

ELECTRONIC VERSION

**THE WIK DECISION AND AFTER**

**RESEARCH BULLETIN NO 4/97**

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## ABSTRACT

*On 23 December 1996 a majority in the High Court held that the issuing of two Queensland pastoral leases under consideration in the Wik case did not necessarily extinguish native title. In each case where native title was claimed on land covered by a pastoral lease the rights conferred by the lease and the nature and content of the native title rights and interests would have to be assessed and considered. The Wik judgment is of vast significance as about 42 per cent of the Australian land mass is under pastoral lease. The judgement resulted in widespread and diverse reactions, with serious concerns about the future of the native title process and the viability of many pastoral holdings. This Research Bulletin examines the events leading up to the Wik claim, including the High Court Mabo judgement of 1992 and the Native Title Act of 1993, the judgement, and developments after the judgement up to mid May 1997. In particular, the development of Prime Minister's ten point plan and the responses to it are outlined.*



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## 1. INTRODUCTION

On 23 December 1996 a majority in the High Court held that Queensland pastoral leases under consideration in the Wik case did not confer exclusive possession upon the lessees.<sup>1</sup> The Court ruled that the leases were granted under particular statutes and therefore under the terms of those statutes and the rights they conferred. The High Court majority concluded that lessees did not have rights to exclusive possession in such a way as to make native title holders trespassers on their own land. This meant that the pastoral leases in question did not necessarily extinguish native title. Instead, two things would have to be considered in relation to each case where native title was claimed on land covered by a pastoral lease. Firstly, the nature of, and rights conferred by, the lease would have to be established. Secondly, the nature and content of the native title rights and interests would also have to be assessed and considered.

The Wik decision showed that there was no easy and general legal answer to the question of whether pastoral leases extinguish native title. Instead, as the President of the National Native Tribunal, Justice Robert French said on the day that the decision was delivered:

*“[I]t seems reasonable to infer that the relationship between pastoral leases and native title across Australia will depend, in each case, upon the terms of the Act under which the leases were granted and the incidents and content of the native title itself.”<sup>2</sup>*

About 42 per cent of the Australian land mass is under pastoral lease, with the percentage in some states being between 70 and 80 per cent. When the implications for the future development of this portion of the national estate are considered, the Wik judgement is of vast significance.

This Research Bulletin examines the events leading up to the Wik claim and judgement, the judgement itself, and developments after the judgement up to mid May 1997.

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<sup>1</sup> *Wik Peoples v State Of Queensland and Others*, No B8 of 1996; *Thayorre People v State Of Queensland and Others*, No B9 of 1996, 141 ALR 129, 1997.

<sup>2</sup> National Native Title Tribunal, ‘Wik decision’, *Media Release*, PR96/50, 23 December 1996.

## 2. HISTORICAL BACKGROUND

The Wik people are not a single tribe, but rather a group of tribes, with the Wik-prefix distinguishing a people whose combined areas extend north from the Holroyd River to the Watson on the central west of Cape York peninsula. The combined areas of the Wik peoples reach from the shores of the Gulf of Carpentaria inland to the central highlands, for a distance of 130 km. The Wikmunkan of the interior is the dominant tribe. West of the Wikmunkan is a line of four smaller tribal groups, the Wikianji, Mimungkum, Wikmean and Wikampama. Six more small groups are based around the coastal swamps, river estuaries and mangrove-lined tidal lowlands extending from the southmost tidal channels of the Holroyd River to Archer Bay and the south side of the coastal reaches of the Archer River. Their names are the Wiknantjara, Wiknatanja, Wik-kalkan, Wikepa, Wikatinda (reportedly extinct) and, finally, the Wikapatja, who inhabit the shores on the south side of Archer Bay and the nearby marshy islands.<sup>3</sup>

The Wik peoples were, until very recent times, most noted for the ecological complexity of their lives, which was a response to the wide variation of seasonal conditions in the region. Anthropologist Harry Lourandos has noted:

*So diverse were their seasonal subsistence and settlement patterns, with such a range in resources and equipment, that ... a casual observer seeing them at different times of year might mistake them for different peoples.*<sup>4</sup>

The Wik were the first Aborigines with whom the Europeans made contact. In 1606 Dutch sailors from Willem Jansz's *Duyfken* clashed with them at Cape Keerweer (Dutch for 'Turn-Again'), midway between the Holroyd and Archer Rivers. Several Dutch sailors were killed, and the incident led to the aborting of the Dutch voyage. The oral traditions of the Wik still tell of their repelling of the invaders.

Although the Wik were remote from the main thrust of nineteenth-century colonial expansion, their twentieth-century relationship with the State government and mining companies has not been a happy one. With the end of frontier anarchy and violence, the Queensland Government created reserves and the Presbyterian Church established mission stations at Weipa, Mapoon, and Aurukun between 1891 and 1904. Ursula McConnel, who made a series of visits after 1927 and was the first anthropologist to spend time with the Wik, described a militant, eloquent and vigorous group.

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<sup>3</sup> Norman B Tindale, *Aboriginal Tribes of Australia: Their Terrain, Environmental Controls, Distribution, Limits and Proper Names*, University of California Press, Berkeley, 1974, p 112.

<sup>4</sup> Harry Lourandos, *Continent of Hunter-Gatherers: New Perspectives in Australian Prehistory*, Cambridge University Press, Cambridge, 1997, p 44.

Decades later, Aborigines in all three locales had their lives adversely affected because of their proximity to the largest bauxite field in the world. In 1957 the *Comalco Act* (Qld) gave that company leases over virtually all of the Weipa reserve for 110 years. In return for leases over 600,000 hectares on central western Cape York containing up to three billion tonnes of bauxite ore, the local Aborigines were given a small living area and Comalco provided money for housing which the state government later rented back to the community. Comalco saw this as “*full discharge of the company’s obligation to the Weipa people*”. In 1959, with the publication of a notice in the *Queensland Government Gazette*, the Weipa reserve was unilaterally reduced to 124 hectares.

