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Teaching Native Title

Melissa Castan
Monash University

Jennifer Schultz
Monash University

TEACHING NATIVE TITLE

MELISSA CASTAN* & JENNIFER SCHULTZ**

INTRODUCTION

Theories of western jurisprudence have traditionally been dominated by the perspective of the white western male.[1] Feminist jurisprudence has suggested that theories of law which neglect to take into account experiences of women are inadequate;[2] we can no longer ignore the proposition that theories of common law and property, that do not embrace Indigenous experiences are also deficient.

Indigenous Australians have been beset by the dominant Anglo-European discourses, be they legal, historical or anthropological, for over two centuries.[3] These dominant analyses have defined, destroyed, created and modified the rights and lives of Indigenous peoples. It is fair to say that the relentless study of Indigenous people which was fundamental to the colonial construction of "The Aborigine" has been the cause of considerable resentment and pain.[4] The resurgence of these processes of constructing Indigenous needs, aims, rights and identities has become a feature of the mid 1990s, particularly in legal and political discourses.

Discussion and constructions of the issues surrounding *Mabo and Others v State of Queensland*[5] and its consequences for Australia's legal and political identity have become a series of stereotyped dichotomies: "Aborigines vs non Aborigine", "Indigenous vs Industry", "Land Rights vs Mining", "Reconciliation vs Racism" and of course "Politically Correct vs Freedom of Speech". Thus "the Great Australian silence" that WEH Stanner referred to in the 1968 Boyer Lectures has become the Great Australian debate.[6]

Students (and teachers) often carry these abovementioned stereotypes, be it consciously or unconsciously, and law teachers will be confronted with these explicitly or implicitly when examining the issues surrounding *Mabo*. This article raises some of the challenges in teaching Indigenous legal issues within undergraduate law courses, particularly at the levels of introduction to law[7] and introductory property law courses. Section I of this article examines teaching objectives when incorporating native title issues into introductory courses. Section II raises some of the challenges facing students and teachers in first approaching the inter-relationship of the Anglo Australian legal system and Australia's Indigenous peoples. Section III examines the methodologies which can be adopted in teaching large and small groups, and Section IV considers assessment issues. Finally some teaching resources and materials are outlined.

I LEARNING OBJECTIVES

It is axiomatic that any consideration of Australian Property law and the development of the common law of Australia must now take account of the watershed represented by the *Mabo* case and its consequential impact on the Australian legal system.

For Legal Process teachers,[8] introducing the *Mabo* case can provide students with an appreciation of cultural and legal diversity, how the law impacts on minority groups and the role of the High Court in the Australian Legal system. The main objective for Legal Process teachers is to use Indigenous issues to illustrate a number of substantive legal doctrines. In terms of cultural perspectives, Indigenous issues and materials can be used to emphasise that a recognisable system of law existed in Australia prior to 1788 and how the imposition of British case law and legislation affected aborigines.[9]

In terms of orthodox legal doctrines the objectives of this subject are to teach fundamental concepts such as the structure of our legal system and the sources of our law, for example, the common law and the legislative process. Cases involving Indigenous issues provide excellent examples for teaching the common law and judicial techniques. *Milirrpum v Nabalco Pty Ltd*,[10] *Mabo* and the *Wik* [11] decision, can be used to illustrate the development of the common law, in particular the courts' attempts

to deal with Indigenous claims. *Milirrpum* also demonstrates the crisis of the collision between fact (or reality) and law. Collectively these cases are illustrative of the role of precedent and how the doctrine of precedent is applied in practice.

The aims and objectives of introducing native title material into Property Law are twofold. In a general sense this material enables students to develop "some familiarity with the historical, social and political factors which have shaped the principles and rules forming part of modern property law."[12] It is important for students to be able to describe and recognise "the possible sources of and different judicial approaches to proprietary rights and the policy issues underlying the recognition of particular interests as being proprietary."[13] In this sense *Milirrpum* is important to teaching the concept of property, as it illustrates the characteristics which are normally associated with having a proprietary interest under Western legal systems. *Milirrpum* illustrates how these characteristics are culturally and historically constructed.

