WIK PEOPLES v STATE OF QUEENSLAND:

EXTINGUISHMENT OF NATIVE TITLE

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The 1996 decision of the High Court of Australia in Wik Peoples v State of Queensland[1] *will be remembered by all as the first fruits of the* Mabo[2] *decision.* Wik *is the first of many decisions that will challenge Australia as it attempts to come to terms with the past. The* Wik *case introduces the possibility that native title may indeed survive 'extinguishment' or at the very least may be subject to mere 'impairment' when conflict arises. This is a consequence of the re-conceptualisation of property rights that the practical outcome of the case necessitates. This paper explains the move from 'co-existence' of rights to 'impairment' of native title to the possibility of the revival of native title.*

I BACKGROUND

A Wik: Factual Background

In 1993 the Wik peoples sought in the Federal Court, inter alia, a declaration that they were the owners of an area of land in Queensland pursuant to any native title they might

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1 *Wik Peoples v State of Queensland*, No B8 of 1996; *Thayorre Peoples v State of Queensland*, No B9 of 1996 (1996) 141 ALR 129 [*Wik*].

2 *Mabo v State of Queensland* (No. 2) (1992) 107 ALR 1, (1992) 175 CLR 1 [*Mabo*].

possess.[3] The land in question covered both the Mitchellton Pastoral Holdings (Mitchellton) and Holroyd River Holdings (Holroyd) leases, and land granted to Comalco Aluminium Limited and Pechiney Holdings Limited under statute.[4] The claims relating to the Comalco and Pechiney lands were dismissed by all members of the High Court.[5] The Mitchellton leases were granted under the Land Act 1910 (Qld) but were never entered into possession and are currently Aboriginal Reserve Land, and the Holroyd lease was granted under the Land Act 1962 (Qld). The Holroyd lessees did enter into possession, and minimal improvements were made to the land.[6]

The case appeared before Drummond J who joined the Thayorre peoples as respondents to the claim on the Mitchellton lease land. At issue in *Wik* was whether or not the grant of a pastoral lease necessarily confers exclusive possession and thus extinguishes all incidents of native title to the land which the lease covers.[7] The majority later expressed some dissatisfaction with the restrictive nature of the question asked in the court at first instance.[8] Drummond J delivered his judgment in the affirmative on 29 January 1996, and on 15 April 1996 the High Court granted leave for the appeal to be removed, to be heard in front of its full bench.[9]

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3 The importance of this case was never questioned by the High Court. Indeed the ensuing political melee and "unprecedented hysteria" is testament to the ramifications of the decision and the emotions it has evoked. The Court heard unchallenged evidence that approximately 42% of Australia is covered by pastoral leases, and that in some states this may be as high as 70-80%. All pastoral leases are to be considered for renewal by 2015, and if some land claims are successful, up to 38% of Western Australia could be 'owned' by as few as 500 people.

If the submissions for the contesting respondents were accepted, the *Mabo* case would be "of little practical significance for Australia's indigenous people over much of the land surface of the nation". Justice Kirby acknowledged that there was to be a certain amount of trading certainty in land law for indigenous rights if the appeal was allowed.

4 *Wik* above n1, 136-138 per Brennan CJ; 165-770 per Toohey J; 191-194, 210 per Gaudron J; 219-222 per Gummow J; 251-255, 269-270 per Kirby J.

5 *Wik* above n1, 162-164 per Brennan CJ; 188-189 per Toohey J; 286-295 per Kirby J.

6 *Wik* above n1, 136-138 per Brennan CJ; 165-170 per Toohey J; 191-194 per Gaudron J; 219-222 per Gummow J; 251-255, 269-270 per Kirby J.

7 *Wik* above n1, 136-138 per Brennan CJ; 165-170 per Toohey J; 191-194 per Gaudron J; 219-222 per Gummow J; 251-255, 269-270 per Kirby J.

8 "The *Wik* could only have stood to lose by the procedure adopted by Drummond J." *Wik* above n1, 166, 188 per Toohey J; 255 per Kirby J.

9 *Wik* above n1, 166-167 per Toohey J.

By a majority of four to three[10] the High Court held that native title is not necessarily extinguished by pastoral leases, which are sui generis and peculiar to Australia.[11] The question of the extent to which native title is extinguished is, primarily at least, answerable with reference to the particular lease and Act which these were granted under, and factual incidents of native title.[12] Indeed it seems incongruous that in the vastness that is the Australian Outback, Aborigines could not exercise their native title rights concurrently with the depasturing of stock.[13] Evidence before the Court showed that this had been the case in the Holroyd lease.[14]

There were two approaches to the case. It is evident that the Judges had in their minds from the start what they believed to be the consequences of success or failure for the appellants. Those in the majority each wrote separate, complex judgments, emphasising the sui generis nature of pastoral leases and their peculiar historical inception.[15] Brennan CJ wrote the decision for the minority, preferring to take the view that all leases, statutory or common law, confer exclusive possession which unavoidably extinguishes all incidents of native title.[16]

Due to the nature of the question asked by the trial judge, their Honours were precluded from giving any further judgments on particular incidents of native title, and importantly, on whether or not native title is extinguished or merely impaired by inconsistency in the exercise of rights.[17]

B Extinguishment in Mabo

Extinguishment of native title rights is acknowledged as possible when there arises an inconsistency between the rights granted by the Crown and any surviving native title

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10 Toohey, Gaudron, Gummow and Kirby JJ for the majority, Brennan CJ for the minority (McHugh and Dawson JJ concurring).

11 *Wik* above n1, 181-182 per Toohey J; 204-209, per Gaudron J; 226, 248 per Gummow J; 279 per Kirby J.

12 *Wik* above n1, 152-153 per Brennan CJ; 185 per Toohey J; 209 per Gaudron J; 233 per Gummow J; 279 per Kirby J.

13 *Wik* above n1, 188 per Toohey J; 208 per Gaudron J; 271-272 per Kirby J.

14 *Wik* above n1, 136-138 per Brennan CJ; 165-170 per Toohey J; 191-194 per Gaudron J; 219-222 per Gummow J; 251-255, 269-270 per Kirby J.

15 *Wik* above n1, 181-182 per Toohey J; 204-209, 218-219 per Gaudron J; 226, 248 per Gummow J; 279 per Kirby J.

16 *Wik*, above n1, 151-154.

17 *Wik* above n1, 170 per Toohey J.

rights.[18] Native title can survive the acquisition of sovereignty through the concept of radical title. Radical title is acquired by the Crown and is a "postulate of the doctrine of tenure and a concomitant of sovereignty."[19] Only the Crown may extinguish native title either explicitly or implicitly by an act of the Legislature or the Executive where empowered by legislation.[20] The intention to extinguish, as expressed by the legislation must be clear and plain,[21] and any ambiguities are determined in favour of the native title holder.[22] The Act must not only be clear and plain that extinguishment is intended but grant rights which are necessarily inconsistent with the continuation of the native title rights. As expressed by Deane and Gaudron JJ in *Mabo*:[23]

> Thus, general waste lands (or Crown lands) legislation is not to be construed, in the absence of clear and unambiguous words, as intended to apply in a way which will extinguish or diminish rights under common law native title.

The test for extinguishment is therefore a hard one to pass.

C Extinguishment in Wik*: General*

The general principles with regard to extinguishment by legislative or executive act as expressed in the *Mabo* decision were confirmed. A grant of a fee simple title necessarily extinguishes all incidents of native title.[24] Most important is the protection to be given to any native title in interpreting rights granted by those acts.[25] It appears that the burden of proof of inconsistency has shifted from the native title holder to those holding rights under a Crown grant.[26] Native title rights are extinguished where there is an inconsistency with the rights of the grantee and in all cases the rights of the pastoralist

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18 *Mabo* above n 2, 46-50 per Brennan J; 84-85 per Deane and Gaudron JJ.

19 *Mabo* above n 2, 33 per Brennan J.

