THE WIK PEOPLES v QUEENSLAND
THE THAYORRE PEOPLE v QUEENSLAND*

I INTRODUCTION

Since its landmark recognition of native title in *Mabo v Queensland [No 2]*,[1] the Full Bench of the High Court has turned its attention to the issue of native title on three further occasions. The first, *Western Australia v Commonwealth*[2] dealt largely with the validity of the Native Title Act 1993 (Cth) ('Native Title Act') and the conflicting Land (Titles and Traditional Usage) Act 1993 (WA), the extent of Commonwealth legislative power and the application of the Racial Discrimination Act 1975 (Cth) to dealings with native title. The second, *North Ganalanja Aboriginal Corporation (for and on behalf of the Waanyi People) v Queensland*,[3] dealt largely with procedural issues arising under s 63 of the Native Title Act 1993 (Cth) and the regulations made under that Act. The third, *Wik*, dealt with the limited but substantive issue of extinguishment of native title on certain categories of Queensland pastoral leases at common law. The decision unleashed an intense reaction, reminiscent of the reaction of state governments and industry groups following the *Mabo* decision, with suggestions that native title should be extinguished generally (or at least on pastoral leases) and replaced with statutory visitation rights similar to those proposed by the Western Australian government in its Land (Titles and Traditional Usage) Act 1993 (WA).[4]

The intensity of the reaction appears to have been generated in part by the belief of some that, on the basis of the *Mabo* decision and the Preamble to the Native Title Act,[5] the grant of a pastoral lease gave exclusive possession and thus extinguished native title,[6] although there has been continual discussion on the point since the *Mabo* decision.[7] In addition, there was perceived uncertainty in relation to the validity of activities carried out by pastoralists on pastoral leases since 1 January 1994 as a result of the interaction of the *Wik* decision with the 'future act' provisions of the Native Title Act 1993 (Cth).[8] This uncertainty

* (1996) 141 ALR 129 ('*Wik*').

1 (1992) 175 CLR 1 ('*Mabo*').

2 (1995) 183 CLR 373 ('*Native Title Act Case*').

3 (1996) 135 ALR 225 ('*Waanyi*').

4 Lenore Taylor, 'It's True — a Wik is a Long Time in Politics', *The Australian Financial Review* (Sydney), 24 January 1997, 33.

5 Native Title Act 1993 (Cth) Preamble.

6 David Russell, 'Dispossession Cuts Both Ways', *The Australian* (Sydney), 7 January 1997, 11

7 Henry Reynolds, 'Mabo and Pastoral Leases' (1992) 2 *Aboriginal Law Bulletin* 8; Henry Reynolds, 'The Mabo Judgment in the Light of Imperial Land Policy' (1993) 16 *University of New South Wales Law Journal* 27. In these articles Reynolds raised the possibility that native title could persist on pastoral lease land. A later article further developed the argument and was referred to in *Wik* (1996) 141 ALR 129, 171 (Toohey J), 197 (Gaudron J), 266 (Kirby J): Henry Reynolds and Jamie Dalziel, 'Aborigines and Pastoral Leases — Imperial and Colonial Policy 1826–1855' (1996) 19 *University of New South Wales Law Journal* 315.

8 Commonwealth Attorney-General's Department, *Legal Implications of the High Court Decision in* The Wik Peoples v Queensland, Advice to the Prime Minister (January 1997) 17 ('*Legal Implications of the High Court Decision*').

persisted despite the tenor of the *Wik* judgment,[9] which suggested that all pastoral activity is valid and lawful because it is authorised by the grant. On a similar basis there was a reasonably well founded concern about the validity of grants made since 1 January 1994, including mining titles and non-pastoral activities such as the erection of buildings in connection with the conduct of tourist activities.[10] In response to the decision, the perceived uncertainty it has created[11] and the political demands of the States,[12] the government has produced a ten point plan[13] said to be necessary to meet these perceived difficulties, but in reality going beyond the specific issues arising from the *Wik* decision.

The central issue for determination in *Wik* involved the characterisation of the rights and interests derived from pastoral leases granted pursuant to the Land Act 1910 (Qld) and the Land Act 1962 (Qld) and the consequences flowing from that characterisation for the native title rights of the plaintiffs. The court divided four–three[14] in deciding that the grants did not have the effect of extinguishing native title with the majority producing four separate judgments. Discerning a ratio from the majority judgments is not a simple undertaking. However, all the judgments, majority and minority, turned on the characterisation of the interest (or estate) assigned by the grant of a pastoral lease and largely agreed on the method which should be used to determine the issue: namely, interpreting the specific statute under which the grant was made as well as the terms of the grant itself.

The end result of *Wik* is a narrow decision, essentially confined to an interpretation of the specific Queensland legislation and the particular grants in issue. The scope of the decision was characterised in this way in the postscript to the judgment of Toohey J, written with the concurrence of Gaudron, Gummow and Kirby JJ.[15] The key elements of the postscript were that the titles of the grantees were valid but that the extent of the rights granted depended on the 'terms of the grant ... and upon the statute which authorised it'.[16] Such grants did not necessarily extinguish native title. 'Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established.'[17] Where there is an inconsistency between the rights granted

[9] The effect of the majority judgments in this regard is summarised in the postscript appearing in the judgment of Toohey J: *Wik* (1996) 141 ALR 129, 189–90.

