Various papers were presented in the *Intimacy and Justice* section. Rosemary Auchmuty of the University of Westminster Law School put the case against marriage by a lesbian feminist property lawyer, arguing that other legal models might more appropriately obtain justice for lesbians and gays. It was suggested that gaining rights for the coupled perpetuates the discrimination against the uncoupled, and that a more appropriate response might be to dismantle the privileges enjoyed by the married (some of which were breaking down of their own accord) and to work towards a society of independent individuals bound by freely chosen rather than institutionalised obligations.

Land law was viewed as an interesting alternative to family law because it treats everyone as individuals.

Sarah Adams Carter of Pembroke College Oxford looked at the attempts to prosecute the homosexual sado-masochist ring in *R v Brown* and the lack of legal mechanisms to deal with the situation. The case was examined with a view to establishing whether it was a truly political process and the question posed — when does state protection become state interference?

Ivana and Milada Bacik of Dublin Law School focussed on the legal demands of women in the context of changes to the law on rape in Ireland.

Barbara Ann Hocking of the Faculty of Law (Justice Studies) at QUT in Brisbane presented a paper on the many past and current uses as well as the possible legal potential of criminal conspiracy.

Another paper presented by Barbara Ann Hocking and written together with Lee Godden and Graeme Orr of the Faculty of Law at Griffith University focussed on the Australian guns buy-back scheme, raising a feminist perspective on the uses of public moneys, of special levies and of human rights and rights to compensation under the economic rationalism of the Howard Government.

In another Australian paper, Margaret Davies of Flinders University addressed 'Heroes and Others? Questions of Identity and Politics'. This paper indicated ways in which theories could be useful in:

- understanding the multi-dimensional nature of 'alternative' political formations and the tensions inherent in coalition politics; and
- analysing mainstream policy formation.

Les Moran focused on the law of Oscar Wilde, and the significance of the production of 'Oscar Wilde' as a story of law.

Larry Backer of the University of Tulsa looked at queering theory, speaking of the conceit of revolution in law. For Backer, queer theory 'is at its best when it is queering things by performing that most thankless of tasks — the interrogation of every reiteration of popular culture within dominant and subordinated groups'.

In the section on *Citizens and Others* Greta Bird and Mark McDonnell spoke of 'Muslims in the Dock', putting the Australian courts on trial. The paper interrogated the construction of Islam by the west and the impact of this on Australian criminal justice, focusing on Islam as a scapegoat.

Janice Gray of the University of New South Wales looked at the Australian High Court's decision in *Mabo*, asking whether the decision about radical title was a radical decision.

Bill Bowring of the School of Law, University of East London looked at minority rights and the problem of nationalism, critiquing theories of minority rights and citizenship, and insisting that law has a crucial role in achieving legitimation and empowerment, while arguing that existing instruments are unable to comprehend the aspirations of peoples such as the Crimean Tatars, or to provide a framework within which justice can be achieved and conflict avoided.

Barry Collins of the University of East London gave a paper called 'Where Have all the Canaries Gone?' This looked at fantasy, commitment and the Irish peace process, arguing that the breakdown of the peace process was inevitable, since the conflict was not adequately represented by the rhetoric of the process. By corresponding the enjoyment of National fantasy to the place of the Lacanian Real, another dimension to the conflict was proposed, one which might endeavour to have the peace process taken seriously.

Many other papers were, of course, prepared for and presented at the conference, and this is only a selection from those attended by the author. Mention must also be made of the fact that, for this academic, at least, being both asked about the need for and then provided with, child minding, let alone having the children running round people's feet at lunch time, means there were no critical legal responses from this reviewer!