20 *Mabo* above n2, 46-50 per Brennan J; 84-85 per Dean and Gaudron JJ.

21 *Mabo* above n 2, 46 per Brennan J; 84 per Deane and Gaudron JJ; 152 per Toohey J.

22 *Mabo* above n 2, 84.

23 *Mabo* above n 2, 84.

24 *Wik* above n1, 184 per Toohey J; 226 per Gummow J; 285 per Kirby J

25 *Wik* above n1, 151 per Brennan CJ; 182-183 per Toohey J; 202 per GaudronJ; 221 per Gummow J; 279 per Kirby J.

26 *Wik* above n1, 233 per Gummow J. See also M Love "The Farmgate Effect" in G Hiley QC (ed) The *Wik* Case: Issues and Implications (Butterworths, Sydney, 1997) ["Farmgate Effect"]; also M Griffin "*Wik* - Why All the Fuss?" (1997) Australian Lawyer, March 32(2).

will prevail.[27]

Inconsistency should be properly defined because it "...is with inconsistency that these appeals are concerned."[28] Justice Toohey cites with approval the leading Canadian case of Delgamuukw v Queen in Right of British *Columbia.*[29]

> Before concluding that it was intended that an aboriginal right be extinguished one must be satisfied that the intended consequences of the colonial legislation were such that the Indian interest in the land in question, and the interest authorised by the legislation, *could not possibly co-exist*.

A high degree of co-existence is possible before the rights will be necessarily inconsistent and thus extinguished. Such co-existence is not new to the Australian legal environment. Mining licences are grantable over pastoral lease land such that the prospecting entity can come onto and alter such land without needing the permission of the leaseholder.[30]

Extinguishment by the grant of a pastoral lease under the relevant legislative enactment is implicit extinguishment.[31] The clear and plain intention is therefore harder to find and courts will be most reluctant to draw the conclusion that all native title rights have been extinguished over the land subject to a pastoral lease, especially after the *Wik* decision. One aspect of the uncertainty created by the *Wik* decision should be noted. No determination of to what extent native title has been extinguished or of the rights conferred on a pastoralist is final until both parties agree. Indeed it is questionable whether or not the Crown should be joined as a party since it has the sole right to extinguish native title. The High Court is the final arbiter given that an important question of law may be in issue and thus any disagreement is only resolvable after it, or a similar case, has been determined in that Court. Currently negotiated agreements may be found to be out of date and in some cases irrelevant after such a decision.

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27 *Wik* above n1, 184-185 per Toohey J; 245 per Gummow J; 279 per Kirby J.

28 *Wik* above n1, 183 per Toohey J.

29 (1993) 104 DLR (4th) 470 at 525 [*Delgamuukw*] as cited in *Wik* above n1, 184 per Toohey J.

30 Maureen Tehan "Co-Existence of Interests in Land: A Dominant Feature of the Common Law" in Land Rights, Laws: Issues of Native Title (Native Titles Research Unit, AIATSIS) Issues Paper No. 12, January 1997 4. See also *Delgamuukw* above n29, 532 per Macfarlane J A.

31 *Wik* above n1, 184 per Toohey J; *Delgamuukw* above n29, 668 per Lambert JA. See also *Wik* above n 1, 151 per Brennan CJ.

II EXTINGUISHMENT: EXISTENCE OR EXERCISE OF INCONSISTENT RIGHTS?

It is clear through the judgments that where there is an inconsistency between the rights of the pastoralist under the relevant legislation and lease and the rights of the native title holders the rights of the pastoralist will prevail and the native title will be extinguished to the extent of the inconsistency.[32] Where the problem arises is in the determination of both native title and pastoral lease rights. Native title rights are determinable only by factual enquiry and are also considered to be sui generis.[33] Determination of native title rights is difficult because relatively few people may be knowledgeable in the customs, mores and history of the particular tribe, and also because there is currently no legal consensus on where the line is to be drawn once those rights are established (eg right to fish in traditional manner or solely the right to fish).[34] Rights of the pastoralist as set out in the pastoral leases are mostly vague, consisting of broad rights to depasture and graze stock, and make whatever improvements to the land as are necessary.[35] Some lease agreements are more precise, requiring the lessees to conduct certain activities such as build fences, accommodation, and in some cases dams or an airstrip.[36] But this is as explicit as most get.

There is some disagreement in the decisions as to whether it is the grant of the rights to construct the said facilities which extinguishes native title, or whether it is the actual construction which, by a factual necessity, extinguishes the title.[37]

Given the willingness of the Court to perceive the continuing ability of the rights in the present leases to co-exist with native title, and the likelihood that it will not find many

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32 *Wik* above n 1, 233 per Gummow J.

33 *Wik* above n1, 151 per Brennan CJ; 185 per Toohey J; 257 per Kirby J. See also *Delgamuukw* above n 29, at 494 - 497 per Macfarlane JA; 644 per Lambert JA.

34 *Delgamuukw* above n29, 657-660 per Lambert JA. See also "Wik Finding Needs Much Clarification" The Australian, 26 December 1996.

35 *Wik* above n1, 175 per Toohey J; 745 per Gummow J.

36 *Wik* above n1, 211 per Gaudron J; 246 per Gummow J.

37 See for example: "Legal Implications of...*Wik Peoples v Queensland*" (Commonwealth Attorney General's Department), 23 January 1997, 4-5 ("Legal implications of ... *Wik*"); see also PA Smith "Pastoral Leases and Native Title" in G Hiley QC (ed) The *Wik* Case: Issues and Implications (Butterworths, Sydney, 1997); P Butt (1997) 71 Aus LJ 326, 330 ["Leases after *Wik*"]; A Devereux (1997) 22 Alt LJ 47, 48 ["Co-existence of Native Title and Pastoral Leases"]; E Willheim "Queensland Pastoral Leases and Native Title: *Wik Peoples v Queensland*" (1997).3, No.89, February, Abo LB 20, 21 ["Queensland Pastoral Leases"]; D Young "*Wik*: Implications for Statutory Leases" (1997) 3 UNSW LJ 2 Forum 12, 13.

instances where exclusive possession has been granted to a pastoral lessee, it is important to know what the Court believes the concept of land rights to entail. This is the key to understanding the case.

A Majority

The majority (Toohey, Gaudron, Gummow and Kirby JJ) were in agreement that the grant of a pastoral lease did not necessarily confer exclusive possession and thus did not necessarily extinguish all incidents of native title. In most cases the focus of inquiry would be on the rights granted and the particular incidents of native title. Native title rights necessarily involve some factual inquiry, as they are peculiar to the particular area of exercise. There was, however, clear disagreement whether or not the test for extinguishment could involve a factual investigation of the pastoralists' exercise of Crown granted rights, that is, is it possible to look to the exercise of the rights, or should analysis be confined to the rights themselves?

1 Justice Gaudron

Justice Gaudron expressed the possibility that it may be the exercise of the rights that results in a necessary extinguishment of native title. This may be so where the pastoral lessee is fulfilling conditions of the lease:[38]

> And to the extent that there is any inconsistency between the satisfaction of conditions and the exercise of native title rights, it may be that satisfaction of the conditions would, as a matter of fact, but not as a matter of legal necessity, impair or prevent the exercise of native title rights and, to that extent, result in their extinguishment.

In this case 'satisfaction of conditions' means the fulfilment of a condition included in the grant itself, for example, the requirement that a dam, airstrip and fences be constructed on that area of land.

2 Justice Gummow

Justice Gummow appears to have gone the furthest in advocating an examination of the exercise of the pastoralists' rights in the determination of the extinguishment of native title:[39]

> It may be that the enjoyment of some or all native title rights with respect to particular portions of the 2380 square kilometres of the Holroyd River Pastoral Lease would be excluded by construction of the airstrip and dams and by compliance with other conditions. But that

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38 *Wik* above n1, 218.

39 *Wik* above n1, 247.

> would present particular issues of fact for decision. The performance of the conditions, rather than their imposition by the grant, would have brought about the relevant abrogation of native title.