More specifically Indigenous perspectives are important in terms of evaluating the conflicts inherent in orthodox legal doctrines of Property Law. Doctrines such as possession, tenure and estates cannot be taught without a detailed examination of native title and the Australian cases which surround it. In terms of specific objectives in relation to these doctrines, it is important to explain the historical basis and rationale, and to evaluate the impact of these doctrines on Indigenous interests in land. Understanding the concept of native title, its statutory regulation and its consequences for the Australian system of property law are thus fundamental to any property course.

II PEDAGOGICAL CONCERNS

Issues for Teachers

One of the challenges for teachers of compulsory subjects, such as Legal Process or Property, is that the Mabo case is often taught in the early weeks of the subject, because it forms part of the "introductory", "perspectives" or "concepts" stage of the curriculum. In Legal Process, Indigenous issues can be used to teach topics like the role of the common law and the legislative process, so that an understanding of the relationship between the legal system and Indigenous people is developed with the learning

of orthodox legal doctrine.[14] "This prevents the conscious or unconscious marginalisation of these issues by teachers and students and facilitates an appreciation of the cultural basis of the dominant legal system and the extent of its conflict with other cultures."[15] The challenge for teachers is to present the issues in such a way as to avoid accusations of bias, or to perhaps make biases explicit.

In relation to Property law, the preconception of Property law students everywhere, is that Property seems to be dull, dry and dauntingly difficult. Like mathematics, Property consists of concepts and symbols, whose relationship to everyday things is not immediately apparent. Students are quick to understand why negligence is actionable, and why murder, theft and rape are crimes. Property is difficult. The world of equitable title, easements and indefeasibility is a world of concepts for which prior experience has not prepared students. In Property law courses, students are forced to unlearn their previous notions of Property in order to begin to understand property's legal persona. Students confronted with this conceptual material try to avoid it in the hope that the examiner will not ask about concepts. Whilst they try to learn Property by simply learning the "rules", students should be encouraged to avoid this temptation. Students need to understand that all this conceptual material means nothing more than that property is similar to a language and like any foreign language, it requires the patient learning of its individual components before one can use it fluently.

Property law's conceptual nature makes a number of demands on both the student and teacher. These demands are exacerbated by the new developments in native title. From the student it requires a persistent expenditure of intellectual energy. The challenge for the teacher is that the traditional continuum that might be used in other subjects will not work well for property. In property law everything is interrelated and almost everything must be introduced at once. Combine the above with the developments in the law arising out of the *Mabo* case and students and teachers face a challenge — how to cope with all this material in the early stages of the course.

It appears that trying to teach Property in a linear fashion makes it difficult for both students and teachers. That is why in most Property courses, the subject matter is taught by building on basic ideas and introducing basic "property" vocabulary. Property starts

with its core, the concept of property and moves on to the classification and interaction of property interests, to the study of those individual interests, to dealings and priorities among them, and then to the impact of registration systems. The historic *Mabo* decision is fundamental to the contemporary understanding of Australian Property law. The difficulty is where to start discussing it in detail. Thus *Mabo* exemplifies the Property law teacher's dilemma. It is a detailed and lengthy case which raises a number of complex new concepts such as the doctrine of tenure, estates and possession. The challenge for teachers is to know where to introduce the case and once introduced, to know how much detail is required at any particular point in the course.

Mabo is often introduced into the curriculum in the early stages of the Property law course. Having raised the significance of the case, teachers feel obliged to continue to explain the more sophisticated concepts which are contained in it. This can have two disadvantages, first students are often forced to understand complex concepts very early in the course and secondly this can often lead to duplication of the discussion of *Mabo* when tenure and related issues are dealt with in detail later in the course. Duplication itself is only a problem when time is of the essence.

In the Law Faculty at Monash University, we teach *Milirrpum* in the early "concepts" part of the course to illustrate what were traditionally recognised as essential characteristics of proprietary interests, leaving *Mabo, Wik* and the *Native Title Act* until students are more familiar with the context of property law and have mastered some of its language. At this point students are in a position to consider questions such as "what are the incidents of native title?" "can native title CO exist with other interests in land?" and "what does extinguishment really mean?"[16]

Further, teachers often find that student reception of Indigenous property concepts and title is poor because the students tend to marginalise the issue. This may be the result of students' natural familiarity with "bits and pieces" of the dominant legal system within which they live, and innate cultural biases.