At Mapoon, at the northern end of the Comalco lease, the state government tried to disperse the Aboriginal community at the site of the old mission station. Although some wished to stay, in November 1963 they were removed by police and the settlement was burnt to the ground. The community was relocated to Bamaje, several hundred kilometres to the north. In 1965, under the *Alcan Act*, Alcan was given a 105 year lease over 1373 square kilometres of the Mapoon reserve. No negotiations were held with, and no compensation was offered, to the traditional owners of the land at Mapoon.

At the Aurukun reserve in late 1975, a consortium named Aurukun Associates was given a mining lease over 2000 square kilometres of the reserve until 2038. There were no appropriate consultations with the Aboriginal community, who opposed the development. Small royalty payments were to be made to the Director of Aboriginal Affairs and used as revenue for Aborigines across the state, but the Aurukun people themselves did not receive anything, although under the surface of their traditional lands were mineral reserves then estimated at \$14 billion.<sup>5</sup>

### **3. THE MABO DECISION : THE FORESHADOWING**

On 3 June 1992 the Mabo decision was handed down by the High Court. With Mabo, the High Court rejected the doctrine that Australia was *terra nullius* (land belonging to no one) at the time of European settlement. It held that the common law of Australia recognised a form of native title that reflected the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands. For the first time, the Australian legal system recognised that rights in relation to land could survive the acquisition of sovereignty by the Crown,

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<sup>5</sup> This section is based on the following sources: Henry Reynolds, ‘White injustice throws a shadow over black lands’, *Australian*, 16 August 1993, p 9; Julianne Schultz, ‘People power’, *Courier Mail*, 22 February 1997, p 24; Ursula McConnel, ‘Cape York Peninsula’, *Walkabout*, June, July and August, 1936.

or exist independently of a grant from the Crown.<sup>6</sup> However, in the High Court view, native title was “*extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates*”.<sup>7</sup>

The Mabo case did not determine if native title rights were extinguished by pastoral leases, if pastoral leases were still valid on lands where the indigenous people could prove a continuous connection, or any of the issues associated with compensation or validation. Before the Wik judgement of 1996, there was considerable uncertainty about how these questions would be resolved under the common law.

#### 4. THE NATIVE TITLE ACT 1993

While the Wik people commenced proceedings after the 1992 Mabo decision by the High Court, the case started before the enactment by the Commonwealth of the *Native Title Act 1993* (Cth). The Act was given assent on 24 December 1993 and commenced on 1 January 1994.

The ‘milestone’ *Native Title Act 1993* was introduced and passed, as Prime Minister Paul Keating remarked, as “*a response to another milestone: the High Court’s decision in the Mabo case*”. When he introduced the Native Title Bill in late 1993, Mr Keating added that one of the key aspects was “*provision for clear and certain validation of past acts - including grants and laws - if they have been invalidated because of the existence of native title*”.<sup>8</sup>

He said during his first reading speech to the Native Title Bill that

*only validated freehold grants, residential, commercial, and pastoral or agricultural leases, and validated Crown actions basically involving permanent public works, will extinguish native title.... [The government has the view that] under the common law past valid freehold and leasehold grants extinguish native title. There is therefore no obstacle or hindrance to renewal of pastoral leases in the future, whether validated or already valid.*<sup>9</sup>

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<sup>6</sup> Peter Van Hattem, ‘The implications of native title legislation for the pastoral industry’, in Richard H Bartlett and Gary D Meyers, (eds), *Native Title Legislation in Australia*, Nedlands, WA, Centre for Commercial and Resources Law, 1994, p 196.

<sup>7</sup> *Native Title Act 1993*, (Cth) Preamble.

<sup>8</sup> Hon P J Keating MP, Native Title Bill 1993, *Commonwealth Parliamentary Debates*, House of Representatives, 16 November 1993, p 2878.

<sup>9</sup> Hon P J Keating MP, Native Title Bill 1993, *Commonwealth Parliamentary Debates*, House of Representatives, 16 November 1993, p 2879.

In his reply to the Bill, the then opposition leader John Hewson claimed that it did not secure existing land titles and that all valid leases of pastoral land made prior to 1975 may still be subject to claims for native title.<sup>10</sup>

The Bill introduced to the House of Representatives in November 1993, and the many amendments debated by the Senate in December, were the outcome of extensive and tortuous negotiations over the previous year, involving Commonwealth, State and Territory governments, Aboriginal negotiators, and representatives of various sectional interests.<sup>11</sup>

The Federal Opposition Liberal/National Coalition opposed the Bill on states' rights grounds. Notably, the government had negotiated with pastoral and mining interests for an amendment that provided for the renewal of pastoral and mining leases on land subject to native claims. Although three National Party Senators supported the amendment, it was defeated by the remaining Coalition Senators, the Democrats and the Greens.<sup>12</sup>

## **5. THE WIK CLAIM**

On 30 June 1993 the Wik peoples made a claim in the Federal Court of Australia for native title to land on Cape York Peninsula in Queensland. The land claimed by the Wik people (and the Thayorre people, who claimed native title rights to an area partly overlapping the Wik claim) included land where two pastoral leases had been issued by the Queensland government.

One lease, Holroyd, was originally granted in 1945 and continues to be a pastoral lease. Surrendered in 1973, a new lease was issued on 27 March 1975 for a term of 30 years commencing on 1 January 1974 under the *Land Act 1962* (Qld). In 1945 the land was described as rough and capable of carrying one head of cattle per 60 hectares.<sup>13</sup> When the lease was renewed, specific conditions were included. The applicants were required to build fences, an airstrip, dams, yards and a house and to sow 40 hectares with seed. But many of these conditions were not met and in 1988 an inspection report found only 100 unbranded feral cattle on the property, with the only human occupants being two sleeper cutter gangs and, in the dry season,

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<sup>10</sup> J Hewson MP, Native Title Bill 1993, *Commonwealth Parliamentary Debates*, House of Representatives, 23 November 1993, p 3409.

