BOOK REVIEW

Bryan Horrigan and Simon Young (eds), *Commercial Implications of Native Title*, Federation Press, 1997 (428 pp) with additional comments on Graham Hiley (ed), *The Wik Case: Issues and Implications*, Butterworths, 1997 (62 pp of Commentary and the text of the decision reproduced from (1996) 141 ALR 129)

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Native title is a complex subject. Any book on the subject must confront the complexities of human rights and federal constitutional law, the policy (if any) and detail of state resource laws, the paradox of land-related commercial risk (which can be elusive) and its associated corporate reporting and disclosure obligations (which can be onerous), the anthropology of indigenous land ownership and the practice of institutions exercising native title functions. Since the law in this area is highly politicised and in a constant state of flux, analysing changes and proposed changes to it can be as rewarding as shadow-boxing. Today's incisive analysis rapidly becomes tomorrow's telephone notepaper.[1]

These difficulties have affected both of these recent books to some degree. Both are aimed at legal practitioners, and both address the law after the decision in *Wik Peoples v Queensland*.[2] The first (Horrigan and Young), which attempts "to be sweeping in the choice of topics and commercial in focus", is a collection of detailed essays, some of them impressive and most of them interesting. The second (Hiley), a set of short comments on aspects of the *Wik* decision, is generally less impressive.

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1 For example, since its commencement in 1994, the Native Title Act 1993 (Cth) has been the subject of four sets of proposed amendments — one proposed by the Labor government in late 1995, two cumulative sets of proposed amendments in 1996, and the present proposed amendments, contained in an "exposure draft" of the Native Title Amendment Bill 1997.

2 (1996) 187 CLR 1.

Horrigan and Young, according to the Preface, "have endeavoured to ensure that [their] book is up to date in its coverage of the *Wik* decision and legislative responses to it, including developments in late 1996 and 1997". The contributions refer to complex proposed amendments to the Native Title Act 1993 (Cth) released in 1996.[3] Besides his clear introduction,[4] Horrigan has added an ambitious chapter on "the way ahead" after *Wik*, which canvasses likely positions of stakeholders and some interesting possible "solutions" (at 375-403).[5] Unfortunately, however, neither the 1996 proposed amendments nor most of Horrigan's suggestions correspond with the *third* draft of proposed changes based on the "10 point plan", released by the Commonwealth in June 1997. Three months after its release, the book's analyses of the future of the legislation are superseded.

Nonetheless, the book's discussion of other issues is more enduring. It contains chapters on the National Native Title Tribunal, State legislation, resource management and resource development agreements, native title evidence, aspects of financial, auditing, accounting and commercial advice affected by native title and the *Wik* decision itself. One chapter which stands out is Graeme Neate's lengthy discussion of proof of native title (at 240-319), which canvasses evidence in native title claims by reference to jurisprudence under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) and Canadian Aboriginal rights decisions. The chapter gives comprehensive[6] coverage of the question of physical connection to land, the nature of

3 See Native Title Amendment Bill 1996 and "exposure draft" of proposed amendments to this Bill, October 1996.

4 The introduction also contains a useful short contribution from Andrew Buchanan on approaches to negotiating native title.

5 Accuracy is sometimes sacrificed in the formulation of "options" in this chapter. For example, Horrigan suggests (at 385) that validation provisions of the Native Title Act could be extended in time to cover pastoral leases granted before *Wik*, but that "[v]alidation does not necessarily require extinguishment of native title". The number of pastoral leases granted after 1994 will be insignificant compared to the large number of *resource tenements* granted over pastoral leasehold subject to co-existing native title in that period. It is these "titles" which require urgent validation. If validation of new pastoral leases is indeed required, extension of the validation provisions of the Native Title Act will necessarily extinguish native title, because that is how the "pastoral lease validation" provisions operate. Similarly, his discussion of legislative options runs together possibilities which have no necessary connection. An "option" (now rejected by the Commonwealth) of converting native title to a form of statutory rights exists independently of what Horrigan describes as a corollary: "weakening or removing the statutory negotiation rights" provided under the Act (at 386).