Teachers themselves may be unfamiliar with the Indigenous perspectives and daunted by the prospect of tackling intercultural legal concepts and the wealth of material available on the case and the legislation. Teachers similarly may feel unsure of teaching Indigenous property concepts that are perceived as politically

sensitive, and are beyond the realm of their own experience. For instance, we may be unsure of the appropriate terminology,[17] or unsure of how to explain Indigenous law.[18]

Issues for Students

Most property students have a basic framework for western notions of property. However, as mentioned above, in the concepts stage of the course students are forced to unlearn these notions. The property course does not deal so much with cars, houses or jewellery, the things lay people call property. Instead we deal with "proprietary interests" in the cars, houses and jewellery. This is difficult enough for students to understand but at least most students have a basic idea of the rights one gets when one has a proprietary interest in the cars, houses or jewellery. In contrast, few students have a basic understanding of Indigenous concepts of property, relationships and "country." Students are often challenged by the technicality of the *Mabo* case, the resulting legislation and how this all "fits" together with the remainder of the course. Add this to property's abstract conceptual nature and students can feel they are floundering.

The application of the principles expressed in *Mabo* can be perceived as ambiguous by law students because they are determined by reference to the customs and traditions of the claimants. Students have difficulty marrying the black letter common law doctrine with the apparent fluidity of the Indigenous title.[19] Further they struggle with concepts such as extinguishment, the co-existence of interests and the effect of the legislative schemes. Often this leads to difficulties in applying the concepts and laws of native title to problem based questions. The transformation of "propositional" knowledge into "practical" knowledge is tricky in all Property problems, but with the added complexity of Indigenous title, special attention is needed for students to come to grips with the process.

Terminology in law subjects often confuses students, particularly in the earlier years. Often students struggle with the language of law. The use of unfamiliar terminology can be daunting and can leave students feeling they have been thrown in at the deep end. This is further exacerbated by the technical language of Mabo and the unfamiliarity of many of the concepts of

Indigenous law. The challenges posed by the issues outlined above are by no means insurmountable, but confidence in ones objectives and preparation for teaching are necessary. That is not to say that the teacher must have all the answers; perhaps in this context it is inappropriate for the teacher to profess wisdom in an area that may be beyond his or her usual realm of study. One senior academic put it well:

> It is therefore advisable … to limit the Indigenous content of the course initially and to expand it gradually as one's knowledge and confidence, fostered by voracious reading, grows.[20]

III TEACHING AND LEARNING

Large Group Teaching

Property law is traditionally taught in large lecture groups with smaller tutorials or it can be taught in a seminar size class. When teaching in a large group environment the challenge is always to be more than a conveyer of information and content. Current views of university teaching focus on ways to engage the student in learning, by not limiting teaching strategies to the straight transmission of information.

> Expert teachers look at teaching from the point of view of the learner, not the teacher. There is a strong association between this way of teaching and the quality and quantity of student learning.[21]

University teaching may have traditionally been viewed as the transmission of a knowledge base from teachers to students.[22] However, recent academic attention has focussed on developing a wider range of skills in students. These include skills thought to be relevant to the workplace — for example teamwork and communication skills, legal drafting, client interviewing, negotiation and advocacy skills.[23]

Further, despite the dynamic social and political context to native title issues, teachers may tend to get saturated in the detail and technicality of the *Mabo* judgment and the provisions of the *Native Title Act*. *In* doing so they may tend to de-emphasise the "big picture" elements of the topic which students would find most stimulating, and yet teachers must tackle these finer details of native title. Thus teachers sometimes feel the discussion of native title becomes removed from its social, political and economic

consequences and thus diminishes its pedagogical significance.[24]

One of the ways to achieve student based learning, rather than "top down" teaching, is to break the large groups into smaller groups to work on the issues raised by native title. This can be achieved by utilising teacher-based tutorial or discussion groups,[25] by student led self-learning groups and group presentations to the class.[26]