<sup>11</sup> Tim Rowse, 'How we got a Native Title Act', *Australian Quarterly*, 65(4), Summer 1993, pp 111-132.

<sup>12</sup> Rowse, p 130.

<sup>13</sup> Julianne Schultz, 'Through the maze: Wik', *Courier Mail*, 1 March 1997, p 27.

contract musterers. No manager's residence or workers' quarters had been constructed.

The other pastoral lease, Mitchellton, was first granted in 1915, forfeited and replaced by another pastoral lease in 1919 and forfeited again in 1920. It was never occupied as a pastoral lease, and Aboriginal people have been in continuous occupation of the area, with 300 recorded as being present in 1919. In 1922 the area became an Aboriginal reserve which it remains today. None of the leases contained express reservations in favour of the Aboriginal people. Both leases were granted with the stipulation "*for pastoral purposes only*", although the *Land Act 1910* (Qld) under which the earlier lease was granted also included provision for the issue of licences to persons to enter any pastoral holding to cut, get and remove timber, stone, gravel, clay, guano, or other material. That lease was granted subject to reservations for access for searching for gold and minerals and the right of any person to go upon the land for survey.<sup>14</sup>

The Wik and Thayorre peoples argued that native title and pastoral leases coexisted on Holroyd from 1945 and on Mitchellton for almost all of the time between 1915 and 1920. Therefore, a precedent had been set that it was possible for the two types of land rights to apply to the one piece of land.<sup>15</sup>

As summarised by James Fitzgerald, the Wik claim of 1993 sought, among other relief:

- *declarations of native and possessory title to parts of the claim area*
- *declarations that the State of Queensland owes a fiduciary duty to the Wik people and that the State of Queensland is in breach of its fiduciary duty*
- *declarations that certain Acts of the Queensland Parliament and certain agreements which allowed Comalco and others to occupy and mine parts of the Wik people's traditional land were ultra vires and otherwise invalid for procedural unfairness*
- *declarations that certain Queensland and Commonwealth statutes under which Queensland granted mining leases to Comalco over coastal waters are invalid.*<sup>16</sup>

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<sup>14</sup> This paragraph and the preceding paragraph are based on the following sources: Ernst Willheim, 'Queensland pastoral leases and native title: *Wik peoples v Queensland*', *Aboriginal Law Bulletin*, 3(89), pp 20-26, February 1997; Julianne Schultz, 'Through the maze: Wik', *Courier Mail*, 1 March 1997, p 27; Philip Hunter 'The Wik Decision: Unnecessary extinguishment', in Graham Hiley, (ed) *The Wik Case: Issues and Implications*, Butterworths, Sydney, 1997, pp 6-18, (p 11).

<sup>15</sup> 'A Plain English Guide to the Wik Case: ATSIIC' *Australian National Review*, March 1997, pp 34-36.

<sup>16</sup> James Fitzgerald, 'The Wik peoples v Queensland and others', *Aboriginal Law Bulletin* 3 (70) October 1994, pp 12-13.

The Wik tried to prove through historical documents that there was a limit to Queensland's powers to legislate on land matters because the British government in the nineteenth century had on various occasions explicitly instructed Australian colonial governments to allow the Aborigines to retain access to pastoral land. Earl Grey, Secretary of State for the Colonies, had no doubt that a pastoral lease could provide for joint use by both pastoralists and indigenous people.<sup>17</sup> In the words of one 1848 Despatch to the Governor of New South Wales concerning pastoral leases:

*I think it essential that it should be generally understood that leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such Land as they may require within the large limits thus assigned to them, but that these Leases are not intended to deprive the Natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil except over land actually cultivated [or] fenced in for that purpose.*<sup>18</sup>

Therefore, if pastoral leases granted by the Queensland government did not contain a preservation of those rights of access, then the leases were invalid because they had exceeded the powers of the state.

In March 1994 Judge Drummond adjourned the case to enable the Wik to apply for a determination to the National Native Title Tribunal.<sup>19</sup> The matter was returned to the Federal Court in May 1994 to obtain a ruling on the following four questions:

*Question 1: Was the power of the Queensland Parliament, at the time of its establishment and thereafter, subject to a limitation that prevented it from enacting laws providing for the grant of pastoral leases that do not preserve native title rights?*

*Question 2: Does the grant (in Queensland) of a pastoral lease that does not contain a term preserving native title rights, and which confers exclusive possession on the lessee, necessarily extinguish native title?*

*Question 3: Has the passage since 1909 by the Queensland Parliament of certain legislation concerning minerals and petroleum extinguished any native title rights the applicants may have had in minerals and petroleum?*

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<sup>17</sup> Henry Reynolds, 'Native title and pastoral leases', *Aboriginal Law Bulletin* 3 (85), October 1996, pp 14-15.

<sup>18</sup> Despatch No 24, Earl Grey to the Governor Sir Charles FitzRoy, 11 February 1848. *Historical Records of Australia*, Series I, vol 26, p 227.

<sup>19</sup> Fitzgerald, 'The Wik Peoples v Queensland and Others', pp 12-13.

