



# 25 YEARS OF NATIVE TITLE RECOGNITION

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*Island of Mer (Murray) Torres Straits. Source: Google Maps*

## THE MABO STORY

As land rights and other civil and human rights movements gathered momentum across the country, in May 1982 five Torres Strait Islanders: Eddie Koiki Mabo, Sam Passi, Reverend Dave Passi, James Rice and Mrs Celuia Mapo Salee, launched a legal challenge that altered the legal and social understanding of the impact of settlement on traditional Australians and their legal relationship to land. Through the Queensland Supreme Court and the High Court of Australia, they sought legal recognition of their traditional lands in the Torres Strait; land that had been in their families for countless generations, yet under contemporary Australian law was deemed to belong to the Crown. The long road to recognition of native title by Australia's judicial system had begun.

### Eddie Koiki Mabo

*He was a fighter for equal rights, a rebel, a free-thinker, a restless spirit, a reformer who saw far into the future and far into the past.*

**Bryan A Keon-Cohen**

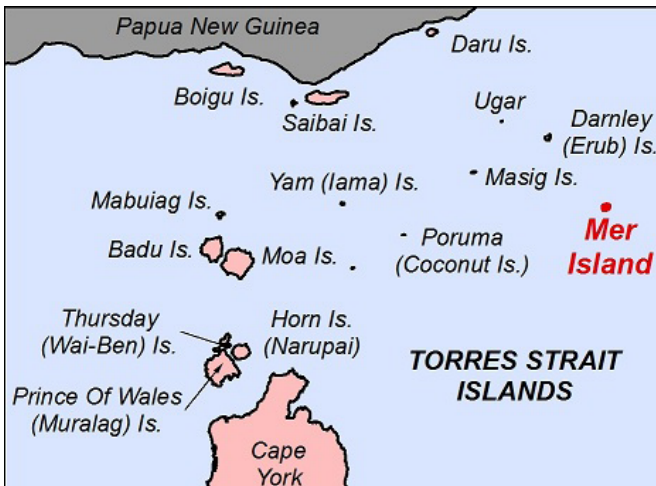
# THE MABO STORY

Eddie Koiki Mabo was born on 29 June 1936 on the island of Mer in the Torres Strait.

The islands of Mer (Murray), Erub (Darnley) and Ugar (Stephens) Islands make up the Murray Group and are the eastern most islands of the Torres Strait.

Eddie was the son of Robert Zezou Sambo and Annie Mabo. When his mother died in childbirth, he was adopted under customary law by his mother's brother, Benny Mabo and his wife, Maiga, and raised as their son. From an early age, Eddie learned about his family land, traditions and heritage.

In 1959, Eddie married Bonita Mabo (nee Nehow) and they settled in Townsville, raising nine children with Eddie establishing a significant legacy as a spokesperson and champion for the rights of Indigenous Australians.



Map of Torres Strait Islands

## A life of community leadership

Some examples of Eddie's extensive community leadership and activism include:

- Representative of Torres Strait Islanders working on the Townsville-Mount Isa railway construction
- Secretary of the Aboriginal Advancement League
- President of the Council for the Rights of Indigenous People
- Co-founder of the Townsville Aboriginal and Islander Health Service
- One of the founding directors of the Black Community School (amongst the first in Australia to teach the language and culture of the Torres Strait Islands, along with the state curriculum)
- President of the Yumba Meta Housing Association.

As a skilled performer and teacher of Meriam song and dance, Eddie was also appointed to the Aboriginal Arts Board of the Australia Council.

In 1967, Eddie started work as a gardener and groundsman at James Cook University. He actively participated in university life and was regularly invited to lecture students studying a unit on 'Race and Culture'.

*Eddie Mabo has left an extraordinary legacy. Like many of the great Aboriginal and Torres Strait Islander leaders, he had a mix of street smarts and self education, an unwavering sense of justice and a profound understanding of his own history. The genesis of the fight that he would take all the way to the High Court came after he had worked at James Cook University as a gardener and where he would also sit in on lectures and read books in the library, particularly those written by anthropologists about his own people.*

Larissa Behrendt

In 1974, Eddie was discussing his land on Mer with Professors Noel Loos and Henry Reynolds when he learnt that the land on the island of Mer, held by his family for countless generations, was actually owned by the Crown and that his people's traditional ownership of the island was not recognised by Australian law.

Very few Europeans had ever lived on Mer and the resident families there were acutely aware of traditional property rights and property boundaries.