[10] *Legal Implications of the High Court Decision*, above n 8, 11. See also Simon Williamson, 'Implications of the Wik Decision for the Minerals Industry' in Graham Hiley (ed), *The Wik Case: Issues and Implications* (1997) 45.

[11] Lenore Taylor and Paul Syvret, 'Industry Dismayed by Wik Ruling', *The Australian Financial Review* (Sydney), 24 December 1996, 1; Alan Moran, 'Wik Decision Settles Nothing for Miners', *The Australian* (Sydney), 24 December 1996, 13; Denis Burke, 'Judgment Adds to Delay and Expense', *The Australian* (Sydney), 7 January 1997, 11.

[12] Taylor and Syvret, above n 11; Burke, above n 11; Taylor, above n 4.

[13] Prime Minister, Commonwealth of Australia, *Amended* Wik *10 Point Plan*, Press Release (8 May 1997) ('*10 Point Plan*').

[14] Toohey, Gaudron, Gummow and Kirby JJ were in the majority, writing four separate judgments. Brennan CJ, with whom Dawson and McHugh JJ concurred, constituted the minority.

[15] *Wik* (1996) 141 ALR 129, 189–90.

[16] Ibid 190.

[17] Ibid.

and native title rights, the native title rights 'must yield, to that extent, to the rights of the grantees'.[18] The possibility of such concurrent enjoyment meant that there was no question as to the suspension of any native title rights. The case was consequently remitted to the Federal Court for determination of issues of fact in relation to the existence and content of the native title rights claimed.

Reaching a conclusion required the court to consider the applicability of English common law property principles to Australia. This issue provided the point of difference between the majority and the minority both in terms of the relevance of common law tenures in statutory interpretation as well as the 'utility'[19] of those principles in determining the nature of statutory tenures in Australia. The majority's decision involved an exploration of the doctrine of extinguishment enunciated in *Mabo*. Some shape to the boundaries of that doctrine can now be discerned. It is the court's consideration of these broader issues that makes the case significant.

The court also addressed two issues outside the question of extinguishment by the grant of a pastoral lease. The first involved the impact on the plaintiffs' native title of the grant of certain mining leases to Commonwealth Aluminium Corporation Pty Ltd ('Comalco') and Aluminium Pechiney Holdings Pty Ltd ('Pechiney'). The second related issue involved consideration of whether the Crown owed a fiduciary duty to native title holders in its dealings with the land. The court found that the mining leases were valid and that no fiduciary duty was owed in the circumstances of this case, although not all judgments dealt with these issues.

II FACTUAL BACKGROUND

The plaintiffs in the case were two Aboriginal groups — the Wik Peoples and the Thayorre Peoples — both of whom claimed interests in land on Cape York. The claims derived from and were based on the doctrine of Aboriginal title or native title.[20] Parts of the claims of the two groups overlapped. The proceedings were commenced in the Federal Court prior to the passage of the Native Title Act 1993 (Cth). Alternative claims were subsequently lodged with the National Native Title Tribunal pursuant to the Native Title Act 1993 (Cth). Those claims under the Native Title Act 1993 (Cth) were not the subject of the appeal before the High Court, although they could well be affected by the outcome of the proceedings before the Court.

The land claimed included two areas — the Mitchellton Pastoral Leases and the Holroyd River Holding — over which pastoral leases had been granted. The Mitchellton Pastoral Leases, covering an area of 535 square miles, had been granted in 1915 and 1919 respectively to non-Aboriginal lessees under the Land

[18] Ibid.

[19] Ibid 226 (Gummow J).

[20] Toohey J placed some emphasis on the precise wording of the pleadings, drawing a distinction between Aboriginal title in the Wik pleadings and native title in the Thayorre pleadings. His Honour focused on the substance of the rights and interests claimed, rather than the language used, but acknowledged that the language could produce significantly different outcomes: ibid 165–6.

Act 1910 (Qld). The relevant provisions of the Land Act 1910 (Qld) included reference to the Crown's power to 'demise for a term of years, any Crown land',[21] and the declaration that '[t]he ... lease shall ... be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated.'[22] The instrument stated that the person named was 'entitled to a Lease of the Land described ... for the term and at the yearly rent hereinafter mentioned',[23] subject to various reservations contained in the instrument. The leases were expressed to be limited 'to pastoral purposes only'. The first lease was forfeited for non-payment of rent in 1918 and the second was surrendered in 1921. The lessee did not take possession under either lease. In 1922 the land was reserved for the benefit of Aboriginal people.

The Holroyd lease, covering an area of 1,119 square miles, was first granted in 1945 under the Land Act 1910 (Qld). This lease was surrendered in 1973 and a further lease granted in 1974 under the provisions of the Land Act 1962 (Qld). These leases did not contain the limitation of use 'for pastoral purposes only' but, as Brennan CJ indicated, they were otherwise in similar terms to the Mitchellton leases save that the leases required the erection of specific improvements on the leased land.[24]

Both the Mitchellton and Holroyd leases contained various reservations in relation to the Crown's mineral and petroleum rights and the rights of entry for third parties specified in the leases or the Act or authorised by the Crown for specific purposes.[25] Neither of the leases contained any reservations in favour of Aboriginal people.