6 To be completely up to date, this chapter should have included discussion of important 1996 "Aboriginal rights" decisions of the Canadian Supreme Court. For example, *R v Van der Peet* (1996) 137 DLR (4th) 289, *NTC Smokehouse Ltd v The Queen* (1996) 137 DLR (4th) 528 and *Gladstone v The Queen* (1996) 137 DLR (4th) 648 limited the definition of constitutionally protected Aboriginal rights to practices, customs or traditions "integral to the distinctive culture of the particular aboriginal group claiming the right prior to European contact". These decisions diminish the likelihood of the Canadian courts using an Aboriginal point of view in their analysis of tradition, increasing the likelihood that those rights will be defined by reference to "Aboriginalist" (authoritative or essentialist) truths based on the notion that indigenous people are radically different from ourselves. For a critique of "Aboriginalism", see B Attwood, "Introduction" in B Attwood and J Arnold (eds), *Power, Knowledge and Aborigines* (1992).

Aboriginal succession to land, dates from which native title must be proven, available evidentiary inferences, practice and procedure in native title tribunals and courts. Neate also discusses Aboriginal communication strategies, genealogical memory and transmission of knowledge, the role of anthropologists and other experts (including possibilities for bias) and the use of historical material,[7] including records which conflict with Aboriginal testimony. Neate's style is occasionally laboured, but what engages the reader is his familiarity with and interest in Aboriginal people, the legal processes for investigating Aboriginal land relationships and the cultural limitations on those processes.[8]

Justice Robert French, President of the National Native Title Tribunal, has contributed a useful overview chapter on the Tribunal's role, its experience of the parties and strategies for performing its functions, particularly mediation (at 29-60). Among other things, the chapter reveals the limitations placed on mediation by the States' insistence on questions of historical extinguishment and by the egalitarian nature of Aboriginal decision-making processes.

In "Implications for government decision-making" (92-112), Dominic McGann and David Yarrow distinguish "legislative" from "non-legislative" policy, when what should be distinguished are decision-making which *requires* legislative authority and decision-making which does not.[9] For this reason, perhaps, the chapter's argument about the continued operation of the Racial Discrimination Act 1975 (Cth) on native title policy is overstated. The Native Title Act does expressly preserve the future application of the Racial Discrimination Act to native title,[10] but it is difficult to find much room for that application in light of the comprehensive "future acts" code of the Native Title Act itself and the fact that some aspects of that code must substitute for the more general Racial Discrimination Act standards. Further, where land-related State government decision-making occurs pursuant to legislation, the Racial Discrimination Act's effect on it is constitutional invalidation, not remediation.[11] A simple *policy* decision — for example,

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7 Neate records some observations by Lambert JA of the British Columbia Court of Appeal in *Delgamuukw v BC* [1993] 5 WWR 97 at 329 which are interesting in the light of Jonathan Fulcher's critique (discussed below) of judicial approaches to history in *Wik*: "It is a strange situation indeed if a trial judge, in a case such as this, can make a finding on a question of historical fact on the basis of the evidence of one or two historians or anthropologists... with the result that the historical facts would become frozen forever as the basis for any legal decision about entitlement to rights. Historians and anthropologists... do not always agree with each other... The tide of historical and anthropological scholarship could... leave a trial judge's findings of fact stranded as forever wrong". (at 305)

8 Graeme Neate is the chair of the Queensland Aboriginal and Torres Strait Islander Land Tribunals and a member of the National Native Title Tribunal.

9 In the area of land policy, most *executive* decisions to allocate land are decisions pursuant to *legislation*, because in Australia the Crown's power to grant land is only exercisable pursuant to legislation. The *Wik* decision confirms this.

10 See Native Title Act 1993 (Cth), s 7(1). The Racial Discrimination Act's application to the past has, however, been "rolled back" to achieve validation of titles granted in a discriminatory manner over native title land between 1975 and 1994: s 7(2).