*[W]hat interested me most was to hear Eddie's stories about growing up on Murray Island. He had a good memory and was a wonderful storyteller. He was also an intellectual in the precise sense of the word. He was intensely interested in ideas, in culture and in anthropology. He would often talk about his village and about his own land, which he assured us would always be there when he returned because everyone knew it belonged to his family. His face shone when he talked of his village and his land.*

*So intense and obvious was his attachment to his land that I began to worry about whether he had any idea at all about his legal circumstances. At our next lunch I cautiously broached the subject.*

*He was stunned. It was as though I had punched him in the face. He looked angry, aghast, incredulous. How could the whitefellas question something so obvious as his ownership of his land?*

**Henry Reynolds**

## Coming together

In August 1981, at a Conference entitled “Land Rights and the Future of Australian Race Relations” convened by the James Cook University, and co-hosted by the Students Union and Townsville Treaty Committee, Eddie gave a speech about traditional ownership of land and inheritance on Mer.

The final session of the conference was entitled ‘A High Court Challenge’ and during this session, it was suggested by a lawyer in the audience that a test case should be organised to claim land rights through the court system. Greg McIntyre, who worked for the Aboriginal Legal Service in Cairns agreed to take the case and he briefed barristers, Ron Castan QC and Bryan Keon-Cohen.

## Mabo: A long journey to justice

### Legislative background

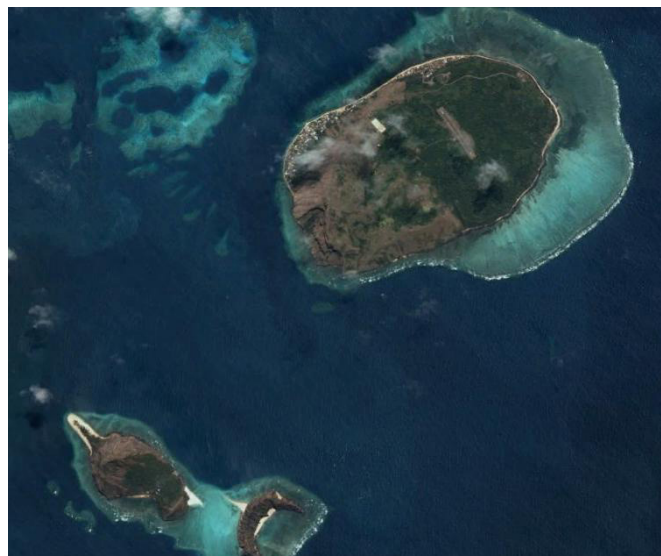
In 1872, Letters Patent were issued by the Colonial Secretary in Britain, instructing Queensland to annex the islands in the Torres Strait up to sixty miles from the coast of Cape York, thereby bringing the Torres Strait under colonial control. The remainder of the Torres Strait Islands were annexed to the Colony of Queensland by the British Crown in 1879 by the *Queensland Coast Islands Act 1879* (Qld).

In November 1912, the Queensland Government gazetted 1200 acres on Mer, as an Aboriginal reserve, a move that was repeated on many other Torres Strait islands at the same time. Between 1912 and 1926, a number of reserves were gazetted across the Islands.

By 1918, a Protector of Aborigines had been appointed to Thursday Island and Islanders came under increasing control of the government who removed Islanders to reserves and missions across Queensland, introduced curfews, a pass system and wage control.

In 1936, approximately 70 per cent of the Torres Strait Islander workforce went on strike for nine months, rebelling against government control over their lives. The strike culminated in a meeting of all Island councillors in August 1937, at which a series of demands were agreed upon and submitted to the Queensland government. As a result, a number

of significant reforms were instituted, one of which was the establishment of Island councils who were provided with a degree of autonomy and control over Island police and courts. The councils moved against restrictive laws such as curfews which were ultimately captured in the *Torres Strait Islander Act 1939*, repealing previous legislation. A significant section in this Act was the official recognition of Torres Strait Islanders as separate from Aboriginal Australians.



*Island of Mer (Murray) Torres Straits.  
Source: Google Maps*

Early in 1981, the Queensland Bjelke-Petersen Government proposed to repeal the *Torres Strait Islanders Act 1971* (Qld) and de-gazette reserves created under this legislation. Following opposition from the Torres Strait Islanders Advisory Council, the Government announced a new proposal to revoke the reserves and issue Deeds of Grant in Trust (DOGITs) as replacements. The change was ultimately established under the *Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982* (Qld) with Murray Island being the only Torres Strait Island not to implement the DOGIT system due to the Mabo litigation underway in the High Court, declaring that the land was not the government's to grant.