Various mining tenements were also granted over the land. Pursuant to the Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957 (Qld), which sets out an agreement between Comalco and the Queensland government, a Special Bauxite Mining Lease for a term of 84 years was granted to Comalco in 1965. Pursuant to the Aurukun Associates Agreement Act 1975 (Qld), a further Special Bauxite Mining Lease for a term of 42 years was granted to Pechiney. The Aurukun Associates Agreement Act 1975 (Qld) authorised entry into a franchise agreement between Pechiney and the Queensland government. A schedule to that agreement contained an access agreement between the Director of Aboriginal and Islanders Advancement of Queensland and Pechiney (among others).

This history reflected non-Aboriginal land use. On the other hand, the plaintiffs claimed continued associations and connections with the land sufficient to establish native title at common law or under the provisions of the Native Title Act.

III THE FEDERAL COURT DECISION

In the proceedings in the Federal Court, before Drummond J, the plaintiffs

[21] Land Act 1910 (Qld) s 6(1).
[22] Ibid s 6(2).
[23] *Wik* (1996) 141 ALR 129, 139.
[24] Ibid.
[25] Ibid.

sought a declaration that they had 'certain native title rights over a large area of land in North Queensland. They also sought damages and other relief, if it be found that their native title rights have been extinguished.'[26] His Honour did not proceed to hear evidence on the issue of the existence of native title, but rather proceeded to determine certain preliminary issues in relation to the effect of the grant of pastoral leases on the extinguishment of native title, the effect of the mining leases granted to Comalco and Pechiney, whether the Crown had any fiduciary duty towards the purported native title holders and if so whether that duty had been breached, and whether the rules of natural justice applied to the Crown's activities in granting the mining leases. It is these five preliminary issues and his Honour's answers that were the subject of the appeal to the High Court.

The questions and their answers may be briefly summarised as the substance of the answers emerges in the various High Court judgments. First, if Aboriginal title (or possessory title) existed at the material times when the various pastoral leases were granted, were the pastoral leases subject to any reservation in favour of the Wik people (and the Thayorre people)? The answer to this question was no. Second, did the pastoral leases grant exclusive possession to the lessees? The answer to this question was yes. The third question was whether the rights granted by the pastoral leases were wholly inconsistent with the continued enjoyment of any rights and interests under either Aboriginal or possessory title. His Honour found they were. As a result, the answer to the fourth question — did the grant of the pastoral leases necessarily extinguish any Aboriginal or possessory title? — was also yes. On the final issue — whether there had been a breach of fiduciary duty and a failure to accord natural justice to the Wik and Thayorre peoples in relation to the various mining leases and agreements — his Honour found that there had been no such breach or failure.

The plaintiffs appealed to the Full Court of the Federal Court but the matter was transferred to the High Court pursuant to s 40 of the Judiciary Act 1903 (Cth).

IV THE HIGH COURT DECISION

The court granted leave to intervene to a number of parties, including State and Territory governments, and Aboriginal and Torres Strait Islander organisations (including the Aboriginal and Torres Strait Islander Commission). However, as Toohey J made clear, the court confined itself to considering the questions raised in the notice of appeal.[27] Thus, even though the issues raised may have wide ramifications, the court confined its considerations to the specific questions answered by Drummond J. Various arguments were put by both the plaintiffs and some of the interveners.

The plaintiffs' arguments and the judgments in the case revolved around three basic issues concerning: firstly, the nature and status of the interest granted under statute; secondly, whether or not the grant involved a grant of exclusive posses-

[26] *The Wik Peoples v Queensland* (1996) 134 ALR 637, 641.
[27] *Wik* (1996) 141 ALR 129, 167.

sion; thirdly, the consequences of the grant for the continued enjoyment, or alternatively the consequences of the extinguishment, of native title. The validity of the pastoral leases was not in question and was accepted by the plaintiffs.

A *The Nature of the Grant*

The first and most significant issue for the court's consideration was the characterisation of the interest granted or the extent of the rights granted under the pastoral leases. It was consideration of this issue which lay at the heart of the decision and ultimately divided the court. All the judges concurred in their approach to this issue, namely that the issue of exclusive possession is to be determined by reference to the language of the statute authorising the grant and the instrument by which the grant was made.[28] However, a significant point of departure between the majority and minority was not only the conclusions reached on this issue, but also the relevant considerations in interpreting the statute.

