Debating WIK

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A review of a recent collection of commentary on the Wik decision.

Butterworths has had some success with 'commentary' books, in which the *Australian Law Reports* text of a High Court decision is included with expert commentary.[1] What makes these books interesting is the individual commentator's unique approach to the entire decision.

In *The Wik Case: Issues and Implications* (edited by Graham Hiley),[2] the formula is varied to include 'commentary' by several people, most of them involved in *Wik*. Unfortunately, the variation has not worked. The quality of contributions is uneven. The most interesting are by non-lawyers. From a lawyer's point of view, the book is only worth buying for the decision itself. Better commentary can be found in many other places.[3]

Perhaps the book does not work *because* most contributors were involved in the litigation. The phenomenon of the lawyer who loses in court but continues the argument in a publication is not unusual; nor is that of the lawyer who doesn't *quite* understand why he has won. (I say 'he' because, although five of the record 35 counsel in *Wik* were women, only one contributes here.)[4]

The Introduction, by Graham Hiley (who appeared for the Thayorre people), illustrates the problem. While other contributions confirm that the controversy generated by *Wik* lies mainly in the application of the *Native Title Act 1993* (Cth) to land presently held under pastoral lease, for Hiley, '[t]he main effect of *Wik* ... relates to land which is no longer held by a third party, but once was' (p.2). The former Mitchellton Pastoral Holding, to which the Thayorre claim relates, is in this category. But why the application of the decision to this kind of land is more important than its application to present pastoral lease land is not explained.

As editor, Hiley contributes five pages. Many other contributions seem to have been selected rather randomly. Several overlap, some to the point where it is not clear why a separate contribution was sought. The perspective of a Cape York solicitor might have been interesting, but John Bottoms' contribution on 'how the Thayorre became involved and the issues which were specific to their case' is hard to follow. The only distinctive angle is a brief discussion of the *Waanyi* case which would have been better included in a broader discussion of how *Wik* got to Court.

Philip Hunter's mysteriously titled 'The Wik Decision: Unnecessary Extinguishment'[5] is supposedly 'the most detailed summary of the whole decision' (p.1). It is an adequate summary of procedural aspects of the litigation and most important issues in the case, but it fails to push the latter.

For example, the fact that some majority judges suggested that whether or not native title is extinguished could depend on performance of lease conditions (rather than terms of the lease grant) is

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mentioned (p.15) but not followed up. Yet rightly or wrongly, this has been a more controversial aspect of the decision.[6] Paul Smith picks up the issue later, but other issues remain unaddressed. Hunter leaves controversial *dicta* from Toohey J which suggest a re-evaluation of the notion of extinguishment[7] out of his account of 'Suspension and Revival of Native Title' (p.16). In a discussion of provisions of the *Land Acts* allowing eviction of trespassers from pastoral leasehold (p.13), he confuses the majority judges' conclusions (that these provisions indicated that a lessee's possession was non-exclusive) with a more specific Wik argument (that the wording of these provisions showed that *only the Crown* was entitled to possession of leasehold land). Brennan CJ's 'three methods of extinguishment' (pp.151-2) and the likely future of the fiduciary duty argument in the land context after his Honour's disparaging remarks about it (pp.160-1) are issues from the minority judgment which could have been followed up.

More interesting legal contributions are Greg McIntyre's 'How Wik Applies to Western Australia' and Peter McDermott's 'Wik and Doctrine of Tenures: A Synopsis'. The former takes us through an argument for co-existence of native title on pastoral leasehold in a state in which 'the aboriginal natives' have, with a short interregnum,[8] always been entitled to enter leasehold land for traditional purposes. (This argument is more convincing than the counter-argument by Raelene Webb and Kenneth Pettit which follows it.)

McIntyre refers, in a discussion of the *Land Act 1933* (WA), to 1860 Regulations and an 1850 Order in Council (p.27). These instruments may indicate that 'the regime under which [*Land Act* 1933] leases were granted was established before the turn of the century' (see Toohey J *Wik Peoples v Queensland* (1996) 187 CLR 1 at 179). But unless they do, they are irrelevant to the 1933 Act's construction.[9] Indeed, Toohey J's preparedness to take such instruments into account in construing 20th century Crown lands legislation is one of the weaker aspects of judicial methodology in *Wik*. McIntyre has not really explained this. It is also not clear why he says that the *Mining Act 1978* (WA) excludes the application to pastoral leasehold of mining consent and compensation provisions (p.29). That Act treats pastoral leases as 'Crown land', but it extends the 'farmers' veto' to them (ss.8(1), 20(5)).

