

## Full response from Sherry Sufi for a FactCheck on native title

Written by Lucinda Beaman, FactCheck Editor

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In an [opinion piece](#) published by Fairfax Media, WA Liberal Party policy committee chairman and PhD candidate Sherry Sufi argued that “native title can only exist if Australia was settled, not invaded”.

The Conversation asked Sufi for sources and comment to support his statement, for inclusion in [this FactCheck](#) . Here is Sufi’s full response:

Disclaimer: My article in Fairfax Media and the correspondence with The Conversation are **not** statements on behalf of the WA Liberal Party or any of its constituent bodies. The views expressed are my own.

As one of the 193 member states of the United Nations, Australia exists as part of a rules-based world order.

Land conquests through war of aggression were only criminalised after World War II.

This prohibition does not apply retroactively. Doing so would throw the entire world map into turmoil.

It applies on future attempts to conquer. The status quo of international borders at the time was deemed ‘frozen’. Lands conquered before the [Kellogg-Briand Pact \(1928\)](#) are deemed lawful conquests.

Yale Professors Oona Hathaway and Scott Shapiro have comprehensively addressed this topic in their recent publication ‘ [The Internationalists: How a Radical Plan to Outlaw War Remade the World](#) ’. [Check Part III, Chapter One](#) .

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So it follows that if Australia was invaded, then it has been conquered. This would technically negate claims to separate land rights for descendants of native populations.

Yet the Mabo decision rested on the presumption that Australia was settled, not invaded. Therefore, native title is safe.

Sources that support my argument that territories invaded and annexed prior to the prohibition of war are legitimate conquests:

“However, under the doctrine of intertemporal law and pursuant to the general principle of non-retroactivity of the law, the title to territory conquered and annexed at the time when international law allowed acquisition of title by a conqueror, remains legally valid.” – Boczek, A. (2005). [International Law: A Dictionary](#) . Scarecrow Press, [page 213](#) .

“ ... that before the UN Charter and the recognition of the right of self-determination, conquest and colonisation were legal.” – McDonnell, T. (2009). [The United States, International Law, and the Struggle Against Terrorism](#) . Routledge, [page 280](#) .

Sources that support my argument that Australia was settled, not invaded:

“It is fundamentally to our legal system that the Australian colonies became British possessions by settlement and not by conquest.” – Gibbs J in [Coe v Commonwealth \(1979\)](#) .

“Most legal commentators agree the ‘foundation case’ of the Australian legal system was the UK Privy Council judgement in Cooper v. Stuart (1889), which described the colony of New South Wales as having been ‘peacefully annexed’ by Britain in 1788.” – Windschuttle, K. (2016). [The Break-Up of Australia: the real agenda behind Aboriginal recognition](#) . Quadrant Books, page 376.

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“The High Court’s decision in Mabo not only preserves the distinction between settled territories on the one hand and conquered or ceded territories on the other, but it also clarifies the law that applies in territories that have been settled in circumstances like Australia.” – Secher, U. (2005). [The Mabo Decision - Preserving the Distinction between Settled and Conquered or Ceded Territories](#)

Here are the relevant quotes from the [Mabo decision](#) that support my argument:

“International law recognised conquest, cession, and occupation of territory that was terra nullius as three of the effective ways of acquiring sovereignty.”

“As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers ... provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organised in a society that was united permanently for political action.”

“The acquisition of territory is chiefly the province of international law; the acquisition of property is chiefly the province of the common law. The distinction between the Crown’s title to territory and the Crown’s ownership of land within a territory is made as well by the common law as by international law.”

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Response from Kate Galloway, lead author of the [FactCheck](#) :

As to whether the law deems Australia to have been settled, not invaded, the sources Sufi has cited above are correct.

However, Sufi’s final paragraph contains the reason that his claim that “native title can only exist if Australia was settled not invaded” is incorrect. As Sufi has cited from the Mabo decision, “the acquisition of property [native title] is chiefly the province of the common law”.

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Following this, Sufi does not examine the common law rules about land ownership that would apply if Australia had been deemed conquered. This is the missing link in his original argument, and why the claim is incorrect.

Read the full FactCheck [here](#).

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