3 *Justice Toohey*

Justice Toohey favoured the approach based only on examination of the rights of both the leaseholders and the native title holders. While he acknowledged, along with the others, that native title must, by its nature, be determined after factual examination, the question of extinguishment is one for consideration of inconsistency in the existence of rights and not in their exercise.

His Honour said that to determine inconsistency, one must:[40]

> focus specifically on the traditions, customs and practices of the particular Aboriginal group claiming the right. Those rights are then measured against the rights conferred on the grantees of the pastoral leases; to the extent of any inconsistency the latter prevail. It is apparent that at one end of the spectrum native title rights may 'approach the rights flowing from full ownership at common law.' On the other hand they may be an entitlement 'to come on to land for ceremonial purposes, all other rights in the land belonging to another group'. Clearly there are activities authorised, indeed in some cases required, by the grant of a pastoral lease which are inconsistent with native title rights that answer the description in the penultimate sentence. They may or may not be inconsistent with some more limited right.

It is important to note the apparent lack of distinction here between authorised and required activities, as made by Gaudron and Gummow JJ. This is important because Toohey and Kirby JJ do not allow this exception of 'the satisfaction of conditions' to the rule of inconsistency in the existence of rights before extinguishment is possible.

4 *Justice Kirby*

Justice Kirby pays considerable attention to the issue. He outlined his view of the law with regard to extinguishment on pages 270-285. He strongly rejected the notion that native title can be extinguished by the exercise of a pastoralist's rights. In short he argued that:[41]

> The search must therefore be one which is first directed at the legal rights which are conferred on a landholder by the Australian legal system. This is because legal title and its incidents should be ascertainable before the rights conferred are actually exercised and indeed whether they are exercised or not. In some cases the grant of such legal rights will have the inevitable

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40 *Wik* above n1, 247.

41 *Wik* above n1, 275.

> consequence of excluding any competing legal rights, such as to native title. But in other cases, although the native title may be impaired, it may not be extinguished. The answer is to be found in the character of the legal rights.

The necessary practical and theoretical implications of his reasoning are not without their problems.

B Minority

The minority (Brennan CJ, with whom Dawson and McHugh JJ concurred) expressed the view that the:[42]

> [Q]uestion of extinguishment of native title by a grant of inconsistent rights is - and must be - resolved as a matter of law, not of fact. If the rights conferred on the lessee of a pastoral lease are, at the moment when the rights are conferred, inconsistent with a continued right to enjoy native title, native title is extinguished.
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> ...the appropriation of the land gives rise to the Crown's beneficial ownership only when the land is actually used for some purpose inconsistent with the continued enjoyment of native title - for example, by building a school or laying a pipeline. Until such a use takes place, nothing has occurred that might affect the legal status quo. A mere reservation of the land for the intended purpose, which does not create third party rights over the land, does not alter the legal interests in the land.

While it appears that this may advance the argument for extinguishment on a factual inconsistency, Brennan CJ is merely highlighting that in this case the legal interests do not change - and hence the inconsistency of rights does not appear - until the factual inconsistency. Before the laying of the pipeline or the building of the school the Crown had only radical title; it had not made an order vesting in itself the beneficial ownership; it had merely made an indication that it would do so in the future.[43]

C Problems with the Reasoning

The main problem with the reasoning that it is the existence of inconsistent rights and not their exercise which extinguishes native title (or even the alternative suggested by Gaudron and Gummow JJ) is the illogical contradiction between impairment and extinguishment in possible circumstances.

While Brennan CJ and Toohey and Kirby JJ appear to agree that it is the existence of inconsistent rights that causes the extinguishment,[44] it must be observed that the concept

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42 *Wik* above n1, 152-153.

43 Compare "Queensland Pastoral Leases" above n 37, 22.

44 *Mabo* above n2; *Wik* above n 1, 275, 152-153.

of rights considered in the statement cited above from the judgment of Brennan CJ[45] necessarily differs from those of the majority. It was this differing conceptualisation that enabled the majority to find no necessary grant of exclusive possession and hence no necessary extinguishment.

The Chief Justice also said: "...inconsistency arises precisely because the rights of the lessee and the rights of the holders of native title *cannot be fully exercised at the same time*."[46] Thus these rights are absolute and not adaptable.

Compare that with the judgment of Gummow J in the majority: [47]

> It does not appear that the statutory interests could be enjoyed only with the full abrogation of any such native title.
>
> The question is whether the respective incidents thereof are such that the existing right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing right.

While Kirby J seems to agree with Brennan CJ by stating that the right of the pastoralist to use the land "for 'grazing purposes only'...could, in law, *be exercised and enjoyed to the full* without necessarily extinguishing native title rights...",[48] the unavoidable consequences of his decision seem to point to a different view. For example, exercising pastoral lease rights to the full could involve being anywhere at any time with numerous cattle, meaning the native title right to occupy that land would be inconsistent. But the pastoralist also has the right to be anywhere else on the land, in a manner such as the above which would prevent the native title holders exercising their right. The pastoralist would not be outside of his/her rights. Kirby J does not mention any concept of reasonable use of a right, but it seems implicit from his judgment that any pastoralist engaging in such activity would be found to be exceeding the full enjoyment of the right. The mention of reasonableness necessarily indicates an examination of the exercise of the right.

While on the surface it appears that the majority and minority differ about whether or not pastoral leases always confer exclusive possession on the leaseholder, the case really

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45 *Wik* above n1, 152-153: "[The] question of extinguishment of native title by a grant of inconsistent rights is - and must be - resolved as a matter of law, not of fact. If the rights conferred on the lessee of a pastoral lease are, at the moment when the rights are conferred, inconsistent with a continued right to enjoy native title, native title is extinguished."

46 *Wik* above n1, 153 (emphasis added).

47 *Wik* above n 1, 247, 253.

48 *Wik* above n 1, 279 (emphasis added).

highlights a land management issue and the protection and enjoyment of interests in land.[49]

A further example of this dichotomy sheds more light on the issue of extinguishment. A leaseholder may have the right to construct a homestead, or accommodation for workers, or a shed for equipment as implicitly authorised in the lease.[50] This would be reasonable under any pastoral lease. Obviously the construction of the shed would be inconsistent with the continued exercise of native title over the land on which the building was sited and its immediate surrounds. The pastoralist would have the right to construct this building anywhere on the land governed by the lease, yet it could hardly be said that granting the lessee this right would evince a clear and plain intention of the legislature to extinguish native title over the whole area on which the lessee has the right to construct that is, the land covered by the lease.

Indeed it appears unlikely that any right granting general authorization of a pastoral activity or any incidental activity (including the building of a residence) would have an extinguishing effect. Neither of the lessees of the Mitchellton lease entered into possession.[51] It can be reasonably inferred that no improvements (including the building of a residence) were made to the land. Thus there was no factual exercise of rights and hence no factual extinguishment or impairment. Yet clearly the right to build anywhere existed, and this right is inconsistent with the right to exercise native title. The majority held that native title was not necessarily extinguished on the land covered by this lease.[52] At first, the necessary implication seems to be that it is the exercise of the right that extinguishes, however this directly contradicts what Kirby J said on extinguishment.[53] It appears that if the Mitchellton lease did not necessarily result in the extinguishment of all incidents of native title (as the majority held),[54] then it must be the exercise of the rights that results in the extinguishment. But it is clear from the judgments, and especially from Kirby J's analysis, that this cannot be so.

The granting of the first and second Mitchellton leases must have either extinguished

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49 "Battle of the Bush" Time Magazine (New Zealand Edition) May 19 1997, 92.

50 *Wik* above n 1, 175 per Toohey J; 245 per Gummow J.

51 *Wik* above n1, 136-138 per Brennan CJ; 165-170 per Toohey J; 191-194, 210 per Gaudron J; 219-222 per Gummow J; 251-255, 269-270 per Kirby J.