*Question 4: Can the applicants claim damages and other relief against the State of Queensland and Comalco Aluminium Ltd (Comalco), if the grant to that company by the State of rights in land, including mining rights, extinguished the native title rights the applicants may have had in that land?*<sup>20</sup>

In his judgement on 29 January 1996, His Honour Judge Drummond rejected the argument that the leases were invalid, saying that:

*It may be said that it was the policy of the Imperial government, for a time, to protect what are now identified as native title rights from extinguishment by the activities of the colonists and, in particular, the pastoralists. ... However, the Imperial authorities never took any action to compel the Governor to implement that policy, as they could have done if they wished.*<sup>21</sup>

In effect, Drummond ruled that the Wik people's native title was extinguished by pastoral leases over their land. As well as this, any native title rights the Wik had to minerals or petroleum in their country had been extinguished by state legislation which transferred ownership of those resources to the Crown. Drummond rejected the arguments advanced by the Wik that they were entitled to compensation for the extinguishing of the native title because of the state's fiduciary obligation to protect their rights and interests.

He held that each of the leases in question conferred on the lessee "*rights to exclusive possession*" of the land and that therefore the grant of each lease "*necessarily extinguish[ed] all incidents of Aboriginal title ... in respect of the land demised under the pastoral lease.*"<sup>22</sup> However, he did not decide whether the appellants were the holders of native title rights in respect of the leased land. It has since been remarked by Toohey J: "*That matter was not explored, and is shut out by his Honour's answers to the questions. The result is to clothe the principal questions with a certain unreality.*"<sup>23</sup>

On 22 March 1996 appellants were granted leave to appeal to the Full Court of the Federal Court against the judgement of Drummond J. Leave was deemed necessary because his Honour's judgement was held to be interlocutory and to not have disposed finally of the proceedings. Notices of motion were filed in the Federal

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<sup>20</sup> *Wik Peoples v State Of Queensland and Others*, 134 ALR 637 at 637-638, 1996.

<sup>21</sup> *Wik Peoples v State Of Queensland and Others*, 134 ALR 637 at 662, 1996.

<sup>22</sup> *Wik Peoples v State Of Queensland and Others*, 134 ALR 637 at 664, 1996.

<sup>23</sup> *Wik Peoples v State Of Queensland and Others*, Judgement of Toohey J, 141 ALR 129 at 166, 1997.

Court seeking removal of both matters to the High Court, and an order to that effect was made on 15 April 1996.<sup>24</sup>

The High Court hearings began on 11 June 1996. During the hearings the Commonwealth Solicitor-General, Gavan Griffith QC said that if the High Court ruled that native title could survive the grant of a pastoral lease, it would “*fracture the skeleton*” that gives land law its shape in Australia. But counsel for the Wik people Walter Sofronoff QC said in his final address that the Court could uphold the Wik argument without the court “*fracturing the skeleton*” of Australian land law. One reason for this was that pastoral leases were novel statutory creatures and did not give the exclusive possession conferred by common law leases. Of the 70 varieties of landholding created by statute, only one, freehold, would necessarily extinguish native title. All others would have to be examined to see if they conferred rights inconsistent with native title rights.<sup>25</sup>

## 6. THE HIGH COURT JUDGEMENT

The High Court judgement, which was handed down on 23 December 1996, determined by a 4-3 majority that general words in a statute should not be presumed to extinguish native title without clear and plain intention.<sup>26</sup> Therefore, pastoral leases issued under the laws of the various Australian states and territories do not necessarily extinguish native title. The majority held that it was possible, in circumstances which they did not attempt to define, that pastoral leases and native title rights of various kinds, might co-exist.

The other questions, as to whether claims of alleged breach of fiduciary duty and failure to accord natural justice could be maintained against the State of Queensland and the mining companies, were unanimously answered ‘No’, and are beyond the scope of this Research Bulletin, which considers the native title aspects of the Wik claim only.

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<sup>24</sup> ‘Wik decision on native title and pastoral leases’, *Legal Reporter* 18(1), 6 January 1997, p 4. According to John B Saunders (ed), *Words and Phrases Legally Defined* (3<sup>rd</sup> ed), Butterworths, London, 1989, Vol 2, p 467, interlocutory applications are those “*which do not decide the rights of parties, but are made for the purpose of keeping things in status quo till the rights can be decided, or for the purpose of obtaining some direction of the Court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the Court ultimately to decide upon the rights of the parties*”.

<sup>25</sup> Bernard Lane, ‘Title, leases can co-exist: Wik counsel’, *Australian*, 14 June 1996, p 6; Bernard Lane, ‘Wik victory would fracture law: QC’, *Australian*, 13 June 1996, p 2.

<sup>26</sup> *Wik Peoples v State Of Queensland and Others*, No B8 of 1996; *Thayorre People v State Of Queensland and Others*, No B9 of 1996, 141 ALR 129, 1997.

The majority issued a statement, described as a postscript, recognising that “*the significance of the answers proposed [in the judgement] should be properly understood*”.<sup>27</sup> In the statement, there was an admission that it was not possible for the High Court to “*answer questions which, no doubt, it was hoped would resolve all important issues between the parties*”.<sup>28</sup>

The remainder of the statement read:

*To say that the pastoral leases in question did not confer rights to exclusive possession on the grantees is in no way destructive of the title of those grantees. It is to recognise that the rights and obligations of each grantee depend upon the terms of the grant of the pastoral lease and upon the statute which authorised it.*

*So far as the extinguishment of native title rights is concerned, the answer given is that there was no necessary extinguishment of those rights by reason of the grant of pastoral leases under the Acts in question. Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees. Once the conclusion is reached that there is no necessary extinguishment by reason of the grants, the possibility of the existence of concurrent rights precludes any further question arising in the appeals as to the suspension of any native title rights during the currency of the grants.*<sup>29</sup>

Expressed in simple terms, the majority concluded that undue emphasis should not be placed on leasehold interests, but that pastoral leases should be seen as arising out of statutes created for uniquely Australian conditions.<sup>30</sup> The nineteenth-century Europeans believed there was a need for some form of title, albeit not residential title over the vast and remote tracts of land where they needed to carry out their grazing activities, but where Aboriginal people continued to live. London saw no need to import into pastoral leases all the features of leases in English leasehold tenures, particularly the implied right of exclusive possession to the pastoralist in circumstances where the Queensland parliament did not provide for such a right expressly in the legislation. Pastoral leases should instead be seen as creatures of statute, and their rights and obligations should be determined by the statute’s construction.