Brennan CJ, in the minority, took the view that the language of the statute and the grant conferred a right of exclusive possession on the pastoral lessee.[29] His Honour reasoned that although there was no express grant of exclusive possession, such a grant could be implied. There were three main elements supporting this view. Firstly, the language of the statute and the instrument itself suggested a grant of exclusive possession because there were specific reservations for the Crown to permit entry by certain persons, to authorise access to pastoral lease land and to remove people who were on the land without authority.[30] His Honour relied on the common law principle that the nature of an interest granted is to be determined by the substance of the grant[31] and in the case of a lease, the grant of exclusive possession.[32] This is so notwithstanding the inclusion of reservations in the lease.[33] Secondly, his Honour placed emphasis on the nature of the language used in the statute and the instrument — 'demise for a term of years', 'to vest the "estate or interest"' and 'on forfeiture, the land reverted to His Majesty'.[34] This, his Honour concluded, 'is the language of lease'[35] and 'in the absence of any contrary indication, the use in a statute of a term that has acquired a technical meaning is taken prima facie to have that meaning.'[36] His Honour then spent considerable time discussing a range of authorities[37] leading to the conclusion that statutory leases should be characterised in the same way as

[28] Ibid 141 (Brennan CJ), 170 (Toohey J), 206 (Gaudron J), 226, 232 (Gummow J), 267–8 (Kirby J, by implication).
[29] Ibid 151.
[30] Ibid 142–3.
[31] Ibid 144.
[32] *Radaich v Smith* (1959) 101 CLR 209.
[33] *Wik* (1996) 141 ALR 129, 144.
[34] Ibid 145.
[35] Ibid.
[36] Ibid.
[37] Ibid 146–8. See also *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199; *Re Brady* [1947] VLR 347; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687; *Davies v Littlejohn* (1923) 34 CLR 174; *O'Keefe v Williams* (1907) 5 CLR 217.

common law leases rather than merely as a set of statutory rights,[38] even though the extent of the Crown's powers is limited by the enabling statute.[39] Finally, Brennan CJ suggested that, as a matter of interpretation, there is a distinction in the statute between leases and licences and had there been no legislative intent to create different interests, 'there would have been little point in distinguishing between leases and licences which share many statutory features'.[40]

Thus the primary conclusion of Brennan CJ was that, as a matter of interpretation and construction of the statute and the instrument granting the pastoral lease, there was a grant of exclusive possession which meant that a pastoral lease had the character of a leasehold estate at common law. The effect of this grant of an estate in land carrying with it the character of exclusive possession is that 'the right of exclusive possession prevailed and the rights of the holders of native title were extinguished'.[41]

Although there were four separate judgments constituting the majority, it is possible to discern a number of similarities in approach to the issue of the nature of grant. The major focus for Toohey J was interpretation of both the statute and the instrument making the grant.[42] His Honour indicated that this issue did not arise 'in an historical vacuum'[43] and that the history of the relationship between the Crown and pastoralists was crucial to understanding the legislation before the court.[44] This history reveals the development of a range of statutory tenures, unknown to the common law:

> designed to meet a situation that was unknown to England, namely, the occupation of large tracts of land unsuitable for residential but suitable for pastoral purposes. Not surprisingly the regime diverged significantly from that which had been inherited from England. It resulted in 'new forms of tenure'.[45] Regard must be had to the extraordinary complexity of tenures in Australia, perhaps most of all in Queensland.[46]

Thus while Toohey J reiterated the view that 'Australia inherited the English law of tenure',[47] he observed that there had been substantial change and adjustment to that law since the reception of the common law[48] with the result that the 'pastoral leases are creatures of statute and the rights and obligations that accompany them derive from statute'.[49] In considering the relationship between this view and the broadly expressed common law view about the relationship between exclusive possession and leases, his Honour did not disagree with the conclusion of Brennan CJ that the substance of a grant and whether it includes

38 *Wik* (1996) 141 ALR 129, 148.
39 *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520.
40 *Wik* (1996) 141 ALR 129, 148.
41 Ibid 154. This issue of extinguishment is further explored below.
42 Ibid 170.
43 Ibid.
44 Ibid 170–1.
45 T P Fry, 'Land Tenures in Australian Law' (1946–1947) 3 *Res Judicatae* 158, 160–1.
46 *Wik* (1996) 141 ALR 129, 172.
47 Ibid.
48 Ibid 173.
49 Ibid 174.

the right of exclusive possession, is the determinant of a lease.[50] However, such a conclusion did not mean that 'exclusive possession is in truth an incident of every arrangement which bears the title of lease'.[51] Those authorities that suggested the use of terminology in statutes indicating common law tenures should be interpreted with reference to common law tenures and principles[52] should be confined to their contexts, involving commercial transactions, and 'cannot be transposed so as to throw light on the position of native title rights'.[53]

Toohey J then considered the specific pastoral leases before the court and concluded that they did not carry with them a right of exclusive possession, but rather possession for pastoral purposes. Such possession does not exclude Indigenous people.[54] 'It was unlikely that the intention of the legislature in authorising the grant of pastoral leases was to confer possession on the lessees to the exclusion of Aboriginal people even for their traditional rights of hunting and gathering.'[55] His Honour confined those authorities[56] that appeared to support a contrary view[57] to their facts and the specific statutes considered. Having reached this particular conclusion about the nature of the interest granted, it was not surprising that his Honour concluded that '[t]he continuance of native title rights of some sort is consistent with the disposition of land through the pastoral leases.'[58]