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NATIVE TITLE

Co-existence of native title and pastoral leases

ANNEMARIE DEVEREUX examines the High Court decision in *Wik Peoples v Queensland.*

On 23 December 1996, the High Court by a 4-3 majority decided that pastoral leases granted under the *Land Act 1910* (Qld) and the *Land Act 1962-1974* (Qld) did not *necessarily* extinguish native title. Although the case involved a common law claim of 'Aboriginal title' (defined in similar terms to 'native title' under the *Native Title Act 1993* — the NTA), it has significant implications for the indigenous community, the resource industry and the management of the NTA. Given that pastoral leases affect approximately 42% of Australia (according to the Commonwealth's submission in Wik), the resolution of at least some of the more general principles concerning pastoral leases and native title is a welcome development.

The facts

The Wik Peoples instituted an action in the Federal Court after the *Mabo* decision but before the enactment of the NTA,[1] seeking a declaration of 'Aboriginal title' in particular land. The Thayorre Peoples cross-claimed for a similar declaration in respect of part of the lands claimed by the Wik Peoples. The Queensland Government and other respondents alleged that because of the granting of pastoral leases over

part of the lands claimed (the Holroyd Pastoral Holdings and the Mitchellton Pastoral Holdings), any native title over such areas had been extinguished.

Two leases 'for pastoral purposes only' had been granted for the Holroyd Pastoral Holdings. The first was issued under the *Land Act 1910* in 1945, for a term of 30 years. It included reservations concerning the ownership, and access for the purpose of searching for and obtaining minerals and petroleum. The second was issued under the *Land Act 1962-1974* in 1975, also for a term of 30 years. It contained similar reservations and was conditional on the lessee carrying out improvements such as building dams, enclosing the property, and sowing 100 acres.

There were also two leases granted for the Mitchellton Pastoral Holdings (over land which the Thayorre Peoples claimed). The first, issued in 1915, was also expressed to be 'for pastoral purposes only' and contained reservations for minerals, while the second, issued in 1919, had reservations concerning minerals, petroleum and a right of access by 'authorised persons'. Possession was never taken up on either of the Mitchellton leases. After the later lease was surrendered to the Government in 1921, an Order in Council reserved the land for the use of Aboriginal inhabitants of Queensland.

None of the leases contained specific reservations about Aboriginal access to the land.

Procedural history

In his judgment of 29 January 1996 on the preliminary questions of law, Drummond J held that he considered himself bound by the decision of the majority (Hill J, and Nicholson J) in *North Ganalanja Aboriginal Corporation v Queensland* (1995) 132 ALR 565; 61 FCR 1 to conclude that a pastoral lease extinguished all incidents of native title since it granted to the lessees 'rights to exclusive possession'.

The appellants were granted leave to appeal to the Full Court of the Federal Court by Spender J on 22 March 1996, and Notices of Motion were filed in the Federal Court seeking removal of both matters to the High Court. An order was made to this effect, and the hearing proceeded in July 1996. At the hearing, 32 counsel appeared for the parties and intervenors and all States were represented except New South Wales and Tasmania.

High Court

The majority

Toohey, Gaudron, Gummow and Kirby JJ comprised the majority in the High Court decision, with each writing a separate judgment of considerable complexity.

The majority considered that resolution of the pastoral lease question required an examination of the consistency or inconsistency of the grants of pastoral leases (as a matter of statutory construction) with native title. Firmly rejecting the view that the use of the terms 'lease and demise' indicated a conclusive intention to grant a common law lease conferring exclusive possession, the majority focused on examining the relevant statutory provisions in detail 'without attaching too much significance to similarities which it may have with the creation of particular interests by the common law owner of land' (Mason J in *R v Toohey; ex Parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 344, quoted by Toohey J).