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<sup>27</sup> *Wik Peoples v State Of Queensland and Others*, at p 189.

<sup>28</sup> *Wik Peoples v State Of Queensland and Others*, at p 190.

<sup>29</sup> *Wik Peoples v State Of Queensland and Others*, at p 190.

<sup>30</sup> Hunter, ‘Unnecessary extinguishment’, in Hiley (ed), *The Wik Case: Issues and Implications*, pp 12-13.

While the two leases in question had given Europeans access to the leased land for various agricultural and mining purposes, there were no provisions in them allowing the lessees to expel Aboriginal people known to be on the land, or to undertake activities necessarily inconsistent with native title.<sup>31</sup> Because of this, the majority concluded that the leases in question did not automatically confer exclusive possession on the lessees.

## 7. RESPONSES AND DEVELOPMENTS TO MAY 1997

### 7.1 INITIAL RESPONSES

From the time that it was handed down, the Wik decision drew a wide range of reactions, particularly from the two groups most affected - Aborigines and natural resources (pastoral and mining) interests. The ATSIC chairman, Gatjil Djerrkura welcomed the High Court's decision, saying that it was "*grounded in common sense*" and "*inherently fair*". He also said:

*As pastoral leases cover a considerable portion of the Australian continent this had created some difficulties for all concerned. The situation has now been clarified to a very considerable degree, and the basic uncertainty surrounding the possibility of co-existence of pastoral leases and native title has been settled.*<sup>32</sup>

Professor of Aboriginal Studies at the University of the Northern Territory and member of the Council for Aboriginal Reconciliation, Marcia Langton, accused the critics of the decision of "*manufactured hysteria*", citing the fact that the Wik finding at common law of coexistence was already enshrined in legislation in the Northern Territory, Western Australia and South Australia, allowing Aboriginal people access to pastoral leases.<sup>33</sup> Langton claimed that "*there is no serious suggestion that these statutory rights have threatened pastoral operations in the past. Rather, they show that coexistence can and does work*". She also claimed that, contrary to statements made by "*the more extreme parts of the pastoral industry*", there was no evidence that the Wik decision was economically detrimental to pastoralists, the security of tenure for pastoralists was not in jeopardy, the land values of pastoral leases would not fall, and the banks would not foreclose on their loans and mortgages. With regard to the last, she cited the 2 June

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<sup>31</sup> Department of the Parliamentary Library, *Pastoral Leases and Native Title - the Wik Case*, Research Note, No 23, Canberra, February 1997.

<sup>32</sup> ATSIC, 'A Victory for Commonsense and Fairness', *ATSIC Media Release*, 23 December 1996.

<sup>33</sup> Marcia Langton, 'Wik opponents weak on logic', *Australian Financial Review*, 10 January 1997, p 18.

1996 comment by Ian Gilbert of the Australian Banks Association that he had been unable to identify any incidents of “‘Concern over native title as an issue in so far as a bank and its lending and security position is concerned’ because ‘invariably a bank will look to the stock that is on the land rather than the land itself as its primary source of security’”.<sup>34</sup>

But the positive reactions of Djerrkura and Langton were not shared in all quarters. Many of the rural and mining associations were critical of the decision and concerned about its implications. Larry Acton, President of the UGA said: “*It is vital that graziers use their collective voice in support of the complete extinguishment of native title on pastoral leases to ensure our industry has the certainty it requires to properly function.*” Acton contradicted Langton’s claims regarding possible bank foreclosure on affected properties, and claimed that there was “*strong evidence to suggest banks are reassessing lending arrangements which will have a direct impact [on] equity, and with more than 28 percent of Queensland under claim, the confidence of existing and potential investors has been shaken*”.<sup>35</sup>

The Prime Minister’s New Year message, delivered eight days after the Wik judgement, promised predictability on the issue of native title. “*In the wake of the Wik decision, which altered one of the basic tenets of previous thinking on native title, responses are required which deliver both predictability and justice to all concerned. The responsibility of delivering such a balanced and fair outcome does not rest with governments alone.*”<sup>36</sup>

## 7.2 QUEENSLAND LAND ADMINISTRATION

On 8 January 1997 the Queensland Minister for Natural Resources, Hon Howard Hobbs, issued a press release saying that all land administration and natural resources matters in Queensland had virtually come to a halt as a result of the Wik decision. The Minister said that all substantial property development on leasehold land, such as new dams, stockyards, residences, fencing, land clearing and other similar improvements, should not proceed without the approval of the traditional owners and that the decision also affected “*a wide range of other areas, such as upgrading land tenures, issue of quarry permits and water licences, the dedication of land for roads, vesting of tidal land in the Crown under the Harbours Act, and*

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<sup>34</sup> Langton, ‘Wik opponents weak on logic’, p 18.

<sup>35</sup> Larry Acton, ‘Vital to extinguish native title’, *Queensland Country Life*, 13 February 1997, p 22.

<sup>36</sup> Hon John Howard MP, ‘New Year’s Message - The Year Ahead’, Media Transcript, 31 December 1996. [Http://www.nla.gov.au/pmc/pressrel/newyear.html](http://www.nla.gov.au/pmc/pressrel/newyear.html)

*the beds and banks of water courses*".<sup>37</sup> The decision meant that many of the areas of administration traditionally dealt with by the Department of Natural Resources were now on hold. It was also possible that some of the sections of the Land Act were invalid because of the Wik decision, the uncertainty meant that leasehold properties could not be further developed nor the tenure upgraded, and that there were potentially hundreds of invalid acts that the Department had undertaken in relation to the granting of leases, in the belief that pastoral leases extinguished native title.