The other majority judgments took a similar, although not identical, approach to determining this issue. Gaudron J took the view that there was nothing in the relevant legislation to suggest the nature of the estate or interest granted except the use of the word 'lease'.[59] However, the question of whether a pastoral lease is a 'true lease'[60] was held to depend upon the terms of the statute in which they arise.[61] Referring to the cases mentioned by Toohey J, her Honour concluded that no guidance could be obtained from those cases because they dealt with different statutory provisions. Thus her Honour turned her attention to the substance of the legislation. In that regard, she considered two factors that suggested a 'true lease' might have been granted. The first was the use of language such as 'lease' and 'demise' and derivatives of the word 'lease'.[62] The second was the use of the word 'licence' in the statute and the distinction drawn in the statute between a lease and a licence. In the latter instance, the distinction seemed to be explicable

[50] Ibid 177.
[51] Ibid 178.
[52] *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199.
[53] *Wik* (1996) 141 ALR 129, 179.
[54] Ibid 181.
[55] Ibid 180.
[56] *Macdonald v Tully* [1870] 2 QSCR 99; *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340.
[57] *Wik* (1996) 141 ALR 129, 180–1.
[58] Ibid 182.
[59] Ibid 199.
[60] Ibid.
[61] Ibid 206.
[62] Ibid 205.

based on the difference in the term of each grant.[63] Generally, her Honour considered that it was not appropriate to attribute the features of 'common law leases to the holdings described as "pastoral leases"'.[64] Firstly, there was a distinction between common law leases, pastoral leases and the impact of entry into possession.[65] This meant there was no reason evident within the statute to assume that the term 'lease' was to be given the same meaning as in the common law. This was especially so as there was 'no basis for thinking that pastoral leases owe anything to common law concepts',[66] particularly because of the geographical and historical locations of pastoral leases. Finally, the statute referred to tenures unknown at common law such as leases in perpetuity, a term that 'cannot possibly take its meaning from'[67] the common law. In addition her Honour found significant indication that there were rights of entry for a number of people including Indigenous people.[68]

Gummow J took the view that the matter could only be considered as a matter of statutory interpretation for a number of reasons. The major factor supporting this view was the development of a range of tenures that may have used the language of common law tenures but which were teeming with 'proverbial incongruities'.[69] As a result, the common law was unhelpful. For example, common law tenures are based upon the assumption that all tenures derive from the Crown and yet native title is an allodial tenure.[70] The issue in this case concerned *sui generis* statutory rights[71] and thus the issue was to be determined by statutory determination.[72] Therefore there was no reason to conclude that the general exclusionary provisions in the statute applied to Indigenous people[73] nor were the general provisions of the statute coincident with the general provisions of leases and licences.[74] His Honour concluded that the grant was not one of exclusive possession amounting to a common law lease, but that it was a statutory grant and therefore did not necessarily extinguish native title.

As with the other majority judgments, Kirby J considered that the pastoral leases took their form and character from the statutes under which they were granted and these statutes created *sui generis* rights not directly related to common law tenures.[75] His Honour also reviewed the historical antecedents of pastoral lease legislation in Australia[76] and relied on the work of Dr T P Fry[77] to

63 Ibid 206.
64 Ibid 207.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid 208.
69 *Stewart v Williams* (1914) 18 CLR 381, 406 quoted in *Wik* (1996) 141 ALR 129, 224.
70 *Wik* (1996) 141 ALR 129, 224.
71 Ibid.
72 Ibid 232.
73 Ibid 237.
74 Ibid 240.
75 Ibid 279.
76 Ibid 265–9.
77 Ibid 279–80.

support both this view of pastoral leases and the view that the rights granted did not result in the exclusion of Indigenous people.[78] Having reached that conclusion about the interest, his Honour further concluded that there was no extinguishment of native title.[79]

None of the judgments found any major or significant distinctions between the Mitchellton and Holroyd leases.

The major distinction between the reasoning of the majority and the minority — that the grant of a set of statutory rights amounted to less than a grant of exclusive possession, as opposed to a grant of exclusive possession amounting to the grant of a common law lease — may well have been sufficient to dispose of the major issue in dispute. The main issue remaining for determination was the effect of these findings on both the continued enjoyment of native title and the status of the statutory rights granted under the name of a pastoral lease. These consequences are discussed further below. However, the central focus of both the majority and the minority was a consideration of the doctrines of tenure and estates and the Crown's radical title in the context of the findings of the case.

B The Doctrines of Tenure and Estates — Radical Title, Reversion and Plenum Dominium

In the end, consideration of these issues was probably not a necessary part of either the majority or minority judgments. However, the manner in which these issues were considered in the judgments provides an insight into the court's intention to develop a unique approach to the interpretation of property law in Australia and may well have implications for future native title issues that come before the court.