52 *Wik* above n1, 181-182 per Toohey J; 204-209, 218-219 per Gaudron J; 226, 243 per Gummow J; 279 per Kirby J.

53 *Wik* above n1, 275.

54 *Wik* above n1, 181-182 re Toohey J; 204-209, 218-219 per Gaudron J; 226, 248 per Gummow J; 279 per Kirby J.

all, or not extinguished at all. The reasoning necessarily suggests not at all.

All other leases that authorise activities in the same or similar manner to the Mitchellton lease must likewise not result in extinguishment, if the exercise of the rights does not extinguish. Therefore those leases, even where residences, sheds, and fences have been constructed, must result in impairment, not extinguishment. This has important consequences for the future validity of pastoral leases which will be discussed below.

The minority and Toohey and Kirby JJ are clear that it is not the exercise of the conflicting rights, but the existence of the rights themselves in conflict which causes the extinguishment.[55] This is in accordance with the rule that a clear and plain intention must be shown by the legislature, and that it is the Sovereign, and not the pastoralist, which has the sole power of extinguishment.[56] Yet inconsistency may only be apparent on the exercise of the rights. An alternative to extinguishment is needed.

Factual inconsistency in the exercise of rights can only ever result in 'impairment'. Justice Macfarlane, who wrote the majority judgment in *Delgamuukw,* held that native title rights "...may be impaired or extinguished...".[57] The alternative to extinguishment is here.

Justice Kirby is adamant that the exercise of rights can never result in extinguishment:[58]

> To suggest that the actual conduct of the pastoralist, under a pastoral lease, could alter the rights which the pastoralist and others enjoyed under the lease would be tantamount to conferring on the pastoralist a kind of unenacted delegated power to alter rights granted under the Land Acts. This cannot be. It would introduce a dangerous uncertainty in the entitlements to land of all peoples in Australia to adopt such a principle.

Not only does it introduce uncertainty, which might appear small in relation to the uncertainty created by this decision, but it imposes on the pastoralist the right of extinguishment of native title normally reserved for the Sovereign. It is clear from precedent that it is only the actions of the Sovereign that can extinguish native title.[59]

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55 *Wik* above n1, 152-153, 185, 275.

56 *Wik* above n1, 136-138 per Brennan J; 165-170 per Toohey J; 191-194, 210 per Gaudron J; 219-222 per Gummow J; 251-255, 269-270 per Kirby J. See also *Wik* above n1, 275 per Kirby J.

57 *Delgamuukw*, above n30.

58 *Wik* above n1, 275.

59 *Mabo* above n2, 33 per Brennan J.

Justice Kirby stated that the "...question is not whether indigenous people have in fact been expelled from traditional lands but whether those making claim to such lands have the legal right to expel them."[60] This ignores two important points: first, the very real legal necessity for native title claimants to have a continuing relationship with the land.[61] In cases where pastoralists have illegally 'hunted the natives off the land' the question of their legal right to do so is, under the current law, irrelevant.[62] Second, the existence of the inconsistency of the native title rights with the prerogative power of the early Governors to explicitly extinguish native title to land. These Governors had powers including a right to make grants in fee simple.[63] That would be implicit extinguishment. But such Governors would also have the prerogative right to exclude Aborigines and effect explicit extinguishment, without causing extinguishment through the creation of inconsistent third party rights. If not it would be strange if a colonial Governor could remove the right of Aborigines to be on their land by implicit extinguishment, and yet could not explicitly extinguish. The inconsistency of rights is very clear, and the effect of following this reasoning is to imply the extinguishment of all native title on the acquisition of sovereignty.[64] The High Court has quite emphatically denied this is the case. So it would not be until the Governor exercised that right (perhaps by physically forcing an eviction, and, importantly, without creating any inconsistent third party rights) that it could reasonably be said that extinguishment has occurred. There is thus a contradiction in the reasoning of Kirby J.

There are more instances where difficulties could arise, with both the view that it is the existence, and the view that it is the exercise, of inconsistent rights that extinguishes. The following hypothetical situations and analyses assume that the suggested resolution of the reasoning of Kirby J (that no pastoral lease extinguishes, unless a high degree of specificity in rights is observed) is not accepted.

What if a permanent impairment results in extinguishment? If a pastoralist builds a large shed on the land, then it seems no-one could deny that the native title rights to the land covered, and its surrounds, would be extinguished.[65] But if the shed is made of

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60 *Wik* above n1, 274.

61 *Mabo* above n 2, 43-44 per Brennan J; see also *Wik* n1 per Kirby J.

62 Perhaps not if the Crown had fiduciary liability over native title interests.

63 *Wik* above n1, 171 per Toohey J.

64 Unless perhaps sovereignty was found to be gradually acquired over the whole of Australia - yet this appears to be the doctrine of settlement rejected in *Mabo* and was agreed by both parties to be wrong.

65 Unless this would result in impairment as suggested as a resolution of the reasoning of Kirby J above.

wood and burns down, dissolving over the years into dust, must Aborigines who would otherwise hold rights to cross, and kill wild animals and perform ceremonies on the area, refrain from killing an animal because it has wandered onto that patch, or must they walk around it on the way to a traditional ceremony?

If a pastoral lease granted fifty years ago expressly required the leaseholder to construct a dam at a certain point on a main creek, to be ten feet deep, or an airstrip at a specific place, no-one could deny extinguishment. But if this was never fulfilled must the native title holders of today refrain from crossing from one side of their tribal area to another to avoid trespassing? It appears to be this particular problem that Gaudron and Gummow JJ were trying to resolve.[66] Even if their interpretation of the law was accepted by the other members of the Court, it would not resolve the problems with respect to permanent impairment: 1) if permanent impairment results in extinguishment, at what point is permanence determined? - if the shed fell down after 20 years would native title holders face extinguishment? 2) if permanent impairment did not equal extinguishment, but clear and plain inconsistency of rights did, what would the result be if the dam ceased to be flooded? Would native title holders be denied access to that land forever, yet if the shed fell down be able to access that land?

To hold that native title can be impaired forever in the manner suggested by Gaudron and Gummow JJ, or that after a certain period of 'impairment' extinguishment results, is illogical, and would necessitate the examination of not only all current pastoral leases, but all former leases, as well as the histories of the land under those leases.[67]

A further problem arises if, as is reasonably likely, pastoral techniques and conditions change and the actions of the pastoralist only then are inconsistent with the rights of the native title holders.[68] Extinguishment seems inevitable in this circumstance, as the rights of the pastoralist must prevail. Yet it could not be denied that it was the exercise of the rights in this case, and not the existence of the rights which caused the extinguishment. What if the reverse occurred - technology meant that there was no longer an inconsistency? Or is it just that the rights are changing/evolving? Is this possible? Where would the clarity and plainness that is required to extinguish be?

It appears from the above hypothetical examples and analyses that talk of extinguishment and impairment, as currently understood, is misleading and problematic. In what follows an attempt is made to provide an answer to the problems of

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66 *Wik* above n1, 185, 247. See also "Legal Implications ... of Wik" above n 39.

67 See also "Legal Implications ... of Wik" above n 37, 6.

68 See, for example, "Farmgate Effect" above n 27. See also M Love "Implications of *Wik* for Company Directors" (1997) 3 UNSW LJ 2 Forum 10, 11.

extinguishment by inconsistent right and to the question of what extinguishment is, bearing in mind that in law, "fictions usually are acknowledged or created for some special purpose, and that purpose should be taken to mark their extent."[69]

D Theoretical Resolution

This inconsistency of rights problem cannot be resolved solely within the extinguishment paradigm.

Both Toohey and Kirby JJ raise the possibility that in the event of a temporary or incidental inconsistency with the exercise of the rights of the pastoralist, the native title rights will "yield"[70] or "be impaired".[71] This new language suggests an alternative to extinguishment in the form of a temporary suppression, known as impairment.

One approach is to view impairment as a temporary extinguishment, and extinguishment as a permanent impairment.