### Proceedings commenced in the High Court of Australia

On 20 May 1982, a statement of claim was filed in the High Court of Australia (High Court) by Eddie Koiki Mabo, Sam Passi, Father Dave Passi, James Rice and Mrs Celuia Mapo Sallee. The named respondents were the State of Queensland and the Commonwealth, with the Commonwealth later withdrawing from the proceedings. As noted above, Greg McIntyre was the solicitor for the applicants, instructing Counsel Ron Castan QC and Bryan Keon-Cohen. The initial action was made possible through a \$50,000 Federal

Government grant.

The applicants sought a declaration that the annexation of Mer by Queensland in 1879 had not extinguished native title in respect of its lands and waters, challenging the notion of *terra nullius* and the acquisition of all land in Australia to the Crown upon settlement. In 1986, the Chief Justice of the High Court remitted the case to the Supreme Court of Queensland to hear the evidence and determine the facts of the claim and Justice Moynihan began hearing evidence.

## A fresh challenge

In an attempt to pre-empt any finding of native title in the Mabo case, the Queensland Parliament passed the [Queensland Coast Islands Declaratory Act 1985](#). This legislation aimed to retrospectively extinguish any surviving native title without compensation, legislating that pre-existing land rights had been extinguished in 1879.

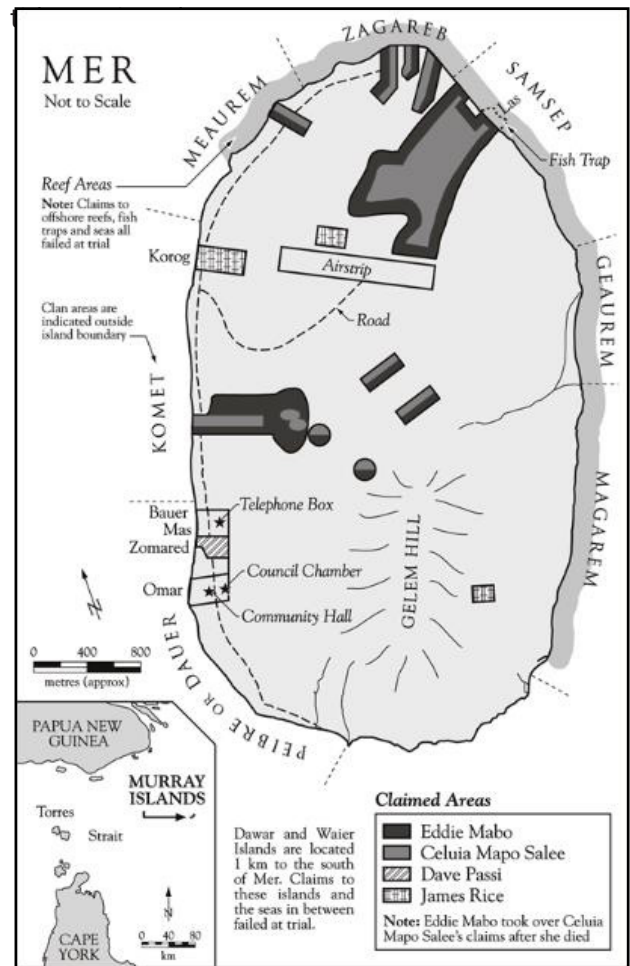
In response, Eddie Mabo and his fellow applicants were left with no choice but to challenge the validity of the legislation in the High Court if they wanted their case to continue, which they did in June 1985.

In [Mabo v Queensland \(No 1\) 1988](#) the High Court found that the legislation passed by the Queensland government was invalid as it was contrary to the [Racial Discrimination Act 1975 \(Cth\)](#). It was determined that the legislation was racially discriminatory in that it expropriated, without compensation and retrospectively, the Islanders' traditional rights and interests in land, whilst leaving untouched non-Islanders' equivalent interests.

## The case decided

After the determination was made in Mabo (No 1), the hearing before Justice Moynihan in relation to the principle proceeding was resumed in May 1989 with hearings both on country and within the court room. The hearing concluded in September 1989 and on 16 November 1990 Justice Moynihan handed down his determination of facts—more than four years after Eddie Mabo first gave evidence. Justice Moynihan discredited Eddie Mabo's evidence, but the determination of disputed facts allowed the matter to return to the High Court.