Brennan CJ expanded upon the view expressed in *Mabo* in relation to the sardine factory leases on the islands of Dauer and Waier, namely that if such leases were validly granted, they had the effect of extinguishing native title, notwithstanding that there were reservations in respect of the Meriam people.[80] Extinguishment occurred because 'by granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease'.[81] In *Wik* his Honour further considered the issue of the Crown's reversion.[82] He concluded that once the doctrine of tenure is brought into play, the Crown has beneficial ownership of all that is not granted. In this case, the Crown has the reversion expectant or a legal reversionary interest in the land.[83] Such a consequence flows from the exercise of the Crown's power 'to alienate an estate in land'.[84] The Crown's exercise of its powers to grant land extinguishes native title at the time of the grant. Such a conclusion arises from the fact that the Crown has granted a (leasehold) estate in

[78] Ibid 280.
[79] Ibid 284–5.
[80] *Mabo* (1992) 175 CLR 1, 72–3.
[81] Ibid 73.
[82] *Wik* (1996) 141 ALR 129, 154–9.
[83] Ibid 157.
[84] Ibid 156.

land. Thus native title is extinguished both because of the grant of an interest amounting to exclusive possession and the engagement of the Crown's reversion. His Honour concluded by again suggesting that it was 'too late now to develop a new theory of land law that would throw the whole structure of land titles based on Crown grants into confusion'.[85]

A further element of his Honour's view is that the Parliaments that passed both the Land Act 1910 (Qld) and Land Act 1962 (Qld) could not have intended that anyone other than the Crown have any reversionary interest in the land, least of all native title holders, who had not been recognised at that time.[86] This final view was referred to by Gummow J who acknowledged that the interpretation of statutes and Parliament's intention pre-*Mabo* created some methodological problems, but considered that since *Mabo* now reflected the state of the law, statutes must be interpreted in light of that decision.[87]

The majority, in their separate judgments, did not find the same doctrinal difficulty as the Chief Justice on this point. Gummow J addressed the point at length. His Honour confirmed that the Crown's radical title provided the link between the constitutional power of the Crown and the system for creating private interests in land,[88] but that it was the subsequent exercise by the Crown of its authority to grant interests in land that produced a *plenum dominium* or absolute beneficial title in the Crown.[89] However, having concluded that the Crown's powers and the nature of the grant derive from the statute rather than the common law doctrines, the conclusion that the Crown had a common law reversion expectant must flow from the statute. No such conclusion could be drawn from the language of the statutes in this case.

Gaudron J took the view that the matter was concluded by a finding that the grant was not a 'real lease', therefore there was no vesting of a leasehold estate. As a reversionary interest only arose upon the vesting of a leasehold estate, the Crown could not be said to have expanded its radical title and acquired full beneficial ownership upon reversion. In the case of the pastoral leases, the land reverted to the Crown and became Crown land under the statutes.[90] However, it does appear from her Honour's consideration of the issue that had the lease been a 'real lease' — that is, a common law lease — the doctrine may well have applied.

In referring to the comments of Brennan J (as he then was) in *Mabo*[91] concerning the Crown's reversion, Toohey J questioned the appropriateness and relevance of the *plenum dominium* doctrine to the Crown's exercise of its authority under its radical title.[92] Rather, his Honour suggested that the reversionary doctrine deriving from the doctrine of estates is a 'feudal concept in

[85] Ibid 158.
[86] Ibid 159.
[87] Ibid 232.
[88] Ibid 234.
[89] Ibid.
[90] Ibid 209.
[91] (1992) 175 CLR 1, 68.
[92] *Wik* (1996) 141 ALR 129, 186.

order to explain the interests of those who held from the Crown, not the title of the Crown itself'.[93] Thus the doctrine properly related to the holder of a fee simple who carved out a lesser estate. To apply this doctrine to the Crown was 'to apply the concept of reversion to an unintended end'.[94] His Honour was at pains to emphasise that this view in no way derogated from the Crown's capacity to exercise its authority under its radical title to grant interests in land.

While Kirby J considered the issue of the Crown's reversion,[95] his Honour did not provide any clear conclusion on the point. Rather, the narrowness of the final decision in *Mabo*[96] was emphasised (a view also expressed by Toohey J)[97] and the need for caution in applying the doctrine in order to achieve extinguishment.[98]

The discussions in the majority judgments of this issue varied in their scope and content. However, unlike the judgment of Brennan CJ, the judgments were characterised by a concern to limit the operation of the principle rather than concern about throwing the system of land titles into confusion.[99] The majority was consistent with accepted principle, since it did not view the interest granted under the statutes as a common law leasehold estate.

C *Extinguishment of Native Title — the Postscript and the Judgments*

The second major issue emerging from the case was the discussion about extinguishment. There was no consistent view expressed by the majority on this point other than the joint view expressed in the postscript to the judgment of Toohey J.[100] The postscript made it clear that the pastoral leases were valid and that no necessary extinguishment of native title rights followed by reason of the grant of the pastoral leases. The rights and interests of both the pastoral lessees and the native title holders must be established and where there is inconsistency, the native title rights must yield to the extent of the inconsistency.[101] The language of the postscript does not seem to be the language of extinguishment. It raises the possibility of subjugation or suppression of native title rights for the term of the grant rather than extinguishment. Native title rights may be unenforceable during the life of the grant. The separate judgments provide little, if any, clarification on the point.