It could be suggested that extinguishment is where Parliament intended the suppression to be permanent and impairment where it was intended to be temporary only. Some problems may be resolved by deciding that in all cases pastoral leases merely impair and do not extinguish native title where actions are authorised and not conditions under the grant. This does not however resolve all problems for example, the dried up dam.

The argument for extinguishment only upon the existence of inconsistent rights denies that the legislature evinced a clear and plain intention for native title rights to be extinguished when the pastoralist fulfils the condition.

Perhaps even the building of the dam could be said to be impairment - Parliament intending unenforceability of the native title right (but not removal forever) while the dam is there. This seems much more acceptable. It also lends more weight to the argument that the general authorization of activities does not extinguish, but merely impairs, native title.

The real question in this article is whether extinguishment means that Parliament intended the suppression to be permanent and native title rights to be in no

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69 *Wik* above n1, 234.

70 *Wik* above n1, 190 per Toohey J.

71 *Wik* above n1, 275 per Kirby J.

circumstances renewable.[72] The answer is in the negative.

In the passages cited from the judgments of Gaudron and Gummow JJ, that the fulfilment of a condition may effect extinguishment one senses an uneasiness with using the word extinguishment and all it currently connotes. Justice Gaudron said performance would "...impair or prevent the exercise of native title rights and, to that extent, result in their extinguishment."[73] Justice Gummow was even more circumspect:[74]

72 *Wik* above n1, 220 per Gummow J. Of course there is an inevitable air of unreality about this question - Parliament at the time presumed the non-existence of native title and so did not contemplate the effect the grant would have on it.

73 *Wik* above n1, 218.

74 *Wik* above n1, 247 (emphasis added).

> It may be that the *enjoyment* of some or all of the native title rights...*would be excluded by*...[t]he performance of the conditions...[which] would have *brought about the relevant abrogation of native title.*

As Toohey J said of implicit extinguishment by the inability of the two rights to co-exist: "[i]t is that inconsistency that renders the native title rights unenforceable at law and, in that sense extinguished."[75] The key is their unenforceability and whether or not they can be enjoyed.

Such an argument for the mere suppression of native title rights and not their complete disappearance is tenuous, however, it can be strengthened. The concept of native title rights is so new that it is being received only minimally and tentatively and on a piecemeal basis. The best approach to native title rights is to view them not as fragile and vulnerable but as strong, durable and as worthwhile as all other property rights recognised by the common law.

A useful starting point is to not view rights as absolutes. This seems simple but is a necessary point to acknowledge. All rights are subject to others. For example, my right to go where I please is impaired by the right of a private landowner to exclude me from his property. If the landowner's right to that piece of land is removed, then my right to cross that land revives. My right has existed, but has merely been unenforceable at law.

So it should be with native title rights. They are common law rights and are acknowledged as such from the acquisition of sovereignty.[76]

Justice Kirby dismissed this "factual inconsistency doctrine", yet it appears that his dismissal was influenced by the submission for the Thayorre that native title rights were outside the common law. That the question of whether or not they are[77]

> ...recognised by the common law was, for the Thayorre, a question of fact to be answered by examining the current state of the native title in order to see whether it could be reconciled with the exercise of the competing title granted under Australian law. If it could not, the latter would prevail, simply because of the ascendancy and power of the Australian legal system. The native title would continue to exist. It would simply not be enforceable in an Australian court.

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75 *Wik* above n1, 184.

76 *Mabo* above n2, 41 per Brennan J; above n30, 643-644, 651 per Lambert JA.

77 *Wik* above n1, 274.

While this submission has certain attractions, it is supported neither by binding legal authority nor by legal principle or policy.[78]

This appears to sound the death knell for any "enforceable at law" theory. Yet there is reason to consider the argument of the Thayorre and its dismissal by Kirby J in more detail. The overseas authority referred to by his Honour is perhaps the judgment of Lambert JA in the *Delgamuukw* case. There it was asserted that rights may be "dormant, suspended or regulated, *but still in existence*."[79] Lambert JA also stated native title rights to be those recognised as such by the common law on the assertion of sovereignty.[80] His view of native title rights surviving suppression is consistent with the notion of those rights being under and part of the common law, akin to the absorption of local custom into the common law.[81] This is consistent with dicta of Brennan CJ:[82]

> Those [native title] rights, although ascertained by reference to traditional laws and customs are enforceable as common law rights. That is what is meant when it is said that native title is recognised by the common law.

The common law looks to the customs and mores of the indigenous people, but only to define the rights. Native title rights are clearly part of the common law and, as Kirby J expressed, are not outside the Australian legal system. Although in *Mabo* Brennan J said "[n]ative title, although recognised by the common law, is not an institution of the common law",[83] it is hard to argue that the native title rights fought for in these cases are not part of the common law of Australia.

The direct analogy can and should be made with British local custom as part of the common law. This is the best way to deal with native rights; as a kind of subset of the common law.

The legal principle for the survival of native title rights is ironically the feudal doctrine of tenure that both Kirby J and Brennan CJ claim is threatened by such a view of native title. The owner of a fee simple in a piece of land does not actually own the land. The right to use the land and exclude others can be transferred via deed and contract. The deed and the contract are the reason that the vendor cannot enforce his or her right to

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78 Compare *Wik* above n1, 256 per Kirby J; "although not of the common law, native title is not recognised as not inconsistent with its precepts".

79 *Delgamuukw* above n29, 686 (emphasis added).

80 *Delgamuukw* above n29, 651.

81 *Delgamuukw* above n29, 651.

82 *Wik* above n1, 151.

83 *Mabo* above n2, 42.

be on the land as previously granted. You cannot enforce your right to be on the land due to the contract, deed or equitable interest, or any other reason. But the Crown as a matter of law holds radical title and thus "ownership" of the land.[84]

An analogy can be made with respect to a Crown grant over land previously subject to native title. It is acknowledged that a Crown grant of fee simple will extinguish all incidents of native title over the land.[85] The native title becomes permanently unenforceable at law. The reason the native title is unenforceable is because, as with all property rights, the Crown backs someone else's claim to the land. There is no question that the Crown has the right to do this.

Talk of extinguishment merely perpetuates the historical racism that denied the Aborigines their lands in the first place. Extinguishment is nothing more than permanent impairment. The High Court in the *Wik* decision has expressed the view that native title rights may be impaired from exercise, but revive in the future. The Thayorre submission that native title is recognised in some cases and in not others, due to the prevalence of Australian law's power and ascendancy, is misleading and has rightly been rejected. Native title rights should be considered part of the common law and are, at times, enforceable rights to land, and at others are not, in the same way as any other rights.

Native title rights are given less status by the statement that they may be "recognised by the common law". They are part of the common law, and may be enforceable as part of it.

The only reason to say that native title rights have been extinguished is to avoid uncertainty or possible conflict. This possible conflict is avoided by granting a priority of rights before a factual inconsistency may occur. No factual inquiry is necessary to let the native titleholders know that, for a period of time, their rights are unenforceable and cannot be enjoyed. This prioritisation is called extinguishment. So what is to be done when the priority is not able to be determined until the possibility of conflict arises "...the coexistence in different hands of two rights that cannot both be exercised at the same time"?[86] The priority must be determined then. Here a factual inquiry is necessary to determine whether or not their native title rights can be enjoyed. If they cannot they will not be enforceable. This prioritisation is called impairment.

This is the necessary legal effect of the *Wik* case. Then why distinguish between

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84 *Mabo* above n2, 31-33 per Brennan J.

85 *Wik* above n1, 160 per Brennan CJ; 184 per Toohey J; 193 per Gaudron J; 226 per Gummow J; 285 per Kirby J.

86 *Wik* above n1, 153 per Brennan CJ.

extinguishment and impairment as to the long-term effect on native title rights? To do so would cause illogical outcomes, for example: land may exist where nothing is on it, but the native title has been extinguished; elsewhere, a large shed may be erected, yet native title is only impaired while the shed is there. It would also be to perpetuate the terra nullius doctrine by imputing a vacuum of rights that the Crown must necessarily fill.

