The Wik Case: Issues and Implications edited by **Graham Hiley QC** [Sydney, Butterworths, 1997, xxi + 229 pages*] ISBN 0-409-31387-4]

In *Mabo v Queensland (No 2)*,[1] the High Court found by a majority of 6:1 that native title was a part of the common law of Australia and until some action was taken to extinguish it, such title survived. In the wake of this decision, the 1993 Native Title Act (Cth) ("NTA") presumed in its preamble that native title was extinguished by the grant of pastoral leases. It was, however, successfully argued in *Wik Peoples v State of Queensland and Others; Thayorre People v State of Queensland and Others*[2] that this was not so and the issue of a pastoral lease would not necessarily extinguish native title. The Court divided 4:3, the majority being Toohey, Gaudron, Gummow and Kirby JJ; Brennan CJ, Dawson and McHugh JJ dissenting.

The Wik Case: Issues and Implications is a commentary on *Wik*, as well as containing the complete text of the High Court's decision. The decision is reprinted in the book exactly as it appears in the Australian Law Reports with the pages numbered as in those reports, and as such is a conveniently packaged copy of the case. Hiley has compiled ten short pieces of commentary and critique from (with one exception) lawyers involved in the *Wik* litigation, totalling 62 pages) including his own Introduction. It is these pages which are the focus of this review.

The editor's point of departure is the "public outcry, largely due to misunderstandings, misreportings and unfounded fears of possible consequences" which was the response to *Wik*, and before that to the decision in *Mabo* [at 1]. The stated aim of the publication is to "remove much of the misunderstanding about *Wik*, to identify the real issues decided, and to identify several issues which remain" [at 1]. On the whole, the aim is achieved. Nevertheless, it will be suggested here that there are some issues which arise that the reader should treat warily.

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* These consist of 62 pages of text and 167 pages from the original report of the case as reported in (19696) 141 Australian Law Reports 129-295.

1 (1992) 175 Commonwealth Law Reports 1 ("*Mabo*").

2 Peoples v State of Queensland and Others (B8 of 1996), Thayorre People v State of Queensland and others (B9 of 1996) as extracted from (1996) 141 Australian Law Reports 129 ("*Wik*").

Hiley's Introduction provides a useful guide to the content that follows, helpfully and importantly explaining which contributors represented which interests. This is bolstered by the more detailed profiles of contributors. While the authors are drawn from lawyers who have represented Aboriginal, government, farming and mining interests, the last two are particularly apparent in their orientation as they quite openly state the case for their parties.

The structure of the commentary is curious and somewhat frustrating. The contents list each contribution separately by title but not by author; despite the appearance, they are not chapters. While the papers are separate pieces, the footnotes are consecutive as if it was one continuous work, but the collection is not sufficiently cohesive to justify this. The footnotes are on occasion inconsistent: for instance, style in citation of journal articles differs at footnotes 93 and 118.

Although the contributions are self-contained, the presentation of the collection as one piece gives the reader a sense of repetition in the frequent restatement of what has already been said. The overall tone is that each piece does (or should) stand on its own. Had this been the case and the book laid out as chapters, the repetition would not be so noticeable and there would be less of an impression that the pieces had been simply pasted together. Leaving behind such pedantry about style and structure, the book has some useful short articles.

Philip Hunter provides the opening and most substantial piece (13 pages) in the book when he gives an overview of the background to *Wik* and the decision itself. It is this essay that the reader not familiar with the issues will find most useful. In conjunction with John Bottoms' short explanation of the involvement of the Thayorre people, it provides a useful precursor to almost all the other contributions, which presume at least a basic knowledge of the case and the issues. The groundwork in place, the remaining papers approach the case from different angles and with a range of concerns.

Peter McDermott explores how the majority in the High Court in *Wik* dealt with the question of whether the doctrine of tenures applies to Australian land law. His analysis of the reasoning explains their conclusion that the concepts of tenure and estates from England are inappropriate to Australian

law with respect to Crown leases due to the feudal origins of these concepts being historically grounded. McDermott closes by drawing on Toohey J:

> To approach the matter by reference to legislation is not to turn one's back on centuries of history nor is it too impugn basic principles of property law. Rather, it is to recognise historical development, the changes in law over the centuries and the need for property law to accommodate the very different situation in this country [at 39].

Historian, Jonathon Fulcher offers a critique of the historical sources - particularly the work of Henry Reynolds - used by the High Court in *Wik*. His point is to examine the history which was used to conclude that "pastoral leases were and are *sui generis* grants, designed for Australia's unique conditions" [at 51]. He suggests that Reynolds presents an incomplete history in ascertaining "the intention of the Crown with respect to pastoral leases and their effect on Aboriginal occupation" [at 51]. Moreover, he is critical of the court, for "to use only two historians...on which to build the *sui generis* argument, without reference to other scholarship is to build a legal edifice on somewhat shaky historical foundations" [at 52].

