opening of Parliament as a “symbolic recognition that the land on which the capital was built was taken from Aborigines without compensation”. (BBC) The apology rendered a mix of reviews.

Although most Aborigines felt grateful to finally hear the word “sorry” many felt that it was simply the very first small step towards a relationship that bears their approval. Many felt like there should have been some other type of compensation to go along with the apology. However, the apology was the first step in the right direction that had been acknowledged both publicly and nationally. Many felt, however, that this would be the first and only step to be taken.

Australia has taken a long road to get to where it is today in regard to its relationship with its indigenous peoples. From the beginning Aborigines were discriminated against in multiple ways. The unique colonization that occurred laid the framework for a long history of battle over lands, rights, and culture. Australia’s relationship with its Indigenous peoples was and has remained totally exclusive. Compared to other nations such as the United States Australia is far behind in developing friendly and non-discriminative relationships with the Indigenous peoples.

## Conclusion and the Future

Since the late 1980's there have been drastic changes and large strides taken in the battle to overcome discrimination of the Aboriginal people. "Historically, there has been a long tradition in Australia of things being done to and for Aboriginal and Torres Strait Islander peoples who have often been depicted as the passive recipients of the largesse or the charity of the European majority." (Thompson 1) This feeling and act was demeaning for the Aboriginal people and finally steps are being taken to speak out and to move forward in developing the relationship between Aborigines and the nation of Australia. It is the active fights that are being made by Aboriginal people that are gaining attention and making the future seem just a bit brighter. "Eddie Mabo's great battle and his vindication in the courts with the sweeping aside of the European assertion of Australia as a *terra nullius* was a spectacular achievement." (Thompson 1) It is battles that are in "the face-to-face negotiations with the Australian Government to negotiate the terms of the political settlement of the native title issue in the wake of the Mabo judgment was the active proof that Australia had begun the long climb to maturity in its working relationship with its indigenous people." (Thompson 1)

The future for Aboriginal relations is still much unknown, although with the new Prime Minister, Kevin Rudd, and his party in power, things seem to be moving in a more positive direction than in previous years. It has taken a long time to get Aboriginal relations where they are today. Aborigines continue to be the poorest and most under developed population in Australia. Their poverty levels and life expectancy is far behind that of an average Australian and even that of a few third world citizens. Aborigines

continue to be more represented in prison than a non-Indigenous person and they live in some of the poorest conditions in country. Australian society is lacking in many of the qualities and programs that would help to create a more positive relationship with its Indigenous population.

Since 1992, relations have been improving from a legal stand point. In regards to education and life in general, however, Aborigines still operate at a level much lower than any other indigenous population of a first-world country. Literacy and education for Aboriginal students have been improving consistently since the 1990's. Many programs have been introduced into Aboriginal communities and public schools to try and improve literacy rates among these students. The Human Rights Commission report shows that the overall population of Aboriginal and Torres Strait Islander people has increased from 265,000 in 1991 to around 410,000 in 2001. The increase in populations is due to the fact that the birth rate for Indigenous women has remained higher at 2.1 babies per woman, where the non-Indigenous birthrate is around 1.7 per woman. Also Indigenous women are more likely to have children younger.

It is argued by some that perhaps the most important step that must be taken by the Australian society is a recognition that Aboriginal people's ties to their lands are going to remain an important aspect of life and that their history should be preserved. Also even more important that the past be remembered because "denial of uncomfortable truths will in the long run diminish our humanity and limit our capacity to assimilate the lessons of the past and to work together to construct a better future." (Thompson 4) Finally the new Prime Minister has taken that step to acknowledge the past and apology

for its mistakes, which is something that the former Prime Minister Howard refused to do because he believed that putting value on symbolic gestures instead of practical things would only create a national guilt rather than help the situation. Time and time again reconciliation has failed however

It is crucial that the Australian government take certain steps in preserving Aboriginal history and traditions. The National Library of Australia has taken large steps to make it a point to preserve and display historical information for Aboriginal people. “It is memory and heritage which has in effect been closed off and withheld from those to whom it should have special value and meaning. It is a curious fact that libraries, notwithstanding their great service tradition of public service and accessibility, have yet been closed off to minority groups and cultures.” (Thompson 2) The exclusion of Aboriginal history and denial of past practices only makes the hopes of the future less attainable.

Aboriginal people “do not recognize the authority of the Australian nation-state and aspire to nothing less than recognition of their unceded and continuing sovereignty.” (Short 504) Therefore one solution that has been presented to address the problems is the need for a “shared comprehensive vision” that contains mutual healing, restoration, and mutual forgiveness. In order to fix the problems that both sides have the Australian government must work to gain the consent of the indigenous people and have nation to nation treaties that would be international treaties and “possess inherent international infringement redress possibilities.” (Short 505)

With all solutions in mind, the most important aspect of any solution is the continued support of the Australia government and society to work with the Aboriginal people and organizations to better the lives for all Aborigines.

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