

THE IMPACT OF *WIK* ON PASTORALISTS AND MINERS

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I. INTRODUCTION

The High Court's decision in *Wik* took the Commonwealth Government by surprise. It appears that little work had been done by the Commonwealth to prepare the ground for a decision that native title and pastoral leases could coexist, despite having had almost four years since lodgement of the claim to prepare. Prior to the decision in *Wik* there had been no meeting by the Commonwealth with the key parties (farmers, miners and indigenous representatives) or a policy position formulated by the Government. As a result, the public release of the decision sparked a maelstrom of fear and loathing.

An important point to realise about the *Wik* decision and the ensuing debate is that it is not the common law (as reflected in the decision) itself that casts doubt upon the operation of pastoral leases and mining leases but the effect of the provisions of the NTA. The NTA contains numerous presumptions about native title, some based on obiter dicta of their Honours in *Mabo*. One such crucial presumption relied on in drafting the NTA was that a lease, in whatever form, extinguished native title. The presumption is included in the Preamble to the Act: "the High Court has ... held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or of leasehold estates". The intended effect of the future act provisions of the NTA are based on this presumption.

The leading judgment of Toohey J in *Wik* rejected the Commonwealth's conclusion on the effect of a pastoral lease on extant native title rights and said that the above statement "reads too much into the judgments in *Mabo* so far as the reference to leasehold estates is concerned ...".¹ Indeed, Toohey J held that the pastoral leases in issue did not necessarily extinguish all incidents of native title.² Justices Gaudron, McHugh and Kirby agreed. However, and vitally for those holding pastoral leases or mining leases, the majority of the High Court

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1 *Wik* at 73.

2 *Ibid* at 81.

also said that where the rights of the lessee are inconsistent with those of the native title holder the former will prevail.³

Wik, therefore, is authority for the proposition that pastoral leases granted over land subject to native title are valid and that the rights of the pastoralist are to be ascertained from the terms of the grant (the lease) and the legislation under which the lease was granted.⁴ Allegations that *Wik* creates 'uncertainty' for pastoral lessees in terms of the validity of pastoral leases are not based on a sound reading of the decision. Doubt can, however, legitimately be said to arise when considering the effect of the future act provisions of the NTA on certain activities on pastoral leases. The future act provisions are also critical to an understanding of the ramifications the *Wik* decision has for certain mining interests.

II. THE FUTURE ACT REGIME IN THE NATIVE TITLE ACT

The NTA protects native title, after 1 January 1994, from extinguishment except in accordance with its provisions (s 11(1)). In most cases, the NTA requires that native title holders be treated as if they held "ordinary title" to the land concerned. An act that "affects" native title land is only permissible if it would be over ordinary title land (s 235(5)). In most cases, "ordinary title" means a freehold estate (s 253). An act that "affects native title" is cast widely and includes not just acts that extinguish native title but also those that are inconsistent with the "continued existence, enjoyment or exercise" of those native title rights (s 227). Section 235 provides a protection to native title that equates generally with freehold title holders. Failure to accord native title holders the same rights as freeholders will result in the act being invalid to the extent that it affects native title (s 22).

Even greater protections are granted in respect of mining interests over native title held land and some compulsory acquisitions of native title rights and interests (s 26). What is commonly referred to as the 'right to negotiate' process applies to all such actions. Governments wishing to grant a mining lease, for example, over native title land must notify native title holders (s 29) and negotiate with them (together with the proposed grantee) for a period of at least six months (ss 31 and 35). Any negotiating party may apply to have the matter arbitrated before the National Native Title Tribunal who must make determinations as to whether an act should be done and if so, under what conditions (ss 36 and 38). Determinations may be overruled by the relevant Minister (s 42).

Prior to *Wik*, and based on the presumption that pastoral leases extinguished native title, the future acts regime was thought mainly to apply to land characterised as 'Crown land' or to certain minimalist forms of interest such as a

3 See, for example, at 75, per Toohey J

4 At 54, per Toohey J

National Park. The regime was thought to affect new grants and other work on such land but not existing operations.

III. THE EFFECT OF *WIK* ON PASTORAL LESSEES

The possibility of the coexistence of native title rights and interests with those under a pastoral lease, as held by the majority in *Wik*, has necessitated a major rethink of the effect of the future act regime. The effect of the future act regime on pastoral leases can be conveniently summarised as follows:

1. Certain acts performed under a pastoral lease may affect native title and be subject to the future act regime;
2. Certain acts not permitted under a pastoral lease, but related to pastoral activities, may affect native title and be subject to the future act regime, for example, the taking of timber; and
3. Non-pastoral activities that affect native title are subject to the future act regime, for example, tourism and agriculture.

