

AN OVERVIEW OF THE *WIK* DECISION

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I. INTRODUCTION

The *Wik* decision provides the latest determination by the High Court of the rights of indigenous Australians in respect of Australian lands; in particular, lands over which pastoral leases have been granted. Although the decision covers more than pastoral leases, this article deals exclusively with that issue. In that respect, it seeks to provide a brief summary of the decision, placing it within the broader legal framework established by the decision of the Court in *Mabo*.

II. THE FACTS

In mid-1993, before the enactment of the NTA, the Wik Peoples made a claim for native title in the Federal Court of Australia in relation to land on Cape York Peninsula in Queensland. The Thayorre People, who claimed to have native title in respect of an area of land which partly overlapped the Wik claim, joined the action. The lands claimed by the two groups included land in respect of which the Queensland Government had granted pastoral leases - the Mitchellton Pastoral Holding Lease, granted pursuant to the *Land Act* 1910 (Qld), and the Holroyd River Pastoral Lease, granted pursuant to the *Land Act* 1962 (Qld).

The Wik Peoples and the Thayorre People argued that their native title was not extinguished by the grant of the leases, but rather coexisted with the interests of the lessees. Without determining whether the two groups were the holders of native title, Drummond J in the Federal Court found that if at any time native title existed in respect of the land demised under the respective leases, the grant of those leases extinguished any native title rights to the land. It did so since, in the opinion of Drummond J, each lease conferred rights to exclusive possession on the grantee.

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The claimants appealed from the decision to the Full Court of the Federal Court. The proceedings were removed to the High Court pursuant to s 40 of the *Judiciary Act* 1903 (Cth).

III. THE APPLICATION OF THE PRINCIPLES IN *MABO*

In *Mabo* the High Court found that what it termed 'native title' had survived the annexation of the Australian lands to the Crown. Such title, having its origin in the traditional laws and customs observed by the indigenous inhabitants, vested rights over land and waters in those inhabitants where a traditional connection with that area could still be shown. Native title rights are enforceable as common law rights.

The strength of native title is its enforceability in the ordinary courts of the land. Its weakness is that "it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant".¹ Although capable of coexisting with the radical title of the Crown, native title rights are extinguished (subject to the operation of the RDA) where the Crown has exercised its sovereign power in a manner inconsistent with the continued enjoyment of those rights.

Importantly, the question of extinguishment is not one of fact, it is one of law. It is not whether indigenous people can *in fact* keep exercising their native title rights over their traditional lands, where, for example, a lessee with rights to exclusive possession has not entered into possession of his or her lease. Rather, the question is whether as a result of the authorisation of activities which are, in law, inconsistent with the continued enjoyment of native title rights, the grant of such rights manifests a clear and plain intention to extinguish native title.² If it is found that an Act authorises the exercise of such inconsistent rights, native title is extinguished the moment those rights are conferred.³ It is therefore the grant of inconsistent rights, not the manner in which they are exercised, which extinguishes native title.⁴

Given this, the appeal to the High Court was primarily a challenge to the finding of Drummond J that the grant of each lease conferred exclusive possession on the grantee. If it did, it would manifest a clear and plain intention to extinguish native title.

1 *Wik* at 151, per Brennan CJ.

2 Intention is to be derived from the language used in the statute and reflected in the instrument of lease, not to any state of mind legislators may have had. *Ibid* at 220, per Gummow J

3 *Wik* at 153, per Brennan CJ.

4 See also *Mabo* at 68, per Brennan J, at 110, per Deane & Gaudron JJ; and at 195-6, per Toohey J

IV. THE HIGH COURT'S RULING IN *WIK*

An incident of leasehold at common law is the right to exclusive possession. Asserted against native title, the grant of a lease for a term suffices to extinguish the former title.⁵ However, as the majority in *Wik* made very clear, pastoral leases are not creations of the common law.⁶ Deriving from an Order in Council of 1847, and then becoming the subject of extensive legislation in both New South Wales and Queensland, pastoral leases were designed to meet conditions unknown to England - namely, "the occupation of large tracts of land unsuitable for residential but suitable for pastoral purposes".⁷ As Toohey J explained:

The need for statutory regulation was brought about by movements in New South Wales in the late 1820s to occupy large areas of land to depasture stock. The 'squatters' moved on to land to which they had no title. The land was unsurveyed, their activities were uncontrolled. And of course they had no security.⁸

The legislative regime which developed sought to give some security of title to pastoralists without conferring on them the freehold over vast areas of land, "the future use of which could not be foreseen" by colonial administrators.⁹

Arising from the legislative responses to particular colonial problems in respect of the management and control of Crown land, pastoral leases became very much creatures of statute. Exclusive possession could be an incident of a pastoral lease, but it need not be. Its existence as an incident of tenure turns upon an interpretation of the language used in the statute and reflected in the instrument of lease. In the case of the *Wik* and *Thayorre*, this meant an examination of the legislation, pursuant to which the Mitchellton and Holroyd River leases were granted, and of the leases themselves.

By a 4:3 majority (Toohey, Gaudron, Gummow and Kirby JJ; Brennan CJ, Dawson and McHugh JJ dissenting), the Court held that the grant of the relevant leases did not confer on the lessees exclusive possession of the land under lease. The relevant intention to extinguish all native title rights which subsisted when the grants were made was not present. The grant of the leases did not, therefore, effect the necessary extinguishment of *all* incidents of native title enjoyed by the *Wik* and *Thayorre* Peoples.

Whether the grant of the leases extinguished *any* part of such title could, in the opinion of the majority, only be determined by reference to the respective rights which were conferred, in the case of the lessee by the grant, and in the case of the native title holder by the "traditions, customs and practices of the particular aboriginal group claiming the right".¹⁰ If, upon a comparison of the rights of the lessee to the rights and interests of the holder of native title, inconsistency at law

5 *Wik* at 226, per Gummow J.

6 *Ibid* at 173-4, per Toohey J; at 204, per Gaudron J; at 226, per Gummow J; and at 265-6, per Kirby J.

7 *Ibid* at 172, per Toohey J.

8 *Ibid* at 171.

9 *Ibid* at 173.

10 *Ibid* at 185, citing *R v Van der Peet* (1996) 137 DLR (4th) 289 at 318, per Lamer CJC.

is found to exist between them, the native title rights and interests must yield to the extent of the inconsistency.¹¹ Otherwise the two coexist.

V. POSTSCRIPT

With the question of law determined, the Wik Peoples and the Thayorre People return to the Federal Court for a determination of their native title rights, if any. Once that determination is made, the Court can ascertain whether those rights are inconsistent, and hence extinguished to the extent of that inconsistency, with the rights conferred on the lessees under the Holroyd and Mitchellton leases.

¹¹ *Wik* at 190, per Toohey J, written with the concurrence of Gaudron, Gummow and Kirby JJ.