Toohey J appeared to take the view that extinguishment could only occur where there was a clear and plain intention to extinguish or where the extinguishment was implicit, ie where it was not possible for native title and the other relevant interests to coexist.[102] The matter is to be determined by reference to the

[93] Ibid.
[94] Ibid.
[95] Ibid 263–4, 272–3.
[96] (1992) 175 CLR 1, 68.
[97] *Wik* (1996) 141 ALR 129, 186.
[98] Ibid 172.
[99] Ibid 158.
[100] Ibid 189–90.
[101] Ibid 190.
[102] Ibid 184.

grant and the incidents of native title.[103] On this basis, it appears that where the grant itself is not inconsistent with the continued enjoyment of native title but there is some inconsistency between the exercise of some rights under the grant and the exercise of native title rights, the latter rights cannot be exercised but may not be extinguished.[104] This view is confirmed by his Honour's reference to the lessees' non-entry onto the Mitchellton leases, namely that the interest vested upon the grant and entry was not necessary to give effect to the grant.[105] Not only does this view reinforce the distinction between the statutory rights granted and a common law lease (vesting of which was dependent upon entry), but it also suggests that specifics of the grant, rather than details of use, may result in extinguishment.

Such a view is consistent with the approaches taken by the other majority judges. Although Gaudron J did not address the issue directly, her Honour did suggest that any questions of extinguishment or impairment were questions of fact to be determined by the Federal Court in its investigation of the detail of the native title claimed.[106] The use of the term impairment is suggestive of something less than extinguishment resulting from inconsistency.

Gummow J appeared to be very careful in emphasising the extent of his decision — that none of the grants necessarily extinguished all the incidents of native title. As a result, his Honour said nothing on the issue of suspension of native title.[107] Thus, the emphasis in decision-making was on the substance of the grant, suggesting that it is those elements that will result in extinguishment.

Finally, Kirby J was very clear in his view that it is the grant of an inconsistent interest in land that will extinguish native title.[108] 'Only if there is inconsistency between the legal interests of the lessees (as defined in the instrument of lease and the legislation under which it was granted) and native title ... will such native title to the extent of the inconsistency be extinguished.'[109] Again, this view, together with the lack of emphasis placed upon the non-entry into occupation of the Mitchellton lease suggests that it is the grant itself, rather than use of the land, that will extinguish native title.

An important point of distinction between the judgment of Toohey J and the other majority judges was in their treatment of 'true leases'. Both Gaudron J, by implication, and Gummow J indicated that a true lease, that is a common law lease, will extinguish native title.[110] On the other hand, Toohey J[111] goes to some lengths to clarify this and limit the views expressed by the court in *Mabo* and correct the view of that decision expressed in the Preamble of the Native Title Act in relation to leases. His Honour first reaffirmed 'the need for a clarity of

[103] Ibid.
[104] Ibid 185.
[105] Ibid 187.
[106] Ibid 218.
[107] Ibid 248.
[108] Ibid 272.
[109] Ibid 279.
[110] Ibid 209 (Gaudron J), 226 (Gummow J).
[111] Ibid 183–4.

intention' to extinguish native title[112] and then went on to suggest that too much weight had been placed upon those parts of the judgments of Brennan J[113] and Deane and Gaudron JJ[114] in *Mabo* which suggest that leasehold estates would extinguish native title. 'At their highest, the references are obiter.'[115] Such a comment was not necessary as the case was essentially decided on the basis that the interest in question was not a leasehold estate. However, as with the discussion of the existence and effect of the Crown's reversion, this view further contributes to the notion that leasehold estates may not in fact extinguish native title.

Brennan CJ was also of the view that the grant extinguishes native title, either because it is a grant of exclusive possession or because of the Crown's reversion. The notion of suspension of native title is inconsistent with the operation of the doctrines of tenure and estates.[116]

There is a clear majority indicating that a fee simple grant will always extinguish native title.[117] However in relation to leases, either leasehold estates or statutory grants called leases, the situation is not as clear. The possibility of suspending native title has been raised. However, the parameters of extinguishment remain uncertain.

D *The Comalco and Pechiney Leases*

The Federal Court decision on validity of the bauxite mining leases and a claim to any benefits arising thereunder was confirmed by all seven justices. The reasoning of Brennan CJ was that any irregularity in the negotiation of the agreements upon which the grant of interests were based, either as a result of a breach of fiduciary duty or the rules of natural justice, was overridden by the legislation authorising the grant of the interests.[118] Kirby J, with whom the majority agreed on these points, also confirmed the validity of the grants in both cases, relying on the force of the State Agreement Acts which provided a specific statutory framework for the agreements in question and the grants made pursuant to those agreements.[119] While this result cannot be said to determine the issue of the possibility of a fiduciary duty owed by the Crown to Indigenous people, first raised by Toohey J in *Mabo,*[120] it is clear that any such claim can now be met with an argument based upon statutory authorisation, provided the statute clearly permitted the action to be done in the manner in which it was done.

112 Ibid 183.
113 *Mabo* (1992) 175 CLR 1, 68 (Brennan J).
114 Ibid 110 (Deane and Gaudron JJ).
115 *Wik* (1996) 141 ALR 129, 183.
116 Ibid 159–60.
117 Ibid 157 (Brennan CJ, by implication), 184 (Toohey J), 209 (Gaudron J, by implication), 226 (Gummow J), 272 (Kirby J).
118 Ibid 163.
119 Ibid 290–1.
120 (1992) 175 CLR 1, 199–205.