On 16 January 1997 a directive was issued from the Minister to the Department of Natural Resources (DNR) listing the land and resource management dealings that could not proceed without the appropriate investigation through the Native Title Tribunal (NTT) and those that could. While the directive potentially put on hold around 10,000 permits, licences and tenure agreements a year, the Department continued to process a range of land administration and resource issues unaffected by the Wik decision. At the time information from the Department showed that the High Court decision had affected the majority of the 4000 pastoral-type leases, many of the 650 Land Act permits that are issued annually, over half of the 1000 road actions, including permanent closures, and approximately half of the 5500 freehold Deeds of Grant issued annually.<sup>38</sup>

In February the Minister for Natural Resources cited a number of issues that had affected people in towns and cities and in different walks of life other than rural landholders. Examples included a truck operator who could not access the gravel and soil that he had previously supplied to local users, shire councils who could not get quarry materials for the construction and maintenance of roads, bridges and other capital works, and a communication company that could not install half a million dollars worth of equipment as part of a pipeline project because the sites required involved leased land.<sup>39</sup>

The Premier partially lifted the freeze in mid-March. He said, according to press reports:

*Our action will free up many, but not all, earlier frozen land dealings. It has been determined that leases with the capacity to be freehold can and will be processed. This will impact on about 10 percent of pastoral leases. On other forms of*

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<sup>37</sup> Hon H Hobbs MLA, 'Wik decision puts land dealings, development on hold', *Ministerial Media Statements* 5-11 January 1997, p 110.

<sup>38</sup> Hon H Hobbs MLA, 'Minister reinforces advice on Wik decision', *Ministerial Media Statements* 12-18 January 1997, pp 50-51.

<sup>39</sup> Hon H Hobbs MLA, 'Wik problems on the rise', *Ministerial Media Statements*, 16-22 February 1997, p 83.

*pastoral leasehold, most basic acts will be able to proceed as quickly as possible after case by case research. But there will be potential complications in those areas already affected by native title claims, which cover approximately 28 percent of the state and affect several thousands of leases.*<sup>40</sup>

The Premier said the Government would renew mining leases granted before the proclamation of the Native Title Act in 1994. This would permit renewal of 254 mining leases, 94 mining claims and one petroleum lease, and enable renewal of a further 155 mining leases and 100 mining claims that will mature in 1997. In relation to newer leases, the Premier was reported as follows:

*In relation to renewal of other mining leases issued since January 1, 1994, or in the case of new mining leases, the Government will make decisions on a case by case basis after weighing the risks and determining whether the right to negotiate process was necessarily involved. If the right to negotiate must be involved, then the Government will consider, on a case by case basis, seeking a contribution from mining companies to cover all, or some of the state's costs.*<sup>41</sup>

Although the freeze had been partially lifted, in May 1997 the validity of approximately 800 mining leases granted by the Queensland Government over pastoral lease land was still in doubt, and mining leases issued since 1994 (without following the right to negotiate procedures) will be invalid if native title can be shown to exist. However, at the very least the Federal Government is expected to legislate to validate these mining leases, and native title holders will be given compensation for any extinguishment of native title that results from validation.<sup>42</sup>

### 7.3 CAIRNS SUMMIT

In January 1997 a 'Wik summit' was held in Cairns between indigenous people, miners, farmers and other interested parties. At the outset of the summit, the Chairman of ATSIC, set down three "key principles that indigenous leaders consider essential for achieving a just outcome for indigenous people".

- 1) *There must be no extinguishment of common law rights to native title on pastoral leases;*
- 2) *The Racial Discrimination Act must not be amended or breached for any reason;*  
*and*

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<sup>40</sup> Peter Morley 'Government takes 'reasonable' risk on Wik land claims', *Courier Mail*, 14 March 1997, p 2.

<sup>41</sup> Morley 'Government takes 'reasonable' risk on Wik land claims', p 2.

<sup>42</sup> 'The end of Wik', *Issues* (Queensland edition), May 1997. (*Issues* is the magazine of Clayton Utz, solicitors and attorneys.)

- 3) *The resolution of native title issues must produce real economic, social and cultural outcomes for Aboriginal people.*<sup>43</sup>

The Cairns Summit and other consultations and negotiations have led to a position paper produced by the National Indigenous Working Group on Native Title (NIWG) entitled *Coexistence - Negotiation and Certainty*, which responds to the Wik decision and the government's proposed amendments to the *Native Title Act*. NIWG consists of Native Title Representative Bodies, the Aboriginal and Torres Strait Islander Commission, the Indigenous Land Corporation, the Aboriginal and Torres Strait Islander Social Justice Commissioner and the National Aboriginal and Islander Legal Services Secretariat.

NIWG based their negotiating position on, among other key principles, that of no extinguishment of native title without the informed consent of native titleholders, and no *de facto* extinguishment of native title by "*physical connection*" tests, the minimisation of native title rights through codification, the imposition of sunset clauses on claims and the preclusion of towns, cities and waterways from claims.

The NIWG affirmed their recognition of the legitimate rights of all parties including pastoralists and native titleholders. However, they rejected the blanket validation of potentially invalid interests granted in land since 1 January 1994. The NIWG, however, signalled their preparedness to discuss with the Government the categories of grant to be validated and the mechanisms to ensure that native title parties were treated fairly and expeditiously. They also noted their belief that native title rights were the key to addressing the economic disparity between indigenous and non-indigenous Australians which otherwise would widen significantly in the next decade.<sup>44</sup>

#### **7.4 THE PRIME MINISTER'S 10 POINT PLAN**

In April, the Prime Minister signalled that he did not intend to extinguish native title over pastoral leases, as had been demanded by members of the National Party and the National Farmers Federation,<sup>45</sup> and that they and others had to accept "*the*

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<sup>43</sup> 'PM's Wik meeting welcomed', *Media release (ATSIC)*, 21 January 1997. Obtained from ATSIC Internet site, <http://www.atsic.gov.au/atsic/media/210197.htm>.