Fulcher identifies his two core concerns as being "the present-centredness of the legal mind, and the lack of a full examination of the sources and scholarship related to the history of land settlement in Australia and other British colonies settled at a similar time" [at. 52]. The latter is the primary focus of his contribution to the book.

The main contention is that:

> to argue as Toohey J does (following Reynolds) that the 'authorities in England expressed almost constant concern that the grant of a pastoral lease should not be used to prevent Aborigines from using the land for subsistence purposes' is to overstate the case and to ignore other evidence not adduced or emphasised by Reynolds [at 53].

Fulcher then cites other sources which he argues support the opposite conclusion, that the intention was to comprehensively and legally restrict indigenous peoples from using the land. He claims that his evidence suggests that the policy intention evinced by [Earl] Grey over pastoral

leases in Australia, much trumpeted by Reynolds and cited by three judges of the majority in *Wik*, has been wrenched from its context and understood from a present perspective [at 54].

His most critical comment he saves for his conclusion, where he claims that a quote used by Reynolds and Jamie Dalziel omits a critical piece which changes the meaning of the selected evidence. It is a strongly worded criticism.

Fulcher's critique is suggestive of a political reading of history (is there any other kind?) by both the majority and Fulcher himself. Perhaps this is found more clearly in the "present-centredness of the legal mind" which Fulcher argues characterises the Court's approach. The more interesting questions might concern the ways in which a political approach presents itself as apolitical. And how might the interpretation of histories sit with the comments of Brennan CJ in *Mabo*:

> It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. [(1992) 175 CLR 1 at 41-2].

While Fulcher's critique presents itself as an objective (or *the* objective) reading of history, its value lies perhaps more in its illumination of historical interpretation and legal reasoning as political exercises.

Three contributions in particular are directed towards the status of pastoral leases. Paul Anthony Smith presents a short, concise argument. Starting with a brief procedural history and summary of the decision in *Wik*, he then shifts his attention to the majority judgments, arguing they reveal a fundamental aspect of the decision in which the majority appear to have split 2:2. The issue is whether the rights of the grantee are measured purely by reference to the terms of the grant itself, or if consideration may also be given to whether the rights granted had actually been performed by the grantee [at 25].

Smith argues that while Gaudron and Gummow JJ both "expressed support for a position which appears to require the actual performance of the lease conditions to be scrutinised," the view of Toohey and Kirby JJ is that the conferring of the rights is the essential point [at 26]. The minority's views are similar to those of Toohey and Kirby JJ: it is the creation or existence

of the right rather than its exercise which is crucial. Smith is cautious about the significance of his reading of the judgments, and concludes with a five point summary of factors which must be examined in determining whether native title has been extinguished in any particular instance.

"How *Wik* Applies to Western Australia" is a three page comparison of the granting of pastoral leases in Western Australia as opposed to those issued in Queensland. Greg McIntyre argues that the majority's conclusion in *Wik* (that pastoral leases did not confer exclusive possession on the leaseholder) would apply even more clearly to leases issued in Western Australia. Less self-contained than the other pieces, his argument is still clear and convincing.

Raelene Webb and Kenneth Pettit provide a well structured analysis of pastoral leases which , unlike those at issue in *Wik,* contain provision for access to the land by Aboriginal people. They ask "[w]hether, and to what extent, native title can continue to exist over land which has been subject to the grant of a pastoral lease with such access provisions" [at 30], moving neatly through the reasoning of the majority which considers pastoral leases in terms of the statute under which they were granted. What then might be the position with respect to leases granted where the statute provided for access? It is suggested that there may be a strong case to argue that native title has been extinguished over such land, essentially on the basis that native title rights have been supplanted by (lesser) statutory rights in the granting of leases. Ultimately they argue that the outcome will depend on the "contractual and legislative formulae", on the "historical, statutory and perhaps factual context" in each case, and the result will most likely be "a myriad of single instances" [at 34].

Simon Williamson and Mark Love argue the case for the mining industry and the pastoralists respectively. The former writes for an audience already familiar with the NTA, discussing the validation of titles as "the most urgent issue arising from the *Wik* decision for the mineral [sic] industry" [at 47]. The right to negotiate and the discussion of section 23 are not explained, Williamson rather presuming the reader is substantially familiar with their operation. A further two pages address the implications for future grants and proposed amendments to the NTA. He argues for a response to the decision "from a land user perspective (that is all land users including Aboriginal people, industry and recreational users)" [at 50]. It might be argued that this approach - while appearing to be neutral and fair -

is politically loaded in its conceptual framework. That is, an understanding of native title as solely a "use" of land is skewing the response from the outset. Rather than considering land to have a value which is not derived from "use", it suggests that unless the land is being used in a "western" or "modern" sense, then the protection of associated rights should be questioned. Does this suggest a subtle reworking (or restating) of *terra nullius* and notions of "desert uninhabited" countries?

