Case Note

The Co-Existence of Native Title and Common Law Proprietary Interests: *Wik Peoples v Queensland*

The High Court decision of the *Wik Peoples v. Queensland*[1] was handed down in December 1996. Since then, a furore has developed in legal and political circles over the merits of the decision. Vocal segments of the community, particularly the conservative elements in politics, have labeled the Court's finding as 'absurd' and 'unworkable' and there have even been threats of a double dissolution over the resulting uproar. Why has the case of *Wik Peoples v Queensland* been the subject of so much debate? Has the High Court handed down a decision based on illogical reasoning and flawed principles?

It can be stated unequivocally that the decision of the High Court in the *Wik Peoples* case was entirely legally sound and the unease in the community at present can be attributed to a tide of misinformation about the judgment and a shameless display of scaremongering by interest groups, such as farmers' associations.

The basis of the *Wik* decision stemmed from the judgment of Brennan J. in *Mabo v. Queensland*[2] where His Honour stated:

> Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title is extinguished to the extent of the inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests.[3]

In what amounted to an expansion upon that statement, the High Court held (by a majority of four to three) that pastoral leases amount to no more than a 'lesser interest' - and that therefore, they do not necessarily extinguish native title. The basis of the Court's finding revolved around two distinct, yet equally important factors: first, historical evidence indicated that it was the intention of the Imperial government that the grant of pastoral leases was not to extinguish native title, and second, the salient common law characteristics of the lease.

The facts of the case briefly were: the Wik Peoples claimed native title over two parcels of land which were the subject of pastoral leases - the Holroyd and

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1 (1996) 141 ALR 129.
2 (1992) 175 CLR 1.
3 *Ibid.*, 69

Mitchellton leases. The claim initially came before the Federal Court[4] where Drummond J held that both leases in question conferred on the grantees the right to exclusive possession and this necessarily meant that any traditional title over the land was extinguished. His Honour considered historical evidence, notably communications between Secretary of State Earl Grey and colonial Governor Fitzroy in the 1840's, which outlined the Imperial government's intention that the Aboriginal people were not to be excluded from their traditional lands merely to accommodate the needs of pastoralists. The pastoralists' right of pasturage was intended to coexist with the Aboriginal right of use and occupancy.[5] This result was preferred by Grey to the option of creating reserves for Aborigines due to 'the nature of Australian geography and settlement patterns.'[6] It could be argued that this reliance upon communications dating back 150 years amounts to reliance on tenuous evidence of the intention of the Imperial government with regard to pastoral leases. This argument can be rebutted however, as it was stated unequivocally by Hartwell: 'the link between a secretary of state and a colonial governor was direct, and much of the information we now have about colonial developments comes from the dispatches between those two officers.'[7] Inexplicably, His Honour rejected that stark evidence and stated that, in his opinion, Earl Grey did not purport to give Governor Fitzroy a binding direction to include in all future pastoral leases any provision which protected the rights of Aborigines.[8]

On appeal to the High Court, a majority held that there was cogent historical evidence of an intention on the part of the Imperial government to ensure that pastoral leases were not used to prevent the Aboriginal population from using their traditional lands for subsistence purposes. Importantly, as Toohey J. highlighted, it is improbable that the legislators of the *Land Act* 1910 (Qld.), under which the two leases in question were granted, formed an intention to grant pastoral leases which conferred exclusive possession on the grantees to the exclusion of Aboriginal people.[9] The issue of whether the leases in question conferred exclusive possession was not only resolved by resorting to statutory interpretation, but could also, as Amankwah argues,[10] be determined by delving into the common law.

The case of *Radaich v. Smith*[11] differentiates a lease from a licence, and the crux of the issue was underlined in the judgment of Windeyer J. His Honour identified a tenant as someone who has an interest in the land as distinct from a licensee who has 'permission to enter land and use it for some purpose or purposes.'[12] His Honour continued by stating the way to ascertain whether a lease interest in land has been granted was by 'seeing whether the grantee was given legal right of

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4 Wik Peoples v Queensland (1996) 134 ALR 637.

5 H.Reynolds, 'The Mabo Judgment in the Light of Imperial Land Policy' (1993) 16 *University of New South Wales Law Journal*, 35.

6 *Ibid.*, p.34.

7 R.M.Hartwell, 'The Pastoral Ascendancy' in *Australia: A Social and Political History*, (G.Greenwood ed. Sydney, 1955), 50.

8 *Wik Peoples v Queensland* (1996) 134 ALR 637 at 658.

