

COMMONWEALTH OF AUSTRALIA

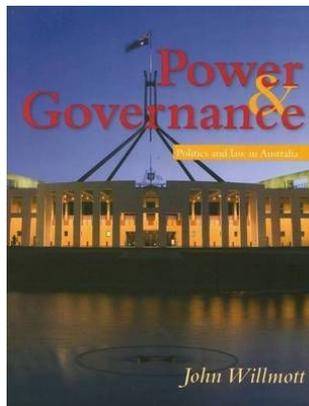
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Willmott, J. (2011). *Power & governance: politics and law in Australia*. (2nd ed). Perth, W.A: Politics Law Publishing.

The High Court and ordinary law

Establishing new common law precedents

In its judgments in *Mabo* (1991), *Dietrich* (1992) and *Wik* (1996), the High Court established new common law precedents. The *Mabo* judgment disapproved of earlier High Court decisions, that is the Court refused to follow an existing precedent set by previous justices. The Judges recognised and applied the underlying values of contemporary society. The first two judgments were made under Chief Justice Mason. They are good examples of the legal activism that Justice Kirby, in a speech in 1997, claimed was a necessary response to some cases.

Mabo (1992)

The *Mabo* judgment is the basis of the 'native title' rights to land of indigenous Australians. It is also an example of the way in which the High Court can create a new common law precedent. The pre-existing view of aboriginal property rights in land was formalised by the Supreme Court of NSW in *Murrell* (1836). This judgment was based on the legal principle of terra nullius. The **terra nullius** principle stated that at the time of European arrival in 1788 Australia was, for legal purposes, vacant land. Under this legal principle European law could be applied without the need to acknowledge any existing proprietary rights of indigenous Australians. This meant that the law did not recognise the existence of any pre-existing system of law or government in Australia before European settlement. Therefore the only lawful property rights in Australia were those created by British law.

Murrell and the legal concept of an empty land

The High Court continued to follow this precedent until the 1980s. In the *Gove Land Rights Case* (1971) it found that indigenous people had no 'customary' property rights. In the *Koowarta* (1982) decision the High Court found that the actions of the Queensland Government breached the Commonwealth's *Racial Discrimination Act* (1975), which was a valid exercise of central power under the external affairs head of power. However, the *Kewarta* decision reaffirmed terra nullius.

The *Mabo* decisions involved two High Court cases. *Mabo (No 1)* (1988) was a challenge to the constitutional validity of the Queensland *Coastal Islands Declaratory Act* (1985), passed to reinforce the state's control over the Murray Islands in the Torres Strait. The Act declared that the islands were crown land. Eddie Mabo and four other people claimed that the Act was discriminatory, as the claimants had a valid title to land on one of the islands. The Queensland Government's defence of the Act relied on the principle of terra nullius. Without explicitly defining any indigenous title, the Court

found the Queensland legislation invalid as it breached the Commonwealth's *Racial Discrimination Act* (1975) which was a valid Act under s51(xxix) of the Constitution.

In *Mabo (No2)* (1992) the High Court defined the property rights of the Meriam people and in doing so created a new common law right to 'native title' for indigenous Australians. This title provided an indigenous property right when:

- 1 a connection had been maintained with land (or waters) through communal use based on traditional law or custom (this included spiritual connection with the land)
- 2 the title had not been extinguished by the creation of freehold title or any use of the land in ways that were clearly inconsistent with customary use.

The Meriam people had native title because they had a continuous physical and cultural tie with their islands and waters. Title did not exist where control had passed to others, as was the case with land on the islands leased by the government to missionaries. These limitations on native title meant that it applied to only a small proportion of indigenous Australians. The British 'acquisition' of sovereignty in Australia and the titles given under British and Australian law remained valid, and therefore indigenous Australians had no general right to compensation.

The *Mabo* judgment is an example of legal activism because it rejected terra nullius as being inconsistent with the underlying values of modern society. However, the Justices still based their decision on precedent and legal authorities. They referenced common law precedents in other regions of British settlement to show that terra nullius was inconsistent with comparable common law outside Australia. They also referred to international legal norms (such as United Nations anti-discrimination treaties) that were now accepted.

A Court judgment only directly determines the outcome of the case being decided. The impact of native title can only be established by further judgments or by legislation. For example in *Wik* (1996) the High Court decided that native title could apply to pastoral leases. The Court found that pastoral leases and native title could co-exist but where there was a conflict (such as the use of land by a pastoralist for the construction of buildings), the pastoral lease prevailed.

native title to
land and waters

activism and
native title

Wik and pastoral
leases

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