In "The Farmgate Effect", Love argues that prior to the decision, "farmers understood that they held leases, in the common law sense" [at 40]. Using the judgment of Toohey J, Love explains the misunderstanding in the following terms:

> Certainly, the authorities point to exclusive possession as a normal incident of a lease. They do not exclude, however, an inquiry whether exclusive possession is in truth an incident of every arrangement which bears the title of a lease [per Toohey J, quoted at 41].

This proposition, combined with the commercial nature of the authorities, left it open for the court to "[remove] the implication of the common law incidents of lease of the grant of a statutory lease" [at 42].

Love then discusses the now uncertain nature of pastoralists' rights under their leases, and in a clearly partisan conclusion argues that:

> The extent to which pastoral activity and the continuing development of the pastoral estate will be curtailed by the *Wik* decision will depend on the willingness of native title holders to accept the extent of interference which modern pastoral management...has on the enjoyment of native title rights... The extent to which that accommodation will be given is likely to depend on the farmers' acceptance of the reasonable and legitimate claims of native title holders [at 44].

The implication is clear: indigenous people must accept what the pastoralists do. The only "reasonable and legitimate claims" will be those which do not impact upon "modern pastoral management." In short, Love presents a loaded political argument as an objective legal conclusion. Such a legal and political argument requires a critical reading, especially by students who would use the book as a way into reading the decision.

Doug Young, John Briggs and Anthony Denholder of Blake Dawson Waldron represented Comalco Aluminium Limited in *Wik*. Their pithy contribution outlines the significance of inconsistency between the 1975 Racial Discrimination Act (Cth) ("RDA") and state laws which would extinguish native title; in line with section 109 of the Australian Constitution, the former will be invalid to the extent that they are inconsistent with Commonwealth laws. They review the decision in *Western Australia v The Commonwealth* (1995) 183 Commonwealth Law Reports 373 where the High Court held unanimously that the replacement of common law native title rights with statutory rights which were more vulnerable to displacement than the rights of holders of ordinary title. In this context, they explore the options available to commonwealth and state governments who would seek to extinguish native title.

Underpinning the paper is the clear approach that native title is something to be overcome, and that legislative action is one way to do so. The question with which they are concerned is how this might best be achieved. They conclude that any extinguishment of title by either the States or Commonwealth will in effect be subject to the provisions of the RDA, and that compensation will be payable under section 51(xxxi) of the Constitution. While the RDA can be amended, such a move would be subject to policy considerations and possibly to Australia's obligations under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

On the whole, Hiley's book offers useful, informed and thought-provoking commentary on the *Wik* decision. It provides an accessible insight into the legal reasoning behind the majority judgments, in contrast with the dissent of Brennan CJ (with whom Dawson and McHugh JJ concurred). It is less of a systematic synthesis and analysis than Richard Bartlett's *The Mabo Decision* (Butterworths, Sydney: 1993), and more of an offering of points of view; the subtitle might more appropriately have been *Perspectives*, rather than *Issues and Implications*.

Hiley essentially presents the commentary as a legal analysis of *Wik*. It is written by lawyers and accompanied by a copy of the decision. The undergraduate law student might well leap to such a text in the hope that 60 pages of straightforward commentary will give her or him an insight into 160 pages of a complex High Court decision. The difficulty is that *Wik* is far more than "just" a decision, as Hiley and his authors are well aware.

The case is immersed in politics, history, language and culture. The acceptance or rejection of Prime Minister John Howard's "10 point plan" in response to the decision embodies debates about reconciliation in this country. Hiley's contribution is a worthwhile one, but it cannot be read solely as a legal commentary.

The problematic nature of the legal veneer is exemplified in the treatment by Hiley and Bottoms of the Thayorre instructions to the solicitor in September 1994, intended to be conveyed to senior counsel: "Just tell that old man - get my country back proper quick" [pages 1, 19-20]. To the lawyer, these are instructions. But the statement is, of course, far more. It is also a brief but eloquent history, a statement about dispossession and power. In reducing it to "instructions", it is sterilised and its significance reduced to a line in a legal dialogue. The legal discourse shifts to the fore, and the law student is instructed about what is important in the *Wik* case: the judgments. There are many competing claims to what is important and in using books such as Hiley's (which in its direction is really no different from most legal books), we must maintain an awareness that - as I am sure Hiley and his authors would agree - there is far more to the *Wik* case than the judgments.

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