In a large group, one strategy is to start the topic in a challenging, controversial or dynamic way that breaks the mould of the normal lecture style. For example, introducing a speaker, or showing a revocative video can stimulate immediate student interest.[27] The inclusion of alternative voices and perspectives within the teaching of native title issues is an important counter to the sometimes frenzied hype surrounding native title. Ideally one might be able to include presentations by Indigenous representatives who are suitable speakers on the issues relevant to the curriculum,[28] but even if this were not possible, students should be provided with material written by Indigenous people[29] or videos[30] that convey their perspectives.[31] This is particularly important when teaching the nature and meaning of Indigenous concepts of, and relationships to, land and country.[32]

Speakers or videos should stimulate reading and participation by the class which can be followed by an overview lecture style class to draw material to ether. Students should be provided with sufficient reading[33] and discussion questions to enable them to break off into smaller self directed groups which can report back to the class.

For example smaller groups or pairs could be asked to prepare a brief to advise groups with different perspectives or positions.[34] The groups can then come back together for a role playing exercise such as a conference on amending native title legislation, or a mock presentation of a native title claim. Such an activity can be spread over a number of sessions and incorporate tutorial times. If students are to take the exercise seriously the exercise should form part of the assessment regime and they need to be given sufficient preparation time. Teachers may need to provide an assisting role at the initial stages to help students get started.

In relation to Legal Process or first year subjects, groups at Monash University can be as large as 60 students. When examining the introduction of British law and its impact on Indigenous people,

again a video can be used as a way of dramatically introducing students to the topic.[35] Videos which deal with the removal of Indigenous children from their natural parents or that demonstrate life on the reserves, will stimulate class discussion on the social, economic and personal effects of past government policies on Indigenous people. The contemporary effects of these policies can be illustrated with material drawn from the National Inquiry into Separation of Indigenous Children from their Families, the Royal Commission into Aboriginal Deaths in Custody and administration of criminal justice statistics.[36]

Small Group Teaching

Teachers with small groups under 40 students have the luxury of being able to be more innovative and creative in their teaching. For Property and Legal Process students, field trips to the Native Title Tribunal or the courts, with follow up field reports, are interesting and exciting for students and the teacher alike. Small group teaching also gives the teachers and students the flexibility to have class presentations or to engage in some of the role playing suggested above. Students can be assigned to review relevant articles and books, and then give short presentations, followed by written reports.

Tutorial groups which link in with lecture streams can be used to facilitate learning in the large lecture environment. Here interactive strategies such as mooting exercises, debates and role playing can all be used to stimulate student learning. Once again if students are given sufficient time for preparation and these tasks are linked to the assessment regime, this will encourage active student participation.

IV ASSESSMENT ISSUES

As much as teachers might encourage students to undertake wider learning, it is often the assessment regime that drives student behaviour.[37] Therefore when thinking about organising any course it is necessary to decide what assessment regime is appropriate and what we ideally want students to learn. However, when designing assessment regimes teachers are constantly having to work within set parameters beyond their control, such as the faculty's budget, student numbers, faculty staffing and facilities. Law courses have

traditionally had assessment regimes which focus on supervised written examinations, testing students' abilities to spot issues, summarise appropriate principles of law and apply these principles to hypothetical facts. This encourages students to acquire and reproduce their knowledge but it does not allow students to develop different skills nor does it allow them to integrate an in-depth analysis of the case law and legislation.[38]

In terms of the traditional examination based curricula,[39] native title is often examined through essay style questions. However, students' understanding of the topic can also be effectively examined through the use of problem style questions, particularly where students have undertaken practice questions in tutorial groups. At Monash Law School problem-based questions might typically involve advising one or more Indigenous groups in relation to the use of certain land areas where some level of continuing connection with the land seems evident. A number of conflicting interests may be brought into the problem including a pastoral lease, tourist interests, government interests, all of which have varying uses for the land. To achieve the best learning outcomes from such a problem it must be clear to the students what the objectives of the assessment are. For instance, are they to refer to specific provisions of the legislative schemes or not, are individual judgments of the Mabo case to be specifically referred to, or is an overview perspective sufficient? It is essential that these sorts of issues are made clear, to avoid students getting "off the track".[40]

