

WIK: CONFUSING MYTH AND REALITY

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I. INTRODUCTION

Mabo and *Wik* have both triggered an extraordinary debate in Australia. I consider much of what we hear and read, especially (but not solely) in the popular press, to be a sad indictment of our national character. In 1993, leading up to the enactment of the NTA, and again through 1997, following the delivery of the *Wik* decision, leading politicians, industry peak bodies, and journalists have uttered outrageously misleading statements about what these judgments actually say, and wildly exaggerated accounts of their alleged impact on landowners and the nation, apparently for short term political gain. In 1997, this unsavoury debate has now included, at its fringes, the looney right gathered around Pauline Hanson. Reasons behind her policies are not hard to find; flat-out racism, the politics of envy, and fear bred of ignorance suggest themselves. But what of the others? Why does the simple proposition that some Aborigines and Islanders may enjoy some native title rights to some areas of lands and seas in Australia create such a virulent and emotional response?

II. REACTION TO THE DECISIONS

As has often been said, both *Mabo* and *Wik* were conservative judgments, carefully securing the Crown grantee's status quo. As regards *Wik*, the majority were at pains to state that the decision altered nothing in the sense that the pastoral lessees' rights, in the event of conflict, would prevail over any native title rights found to coexist over the same land. Whatever pastoralists could do under their leases pre-*Wik*, they can do now. Yet for some reason, pastoralists, State governments, the Federal Coalition, mining companies and many others seem obsessed with introducing wide-ranging new laws, by way of amendments to the NTA, to resist threatening new legal and practical problems which simply are not there. Why?

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This is a complex social, political and, I suggest, psychological question, the answer to which is not at all clear. The fact that industry leaders, such as the pastoralists' peak representative bodies in their recent television advertisement, and some senior politicians such as the Prime Minister, continue to play the race card (at least in the Prime Minister's case by conspicuously delaying any forcible rejection of Pauline Hanson's views) suggests that we have moved one step forward as a nation in recent years, only to take two steps backward when real equality and bargaining power are to be delivered to blacks. I recall a similar, somewhat less subtle television advertisement promoted by the Australian Mining Industry Council in 1984. This depicted a black hand building a wall across a map of Western Australia, and was broadcast in Perth for weeks in an orchestrated - and successful - attempt to scuttle the report compiled by Paul Seaman QC into Aboriginal land prepared for the Burke Labor Government in 1983-4.¹ What was then graphically explicit is now, through the recent farmers' advertisement, implicit, but no less reprehensible. It seems in 1997, that the race card may again deliver lobbying success, at least in the short term.

A fear of the unknown may provide one explanation for some of the more irrational responses. But this cannot apply to the well informed, or to those with every opportunity to understand even the basic facts. For example, this cannot apply to Premiers Kennett, Borbidge and Court, all of whom, when it suits them, both in 1993 and today, trot out the utterly ridiculous claim that urban backyards are at risk, and similarly exaggerate claims of the impact of these judgments upon their various State economies. Mr Court's argument in the constitutional challenge *Western Australia v Commonwealth*,² that the Western Australian mining industry and the Government's ability to function properly were both seriously compromised by native title, ignores the facts, then and now.³ RTZ-CRA stated in July 1996 that Australia remained highly prospective, and that it would continue to allocate a high proportion of its worldwide exploration expenditure in Australia.⁴ Mr Court contradicted his own High Court claims (which failed) a few months later during the 1996 Western Australian election campaign, claiming that the self-same industry was booming in that State. He can't have it both ways.

I think this overreaction has something to do with the way the issue of native title challenges our sense of history, our national sense of self. The existence of native title reminds us, individually and as a nation, of aspects of our history many would rather forget. Native title claims have, for some, a troublesome habit of opening many historical closets, the contents of which may be

1 P Seaman, *The Aboriginal Land Inquiry*, September 1984.

2 (1995) 183 CLR 373.

