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## NOTES AND TOPICS

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### The *Wik* Decision: Judicial Activism or Conventional Ruling?

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FEW judicial decisions in Australia's history have evoked such intense reactions as the High Court's recent judgment in *The Wik Peoples v Queensland*.<sup>1</sup> In that case the Court reaffirmed the common law doctrine of native title first laid down in *Mabo v Queensland [No 2]*,<sup>2</sup> and decided by a narrow majority that the grant of certain Queensland pastoral leases did not extinguish the applicants' native title (if any) to the leased lands. Many people in government and industry believed the decision was inconsistent with prior understandings as to the legal effect of Crown leases upon native title rights. Some State and Territory premiers, the National Party and industry groups demanded that the Commonwealth parliament legislate for the wholesale extinguishment of native title on pastoral leases. Indigenous groups warned that any attempt to reverse the decision by legislation would violate the principles of racial equality, imperil the reconciliation process and invite international opprobrium.

Public debate revealed a considerable polarisation of opinion, as well as a degree of confusion about the making of the decision and its implications. Correspondents to newspapers asked how it came about that a question of such national importance was decided by the Court rather than by parliament. How could they have any confidence in the legal correctness of a decision that commanded the support of a bare majority of the Court (4 to 3)? And why was the outcome of the case not anticipated by State and Commonwealth governments, which had confidently maintained that it was clear from the *Mabo* decision that the grant of a pastoral lease extinguished native title? It was tempting to assume that the High Court had engaged in judicial activism, deciding according to what it thought the law ought to be instead of applying existing principles, and arrogating to itself the role of legislator.

Yet the legal principles and methods used by the Court to reach its decision were quite conventional. In its earlier *Mabo* decision, in contrast, the Court boldly

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<sup>1</sup> (1996) 71 ALJR 173.

<sup>2</sup> (1992) 175 CLR 1 (hereafter '*Mabo*').

rewrote the common law of Australia, invoking policy considerations in justification. It expressly overturned a long-held assumption of property law that native title did not survive the annexation of the Australian colonies to the British Crown. Such a doctrine could no longer be supported, the Court said, based as it was on the 'unjust and discriminatory' notion that Australia was *terra nullius* (practically unoccupied) at the date of acquisition by the Crown.<sup>3</sup> As Justice Kirby has conceded, the *Mabo* decision 'sits on the fine line which separates a truly legislative act from the exercise of a truly judicial function' (1994:70).

Paradoxically, the *Wik* decision evoked a much more swift and hostile reaction than the *Mabo* decision itself. This was because government and industry groups had relied on legal opinions that failed correctly to predict the Court's decision on the pastoral lease question. The Queensland government, acting on legal advice that native title could not subsist on pastoral leases, had been granting mining titles over land subject to a pastoral lease without complying with the procedures laid down in the Native Title Act (Wilson, 1997:50). The validity of those titles depended upon the correctness of the government's view of the law.

More than any other statute, the Native Title Act was negotiated legislation. Some of the industry groups who were party to the negotiations insist that their support for the Act depended on government assurances that native title was extinct in all lands held under pastoral leases. They cited the preamble to the Native Title Act as evidence that the Act was passed on the strength of that understanding. The preamble includes a recital that the High Court in *Mabo* decided that native title was extinguished by the valid grant of freehold or leasehold titles.<sup>4</sup>

### **The Pastoral Leases Question After *Mabo***

Although the High Court in *Mabo* had not considered the effect upon native title of the grant of a pastoral lease, the government's legal advice assumed that pastoral leases were not relevantly different from traditional common law leases. The majority judges in *Mabo* had said that native title is extinguished where the Crown grants to a third party an interest that is inconsistent with a continuing right to enjoy native title. Six of the judges in that case considered the effect of two leases granted over land in the Murray Islands for the purposes of a sardine factory. Brennan J (with whom Mason CJ and McHugh J concurred) were of the view that the grant of a lease extinguishes native title, even in the case of the sardine factory leases which expressly reserved the access rights of the Islanders.<sup>5</sup> Deane and Gaudron JJ

<sup>3</sup> *Ibid* at 42 per Brennan J.

<sup>4</sup> The *Wik* decision can be reconciled with that statement. The Court affirmed that the grant of a Crown lease is inconsistent with native title and extinguishes it. The pastoral leases in question did not have that effect because, according to the majority, they were not true leases.

<sup>5</sup> *Mabo* (1992) 175 CLR 1 at 71-3. Dawson J agreed (p. 158), but this was subsumed by his larger view that native title could not survive the acquisition of sovereignty by the Crown: a view rejected by the other six judges.

thought that native title might survive the grant of the lease, but found it unnecessary to reach a concluded view.<sup>6</sup> It was common to all the judges who considered the lease question that native title was extinguished by the grant of a lease that conferred exclusive possession and contained no reservation in favour of indigenous people.