Skills-based training[41] can be introduced into teaching native title in a number of ways. Legal research skills, such as student knowledge and use of legal research tools can be tested through research projects. For example in 1996 and 1997 in the Faculty of Law at Monash University, property law teachers set specific native title questions which required students to consider policy perspectives and conduct thorough research. These problems were in the form of essay style questions, but they could alternatively be hypothetical problem style questions which try to encourage students proactively to design a solution to the problem posed.

To emphasise the importance of the research component of the task, in addition to writing up the research paper, students can also be asked to provide an outline of the process through which they conducted their legal research. This process encompasses both the

method and sources used by the students to obtain the relevant information. By outlining their research strategy students become more focused on completing their research in a systematic and thorough way rather than in an ad hoc fashion.

Classes on how to engage in paper-based and computer-based research can be conducted just prior to handing out the research assignment. These classes enable students to familiarise themselves with legal research skills, in particular computer skills.[42] The computer classes can be conducted in small groups by a law librarian. Because the classes link into a specific research assessment task, students find that these classes focus their learning. The research strategy is also a valuable tool, as it encourages students to think about the application of their research skills.

Research assignments which are conducted in this way test a number of important skills. They test the traditional skills of legal analysis such as analysis of cases, legislation, synthesis and evaluation of legal arguments. They also test in depth legal research skills such as knowledge and use of legal research tools, in addition to information gathering skills such as organisation of material. If conducted in pairs or small groups, the research assignment encourages communication skills and encourages students to work together productively.[43]

Self-learning groups and self assessment tasks reinforce that it is each student's obligation to take responsibility for their own learning. Self-learning can occur in collaborative self-learning groups where students are organised into study groups which meet regularly to answer questions provided by their teachers. In this environment students develop the confidence to openly discuss legal issues and concepts with their peers. These groups can also form the basis for study groups when students are preparing for final exams.

Self-assessment tasks can be set in a number of ways. A common method is to incorporate questions in the reading guide at the end of each topic to help students crystallise their understanding of the In property law, questions asking students to articulate — "What are the incidents of native title; how do you determine them and how can native title be extinguished", or "define the following terms: tenure, freehold, sovereignty, radical title, usufructuary", all help the student critically assess their understanding of the topic.[45]

This type of "interactive" learning which involves asking questions as students progress through the course, encourages students to "actively" engage in the subject matter.

Thus in teaching and assessing native title it is useful to adopt a variety of assessment regimes that reward students for coming to terms with a wide range of social, political, historical and legal factors involved in the issue of native title, rather than a superficial recitation of the legal rules.

CONCLUSION

The issue of native title gives teachers the opportunity to embrace wider perspectives than might usually be presented in introductory law courses. Mabo and its legislative, judicial and political consequences illustrates the dynamic of Australian law on a number of levels. There are constitutional, property, intercultural, and precedential issues which all arise from this unique case. The categorisation and fictions which characterise western legal systems are well illustrated by reference to the recognition of dispossession and delegitimisation of Indigenous cultural and legal systems. Thus the challenge for the law teacher is to address these issues at an appropriate level and to be armed with a diversity of teaching tools. We trust that this piece provides teachers with some of the practical resources to redress the inadequacies of the dominant discourse and to meet the challenges of teaching native title.

TEACHING RESOURCE GUIDE

(Please Note: This is not a comprehensive survey of all material on Mabo, but rather it represents material that the authors have found useful.)

Aboriginal Land Rights

Articles

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J Behrendt, Fiduciary Obligations and Native Title (1993) *Aboriginal L Bull 7.*

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SEK Hulme, Aspects of the High Court's Handling of *Mabo* (1993) 87 *Vict B News* 29 *(see* reply by Castan, & Keon Cohen at 47).

M Kirby, In Defence of *Mabo* (1994) *James Cook UL Rev,* 51.