3 See Industry Commission Draft Report, *Implications for Australian Firms Locating Offshore*, 1996. The report indicates that 95 per cent of the exploration and prospecting licences in WA have been processed within the minimum period under the NTA (two months); and that 35 per cent of mineral leases have been processed using the expedited procedures in the NTA. Cited in ATSIIC, *Proposed Amendments to the Native Title Act 1993 - Issues for Indigenous People*, November 1996 at 9.

4 RTZ-CRA Press Release, 8 July 1997, cited in ATSIIC, note 2 *supra* at 9.

embarrassing for current generations. After all, atrocities and other embarrassments (miscegenation, rape and worse) occurred on outback pastoral leases, as Professor Reynolds and others have recently documented.⁵ For example, in the Yorta Yorta native title claim, now proceeding in the Federal Court, evidence has been given, under oath, by a claimant, of the rape, beating, burning and death of the claimant's ancestors by early settlers in the Echuca area. These dark pages of national policies and programmes, and the brutal facts of frontier conflict are exposed by native title claims, requiring us all to face up to "a national legacy of unutterable shame", to quote Deane and Gaudron JJ in *Mabo*.⁶

Today's leaders appear manifestly incapable of facing this crisis of national conscience. They respond by seeking to bury *their* problems in a sea of myths and misrepresentations, providing a fabricated basis for quite unnecessary and draconian amendments to the NTA. These amendments, as proposed in mid-May 1997, far exceed any response reasonably arising from the 'workability' of the NTA, or the *Wik* decision. Put simply, the Prime Minister's Ten Point Plan threatens to strip so much value from native title rights, as to render them, for many communities, practically worthless.

III. IMPLICATIONS OF THESE REACTIONS

This inability to acknowledge the facts underlying both the current debate and our unworthy past, sits uncomfortably with our penchant to recall and rejoice in meritorious aspects of our history (for example, Anzac Day). This failure by the nation's leaders provides no firm basis to move forward and forge a new national sense of self. It is, to my mind, the most significant and enduring aftermath of both the *Mabo* and *Wik* judgments.

If this be true, the implications for Australia are grave indeed, not only for indigenous people seeking some measure of land justice, but also for our numerous minority ethnic groups, other disadvantaged groups at risk, and Australian society at large. Like the Anzac tradition, where the myth has taken over from a military disaster, so too we may ask: what happened to the land of a 'fair go' for all? All myth? What of our protestations as the world's most successful multicultural society? Mere protestation? And what of our oft trumpeted concern to maintain and advance the cause of human rights in Asia? More humbug? And what of the social fabric, the values of tolerance, generosity of spirit, respect for the individual, and the rule of law, including the institutions of justice (such as the High Court) that have underpinned and served the nation so well? Answer: unravelling before our eyes, swamped in a welter of narrow-minded economic rationalism, of populist politicians pandering to a lowest common denominator of ignorance and intolerance, and the cynical deflection of

5 See for example, H Reynolds, *The Other Side of the Frontier*, Penguin (1982); H Reynolds, *Fate of a Free People*, Penguin (1995).

6 At 104.

widespread economic hardship and anger towards an obvious and relatively defenceless black target. Sound like Germany of the early 1930s?

IV. TIME TO STAND UP

There comes a time in the history of a nation when fair-minded people should stand up, assert basic values, and stem the tide of revenge politics which threatens to throw us backwards as a disintegrating society, not forward as one people reconciled with its past, and confident of its future. As in 1993, this is such a time. In particular, this is a time when our politicians and their masters - the general community who elect them - should realize that miners and pastoralists do not have a God given right to dig up or use the land as they see fit at all times. Rather, they should realise that this is a time when respect for cultural values in a multicultural society, a need to cement our national ethic of tolerance and of equal opportunity for all, should prevail over dollar-driven economic development, be it through mining or pastoralism. Just once, *cultural* values, critical to indigenous persons and of great value to the entire nation, should be recognised and asserted as a national priority. This is especially so when we contemplate the aftermath of *Wik*, the raucous and illogical land grabs being pursued by pastoralists and their political representatives, and the unnecessary curtailment of native title rights that will also result.