11 The Racial Discrimination Act operates via Constitution, s 109, which prescribes that inconsistent (that is, discriminatory) State *laws* are invalid to the extent of the inconsistency. The same result occurs with respect to discriminatory State *decision-making* involving land allocation (which must conform to State land legislation). To the extent that State land legislation authorises such decisions, its inconsistency with the Racial

that pastoral land will not be granted to Aborigines — if it is an "act" within section 9 of the Racial Discrimination Act, might be rendered "unlawful" by that provision. But *implementation* of the policy — for example, a Minister's refusal under the Land Act to approve the transfer of a pastoral lease to Aborigines — exposes the authorising Land Act to inconsistency with the Racial Discrimination Act and invalidity.[12]

David Yarrow's "Ownership and control of natural resources" (126-156) is one of many chapters to revisit issues arising from the Racial Discrimination Act. After a while, this repetition becomes annoying. This chapter contains some complex analysis of the interaction of State resource statutes with the two Commonwealth Acts. However, it neglects to cover the important question of whether native title can relate to sub-surface resources, and its discussion of Crown ownership of those resources seems out of step with judicial reasoning.[13] Yarrow fails to distinguish adequately between methods by which Crown "ownership" of minerals or petroleum was acquired in different States and at different times: by reservation (as in New South Wales); by appropriation of the beneficial ownership of resources in Crown land (as in early Queensland); or by expropriation of privately owned resources (as in several States this century). A discussion of the possibility of compulsory acquisition of native title for national parks neglects to inform us whether other private rights can be acquired for this purpose (at 145), and a discussion of the impact of riparian rights and Crown entitlements to water on native title to watercourses (at 151-155) seems to overlook the possibility of historical extinguishment.

Margaret Stephenson's "Negotiating resource developments with indigenous people" (320-374) is an ambitious attempt to use North American jurisprudence in analysing Australian minerals and petroleum agreements. This is important research, but it is not complete. The chapter promises an analysis of United States, Canadian and Australian agreements, but delivers detailed analysis of Canadian agreements only. Its discussion of the United States position relies on a few secondary sources, and its discussion of Australia relies heavily on the work of Ciaran O'Faircheallaigh. Stephenson dismisses summarily some of the best sources of information about indigenous land and miners in Australia: mining agreements under the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) or comparable legislation. Indeed, one of the chapter's weaknesses is its lack of attention to the limitations imposed on

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Discrimination Act also results in invalidity. Constitutional invalidity can therefore arise as a result of the operation of either s 9 or s 10 of the Racial Discrimination Act: see *Gerhardy v Brown* (1985) 159 CLR 70 and *WA v Commonwealth* (1995) 183 CLR 373.

12 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. McGann and Yarrow suggest (at 109) that the Racial Discrimination Act may continue to apply in relation to titles granted pursuant to "non-claimant applications". The Native Title Act, s 24 suggests that native title may be extinguished by such grants, that is, that the common law extinguishment rules continue to apply to them. McGann and Yarrow argue (at 109), making selective reference to the High Court in *Western Australia v Commonwealth* (1995) 183 CLR 373 at 463, that the Racial Discrimination Act probably operates to confer on native title affected by such titles "added statutory protection... so that the holders of native title were able to enjoy their title equally with the enjoyment of other title by [its] holders". But if these titles were inconsistent with the Racial Discrimination Act, the State land laws under which they are granted would be invalid to that extent. Nonetheless, Native Title Act, s 24 states that such titles are *valid* — it effectively amends the application of the Racial Discrimination Act to remove the basis for constitutional inconsistency of laws in the case of such titles.

13 See the decision of Drummond J in *Wik Peoples v Queensland* (1996) 134 ALR 637.

bargaining by the statutory context. North American law relating to indigenous land is given a solid introduction, but the applicability to Australia of terms negotiated under very different legal arrangements is sometimes assumed rather than demonstrated.[14] The chapter's discussion of indigenous participation in resource development also seems to overlook the fact that Australian joint ventures involve product-sharing for taxation reasons.[15] The chapter could have benefited from more flexible discussion of the ways in which private royalties are calculated, and of the limits imposed on the use of such royalties in the native title context by State government opposition to them.