K McNeil, Racial Discrimination and Unilateral Extinguishment of Native Title (1996) 1 *Austl Indigenous L Rep* 181.

H Morgan, *Mabo* and Australia's future (1993) *Quadrant* 63.

G Nettheim, Judicial Revolution or Cautious Correction? *Mabo v Qld* (1993) 16 *UNSWLJ* 1.

I Omar, The Semantics of *Mabo:* An essay in law, language and interpretation (1995) *James Cook UL Rev* 154.

N Pearson, *Mabo:* Towards respecting equality and difference, in *Voices From the Land* (Canberra: ABC Boyer Lectures, 1993).

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F Brennan, One Land, One Nation: Mabo — towards 2001 (St Lucia: UQP 1995).

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D Sweeny, Broken Promises: The Crown's Fiduciary Duty to Aboriginal Peoples (1995) 3 *Aboriginal L Bull* 4.

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R Bartlett, The High Court Decision, Racism and the WA Govt (1995) 3 *Aboriginal L Bull* 8.

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The Work of the Native Title Tribunal

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Some Useful Journals/Serials

Aboriginal Hist
Indigenous (formerly) Aboriginal L Bull
Alternative LJ
Austl Mining & Petroleum L Ass'n Bull
Austl Aboriginal Stud
Austl Indigenous L Rep
Austl Property L Bull
Native Title News
Oceania

Some Useful Reference Materials

Encyclopedia of Aboriginal Australia (Canberra: Aboriginal Studies Press, 1994). Mabo: *A Source Book* 5th ed (Clayton: Monash Information Service, MONINFO).

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http:/ /www.vicnet.net.au (Victorian Koorie Information)

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http:/www.aiatsis.gov.au/ntpapers/ntipl2.htm (AIATSIS homepage)

* Lecturer, Monash University.

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1 See further R Delgado, *Critical Race Theory:* The *Cutting Edge* (Philadelphia: Temple University Press, 1995).

2 L Behrendt, Women's Work: The Inclusion of the Voice of Indigenous Women (1995) 6 *Legal Educ Rev* 169, at 172.

3 This is examined in B Attwood, *1n the Age* of *Mabo* (Sydney: Allen & Unwin, 1996); Further see T Rowse, *After Mabo: Interpreting Indigenous Traditions* (Melbourne: Melbourne University Press, 1994).

[4] C Healy, "We Know Your Mob Now": Histories and their Cultures (1990) 49 *Meanjin* 512; G Foley, Teaching Whites a Lesson, in B Lee J ed, *Staining the Wattle: A People's History* of *Australia since 1788* (Fitzroy: McPhee Gribble, 1988).

[5] (1992) 175 CLR 1 hereafter referred to as *Mabo*.

[6] J Morton, Aboriginality, *Mabo* and the Republic: Indigenising Australia, in B Attwood ed, In *The Age of Mabo* (Sydney: Allen & Unwin 1996) 117 at 120 examines this shift.

[7] For example Legal Process, History and Philosophy of Law and other first year introductory law subjects.

[8] The term Legal Process is used here to encompass first year introductory law subjects.

[9] See S Campbell, Teaching Aboriginal Legal Issues to First Year Students, paper delivered and distributed to the Australian Law Teachers' Association, 46th Annual Conference, July 1991, Law and Social Justice Interest Group, at 4 (Campbell).

[10] (1971) 17 FLR 141 (*Milirrpum*).

[11] *The Wik Peoples v Queensland* (1997) 141 ALR 129 (*Wik*).

[12] Monash University, Faculty of Law, Property law reading guide 1996.

[13] The University of Melbourne, Faculty of Law, Property law reading guide 1996.

[14] Campbell, *supra* note 9, at 2.

[15] *Id.*

[16] This question is aimed at elucidating the proposition of Brennan J in *Mabo*, that native title has its origins in the traditional customs of the Aboriginal people and that the common law is only providing recognition of the title that existed prior to the reception of common law. In this sense native title holders would never consider their rights extinguished, despite some inconsistent Crown grant or other act that is understood to extinguish according to common law. Noel Pearson describes this as the "recognition concept". That is, that native title is "the 'recognition space' between the common law and the aboriginal law which now [is] afforded recognition in particular circumstances." N Pearson, The Concept of Native Title at Common Law, in G Yunupingu ed, *Our Land is our Life: Land Rights — Past Present and Future* (St Lucia: UQP, 1997).