<sup>44</sup> 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. Obtained from Internet at <http://www.edime.com/nativetitle/main.htm>.

<sup>45</sup> Lenore Taylor, 'Wik compromise essential: PM' *Australian Financial Review* 7 April 1997, p 7.

*sensitivity of the Aboriginal community to the notion of extinguishment of title” while Aborigines needed to accept that the High Court Wik decision could not be automatically accepted. An agreed outcome, however, could still be possible “within these two areas of understanding ... [one] that delivers respect for native title, but by the same token guarantees security, predictability and certainty, and an avoidance of endless block by block litigation over perhaps 40 to 50 per cent of the land mass of Australia”.*<sup>46</sup>

According to Daryl Melham, Opposition spokesman for Aboriginal Affairs, “*Even if it was constitutional, extinguishing native title would mean billions of dollars in compensation and effectively give pastoralists freehold title for the first time*”.<sup>47</sup> But the leader of the National Party Tim Fischer rejected this view saying that quashing native title on pastoral leases but retaining it elsewhere was a “*fair*” and “*effective*” solution to the uncertainties created by the Wik decision.<sup>48</sup>

In April 1997 the Prime Minister announced a proposed ten point plan aimed at reconciling the National Party and the farmers and the Aboriginal negotiators. The current version of the plan, as released on 8 May 1997, is as follows:

**1. Validation of acts/grants between 1/1/94 and 23/12/96**

*Legislative action will be taken to ensure that the validity of any acts or grants made in relation to non-vacant crown land in the period between passage of the Native Title Act and the Wik decision is put beyond doubt.*

**2. Confirmation of extinguishment of native title on 'exclusive' tenures**

*States and Territories would be able to confirm that 'exclusive' tenures such as freehold, residential, commercial and public works in existence on or before 1 January 1994 extinguish native title. Agricultural leases would also be covered to the extent that it can reasonably be said that by reason of the grant or the nature of the permitted use of the land, exclusive possession must have been intended. Any current or former pastoral lease conferring exclusive possession would also be included.*

**3. Provision of government services**

*Impediments to the provision of government services in relation to land on which native title may exist would be removed.*

**4. Native title and pastoral leases**

*As provided in the Wik decision, native title rights over current or former pastoral leases and any agricultural leases not covered under 2 above would be*

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<sup>46</sup> Taylor, p 7.

<sup>47</sup> David McKenzie, ‘Farmers in Wik land grab: Labor’, *Australian* 31 March 1997, p 4.

<sup>48</sup> McKenzie, p 4.

*permanently extinguished to the extent that those rights are inconsistent with those of the pastoralist.*

*All activities pursuant to, or incidental to, 'primary production' would be allowed on pastoral leases including farmstay tourism, even if native title exists, provided the dominant purpose of the use of the land is primary production. However, future government action such as the upgrading of title to perpetual or 'exclusive' leases or freehold, would necessitate the acquisition of any native title rights proven to exist and the application of the regime described in 7 below (except where this is unnecessary because the pastoralist has an existing legally enforceable right to upgrade).*

#### **5. Statutory access rights**

*Where registered claimants can demonstrate that they currently have physical access to pastoral lease land, their continued access will be legislatively confirmed until the native title claim is determined. This would not affect existing access rights established by state or territory legislation.*

#### **6. Future mining activity**

- *For mining on vacant crown land there would be a higher registration test for claimants seeking the right to negotiate, no negotiations on exploration, and only one right to negotiate per project. As currently provided in the NTA, states and territories would be able to put in place alternative regimes with similar right to negotiate provisions.*
- *For mining on other 'non-exclusive' tenures such as current or former pastoral leasehold land and national parks, the right to negotiate would continue to apply in a state or territory unless and until that state or territory provided a statutory regime acceptable to the Commonwealth which included procedural rights at least equivalent to other parties with an interest in the land (e.g. the holder of the pastoral lease) and compensation which can take account of the nature of coexisting native title rights (where they are proven to exist).*

#### **7. Future government and commercial development**

- *On vacant crown land outside towns and cities there would be a higher registration test to access the right to negotiate, but the right to negotiate would be removed in relation to the acquisition of native title rights for third parties for the purpose of government-type infrastructure. As currently provided in the NTA, states and territories would be able to put in place alternative regimes with similar right to negotiate provisions.*
- *For compulsory acquisition of native title rights on other 'non-exclusive' tenures such as current or former pastoral leasehold land and national parks, the right to negotiate would continue to apply in a state or territory unless and until that state or territory provided a statutory regime acceptable to the Commonwealth which included procedural rights at least equivalent to other parties with an interest in the land (e.g. the holder of the pastoral lease) and compensation which can take account of the nature of co-existing native title rights (where they are proven to exist).*

- *The right to negotiate would be removed in relation to the acquisition of land for third parties in towns and cities, although native title holders would gain the same procedural and compensation rights as other landholders.*
- *Future actions for the management of any existing national park or forest reserve would be allowed.*
  - *A regime to authorise activities such as the taking of timber or gravel on pastoral leases, would be provided.*

### **8. Management of water resources and airspace**

*The ability of governments to regulate and manage surface and subsurface water, off-shore resources and airspace, and the rights of those with interests under any such regulatory or management regime would be put beyond doubt.*