It was not necessary for the Court in *Mabo* to rule upon the effect of leases on native title. It follows that the judges' views on this point, though of high authority, were not binding. There was a divergence of opinion, and none of the views expressed commanded majority support. Another reason for caution in interpreting the observations in *Mabo* was that the judges were not discussing pastoral leases specifically. Brennan J had said that while the grant of a lease would extinguish native title, the grant<sup>7</sup> of lesser interests (for example, mineral exploration permits) would not do so. Long before the *Wik* decision, several legal writers had canvassed the argument that pastoral leases<sup>8</sup> might fall into the category of lesser interests which had no extinguishing effect. In an article based on a conference paper delivered in June 1994, Peter van Hattem (1994:200) foreshadowed the argument:

It is arguable, having regard to the limited rights and tenure conferred by a pastoral lease, the degree of concurrent use of the land permitted to others, and the limitation on usage by pastoralists, that a pastoral lease confers little more than a non-exclusive licence ... to use and occupy Crown land for pastoral purposes.

The Native Title Act did not solve the pastoral lease question. Provision was made to validate pastoral leases in force as at 1 January 1994 that might have been invalid by reason of the operation of s.10 of the Racial Discrimination Act 1974. Once validated, these leases extinguished native title, and compensation was payable to the former holders of native title. Otherwise, the effect of pastoral leases on native title was left for the courts to resolve. Pastoralists were pressing for wholesale extinguishment of native title on all their lease-holdings. The government was reluctant to accede, mindful of the compensation implications.<sup>9</sup> It chose to stay its legislative hand in the expectation that the High Court would solve the problem by ruling that native title on pastoral leases was already extinct. No question of compensation for the extinguishment would then arise.

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<sup>6</sup> *Ibid* at 116-7.

<sup>7</sup> *Mabo* (1992) 175 CLR 1 at 69.

<sup>8</sup> For example, Stephenson (1993:109); van Hattem (1994:199-201); Durack et al. (1992:7); Amankwah (1993:14). It has been reported that a submission to federal cabinet as early as April 1996 anticipated the outcome in *Wik* (Tingle, 1997). Henry Reynolds (1996) has opined that there was an element of wishful thinking in the government's understanding of what was decided in *Mabo*.

<sup>9</sup> Under s.51(31) of the Constitution, the Commonwealth must give just terms if the extinguishment amounts to an expropriation of property.

### **The Wik Decision**

And so it came about that a matter of such great national importance was left to be decided by the High Court rather than by the Commonwealth parliament. Much was at stake in the outcome of the *Wik* case. The Court was told that pastoral leases cover some 40 per cent of the total land area of Australia. Many pastoral leases cover marginal lands in remote areas, where grazing activities do not involve an intensive use of land. These are the areas where Aboriginal people are most likely to have maintained their traditional associations with the land. If the High Court had accepted the argument that the grant of a pastoral lease necessarily extinguished native title, any lands that had ever been under pastoral lease would be put for ever out of reach of native title claims. A victory for the Wik peoples on this point would consolidate the gains represented by *Mabo* and the Native Title Act, while a loss would marginalise their significance.

The Wik peoples claimed native title over an area of land and waters in northern Queensland. The lands claimed included two large areas that had been subject to pastoral leases. One of the two holdings had been the subject of leases granted in 1915 and 1919, but so marginal was the land that no lease holder had ever gone into possession. Since 1922, after the second lease was terminated, the land had been reserved by an Order in Council for the use of Aboriginal inhabitants.

The Wik peoples' claim was met with the argument that their rights had been automatically extinguished when the land was first leased to pastoralists. The Queensland government argued that the grant by the Crown of any pastoral lease necessarily extinguished native title, even if the lease holders never set foot on the land. The High Court in *Mabo* had laid down two prerequisites for a finding that native title exists on a parcel of land: the Aboriginal claimants must have maintained their traditional association with the land, and their title must not have been extinguished by an act of the Crown inconsistent with the continued enjoyment of native title rights. This means that even if the Aboriginal people have continued to occupy the lands, their title might still be extinct in consequence of a past grant.

The High Court was asked to determine two main issues: did the pastoral leases confer exclusive possession on the grantee, and did the grant of the pastoral lease necessarily extinguish native title to the land? The majority answered both questions in the negative, the second question subsumed by the negative answer to the first.

### **The 'Lease' that Wasn't**

The defining characteristics of a lease are that it holds for a certain duration and that it confers on the lease holder a right to exclusive possession. Exclusive possession means that, subject to reservations in the lease, the lease holder can turn everyone else off the land, including the landlord. The right to exclude others may be subject to the property rights of third parties, such as an easement of right of way.

The minority judges agreed with Brennan CJ that if parliament uses the term 'lease' to describe a title that the Crown may grant under statute, it is presumed to

mean a lease in the sense understood at common law. If parliament calls the grant a 'lease', then a lease it is — and a lease by the usual definition confers exclusive possession. The grant is therefore inconsistent with the continued enjoyment of native title.

The majority judges approached the matter from the opposite direction: the grant is a lease only if it confers exclusive possession. If it does not, then it is something other than a lease. Courts have long insisted that the question of whether a transaction creates a lease or a licence is determined not by the nomenclature but by the substance of the rights conferred.<sup>10</sup> The controversy in *Wik* was about what should be inferred from the terminology used in the statute. Was the statute deeming this limited tenure to be a lease, or did it simply use the word 'lease' as a convenient misnomer for a tenure that was entirely its own creation?