[17] For instance should we use the words Aboriginal, Black, Indigenous, Koori, Murri, Nunga, Nyungar, etc? Here we have used the term Indigenous to refer to indigenous people across Australia including Torres Strait Islander people. The words Aborigines or Aboriginal People are used as nouns and Aboriginal as an adjective. Koori, Mum, Nunga and Nyungar refer to the Indigenous people of particular regions using the words they currently use to name themselves. Consider E Feisl, *How the English Lunguage* is *used to put Koories down, deny us rights or* is *employed as a political tool against us* (Clayton: Koorie Research Centre, Monash University, 1989).

[18] For instance the dreaming, religious imperatives, the significance of "country", the appropriate generalisations to make in describing indigenous concepts of native title.

[19] An interesting comparison is evident in the tale of Hobbles Danaiyairi where he tells of the Saga of Captain Cook and he relates that "My Law only one. Your law keep changing." See Healy, *supra* note 4, at 517. Also extracted in H McRae, G Netheim, & L Beacroft (eds) *Indigenous Legal Issues: Commentary and Materials* 2nd ed (Sydney: LBC Information Services, 1997) 1–2.

[20] Campbell, *supra* note 9, at 11.

[21] P Ramsden, Improving the Quality of Higher Education: Lessons from Research on Student Learning and Educational Leadership (1995) 6 *Legal Educ Rev* 1, 5.

[22] S Kift, & G Airo-Farulla, Throwing Students in the Deep End, or Teaching them how to swim? Developing "Offices" as a Technique of Law Teaching (1995) 6

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[23] *Id.*

[24] For example the big picture issue at the moment is the hysterical tone of much of the media debate about the recent *Wik* decision.

[25] M Le Brun, & R Johnstone, The *Quiet (R)evolution: Improving Student Learning in Law* (Sydney: Law Book Co, 1994) 272.

[26] Many teachers would rightly feel concerns about letting student self-learning groups exercise too much autonomy. This can be addressed by providing appropriate linkage back to clearly stated assessment tasks, whether they be reports, presentations or research papers etc.

[27] For example showing property students video footage of the Premiers' Conference discussing the effects of the recent High Courts' *Wik* decision could provoke a passionate response within a class. Excerpts from the Premiers' Conference were aired on the ABC's 7.30 Report on 22 January 1997. The Conference illustrated clearly the misleading and hysterical tone of much of the debate about the *Wik* decision.

[28] These may be recommended by local Indigenous community groups, the regional branch of the Council for Aboriginal Reconciliation, The Aboriginal and Torres Strait Islander Commission, The Australian Institute of Aboriginal and Islander Affairs, and University based research centres. Ideally an Indigenous speaker would have the most impact, but if that was not possible then a member of the legal profession eg a solicitor or barrister working in the area or an academic from another faculty, such as history or anthropology, might be suitable.

[29] For instance: L Behrendt, No One Can Own the Land (1994) l(1) *Austl J Hum Rts* 43; N Pearson *"Mabo:* Towards respecting equality and difference" in *Voices From the Land* (ABC 1993 Boyer Lectures); G Yunupingu, *Our Land our Life: Land Rights — Past, Present and Future* (St Lucia: UQP, 1997).

[30] For instance *Land Bilong Islanders* by Graham T (Melbourne: Yarra Bank Films, 1992).

[31] One important point outlined by Ms Lisa Sarmas of the University of Melbourne, School of Law in private correspondence was that if there are Indigenous students in the class they should not be forced to act as a spokesperson for their people. Like other students, they should be given the option of choosing not to participate in the discussion if they so desire. Similarly teachers need to consider the possibility that if there are Indigenous students in the class they might feel marginalised and maybe even brutalised by the discussion. In such a situation it is important not to use language such as "them" as such comments are based on the assumption that the whole class is not Indigenous and makes invisible those members of the class who are.