Wik and the doctrine of tenure

McDermott's 'synopsis' is a straightforward introduction to perhaps the most intriguing question after *Wik*: does it matter for Australian property law that the judges have developed property rights independently of tenurial concepts? *Wik* emphasises the statutory nature of the Crown's power to grant land in Australia. While that power is referred to in the language of real property ('radical title'), there has been no Crown prerogative to grant land since before colonial self-government. However, for the *Wik* minority, the doctrine of tenure remains relevant to characterising property rights granted under statute. For them, when the Crown grants a pastoral lease, it acquires for itself the common law lessor's reversionary interest in the land (an interest which excludes the possibility of co-existing native title). For the majority, however, 'the senile impotence of the emasculated tenurial incidents of modern English Land Law'[10] were irrelevant to the characterisation of rights conferred under distinctly Australian legislation. McDermott raises these issues, but has little scope to analyse them.

Behind the pastoralists' panic

Mark Love's 'The Farmgate Effect' explains why 'farmers' (mainly pastoralists)[11] failed to anticipate *Wik*. First, they relied on decisions in which parliament's use of the language of common law property rights ('leases') was read as indicating an intention to confer similar rights under statute. Second, pastoralists believed, apparently because they were led by the nose by the Commonwealth and others when negotiating the *Native Title Act*, that *Mabo (No. 2)* had determined that their leases extinguished native title.

While no-one could fault pastoralists for the first assumption,[12] it is important to look behind the facade of the second. Like many unnecessarily rigid ideas about native title, the 'orthodoxy' that it was extinguished by pastoral leases was manufactured in the hot-house environment of political negotiation and extensively workshopped at conferences. Yet the possibility of the two rights co-existing was always manifest in *Mabo (No. 2)*. Indeed, despite what the National Farmers' Federation (NFF) has said in 1997, it is doubtful that it placed its faith in this 'orthodoxy' in 1993. During the Act's negotiation, the NFF struggled to ensure that provisions 'validating' pastoral leases granted between 1975 and 1994[13] went beyond the likely common law position by explicitly extinguishing native title *(Native Title Act,* ss.15 and 229(3)).

This raises an important issue about advocacy in the native title industry. Should lawyers barrack on a legal outcome which suits their clients, or should they remain more objective about the likely state of the law? The '10-point plan' and the *Native Title Amendment Bill 1997* demonstrate that barracking is a far more effective strategy for 'opponents' of native title. Among other things, the plan will reward those governments (for example, Queensland) which stuck their heads in the sand on the co-existence issue, refusing to comply with the *Native Title Act* when issuing mining tenements on pastoral land — despite the fact that other governments (for example, Western Australia) eventually saw the *Wik* writing on the wall and complied.[14]

Love is honest about why *Wik* has pastoralists panicked. It's not because they are worried about the validity of their *leases*. It's because they are worried about the validity of their *unauthorised activities*. Outdated pastoral lease statutes say little about the detail of rights conferred by leases (p.43). Under international and environmental pressure, graziers have diversified into land uses possibly unauthorised by the pastoral lease. Since the States have encouraged (or turned a blind eye to) these illegal practices, pastoralists could be excused for thinking they were legal.

However, what Love and pastoral advocates never really make clear is that the illegality is not fundamentally attributable to native title. It stems from the principle that the Crown may only grant, and a pastoralist may only hold, what statute authorises. It is much easier, however, to blame the problem on the *Native Title Act*, which adds to this general rule the more specific rule that illegal pastoral activities are also 'impermissible' (invalid)[15] unless native title holders agree to them (native title holders may make an agreement with government for any future use of native title land: s.21). 'Until now,' says Love, 'there has been little perceived need to develop the rights granted to leaseholders' (p.43). But why? What on earth is going on in State Lands Departments? How can governments which devote so much attention to 'opposing' native title have such an off-hand attitude to their own tenures?

Finally, Love's contribution is made dangerously confusing by his misuse of the word 'prevail' in relation to native title affected by pastoral leases where he really means 'survive' (p.42) or 'yield' (p.43). He creates the misapprehension that native title somehow threatens the security or incidents of a pastoral lease, which it does not.

The mining industry and the 'right to negotiate'

Simon Williamson's 'Implications of the Wik Decision for the Minerals Industry' contains useful information about areas of land and numbers of tenements affected. Unfortunately, the sources of this information are not provided, making its accuracy not always verifiable.[16] According to Williamson, while WA has granted more than 4000 exploration tenements and 300 mining tenements since it commenced complying with the *Native Title Act* in 1995,[17] other governments have avoided the Act or flick-passed their responsibilities under it to tenement holders. Forty mining lease grants over native title land in Queensland have been deferred, and many exploration tenements issued on the simple instruction that holders are not to exercise their rights on land in which native title might exist (p.46).