There are weaker contributions to the book. Perhaps because others invade her territory, Carmel MacDonald's discussion of state legislation (61-91) is not comprehensive (it omits to discuss the "right to negotiate" procedure) and contains careless errors.[16] Poh-Ling Tan's consideration of native title and freshwater resources (157-199) contains wooden discussion of "Aboriginal social structure" based on out-dated anthropological literature. To be fair to Tan, she is one of the few lawyers brave enough to grapple with indigenous land traditions. However, it is important that "Aboriginalist"[17] preconceptions do not taint such attempts to come to terms with another culture. Attempting "to glean some generalities from a study of the Aboriginal people of the Northern Territory and Western Australia" (at 167) will not produce meaningful understandings of native title on the ground. What is required is a less distanced approach, one which acknowledges regional differences, patterns of cultural change and the authority of Aboriginal people — not dead anthropologists — over social reality. If Tan was unaware of the perils, her editors should have assisted her in avoiding them.

14 For example, while the reader is informed that in the United States, Indians are among the country's largest private mineral owners, the position regarding mineral ownership on some types of indigenous land in Canada is not made clear. In Australia, indigenous people generally do *not* own minerals in indigenous land (New South Wales and Tasmania provide limited exceptions). Yet, in a discussion of strategies for indigenous participation in resource development in Australia, Stephenson relies heavily on a 17-year-old United States article, suggesting that joint venture shares might be allocated by weighing the value of exploration expenditure brought to the venture by the miner against the value of minerals brought by an indigenous party (at 341). Similarly, the Australian statutory context (which involves multiple linked tenement grants) may limit the applicability of terms of North American negotiated agreements about how mining may proceed (cf at 360).

15 See H Alexander, "Tax Aspects of Joint Ventures" in W D Duncan (ed), *Joint Ventures Law in Australia* (1994) ch 7.

16 For example, MacDonald suggests that the Cape York agreement is an agreement under Native Title Act 1993 (Cth), s 21 despite the absence of a government party (at 69). Her discussion of the "past acts" regime (at 73) omits the important information that some validation provisions relate to titles which were *in existence* at the commencement of the Act. It is true to say that, at common law, native title may be extinguished "without statutory authority" (at 72), but that statement is not particularly meaningful where extinguishment is effected by the grant of an inconsistent title to the same land, which requires statutory authority.

17 See note 6 above.

Horrigan and Young, however, have produced a much better edited collection than Hiley. [18] In *The Wik case: Issues and Implications*, Butterworths has varied its successful formula for "commentary" books — those which reproduce the Australian Law Reports text of a High Court decision, with expert commentary[19] — to include contributions from more than one "expert". But the 10 short contributions seem to have been selected rather randomly from among people involved in the *Wik* litigation, few of whom separate their analysis of the decision's significance or "implications" from the interests they represented, or the submissions they made, in the case. While several contributions overlap considerably, those which address particular issues are not always comprehensive on the point. Some contain errors; others are simply unenlightening.

Indeed, the two best contributions come from non-lawyers. Simon Williamson's overview of the position of mining tenement holders after *Wik* (45-50) contains useful (albeit unsourced) factual information. Jonathan Fulcher's "Sui generis history" (51-56) is a provocative analysis of the majority judges' use of historical material in reaching conclusions about pastoral leases. Their approach "is so present-centred as to be meaningless to historians nurtured on the fundamental importance of context to an understanding of the past" (at 52). Unfortunately, while Fulcher has his own view of the historical material, he does not tell us whether it was before the Court. Further, whatever its limitations as history, the transformation of "a contingent historical hypothesis to an absolute legal truth" with a "performative function" is not unusual in High Court litigation.[20]

In summary, Horrigan and Young compile a sounder and more substantial collection of commentary, including the *Wik* decision. Despite the shortcomings noted above, of the two, Horrigan and Young should be the preferred choice for practitioners and academics alike.

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18 For a more detailed review of the Hiley book, see J Clarke, "The Wik Case: Issues and Implications", *Alternative Law Journal* (forthcoming).

19 For example, M Coper, *The Franklin Dam Case* (1983), and R Bartlett, *The Mabo Decision* (1993).

20 See R McQueen, "Why High Court Judges make Poor Historians" (1990) 19 *FLR* 245-46. See also the comment by Gummow J in *Wik* that, even if an "established taxonomy" could be developed to regulate uses of history in the formulation of legal norms, "it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts": (1996) 187 CLR 1 at 183.