9 *Wik Peoples v. Queensland* (1996) 141 ALR 129 at 180.

10 H.A.Amankwah, 'Mabo :Extinguishment of Native Title and Pastoral Leases Revisited' *Aboriginal Law Bulletin*, Vol.3, No.63, August 1993.

11 (1959) 101 CLR 209.

12 *Ibid.*, 222.

exclusive possession of the land for a term or from year to year or for a life or lives.' If that is the case, the grantee holds a lease. If either of the requirements for a lease (exclusive possession or certainty of duration) is not satisfied, then the interest is less than a lease (a licence for example).

This principle was superimposed upon the aforementioned historical evidence by a majority of the High Court, and a logical conclusion was reached to the effect that if the grants to pastoralists are subject to the right of other people to enter the land and put it to their own use (these 'other people' being Aborigines and 'their own use' being the right to hunt and fish etc.) then the pastoralists do not enjoy exclusive possession (and therefore do not hold a lease). Rather, they possess mere licences for pasturage purposes.

The High Court effectively held that a pastoral lease does not amount to a leasehold interest - that is, pastoral leases fall within Brennan J's 'lesser interests' designation in *Mabo* (supra). Thus the High Court determined that native title was not necessarily extinguished by the granting of a pastoral lease over traditional Aboriginal lands and if native title can be identified over a parcel of land which is subject to a pastoral lease, then the rights associated with such traditional title will coexist with the rights conferred upon the grantee of the pastoral lease. This scenario, of course, assumes that the competing interests can coexist and there is no inconsistency between the two. In the event the two interests are not compatible, the High Court stated unequivocally that the rights conferred upon the grantees of the pastoral leases prevail.[13] The simple and efficacious nature of this point would seem to be lost on those who are critical of the decision.

One of the most interesting aspects of the *Wik Peoples* case was that Brennan CJ, who was among the majority in *Mabo v Queensland*,[14] dissented. This writer views two flaws in His Honour's reasoning for holding that the pastoral leases in question conferred exclusive possession on the grantees to the exclusion of Aborigines. Firstly, Brennan CJ gives practically no consideration to the historical evidence furnished by Reynolds; the extent of His Honour's regard for this evidence is manifested in one solitary line of his judgment.[15] Second, His Honour makes the point that in 1910 , when the two leases in question were first granted, 'no recognition was accorded by Australian law to the existence of native title in or over land in Australia.'[16] It would seem that this point was raised to rebut the idea, argued by Toohey J, and accepted by the majority, that the legislators of the *Land Act* 1910 (Qld.) more than likely had no intention of conferring exclusive possession on grantees of pastoral leases to the exclusion of Aboriginals. With the greatest respect, the point of Brennan CJ's argument would appear shortsighted, as the legislators of the *Land Act* 1910 (Qld.) were quite entitled to enact any provision they felt appropriate to protect the interests of Aboriginals, and just because the courts had previously failed to identify the existence of the intention of the legislators does not necessarily mean that the intention did not exist. This contention would appear to have been substantiated now that the intention of the legislators of the *Land Act* 1910 has been identified.

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13 *Wik Peoples v. Queensland* (1996) 141 ALR 129 at 185.
14 *Mabo v Queensland* (1992) 175 CLR 1
15 *Wik Peoples v Queensland* (1996) 141 ALR 129 at 148.
16 *Ibid.*, 157.

It was disappointing, but perhaps not surprising, that the appellants' assertion that the Crown owed them a fiduciary duty was essentially left unexamined. This assertion, also raised by the appellants in *Mabo* where only Toohey J gave it any considerable examination,[17] was addressed in the *Wik Peoples* case only by Brennan CJ who summarily dismissed the claim. It is unsatisfactory that in jurisdictions such as the United States[18] and Canada[19] native title rights and interests of their indigenous peoples are recognised and protected, but that in Australia they are not. This was a disappointing aspect of what was otherwise a momentous legal victory for Aboriginals.

When one considers the weight of authority in favour of the majority's decision, it is incomprehensible to this writer that the High Court has been denigrated over the *Wik Peoples* case. The decision, it is submitted, is merely an expansion upon the principles enunciated in *Mabo*, and does not mark a 'radical' or 'unworkable' change in the fundamental nature of Australian land law.

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[17] *Mabo v Queensland* (1992) 175 CLR 1 at 199-205.
[18] *United States v Mitchell* (2) (1983) 463 US 206.
[19] *Guerin v. Queen* (1984) 13 DLR (4th) 321.