Since many such tenements have been granted on pastoral leases, they will be invalid where native title parties have not been accorded the 'right to negotiate' (see *Native Tiltle Act,* s.28). Like pastoralists and State governments, the resource industry has asserted that its legal advice was not capable of anticipating *Wik* in order to maintain political pressure for retrospective 'validation' of tenements. Williamson does this effectively. He alludes, however (p.47), to what might have been an alternative solution to this problem of resource insecurity — a system of priorities, under which present tenement holders were permitted to re-apply for them via the 'right to negotiate'.

Williamson canvasses familiar resource industry themes: the need for a stricter claims registration test, and a re-assessment of the form of the 'right to negotiate' (p.49). While it is generally insightful on the legal issues, his contribution is inaccessible to the uninitiated. His discussion of the procedural rights of native title holders in cases where the 'right to negotiate' doesn't apply (p.48, see *Native Title Act*, s.23) and of the initial failure of WA to negotiate in good faith for native title holders' consent to tenement grants[18] probably mean little to those who have not followed native title issues closely.

Williamson comments that, even if plans to extinguish native title are accompanied by compensation, 'validation of invalid titles should also be accompanied by some further gesture by governments' (p.48). He's right — there is a strong possibility that the extinguishing law (see *Native Title Amendment Bill 1997)* will be invalid without such a 'gesture'.[19] What will that gesture be, Mr Howard?

Versions of history

I found Jonathan Fulcher's contribution, 'Sui Generis History?' the most interesting. Fulcher's argument is that, by using a 19th century history of Queensland pastoral leases to interpret 20th century tenures, the *Wik* majority failed to appreciate the tendentious or decontextualised nature of the *version* of history on which they relied. For Fulcher, pastoral leases were *not* distinctively Australian creations because they were designed by the Colonial Office. He argues that pastoral leases were not intended to allow co-existing native title. He marshals in support of his argument, among other things, contemporaneous legal advice and evidence of Earl Grey's view, expressed in an 1844 House of Commons Select Committee report on New Zealand, that the Maori did *not* have a proprietary right to the soil — only a *right to occupy* lands vested in the Crown (p.53). '[T]he work of Dr Fry and Professor Henry Reynolds' on which the majority relied is:

> Whig history producing Whiggish law ... It is so present-centred as to be meaningless to historians nurtured on the fundamental importance of context to an understanding of the past. [p.52]

Is Fulcher right to single out Fry and Reynolds? It would have been helpful to know whether Fulcher's alternative history was before the Court. Other commentators — e.g. Lang[20] — have observed the *sui generis* nature of Crown land tenures, noting that, despite 'frequent reversals and rapid changes in land policy and legislation', basic features of 19th century land legislation continued into the 20th.[21]

If the Court *has* played fast and loose with history, does it matter? As Gummow J and McQueen have pointed out, historical and legal truths have very little to do with one another, especially in a nation with an impoverished sense of legal history. The transformation of 'a contingent historical hypothesis to an absolute legal truth' with a 'performative function' is not unusual in the High Court.[22] That such an approach is permitted by 'the time-honoured methodology of the common law' appears uncontroversial.[23] It can also be employed in both constitutional decision making[24] and statutory interpretation. But in these last two contexts the restricted number of permissible 'extrinsic materials'[25] limits from the beginning the 'truth' on which 'history' may be founded.

The commentaries conclude with a multi-authored Blake Dawson Waldron advertisement[26] on native title and the *Racial Discrimination Act.* This covers the law accurately, but coolly dismisses human rights:

> Any Commonwealth response to *Wik* which seeks to comply with the [Racial Discrimination Act (RDA)] must meet the standard of protection for native title as required by that Act. Further ... the Commonwealth is competent to expressly repeal or amend the RDA or impliedly amend it by inconsistent amendments to the NTA.[27]

This contribution also seems to repeat a common misunderstanding about the potential unconstitutionality of discriminatory amendments to the *Native Title Act* — that these will be unconstitutional because they will remove the 'proportionality' between the *Racial Discrimination Act* and the International Convention on which it is based (p.61). While unconstitutionality of the *Racial Discrimination Act* might be a consequence of such amendments, the more immediate question is: 'would the amendments themselves *nonetheless* be justified as an exercise of the Commonwealth's 'races' power?'[28] The answer to this question depends not on international discrimination law but on the High Court's view of the power conferred on the Commonwealth by the 1967 referendum.