Prior to *Wik* it had been thought that if there was an inconsistency between native title rights and a grant then the native title rights were extinguished to the extent of the inconsistency. The inconsistency was to be ascertained by reference to the terms of the grant. The High Court in *Wik* was, however, unwilling to confirm this interpretation of *Mabo*. As stated above, Toohey J, amongst others, was prepared to say that the rights of the grantee prevail to the extent of any inconsistency with native title rights and interests. However, Gaudron J went further and said that the inconsistency was to be entirely ascertained by reference to the terms of the grant and also to the exercise of rights under the grant.⁵ Following this argument, it is possible that native title rights otherwise inconsistent with a right under a pastoral lease can continue to exist where a lessee has not exercised those rights.

An implication for pastoral leases is that certain acts performed pursuant to rights granted under a pastoral lease may “affect” native title rights and interests existing on a pastoral lease within the meaning of that term in the NTA. Consequently any such acts performed after 1 January 1994, where native title holders were not treated as if they had freehold title over the area, may *potentially* be invalid (to the extent that they affect native title rights and interests). It is important to note that any such act retains its general validity and would only be invalid vis-a-vis native title if a claim was actually lodged and native title determined to exist over that particular area of land.

Significant concern has been raised publicly about the ability of pastoral lessees to engage in pastoral related activities not necessarily covered by their leases (point 2 above) and also to use that land for other commercial (non-pastoral) activities (point 3 above). In both situations a pastoral lessee would not

⁵ *Wik* at 124

have a right to expand his or her interest to take in such activities generally (it would depend on the legislation, the lease and the right concerned). He or she would generally have to seek an authority from the Crown in the former case or an expanded form of tenure in the latter. The effect of the NTA is that both cases would be subject to the future act regime and the native title holders, if any, would need to be involved.

IV. THE EFFECT OF *WIK* ON MINING INTERESTS

The effect of *Wik* on mining interests is reasonably straightforward. Although *Wik* has implications for the coexistence of native title rights and interests with mining interests, most concern has been expressed about the application of the future act regime to pastoral leases. This is because a very large amount of mining in Australia is performed on pastoral leases.

The presumption that pastoral leases extinguished native title had lead many State and Territory governments to continue issuing mining titles over pastoral leases after 1 January 1994 without abiding by the future act provisions of the NTA. The consequence of that action is that where mining titles were issued over pastoral leases where native title rights and interests also existed, the mining interest would potentially be invalid to the extent that it affected native title under s 22 of the NTA. In addition, all future mining interests over pastoral leases will have to abide by the future act provisions, particularly the 'right to negotiate'.

The most important aspect of *Wik* for miners is not that they have suddenly had the 'right to negotiate' thrust upon them - they already bore that obligation in relation to mining on 'Crown land' and Aboriginal owned land. The more important aspect of the decision for miners is that the amount of land, in relation to which they will have to negotiate with indigenous people, has vastly expanded.

There is an additional impact upon miners and pastoralists arising out of *Wik*. Two negotiation regimes will apply for miners wishing to have access to pastoral lease land; one allowing for the concerns of pastoralists to be addressed (generally included in the relevant mining legislation for the State or Territory) and the other, under the NTA, concerning the rights of native title holders. The different regimes reflect the different nature of the two titles - the pastoral lease characterised as an economic interest and native title rights recognised as *sui generis* and an integral part of Aboriginal culture and society. However, as the two rights may conceivably exist over the same land there is a distinct possibility, based on a misunderstanding of the nature of native title, that the rights of native title holders will be perceived to exceed those of pastoral lessees.

V. THE REACTION

Unfortunately the reaction to the *Wik* decision has been based more on fear and rhetoric than on calm consideration of the competing issues. Scare mongering based on assertions that the validity of leases or some nebulous concept of 'certainty' have been threatened has lead to calls for the complete extinguishment of native title on pastoral leases. Any such extinguishment would surely be a breathtaking removal of the property rights of one group of Australians.

Unlike the debate over the NTA, where both Aboriginal negotiators and the National Farmers Federation sat at the same table with the Federal Government, there seems to be an absence of recognition of Aboriginal property rights. The public and political debate has been between wholesale extinguishment and the Prime Minister's Ten Point Plan to all but eliminate Aboriginal access to pastoral lands. The Indigenous Working Group's proposals for negotiated use has been left floundering.