The full case was then argued before the High Court over several days in May 1991 and the High Court handed down its judgements in [Mabo v Queensland \[No 2\]](#) on 3 June 1992. The majority held that native title to the Murray Islands had survived annexation by Queensland, rejecting the doctrine of *terra nullius* and determining that native



Murray Island: Claimed Areas and Locality, Torres Island. Keon-Cohen, *A Mabo Memoir: Islan Kustom to Native Title*, p xvii, A.C. Haddon, Vol 1, pp 160-61, Exhibit 117 at MC Vol-WF 6/95-6

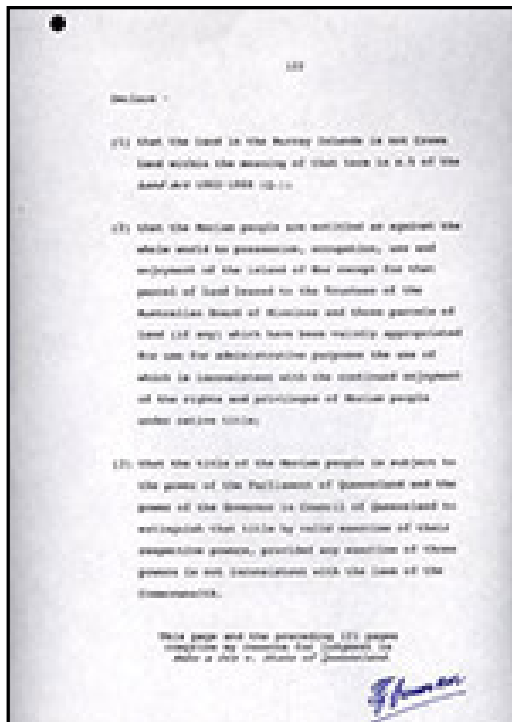
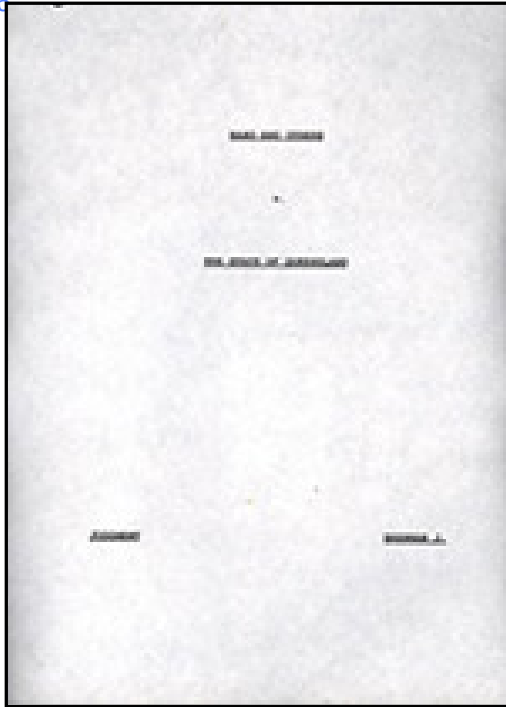
## The Mabo decision

*(T)he Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer...*

*The fiction by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country.*

*Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the Indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.*

**Brennan J** *Mabo v Queensland [No 2]* [1992] HCA 23,



Cover and page 122 of *Mabo and Others v The State of Queensland Judgment*, Justice Brennan  
© High Court of Australia

*The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.*

*The lands of this continent were not terra nullius or 'practically unoccupied' in 1788. The Crown's property in the lands of the Colony of New South Wales was, under the common law which became applicable upon the establishment of the colony in 1788, reduced or qualified by the burden of the common law native title of the Aboriginal tribes and clans to the particular areas of land on which they lived or which they used for traditional purposes.*

**Deane and Gaudron JJ** *Mabo v Queensland [No 2]* [1992] HCA 23, 86

The Mabo decision altered the foundation of land law in Australia and delivered a measure of justice to Indigenous Australians by recognising their inherent rights to their traditional lands.

## An important legacy

Eddie Koiki Mabo died on 21 January 1992, just five months before the decision that bore his name was handed down. Although he was not alive to witness the culmination of his vision and fight for justice, he left an invaluable and profound legacy.

In 1992 Eddie, along with Father Dave Passi, Sam Passi, James Rice and Mrs Celuia Mapo Salee, was posthumously awarded the Human Rights Medal.

The life of Eddie Koiki Mabo is celebrated each year on 3 June—Mabo Day.

*[F]or me, [the Mabo decision] was a shining star. Like the stars have always navigated Torres Strait Islanders, a seafaring people, Eddie Koiki Mabo's light illuminated the night sky. It gave me a belief that the Australian legal system could deliver Aboriginal and Torres Strait Islanders peoples' justice.*

**Terri Janke**

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