Like Williamson, the BDW team understands the potential constitutional importance of an additional 'gesture' to Aboriginal people accompanying any discriminatory amendments to the *Native Title Act.* Since the pastoral and resource industries will be major beneficiaries of the *Native Title Amendment Bill,* and since taxpayers will be major losers under it, perhaps those industries could offer to contribute financially to such a 'gesture'?

References

1. For example, Coper, Michael, *The Franklin Dam Case*, 1983 and Bartlett, Richard, *The Mabo Decision*, 1993.
2. *The Wik Case: Issues and Implications*, Graham Hiley QC (ed.), Butterworths, 1997.
3. For example, *Legal Implications of the High Court Decision in the Wik Peoples v Queensland: current advice*, The Attorney-General's Legal Practice, 23 January 1997, located on the Prime Minister's internet home page: http://www.nla.gov.au/pmc/native/wik.html, October 10, 1997.
4. Native title law generally seems to be no place for a woman — let alone an Aborigine. A recent edition of the *University of New South Wales Law Journal* on *Wik* is composed of contributions from the 'usual (white male) suspects'.
5. I say 'mysterious' because we are left guessing as to what he means by 'unnecessary extinguishment'.
6. Do these judges mean to suggest that, whatever the impact of a *grant* of a pastoral lease on native title, the *lessee's authorised actions* could further extinguish native title over particular areas — for example, dams or buildings? If so, when does extinguishment occur? At the time of grant or at the time of construction?
7. See Toohey J (1996) 187 CLR 1 at 184-5, where His Honour refers to the fact that inconsistency with Crown-granted rights 'renders the native title rights unenforceable at law and, in that sense, extinguished' and states that 'there is something curious in the notion that native title can somehow suddenly cease to exist, not by reason of a legislative declaration to that effect but because of some limited dealing by the Crown with Crown land'.
8. The statutory provision authorising Aboriginal access disappeared from the *Land Act* for a short period between 1932 and 1934, with the result that leases granted during that period were not subject to such a reservation.
9. More general arguments about the ongoing relevance of such instruments were dismissed by the Federal Court in *Wik* and not appealed. The Wik tried to convince Drummond J that the legislative power of Queensland was limited by historical 'promises or engagements' made to them by colonial authorities and preserved by the Queensland Constitution (the so-called 'Henry Reynolds argument'). These 'promises or engagements' were said to have been contained in an 1849 Order in Council allowing the Governor to insert a reservation in favour of Aboriginal people in pastoral leases, and in associated Colonial Office despatches. However, Drummond J concluded that these instruments could not and did not constitute such promises or engagements, including because the OIC pre-dated colonial constitutions which conferred on colonial legislatures power to repeal the OIC. The material before Drummond J indicated what had been foreshadowed by Dawson J in *dicta* in *Mabo (No 2)*: that 'promises and engagements' had a much more specific meaning associated with post-1842 enforcement of Crown promises to grant land made before 1842, at which time the Crown's 'radical title' became subject to statutory control.
10. Fry, *Freehold and Leasehold Tenancies of Queensland Land Law*, 1946, quoted by Gummow J at 225.
11. Here I repeat the complaint made by my mother, a dairy farmer: 'Don't say 'farmers' dear — it's not us'. While some agricultural and other intensive land uses are permitted on some pastoral leases, at least where they bear some relationship to pastoral activities, pastoral leases confer mainly *grazing* rights, not agricultural or animal husbandry rights.
12. In *Wik*, Toohey J conceded quite frankly that the earlier decisions were not persuasive *because they were not concerned with native title* (at 178). While this may seem like a rather cavalier approach to precedent, it should be remembered that even the Court in *Mabo (No 2)* acknowledged that there would need to be some adjustments to Australian land law to take account of native title.
13. That is, pastoral leases which may have been invalid because of the operation of the *Racial Discrimination Act 1975* (Cth). The argument about possible invalidity of titles granted by the states after 1975 goes like this: The States' powers to grant land are limited to circumstances prescribed by statute. If State Crown lands legislation authorises grants of native title land in circumstances where other private land would not be granted to a third party (e.g. without notice, acquisition or compensation), that legislation may be invalid for constitutional inconsistency with s.10 of the *Racial Discrimination Act*, which provides for racial equality before the law in the enjoyment of property rights. This would render the grants themselves invalid. A similar argument might be made about the operation of s.9 *Racial Discrimination Act* — which outlaws 'acts involving a distinction based on race' — on the grants themselves. This argument has not been conclusively evaluated by the High Court.