### **9. Management of claims**

- *In relation to new and existing native title claims, there would be a higher registration test to access the right to negotiate, amendments to speed up handling of claims, and measures to encourage the States to manage claims within their own systems.*
  - *A sunset clause within which new claims would have to be made would be introduced.*

### **10. Agreements**

*Measures would be introduced to facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery.*

Some of the aspects of this plan, such as the possibility that a sunset clause for native title claims would be removed and that any legislation could provide for regional and local agreements, represented concessions on the part of the Prime Minister's taskforce on Wik.<sup>49</sup> On 23 April, the Federal National Party leader, Tim Fischer, came out in support of the 10-point plan, which he saw as aimed at giving pastoralists security while falling short of total extinguishment of native title on pastoral leases. But the National Party's federal president and the Queensland National Party Premier both called for the Commonwealth to extinguish common law native title on pastoral leases.<sup>50</sup>

The ATSIC chairman, Gatjil Djerrkura, said that Aborigines would seek to amend the plan in the Senate and challenge it in the courts. The Aboriginal negotiators indicated that their main problems with the plan were the very broad definition of "pastoral activities" which pastoralists could undertake without any interference from native title holders and the removal of the right to negotiate over future

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<sup>49</sup> Lenore Taylor 'Wik deal imminent: Nats give nod to Prime Minister's 10-point plan', *Australian Financial Review* 21 April 1997, p 1.

<sup>50</sup> Michelle Grattan, 'Fischer isolated from Nats over native title', *Australian Financial Review*, 24 April 1997, p 1.

developments, such as mines and tourism developments, occurring on pastoral leases where coexisting native title had been proven.<sup>51</sup> The UGA president Larry Acton reiterated his earlier call for extinguishment of native title on leasehold properties and said landholders had been betrayed, and rural and mining investors would be driven out of Queensland because they did not want to be trapped in the complex legal issues following Wik.<sup>52</sup>

In late April, one key aspect of the original plan was amended, at the instigation of the Queensland Government. As the Premier told Parliament on 29 April, under the Federal Government's original plan, a registered native title claimant would have automatic statutory rights of access once they lodged a claim.<sup>53</sup> However, the Prime Minister withdrew that proposal, and statutory rights of access in the modified plan will only apply where they exist currently, in Western Australia, South Australia and the Northern Territory. The issue of what proportions of compensation the State and Federal governments would meet was also unresolved. However, the Queensland Treasurer Joan Sheldon has said that the state could not meet a compensation level of more than 25 percent.<sup>54</sup>

On 17 May the Prime Minister addressed a gathering of 2000 in Longreach on the 10-point plan. During the meeting, the Prime Minister promised that his plan would deliver land tenure security without producing the instability, expense and years of constitutional challenges which would result from the blanket extinguishment of native title. He gave a specific set of guarantees that no pastoral leaseholder would lose *"anything at all"*.

Press reports quoted the Prime Minister as saying: *"You can't lose your land. The legislation we are going to introduce in Federal Parliament will confirm that situation and put beyond any legal doubt that those sorts of fears are completely unfounded"*. Mr Howard indicated that no pastoral leaseholder would have their title diminished by a native title claim. Pastoralists would be able to conduct their activities in any way connected with primary production without being interfered with by a native title claim. *"We've had all this talk over the past few months that you'll need the permission of native title claimants to put in a fence, to sink a dam*

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<sup>51</sup> Lenore Taylor, 'Broad ALP support for Wik plan', *Australian Financial Review*, 30 April 1997, p 3.

<sup>52</sup> Craig Johnstone and Tony Koch, 'PM stands firm amid Wik furore', *Courier Mail*, 29 April 1997, p 1.

<sup>53</sup> Hon R E Borbidge MLA, 'Wik case', Questions Without Notice, *Queensland Parliamentary Debates*, 29 April 1997, pp 1022-1024.

<sup>54</sup> Johnstone and Koch, 'PM stands firm amid Wik furore', p 1.

*or do anything that is incidental to the carrying on of your business. Can I say: no, no, no, that cannot happen....when this legislation is passed through the national Parliament you will have the full and unfettered capacity to run your properties".* The Prime Minister also stated that any compensation payments in relation to compulsory acquisitions of property would be borne by state and federal governments, bogus claims would be eliminated, and unless a claimant had a current physical connection with the land, traditional access would not be permitted.<sup>55</sup>

Despite the Prime Minister's assurances about his plan at Longreach, a straw poll indicated that only 150 of the 2000 present accepted it, with most still wanting no less than immediate extinguishment of native title on all land under pastoral leases. However, some graziers, such as the Longreach district president of the UGA, later conceded that while blanket extinguishment was not politically achievable, the Prime Minister's plan was at least that.<sup>56</sup>

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<sup>55</sup> Sid Maher, 'Howard's poll threat', *Sunday Mail*, 18 May 1997, p 5.

<sup>56</sup> David Fagan, 'Graziers find virtue in persistence', *Australian*, 19 May 1997, p 5.

On 20 May the Queensland Premier reportedly indicated that Queensland would “*work the best we can within the Commonwealth’s framework. ... The reality is that we can’t work outside what the Federal Parliament legislates for*”.<sup>57</sup> However in a press release Mr Borbidge denied that he had accepted the Prime Minister’s plan. “*We now have to wait and see if the Prime Minister’s promises are translated into legislation. If, when that legislation is drawn up, I believe it does deliver certainty, then I will support it. If it does not, I will not.*”<sup>58</sup> No timetable for the legislation has been released.

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<sup>57</sup> Scott Emerson, David McKenzie and Georgina Windson, ‘Borbidge signals Wik acceptance’, *Australian* 21 May 1997, p 2.

<sup>58</sup> Hon RE Borbidge MLA, ‘10 Point Plan’, *Ministerial Media Statements*, 18-24 May 1997, p 2.



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