

COMMONWEALTH OF AUSTRALIA

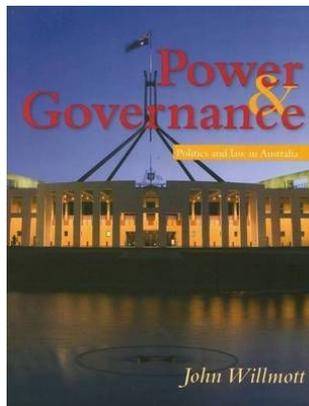
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Willmott, J. (2011). *Power & governance: politics and law in Australia*. (2nd ed). Perth, W.A: Politics Law Publishing.

Mabo and statutory law

Mabo also demonstrates the interaction between judicial decisions and the laws passed by parliament. The Federal Parliament could have responded to the Mabo judgment in several ways. Its options included overturning the principles of Mabo, endorsing them in legislation or doing nothing and leaving the common law to develop and regulate native title ownership disputes, in a similar way to how the courts and common law have developed the law of negligence.

statutory responses to native title

The Keating Government chose to endorse the principles of the Mabo decision and create a statutory framework for the processing of native title applications. The *Native Title Act* (1993) incorporated the new common law of native title into the legal code and created a Native Title Tribunal to adjudicate on native title claims. In 1997, the Howard Government passed the *Native Title Amendment Act* (1998), which negated the Wik judgment by excluding the possibility of native title claims in leasehold land.

the development of native title law

The courts continue to be involved in the development of native title law as they hear appeals from individual decisions of the Native Title Tribunal. These cases have had varying effects on native title law:

- In *Ward* (2002), the High Court limited the scope of native title applications. It made it clear that native title could not give exclusive rights to Aboriginal claimants over pastoral leases and that there were no native title rights and interests to petroleum and mineral resources on the claimed land.
- In *Blue Mud Bay* (2008), the High Court recognized that indigenous traditional owners in the Northern Territory had exclusive rights to control fishing in the tidal waters adjacent to Aboriginal lands. The decision covered 80% of the Territory's coast. Under this decision other users of the inter-tidal zone - such as commercial and recreational fishermen - would have to negotiate access with Aboriginal communities.

Dietrich and the right to fair trial

The High Court's judgment in *Dietrich* (1992) established that defendants in criminal cases have a limited right to legal representation. Previous attempts to appeal Court decisions on the basis of a defendant's lack of legal representation had been unsuccessful. For example the High Court in *McInnis v the Queen* (1979) ruled that defendants did not have an open right to legal aid. Legal aid is the term used to describe all taxpayer funded legal services.

the Dietrich decision

The Dietrich judgment did not establish an unqualified common law right to legal representation at public expense for anyone accused of a serious

crime. Rather it found that a fair trial was impossible if the defendant was not adequately represented. Dietrich was charged with the trafficking and possession of heroin. His application for legal aid was denied. As he could not afford legal assistance, Dietrich went to trial without representation. He was found guilty. The High Court found that the failure of the trial judge to appoint a legal representative resulted in a miscarriage of justice.

The general principle established by Dietrich was that defendants charged with a serious offence, and who could not afford legal representation, must be provided with legal aid. If such assistance were not provided, then charges in such cases would have to be 'stayed' or suspended. This judgment caused considerable concern as it increased the call on legal aid funds. This is particularly problematic because governments have reduced the level of funds available for legal aid over recent years.

The High Court and the common law of negligence

Over the past twenty years High Court decisions have significantly altered the way the common law of negligence is applied in Australia. At the beginning of this period plaintiffs were quite successful in negligence actions before the High Court. One example of a successful action by the plaintiff was *Nagle v Rottneest Island Board* (1993). This judgment found that statutory authorities were liable for signposting dangers in recreation areas. The judgment reflected a broad view of foreseeable risk. The decision made it clear that the defendant had a responsibility to take (quite expensive) action to warn of dangers even if the risk was foreseeable by ordinary people.

In more recent High Court cases, the test used has been narrowed and plaintiffs have a lesser probability of success. The test applied by the court examined such factors as:

- the probability of the risk occurring
- the significant of the possible harm
- the cost and difficulty of possible precautions defendants might have taken
- the capacity of plaintiffs to look after themselves.

This more restrictive view of liability for negligence is demonstrated by the judgment in *Mulligan v Coffs Harbour City Council* (2005). In this case the High Court found that the Council was not liable. Mr. Mulligan was very badly injured when he dived onto a sandbank at Coffs Creek. The High Court found that the Council was not required to put up warning signs, as the risk to swimmers of diving at beaches is well known. In this case the High Court reconfirmed the precedent of the Full Court of the Western Australian Supreme Court in the case of *Prast v Cottesloe City Council* (2000).

Nagle and the broad view of negligence

later cases and a narrower view