The point is this: as a matter of law, *Wik* protected pastoralists. It reduced none of their previously enjoyed property rights. The close examination of pastoralists' rights however, revealed that for many years, in practice, many may have wrongly assumed to exercise greater rights of a fee simple character than they were ever granted. This is also embarrassing. Coexisting native title *does* threaten those unlawful non-pastoral activities which exceed the terms of their leases - and why not? If this creates 'uncertainty' for pastoralists, why should Aboriginal people suffer?

V. THE TEN POINT PLAN

This raises another objectionable response now being proposed by the Howard Ten Point Plan: that major non-Aboriginal stakeholders will be retrospectively excused by the national Parliament from such flagrant historical breaches of the law. Thus, pastoralists, far from being made accountable for past activity beyond the terms of their leases, are to be *rewarded* with the upgrading of their rights to "primary producer" levels.⁷ This represents, at the stroke of the parliamentary pen, a wholly unnecessary extinguishment of native title by

⁷ Apparently by reference to the definition of "Primary Production" in the *Income Tax Assessment Act 1936* (Cth) as reproduced in Appendix B. Everyone will be gratified to hear that the Taxation Commissioner has ruled that this definition excludes whaling!

stealth, and a breathtakingly audacious increase in pastoralists' property rights without payment of a single cent. The result is a land grab by pastoralists across Australia far exceeding anything contemplated by native title claimants. And yet, pastoralists are reported to be unhappy with the proposed amendments! What more could pastoralists want? Giving pastoralists the benefit of every doubt, one can only agree with the Prime Minister's comments following his abortive meeting at Longreach on 17 May: that is, he was "absolutely amazed at the level of fear and misinformation" about native title peddled in the bush.⁸ Clearly, much of that misinformation has been peddled by irresponsible poll-driven politicians - including the Prime Minister.

In post-*Wik* Australia, are pastoralists and primary producers to be not only considered above the law but enriched for their excesses? Similar questions apply to State governments, which, since 1 January 1994, have granted thousands of mining tenements over pastoral land in flagrant disregard of the s 29 notice provisions of the NTA. Yet those governments now demand retrospective amendments to render those unlawful grants valid and lawful. It seems State governments are also to be declared above the law. Thus, *Wik*, far from securing native title rights, triggers an audacious land grab by pastoralists and miners across the nation without a shred of demonstrated factual need or legal or moral justification.

VI. CONCLUSION

Whilst the Federal Coalition proceeds down this clearly unjust and discriminatory track, indigenous people will never accept the concomitant loss of native title rights, and nobody achieves certainty. 'Certainty' in any sphere of life, let alone business, is yet another overworked myth that crumbles upon examination. Do investors in the stock exchange thrive on certainty? Certainly not. Miners are well used to evaluating various 'uncertain' sovereign risk factors, in various degrees, around the world when deciding on investment. Equally, if it be said that *Wik* did deliver uncertainty, this is no more than a form of legal uncertainty well understood by the Courts and favoured as an integral part of the common law. After all, what is the doctrine of negligence, enunciated by the House of Lords in 1932, but a recipe for litigation and uncertainty? Nobody attacks negligence or many other common law and equitable doctrines as undesirable because of their inherent 'uncertainty'. On the contrary, their flexibility is valued as enabling the law to adapt to changing social needs.

However, native title, it seems, is different. The Coalition's current response will deliver even greater uncertainty, both to the principal stakeholders - as indigenous people fight for their rights politically and in the courts - and to the nation, as it struggles to explode these myths, to confront the facts of its own history, and to forge a soundly based national sense of self - one that must include its indigenous peoples.

8 D Fagan and C Dore, "PM flags double dissolution on Wik", *The Australian*, 19 May 1997, p 5.