For example, extinguishment is accepted as being where there is an inconsistency in the existence of rights. What is the result if there is no longer any inconsistency? If the pastoralist loses rights through forfeiture, and the native title holder has lost his/her right through "extinguishment", then why should this vacuum be filled by the Crown? Would it not be more appropriate for the right of the native title holder to revive?

Otherwise results such as the following may occur: the Crown grants in fee simple previously unalienated land to a war hero who is languishing in a German prisoner of war camp. The land comes under the definition of Crown land in section 4 of the Lands Act 1910, that is, the Crown holds only radical title.[87] The native title holders have no knowledge of the grant, and go about their daily lives according to how their ancestors have lived "since time immemorial". Two months later the war hero is exposed as a traitor, and according to the law the grant is revoked and the land returns to its previous status as Crown land.[88] As in both *Wik* and *Mabo,* the land was considered subject to native title before the grant. By what rule of law should the native title holders be denied the continuing right to the land they have lived on for millennia? There is a direct analogy to the land subject to the Mitchellton leases in *Wik*. As Kirby J himself says of that instance:[89]

> Given that it is now established that their native title survived the annexation of all Australian land to the Crown, it would require a very strong legal doctrine to deprive them of their native title; especially because, so far as they were concerned, nothing of relevance had occurred to their land, save for (as it was put in argument) "the signing of documents by people in Brisbane".

Would it matter if instead of returning the land to "Crown waste lands", the government of the day designated the area an aboriginal reserve? Should it matter? Should the Crown receive the full beneficial ownership merely because the land was "touched" by the feudal system of tenure? The following passage in the judgment of Toohey J is relevant for raising

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87 *Wik* above n1, 236 per Gummow J.

88 AWB Simpson *An Introduction to the History of the Land Law* (Oxford University Press, London, 1961) 19.

89 *Wik* above n1, 270.

the possibility that extinguishment may not be exactly what it was previously thought to be, and for its relevance to the hypothetical case described above.:[90]

> While the appellants accepted, as they were bound to in light of *Mabo (No. 2)* and the *Native Title Act* case, that native title may be extinguished, 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. To say this is in no way to impugn the power of the Crown to deal with its land. It is simply to ask what exactly is meant when it is said that native title to an area of land has been extinguished.

A helpful but somewhat incomplete analogy can be made with the FM radio band. The use of a frequency at 107 on the dial will not interfere with a broadcast at 90 on the dial. So it is with land. The right to collect wood is not inconsistent with the right to cross the land. Thus the two rights to the land, and the two broadcasts, co-exist. However, a strong broadcast at 96.5 will drown out a broadcast at 96.7. This illustrates how a right to graze cattle is inconsistent with the right to shoot any animal on the land. The broadcast at 96.7 cannot be heard, and the right to shoot animals cannot be exercised. But take away the strong broadcast at 96.5 and the 96.7 broadcast can be heard again, indeed it was there all along. So it is with native title rights. This analogy is most helpful when dealing with clear granted rights. Impairment of native title rights is where the inconsistency is only noticeable on the exercise of inconsistent rights. In the radio example this may be where the antenna is portable and only blocks out the weaker broadcast on occasion. But again the broadcast revives. Note also the unlikelihood of two broadcasts (rights to land) being inconsistent over the whole band of possible frequencies (uses), in comparison with the legal test that the rights "could not possibly co-exist".[91]

Extinguishment is where the ability to enjoy can be determined before the factual inconsistency, and impairment is where no determination can be made until the time of the exercise of the rights available to both parties. The banning of certain activities outright and the denial of resource consents for others is a classic example of this in the law. The result is that the ability to enjoy the right can be seen as lasting a certain amount of time. Pastoralists have the right for the duration of the current lease for all pastoral activities, but may not exercise that right where it will result in a permanent inability of the native titleholder to enjoy a right. Some native title rights are held for the duration of the lease, and others for that period minus the time when their right is unenforceable because of the exercise of the superseding right of the pastoralist.

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90 *Wik* above n1, 185.

91 *Wik* above n1, 184 per Toohey J.

Those inabilities to exercise native title rights determined before the inconsistent exercise of rights are long term, and those decided only at the exercise of the rights are short-term.[92]

So the meaning to be given to "extinguishment" is this: the native title rights are unenforceable at law for the entire period over which Parliament has intended. This is not to deny that Parliament can "change its mind" at a later date and, by removing the supervening granted rights, effect the revival of the native title. For example, when the legislature or the executive makes an inconsistent freehold grant native title will be unenforceable forever - because Parliament intended that land to come under the doctrine of tenure and be alienable to others. But title will not be unenforceable forever if Parliament withdraws the grant (this is not the same as the acquisition of private land through Government purchase from a non-aboriginal). A grant of a common law lease would also make the native title rights unenforceable forever because Parliament necessarily expressed the notions of reversion expectant and plenum dominium to apply to the land subject to the lease.[93] For grants not coming under the doctrine of tenure and estate proving the intention of Parliament to make the native title rights unenforceable forever is more difficult, as is shown below.

In any event, as Kirby J says, "[t]he answer is to be found in the character of the legal rights, not in the manner of their exercise." Look to the effect on the ability to enjoy native title.[94]

E Implications for Reversion and Renewal

Pastoral leases are sui generis rights granted by statute. The leaseholder has the exclusive right to depasture stock over a parcel of land for a period of time, and to construct any necessary improvements to the land.[95] This is all the pastoral leaseholder has of right. Thus this is all that the Crown has granted and also it may be assumed, the extent to which the native title has been extinguished or impaired. The majority explicitly left open the

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92 Of course there may be cases as outlined above where rights are impaired for the long term on the inconsistent exercise of rights (for example, construction of a shed), but this is the exception.

93 Even this is not certain - see *Wik* above n1, 183 per Toohey J; 285 per Kirby J. Is it clear and plain that Parliament intended to receive and enforce the reversion expectant? The judgment of Brennan CJ will be of significance as he specifically addresses the issue *Wik* above n1, 154-159.

94 *Mabo* above n2, 49 per Brennan J.

95 *Wik* above n1, 211 per Gaudron J; 246 per Gummow J. See above n 39.

possibility that the Crown may not receive the reversion expectant on the land which would vest the land in the Crown on expiry, and indeed indicated it would not.[96]

This is in line with the argument that native title may be merely suppressed and not extinguished. If this argument is accepted, the question of the pastoralists' right to renew their leases under the grant document and section 72 of the *Lands Act 1910* (Qld) (or its equivalent) and the Native Title Act 1993 (Cth) must be open for debate.

Even if pastoralists can enforce their right of renewal due to the principle of extinguishment as previously understood, there is no guarantee that the Racial Discrimination Act 1975 (Cth) does not apply to the impairment of rights. Where other groups in society are entitled to representation before their rights are restricted, it appears that the right of renewal would prevent this for native title holders. This is the real reason for the need for the immediate round of negotiation between pastoralists and native title holders following the *Wik* decision. An argument that does not appear to have been discussed in *Wik* is that the Native Title Act and the surrounding negotiations did in fact extinguish *all* native title over the pastoral leases validated by that Act.[97] Sections 14 and 228(2) provide for the validation of "past acts" occurring before 1 January 1994. Section 229(3) includes pastoral leases in the category A definition of "past acts". Thus any pastoral lease granted or renewed before 1 January 1994 has been validated by the Native Title Act. It appears that whatever the result on native title at common law, section 15(1)(a) provides that these validated pastoral leases may extinguish all native title over the land concerned. The section reads (in part): "if it is a category A past act... - the Act extinguishes the native title concerned". The inference is that all the native title on the area of land covered by the pastoral lease is extinguished. However, a clear and plain intention is required, not a mere inference. When compared with section 15(1)(c) it becomes quite clear that this blanket extinguishment is what, in spite of its mistaken view as to the common law effect of the grant of a pastoral lease on native title, the legislature intended. Section 15(1)(c) reads:

> ...if it is a category B past act that is wholly or partly inconsistent with the continued existence, enjoyment, or exercise of the native title rights and interests concerned - the act extinguishes the native title to the extent of the inconsistency.