14. See point 1 of the plan, implemented in provisions for the validation of 'intermediate period acts' in the Bill.
15. Although there are many exceptions to the general rule, generally under the *Native Title Act* 'impermissible future acts' are those which could not be done to freehold. Pastoral diversification activities may fall into this category because pastoralists would not be authorised to conduct them on another person's freehold land. 'Impermissible future acts' are invalid to the extent that they affect native title.
16. e.g on p.46 Williamson states: 'Thirty-three percent of Victoria is covered by Crown land which includes pastoral leasehold land'. The 1993 Australian Surveying and Land Information Group map, *Australia: Land Tenure*, however, showed only the tiniest possible patch of pastoral leasehold in that State. However, other Crown leases are common: 33,000 people hold unused road and water frontage licences on long-term tenure. The State's Department of Natural Resources and Environment Crown land database covers '70,000 Crown allotments totalling 8 million ha', although 534 parcels of 'surplus' Crown land were sold during 1995-96: Department of Natural Resources and Environment, *Annual report*, on http://www.dce.vic.gov.au/dnre.annrep96/40claa.htm, 16 July 1997.
17. p 49. WA commenced to comply with the Act after unsuccessfully challenging its constitutionality, and after WA native title legislation was found to be inconsistent with the *Racial Discrimination Act* 1975 (Cth): see *WA v Commonwealth* (1995) 183 CLR 373.
18. p.49 See *Walley v WA* (1996) 1 AILR 568.
19. Even if the law complies with s.51(31) Constitution by providing 'just terms' compensation, the law might be unconstitutional if the High Court determines (inconsistently with earlier *dicta*) that s.51(26) Constitution (the 'races' power) does not authorise laws which discriminate *against* Aboriginal people, only laws which discriminate *in their favour*.
20. 'Tenures acquired pursuant to the Crown lands legislation are statutory interests and the legislation ... is "the repository of the respective rights and obligations of the Crown on one side" and the lessee or purchaser on the other side (per Isaacs J in *Davies and Ors v Littlejohn*), and constitutes a code for the disposal of the Crown land of the State ... Since interests acquired pursuant to this legislation are statutory, they can not be described either as legal or equitable interests, except as being legal interests in the sense of interests created by statute...': Lang, *Crown Land in New South Wales*, Butterworths, 1973 at 39. But cf Brennan CJ's comments on *Davies v Littlejohn* in *Wik* at 147-8. See also the comment by Else-Mitchell J in the Foreword to Lang that 'although the Crown Lands Acts provide a system for the alienation and disposition of land within prescribed areas of the State, they did not simply apply the traditional conceptions and terminology of the law of real property with which practising lawyers were indoctrinated...' (p.vii)
21. See Lang, above, at pp.12-13; cf the observation at p.10 that the 1884 NSW legislation was 'the basis, or at least the immediate forerunner, of the current legislation'.
22. McQueen, Rob, 'Why High Court Judges Make Poor Historians' (1990) 19 *Fed LR* 245-6. See also Gummow J's comment in *Wik* that, even if an 'established taxonomy' could be developed to regulate uses of history in the formulation of legal norms, 'it might then be said of it that is was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts': at 231.
23. See Gummow J in *Wik* at 228-32. See also Webber, Jeremy, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17 *SydLR* 5.
24. Compare the different approaches to the 'conquest/settlement' debate in *Mabo (No. 2)* and the cases which it overturned. On the Commonwealth Constitution, see also Cole *v Whitfield* (1988) 165 CLR 360, *NSW v Commonwealth* (1990) 169 CLR 482.
25. In interpreting the Australian Constitution, materials to which the Court may have regard include drafts of the Constitution and Quick and Garran's annotated commentary on it, as well as Convention Debates, at least for certain purposes. In the case of legislation, the courts are also permitted to have regard to second reading speeches leading up to the Act's enactment for certain purposes.
26. Judging by the contributors' note, BDW is the expert in native title matters in Queensland.
27. p 61. The BDW team, unlike the electorate, seem to have always known that the Commonwealth 'does not regard the RDA as "sacrosanct"': p.62.
28. In Australian constitutional law, a Commonwealth law not valid under one head of power may nonetheless be valid under another. The two heads of power are, generally speaking, not read as limiting one another. Cases on racial discrimination demonstrate this — e.g. in *Koowarta v Bjelke Peteresen* (1982) 153 CLR 168. The majority held that, while the *Racial Discrimination Act* was not a valid exercise of the 'races' power, it was a valid exercise of the 'external affairs' power.