The majority said that the pastoral leases in question were not leases in the common law sense, but were special interests created by statute. These 'leases', the majority said, were subject to so many reservations of rights of entry in favour of the Crown's agents and other authorised persons that it could not be said that they conferred upon the holder a right to exclusive possession. Historical evidence of the origins of the pastoral lease indicated that this form of tenure was never intended to authorise pastoralists to displace the Aborigines.<sup>11</sup> The majority concluded that the pastoralists' rights were not exclusive of the rights of the native title holders, but were capable of being enjoyed concurrently. Since the rights could coexist, the grant of the pastoral leases did not extinguish native title.

### Living with the *Wik* Decision

The *Wik* decision did not deliver what the government and industry groups had hoped for: a simple and universal answer to the pastoral leases question. Assessment of whether a particular lease can be regarded as conferring exclusive possession — thereby extinguishing native title — requires a judgment of degree. That a lease document and its authorising statute limit land use and reserve rights of entry does not necessarily destroy the characteristic of exclusive possession, but they will have that effect if the restrictions are judged to be too extensive. As a result of Australia's federal structure, there is substantial variation in the terms of pastoral leases and their authorising statutes in operation at various times in different parts of the country. It is difficult to predict which of these may be found to confer exclusive possession on the grantee.

Other aspects of the decision also raise the spectre of case-by-case adjudication of many claims across Australia. There is the absence of any clear test for determining the effect of non-extinguishing pastoral leases on the rights of native title

<sup>10</sup> *Radaich v Smith* (1959) 101 CLR 209; *Street v Mountford* [1985] AC 809. The principle was often invoked during the postwar housing shortage to thwart attempts by landlords to avoid rent control legislation by signing tenants up to 'licence' agreements.

<sup>11</sup> For an account of the historical origins of pastoral leases, see Reynolds (1992:14).

holders. With the support of the other majority judges, Toohey J stressed that in the event of any inconsistency between the rights, then the rights of the native title holders must 'yield' to those of the pastoral lease holder.<sup>12</sup> The application of this priority principle in cases of conflict will require a detailed assessment of the circumstances. It will be necessary to identify the rights granted to the pastoralists by examining the terms of the lease and the statute under which it was issued. The specific content of the native title holders' rights will also have to be determined, in order to assess whether and to what extent these are inconsistent with the rights granted to the lease holder (Farley, 1997:3).

The notion that different interests can coexist in the one parcel of land is quite unexceptional in property law (Tehan, 1997). For example, different persons may hold freehold, leasehold and mining titles over the land, while another has an easement of right of way. There is nothing extraordinary in the Court's ruling that native title can coexist with the rights of a pastoral lessee. The difference is that, in the case of the long-established interests mentioned above, the law has developed rules for resolving conflicts about priority and enjoyment.

Given time and a sufficient volume of cases, the courts could work out a regime for regulating the coexistence of native title and pastoral leases. But it would be far preferable for parliament to step in and provide a scheme. Regulating the coexistence of proprietary interests is an entirely familiar subject matter for legislation. It has not proved to be beyond the ingenuity of legislators to draft laws governing commercial and residential tenancies, coownership, strata and cluster titles and life tenancies. There is nothing insuperable about the novel problems presented by the coexistence of native title and pastoral leases.

In a speech titled 'Wik: What Do We Do Now?' delivered on 22 January 1997, Justice French, the President of the National Native Title Tribunal, suggested certain steps to develop a model for coexistence, including codes of practice for the parties governing access to and use of leased land, enforcement and dispute resolution mechanisms, and processes for consultation with native title holders concerning proposed improvements and new uses of the land. Other possible responses include statutory codification of the access and usage rights of native title holders on pastoral land.

Pastoralists had assumed before *Wik* that their rights were the equivalent of those enjoyed by the holders of a true lease. If they hold only lesser statutory interests, there is a need to clarify the content of their rights and update the statutes to take account of the range of land-use activities that comprise modern pastoral practices (Love, 1997:6-8).

It is really no valid criticism of the *Wik* decision that it laid down the broad principle of coexistence, leaving the myriad details to be worked out by legislation. It is for parliament, not the Court, to elaborate a detailed scheme for the accommodation of competing interests, just as parliament acted to implement the principles of *Mabo* by legislating for the adjudication of native title claims. The scope of

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<sup>12</sup> *Wik* (1996) 71 ALJR 173 at 215.

what the Court could decide was in any event confined by the way the matter came before it in the form of an itemised list of questions reserved for its consideration.

Negotiating a regime for coexistence of native title and pastoralists' interests will be a complex and contentious process, but no more so than the multilateral negotiations that produced the Native Title Act. It is only through the process of negotiation and compromise that an enduring settlement can be reached. The extinguishment of native title on pastoral leases is not the 'quick fix' solution its proponents represent it to be, but would lead to resentment, litigation and international opprobrium. The search for a just resolution must involve indigenous and industry groups working constructively with government for the best possible negotiated solution.

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