V COMMENT

The immediate outcome of *Wik* was a return of the matter to the Federal Court for determination of the facts including whether native title exists and if so the incidents of native title claimed. This determination will form the basis of inquiry about the capacity of native title and pastoral interests to coexist and the extent of any factual inconsistency. In relation to other cases, the consequence is that each native title claim and each grant of an interest under pastoral lease legislation must be considered case by case.[121] The case also raised significant issues about the coexistence of interests and the on-going relationship between native title holders and pastoralists, the validity of acts taken and grants of interests made in relation to pastoral lease land since the commencement of the Native Title Act on 1 January 1994 and the consequences for future acts on pastoral lease land.

The case by case approach has provided the basis for major criticism both because of the delay involved and the uncertainty surrounding the definition of precise native title and pastoralist rights.[122] The response of state governments and industry organisations has been to call for legislation to override native title rights in order to create certainty both in relation to coexisting rights and management of pastoral activities as well as the conduct of future, non-pastoral activities on pastoral leases such as mining.[123] At present such activities are governed by the code for future activity established in the Native Title Act,[124] the validity of which was confirmed in the *Native Title Case*.[125] Validating legislation was also sought in relation to actions taken since the Native Title Act came into operation on 1 January 1994 which had not complied with the future act requirements of the Act.[126] The response of Indigenous people has been to suggest the development of regional land use agreements as the basis for shared use of and coexistence on land.[127]

The Government has released a ten point plan setting out its proposed response to the decision.[128] The plan incorporates both aspects of *Wik* and broader elements of amendments to the Native Title Act already introduced into Federal Parliament.[129] While an extensive consideration of the proposals is not appropriate here, and their fate both in their drafting and in the Senate is uncertain, the

121 *Legal Implications of the High Court Decision*, above n 8, 9.

122 Taylor and Syvret, above n 11.

123 Lenore Taylor, 'Advice Warns of Need for Consent', *The Australian Financial Review* (Sydney), 4 January 1997, 5.

124 Native Title Act 1993 (Cth) ss 21–44.

125 (1995) 183 CLR 373.

126 *Legal Implications of the High Court Decision*, above n 8, 17.

127 Peter Gill, 'Push for Regional Agreements', *The Australian Financial Review* (Sydney), 24 January 1997, 5; The National Indigenous Working Group on Native Title, *Coexistence — Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act 1993* (April 1997).

128 *10 Point Plan*, above n 13.

129 Native Title (Amendment) Bill 1996 (Cth). See also Parliamentary Secretary to the Prime Minister, Commonwealth of Australia, *Exposure Draft of Proposed Amendments to the Native Title (Amendment) Bill 1996* (October 1996).

effect of the *Wik* related amendments can be shortly stated: 'validation of acts/grants between 1/1/94 and 23/12/96';[130] extinguishment of native title rights inconsistent with a pastoralist's activities which will be upgraded and permitted in accordance with the definition of primary production in the Income Tax Assessment Act 1936 (Cth); statutory access rights for registered native title claimants where there is 'current physical access to pastoral lease land';[131] the capacity for States and Territories to diminish native title holders' rights to negotiate over future activities on pastoral lease land. While these proposed amendments reflect acceptance of *Wik,* namely that exclusive possession is not necessarily an incident of a pastoral lease, the diminution of native title rights on pastoral leases by statute may effectively diminish the impact of the decision.[132]

The political furore provoked by the decision has clouded some of the major issues that emerge from it. Although there has been a focus on the detail of the resolution of the specific issues and their practical implications, some longer term implications also strongly emerge from the judgments. The exploration of the boundaries and rationales of extinguishment of native title have been referred to above. These considerations were characterised by a willingness of the majority to reassess the relevance of English common law principles to a very different social, political and geographical environment. The historical explorations in the majority judgments suggested a new and different environment driven by the imperatives of a settler community grappling with Indigenous peoples asserting themselves in their country and with the institutions through which land use and management might be controlled and regulated. This process continues to resonate in the political and legal discourses of contemporary Australia. The court's willingness to reassess the shape and form that should be accorded to English common law concepts in this environment raises new possibilities for the development of an inherently Australian land law regime — a view aptly captured by Gummow J:

> Traditional concepts of English land law, although radically affected in their country of origin by the Law of Property Act 1925 (UK), may still exert in this country a fascination beyond their utility in instruction for the task at hand. ... The task at hand involves an appreciation of the significance of the unique developments, not only in the common law, but also in statute, which mark the law of real property in Australia, with particular reference to Queensland. I have referred above to some of these developments. There also is the need to adjust ingrained habits of thought and understanding to what, since 1992, must be accepted as the common law of Australia.[133]

MAUREEN TEHAN*

130 *10 Point Plan*, above n 13, 2.

131 Ibid.

132 See generally, The National Indigenous Working Group on Native Title, above n 127; Hiley, above n 10; and Bryan Horrigan and Simon Young (eds), *Commercial Implications of Native Title* (1997) for a discussion of the practical impacts of both the decision and proposed responses for Indigenous people, government and industry.

133 *Wik* (1996) 141 ALR 129, 226–7.

* BA (Melb), LLB (Hons) (Mon), LLM (Melb); Lecturer in Law, University of Melbourne.