[32] The *Encyclopedia of Aboriginal Australia* (Canberra: Aboriginal Studies Press, 1994) has some useful entries under headings such as "land ownership", "Land Rights", "Native Title" and "Sacred Sites". The Council for Aboriginal Reconciliation has published a paper: Dr D Smyth, *Understanding County: The Importance of Land and Sea in Aboriginal and Torres Strait Islander Societies* (Canberra: CAR, 1995).

[33] Refer to the reading list at the end of the article.

[34] Groups could be representing Indigenous groups, the Native title tribunal, mining groups, farmers and government representatives.

[35] Associate Professor Susan Campbell suggests using a video called *Lousy Little Sixpence* (by A Morgan, Sydney Department of Education, 1984) which shows life on Aboriginal reserves and the effects of the policy of using Aboriginal children for domestic and manual service. Campbell, *supra* note 9, at 4. See R Frankland, *Who Killed Malcolm Smith?* (Lingfield: NSW, 1992), available from Film Australia Pty Ltd: and The ABC's *Frontier* documentary that screened in March 1997 (on file with authors).

[36] R W Harding et al, *Aboriginal Contact with the Criminal Justice System and the impact of the Royal Commission into Aboriginal Deaths in Custody* (Leichardt, NSW: Hawkins Press 1995); M Dodson, *Indigenous Deaths in Custody* 1989–1996 (Canberra: ATSIC, 1996); C Cunnen, & D McDonald, *Keeping Aboriginal and Torres Strait Islander People Out of Custody* (Canberra: AIC, 1996).

[37] This issue is discussed further in the forthcoming text by R Johnstone, J Patterson & K Rubenstein, *Improving Criteria and Feedback in Student Assessment in Law* (London: Cavendish Publishing Limited, 1998).

[38] As Le Brun and Johnstone succinctly state: If learning is about engaging students in the making of meaning or the constructing of knowledge within a discipline, we need to motivate our students. To do so we need to devote our attention to more than intellectual activities: we need to engage our students' attention; and we need to make their learning relevant and meaningful by integrating knowledge, attitudes and habits with the requisite skills. Le Brun, & Johnstone, *supra* note 25, at 169.

[39] Written examinations in law are the most popular method of assessment because they are relatively easy to administer and can be conducted with large numbers of students.

[40] Given that *Mabo* issues are often taught at the beginning of the course it is imperative to remind students of its significance to the overall property course if we propose to examine it at the end of the year. As discussed earlier students may marginalise the issue and thus may marginalise the topic undertaken at the start of the course.

[41] See Le Brun, & Johnstone *supra* note 25, at 171 where there is a comprehensive table which illustrates some of the generic skills that can be included in any curriculum. In general terms these skills include: skills of legal analysis and reasoning, legal research skills, problem solving skills, communication skills, interviewing, counselling, negotiating, mediating skills, litigation skills, information gathering skills, and organisational/managerial skills.

[42] In 1996 and 1997 Ms Petal Kinder conducted the Legal Research and Methods (LRM) Unit at Monash University and produced an invaluable guide for property law students undertaking the research assignment described above. In her guide she outlines the aims of the LRM Unit as being: "to reinforce and further develop legal research skills taught in first year Legal Process." As part of her classes she introduces students to "a basic methodology for researching undergraduate written assignments." The sources referred to are applicable to legal research in general and also encompass those specific to Property. P Kinder *Legal Research and Methods Unit — Property 1996* (Clayton: Faculty of Law, Monash University, 1996) 1 (copy on file with the authors).

[43] In 1996 the property research assignment was conducted in pairs to encourage communication and team work skills which are invaluable to legal practice. For instance students were asked to respond to the following questions:
"References to native title in *Mabo* v State *of Queensland (No* 2) as usufructuary are misleading and misplaced. Statute has now rendered the distinction irrelevant." Do you agree?
"Since the *Mabo* decision the doctrine of tenure has ceased to have any practical relevance to Australian law because the Crown's rights and powers are based on sovereignty rather than tenure." Do you agree?

[44] See The University of Melbourne Property Reading Guide 1996.

[45] *Id.*