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96 *Wik* above n1, 185-187 per Toohey J; 234-237 per Gummow J; 280 per Kirby J. See also PM McDermott "*Wik* and Doctrine of Tenures: a Synopsis" in G Hiley QC (ed) The *Wik* Case: Issues and Implications (Butterworths, Sydney, 1997); "Leases after *Wik*" above n 37, "Co-existence of Native Title" above n37; "Queensland Pastoral Leases" above n37.

97 D Gal "Implications arising from the operation of the Native Title Act for the existence of native Title on Pastoral Leases" (1997) 71 ALJ 487. [Implications arising from the operation of the Native Title Act.]

Unfortunately this argument then appears to fail under section 15(2):

> The extinguishment effected by this section does not *by itself* confer any right to eject or remove any Aboriginal persons who reside on or who exercise access over land or waters covered by a pastoral lease the grant, re-grant or extension of which is validated by section 14 [Emphasis added].

Thus a right of exclusive possession may be required. Without this section the intention to extinguish all native title right appears clear and plain. This reservation for access might suggest that the removal of other native title rights is not made by section 15(1)(a). If the result is extinguishment, this validation (section 14) and extinguishment (section 15(1)(a)) means that pastoralists operating under a pre-1 January 1994 grant would not need to negotiate with native title holders as to the exercise of one-another's rights. Of course section 14 provides for this effect only pursuant to Commonwealth actions. Each state or territory legislature would have to have enacted similar legislation as entitled to under section 19.

It is important to note the response of Brennan CJ to the submission that native title may revive after a temporary suspension:[98]

> Logically, this hypothesis would attribute to the Crown no more than a radical title (that is essentially a power of alienation controlled by statute) whenever there might be a gap in or cesser of the proprietary interest of an alienee. It would treat the proprietary interest as a bundle of statutory rights to which the doctrines of tenure and estates had no necessary application. No land would escheat to the Crown, at least while there were any surviving holders of native title. That cannot be accepted.

The effect of the majority judgment, and as indicated by dicta on the nature of the Crown's reversion, is precisely that pastoral leases are a "bundle of statutory rights to which the doctrines of estates and tenure [have] no necessary application."[99] Chief Justice Brennan dismisses the argument because it treats pastoral leases as distinct from common law leases - essentially what the majority decided as the ratio decidendi of the case.[100] Indeed one must question whether a pastoral leaseholder could now rightly be considered a 'tenant' or a 'landholder'. The rights previously considered in rem are now in personam. It is at this point in his judgment that the real reasons for his decision become clear. Chief Justice Brennan foresaw the exact problems with respect to right of renewal "that arise once

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98 *Wik* above n1, 159 per Brennan J.

99 *Wik* above n1, 159.

100 *Wik* above n1, 185-187 per Toohey J; 234-237 per Gummow J; 280 per Kirby J.

the fundamental doctrines that govern the title to land granted under the 1910 Act are departed from."[101]

If the Crown is held not to receive the reversion expectant at the end of the lease, and the native title holders receive the right to their land again due to the full revival of their title, if even for a millisecond, then any renewal pursuant to section 72 (or its equivalent) would, in the absence of the Native Title Act, be invalid due to a breach of the Racial Discrimination Act and section 109 of the Federal Constitution.[102] If not the Racial Discrimination Act, then paragraph 51(xxxi) of the Constitution would apply to ensure the native title holders received "just terms" for the removal of their property rights.[103]

How does the definition of extinguishment given above help this problem? Extinguishment, it is submitted, means that the native title rights are unenforceable at law for the entire period which Parliament has intended. It could be argued that the right of renewal shows that Parliament intended the extinguishment to last forever (or as long as the pastoralist wanted) and that it intended the pastoralists to have the right of extinguishment. The problem lies on two levels: first, the right to exercise the grant and the right to renew as given by the relevant Land Act; second, the actual grant and rights granted under it by the act of the executive. It is only when these two levels are present that an extinguishment can be said to have occurred. In the absence of the Native Title Act a pastoralist who is attempting to exercise a 'right' of renewal which has always been present would commit the act which extinguishes the native title. Extinguishment cannot be effected like this as only the Sovereign has that right. A claim then that it is the executive that would be renewing the grant is admitting that without the renewal there would be no extinguishment or unenforceability of native title rights. This renewing

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101 *Wik* above n1, 160:

> If the holders of native title were recognised as the owners of an estate in remainder in the land, could the priority right to a selection enjoyed by a lessee be exercised? And would the holders of native title have become liable to pay for the improvements to the land effected during the expired lease? To what extent was the discretion to enforce a forfeiture against a lessee affected by the supposed subsidence of native title in the land? In the unusual determination of an estate in fee simple, would the land revert to the Crown or would it be taken by the holders of native title? And, since the Racial Discrimination Act 1975 (Cth) commenced, would the provisions which annex statutory rights to a pastoral lease (for example the right to receive an offer of a new lease) be ineffective by reason of s109 of the Constitution?

102 P O'Connor "The Racial Discrimination Act and Native Title" Briefing, Australian Institute of Jewish Affairs, Autumn, 1997, No 36; "Implications arising from the Operation of the Native Title Act" above n 97, 488-489.

103 Above n 102. Also, one must question whether native title can actually be considered property given that it is barely exclusive, limited in use to traditional rights and non-alienable except to the Crown.

grant would thus have an extinguishing effect and be invalid under the Racial Discrimination Act. In any event it seems unlikely that the clear and plain intention could be seen; the right of renewal merely provides the first of two necessary levels, simply an *opportunity for extinguishment*.

It is the effect of the renewal provision in the Native Title Act which is going to cause the greatest concern. Renewal of a pastoral lease previously renewed or granted before 1 January 1994 and a past act under section 228(2), is also defined as a past act under section 228(4). For the purposes of the Act this means that it is validated under section 14, and provides for the extinguishment of the native title concerned under section 15(1)(a). This has important implications for pastoralists because it means that they can enforce their right to renew their lease (unless the validating sections were not enacted at the state or territory level). For native title holders the effect depends on whether their native title rights are extinguished permanently by the Native Title Act[104] or only for the period of the lease. Section 14 provides for the validation of the act (the grant of the pastoral lease) and section 15(1)(a) provides that the act extinguishes the native title. At common law, it is understood that the grant extinguishes native title, but this is only because the grant signals the commencement of the third party rights which are inconsistent with the native title and hence cause its extinguishment. As argued above, at common law the extinguishment only lasts as long as the inconsistent third party rights. So the question is - what is meant by "the grant"? Is the grant severable from the rights enjoyed under it, or is it just the signing of the lease document by the authorised government official? This latter view supports permanent extinguishment. Is the grant just another expression for the rights enjoyed?

This view supports the revival. Under section 15(1)(a) the legislature has expressed its intention that the act (grant) will extinguish native title once the act (grant) has been deemed by section 14 to be valid. The argument for permanent extinguishment is that as the grant itself - the signing of the document - continues to 'exist' as a historical moment, in spite of the end of the third party rights at the end of the lease, then the extinguishing effect of that act *(grant)* under section 15(1)(a) continues to exist. The argument that native title will revive in spite of the validation is that the Native Title Act does not express in a clear and plain and unambiguous manner that the act is the signing of the documents - the giving of pastoral lease rights - and is severable from the rights created under the grant, and that it is this "act" that will go to extinguish the native title. Is the term 'grant' merely a name for the lessee's rights as a whole, or is it the physical and legal act of giving those rights to the lessee? Section 229(3) reads: "A past act consisting of the grant of: (a) ...a pastoral lease" may add weight to the permanent extinguishment

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104 "Implications Arising from the Operation of the Native Title Act" above n 97, 490.

argument by implying the separation of the grant and the lease or it could be interpreted as indicating the inseparability of the grant and the lessee's rights. This is obviously a matter of great concern for all, and its determination awaits a High Court decision as to the clarity of section 15(1)(a). In the absence of the fulfilment of such strict criteria native title holders will be entitled to compensation for each renewal on "just terms" for the removal of their rights by the validation of the renewal of the pastoral lease and the following extinguishment.[105]

This has enormous implications for the State, Territory and Federal Treasuries. The compensation bill could be huge. The rights being compensated would be only for the term of the lease which would go to reducing the cost, unless the new grant was made perpetual. It is unclear whether temporary impairment for a set period of time is compensable under paragraph 51 (xxxi), although this would most likely be resolved in favour of the holder of the proprietary right. This could lead to further compensation - how long must an impairment be before the suppression must be compensated? Difficulties like this in relation to the question of future acts resulting in permanent or temporary impairment highlight the inappropriateness of the current extinguishment-impairment dichotomy. In any event, native title rights may be found to co-exist with the rights of the pastoralist,[106] and given that permanent impairment may only result over a minuscule proportion of the land in question, the cost of compensation may be relatively small.

The current Australian Federal Government is attempting to circumvent the revival of native title rights in the implementation of its "10 Point Plan".[107] Point Four reads:

> As provided in the *Wik* decision, native title rights over current or former pastoral leases...would be *permanently* extinguished to the extent that those rights are inconsistent with those of the pastoralist.

As demonstrated above, the *Wik* decision did not provide for the permanent extinguishment of native title. Legislation based on this plan may be found to be invalid because if native title can revive after the end of a pastoral lease the legislation would be taking away property rights without compensation and contrary to paragraph 51(xxxi) of the Constitution.

If the Federal Legislature decides to avoid liability for the renewed and validated

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105 Section 15.

106 *Mabo* above n2, 49 per Brennan J. "Of course, a native title which confers a mere usufruct may leave room for other persons to use the land either contemporaneously or from time to time."

107 Prime Ministerial Press Release, May 1997. Emphasis added.

leases, by removing section 228(4) from the Native Title Act, and if the courts find that native title can revive, then pastoralists will not be able to enforce their right of renewal. They will be faced with the need to compensate native title holders or not renew their leases.

Further considerations include the liability for and ownership of any improvements made to the land, including those non-pastoral activities not authorised under the lease. If native title revives, then it would be logical for these improvements to be owned by the holders of the title to the land. This would have been considered the case prior to *Wik* as a result of a forfeiture and "return" to beneficially owned Crown land. Native title holders would conceivably have the right to use these improvements as they wish under their usufructuary or fuller native titles. Would the lessee own the improvements until the expiry, and be able to "take all they could carry"? Even if these improvements were held to permanently extinguish native title over the area and surrounds of the improvement (as previously perceived), in the result of a forfeiture for non-payment and return of the rest of the lease area to native title owned Crown land, the Crown would own in fee simple a small one hectare block in the middle of the outback. Over this land native title holders could not pass, and pastoralists would not desire this land due to the inability to impair native title rights to the surrounding land at low cost.

III CONCLUSION

The above analysis of the current jurisprudence highlights the already contradictory and uncertain nature of the law. Contradictions such as these breed uncertainty and will not be resolved under the current extinguishment-impairment paradigm.

The conflict arises because pastoral leases were granted not solely for the "depasturage of stock" but for the wider purpose of developing the land.

Native title rights are, in an economic sense, virtually useless. It is widely accepted that property rights were developed to enhance economic efficiency,[108] and are supported by the principles of exclusivity, freedom of use, and alienability.[109] Native title rights have clearly been developed in Australia to right the wrongs of the past, and to go some way to ensuring the welfare of a race of peoples. Thus there is a conflict. They are alienable only to the Crown, and while there is an element of exclusivity, the use for which the land can be put to is limited to the right extant at the acquisition of

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108 For example; RA Posner Economic Analysis of Law (4 ed, Little, Brown and Company, Boston, 1992) 76.

109 Economic Analysis above n110, 31-36. See also; RA Epstein "Property as a Fundamental Civil Right", (1992) 29 California Western Law Review 187.

sovereignty.[110] The economic value is minimal to anyone attempting to live in the new millennium.[111] Pastoral leases have undeniably more restricted rights (lessee rights must now be read down in favour of native title where inconsistency may arise due to the need for unambiguous legislative intent[112]), and this loss in freedom and certainty means, whatever some may say,[113] a loss in value. Increasing societal welfare through economic development must at some stage be given importance, yet native title as currently understood (inalienable, and restricted to traditional rights) is restraining and close to being practically prohibitive of development.

The Legislature could grant holders of native title an equivalent freehold grant in fee simple, thereby creating a tradable and valuable interest.[114] At present it appears that neither native title holders nor pastoralists have enough certainty for value to accrue. No new pastoral leases can be granted without lengthy negotiation and compensation. Justice, it seems may no longer be able to be a driving consideration for those in government who have to deal with this mess. But should holders of what is over some areas a usufructuary title receive full benefits of fee simple? This is the title over most of the land covered by pastoral leases.

Compensation to native title holders is incremental under the present rules, in step with development. A bulk, "one-off" compensation package may be cheaper in the long-term. The marginal cost of development has risen for pastoralists, in spite of any local agreements, and the result will be less development than desirable.[115] Pastoral leases were not granted solely for the purpose of the regulation of "the depasturage of stock" but for the wider purpose of the development of the land. Development was the primary aim of the pastoral lease.

Has Australia now reached a time where some degree of economic development can be sacrificed for land rights justice? The majority in *Wik* appears to think so. Perhaps the

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110 *Mabo* above n2, 41 per Brennan J.

111 "You can't mortgage it and raise any money to do anything with it, and you can't sell it. What the hell use is it? We are going to eat the land, are we?" Aboriginal native title holder as quoted by The Hon RC Katter MP, 24 November 1994, House of Representatives.

112 *Wik* above n1, 233 per Gummow J.

113 Aboriginal and Torres Strait Islander Commission "A Plain English Guide to the *Wik* Case", Press Release 12 January 1997.

114 *Wik* above n1, 233 per Gummow J.

115 Pastoralists will not develop where the perceived costs of negotiating for the abrogation of native title are greater than the perceived benefits of the development. Thus the benefits of the development are lost.

High Court does not feel it has gone far enough and will force upon the government the treaty and/or constitutional recognition of the rights of the indigenous peoples that apparently only Australia of the former British colonies has failed to create. Such enactments and moves would cause great political and social upheaval and conflict, yet for a long-term solution they seem the only possible way out of the quagmire.[116] International condemnation and sanctions await the government that attempts to turn back the clock and remove native title.[117]

One possible solution is to come to a final agreement with native title holders whereby the majority of their native title rights are traded for fee simple estates in reserves and selected pastoral lease land, and the extinguishment of native title on pastoral lease land elsewhere.[118] Such extinguished rights may be replaced with acceptable, non-problematic, and (possibly) constitutionally guaranteed access rights, and a freehold grant to the current pastoral leaseholder for some something less than the discounted future lease payments. The 'just terms' requirement would be easily satisfied. In this situation the pastoral lessee can trade and develop with less fuss than presently, and native title holders can use or sell their land in any manner so as to receive a fair income. Determination of who would benefit from such settlements is made through the current process in the Native Title Tribunal.

Like *Mabo*, the *Wik* case will test Australian resolve for reconciliation with Aborigines. Full reconciliation can only be achieved with a full understanding of the perspectives, issues and implications involved.

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116 See also G Nettheim "*Wik*: On Invasions, Legal Fictions, Myths and Rational Responses" (1997) 3 UNSW LJ 2 Forum 5, 7.

117 See, for example, G Nettheim "The *Wik* decision: yesterday, today and tomorrow" The Australian, 31 December 1996.

118 See, for example, P Hartley and M Warby "The Freehold Way to Settle Land Claims", Australain Financial Review, 4 February 1997.