They concluded that there was no legislative intention to confer on the grantee a right of exclusive possession or a right to exclude Aboriginal people from their traditional lands. While acknowledging that the legislature could not be considered to have given conscious recognition to native title, they were not satisfied that there was any evident intention to exclude indigenous people from the land. Toohey J, in particular, rejected the argument that having granted the lease, the doctrines of reversion and plenum dominium came into play such that the Crown gained the 'beneficial interest'.[2] Instead, he was satisfied that once a pastoral lease expired, the land would be 'Crown Land' and the Crown would simply have the 'radical title'.[3]

The majority seem somewhat divided over the relevance of the acts of the *lessee* to the question of extinguishment of native title. Kirby J was clearest in stating that the acts of the lessee have no legal effect on native title and that one must concentrate on the grant itself. Toohey J also noted that the required activities might be inconsistent with native title rights, though the context of his statement suggests that he was concerned more with a factual comparison of legal rights of the pastoralist with the particular incidents of native title, a matter which was not before the court. Gaudron J noted that the lessee's behaviour (for example, carrying out the improvements) would, 'as a matter of fact . . . not as a matter of legal necessity' impair the exercise of native title rights, and to that extent, result in their extinguishment. However, Gummow J, appears to have gone further in regarding the performance of inconsistent acts as relevant to whether or not extinguishment takes place:

> The performance of the conditions, rather than their imposition by the grant, would have brought about the relevant abrogation of native title.

Given that the case was at a preliminary stage, there were no findings for the Court to use concerning whether the Wik and Thayorre Peoples had native title, let alone its nature. It was thus impossible to conclude whether native title was actually (rather than *necessarily)* affected. Thus, the majority confirmed the need for a case-by-case approach which compared the nature of the pastoral lease with the nature of the native title established.

Should the comparison of interests reveal inconsistency, the majority accepted that the rights of the pastoralist would prevail. Although Gummow, Gaudron and Kirby JJ seem to accept such inconsistency would result in 'extinguishment' of native title, Toohey J's interchangeable use of the language of extinguishment and suspension of enforceability of native title points to a possible future decision that particular native title rights are merely suspended during the operation of the lease, but resurrect at its conclusion. At this stage, such a position does not seem likely to win majority support.

The minority

The minority judgment was written by Brennan CJ (with whom McHugh and Dawson JJ concurred). Brennan CJ interpreted the statutes as intending to grant an interest analogous to a lease at common law (thus giving exclusive possession). Following the principles outlined in his judgment in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, he regarded the grant of a leasehold interest as inconsistent with the continued right of native title holders to enjoy native title (at least those rights connected with native title which depend on access to the land). Furthermore, once the leasehold estate was granted to a third party, the Crown held the reversionary interest. The leasehold interest and the Crown's reversionary interest exhausted the proprietary legal

interests which could attach to a parcel of land, leaving no room for any native title.

Brennan CJ rejected the appellants' argument that the Crown's power of alienation under the *Land Act* was conditioned by a fiduciary duty owed by the Crown to the indigenous inhabitants. Neither the Crown's power to extinguish native title, nor the position occupied for many years by the indigenous inhabitants *vis-a-vis* the Government was sufficient to base a 'free-standing fiduciary duty'.

Subsidiary questions

There was a subsidiary question in the case about the ability of the Wik and Thayorre Peoples to maintain an action for damages in respect of the State Government's entry into Agreements for the granting of Special Bauxite Mining Leases for breach of procedural fairness or breach of fiduciary duty where the Agreements had later been given the force of law by legislation (the Comalco and Aurukun Acts). Kirby J explained the reasons of the majority rejecting the applicant's claims. In the Court's view, the legislation clearly authorised both the execution of the Agreements and the granting of the mining leases and to maintain such an action would be to undermine the clear intention of the legislature to prevent any impugning of the Agreements.

Where to now?

The reaction to the judgment from all sides of the native title debate has been immediate. Despite the postscript of the majority to the effect that their decision was 'in no way destructive of the title' of the pastoralists, there has been concern expressed about the remaining uncertainty relating to grants under other legislation and the ongoing need to determine the extinguishment/co-existence question on a case-by-case basis. Predictably responses from the industry sector and State Governments have varied with some calling for the extinguishment of all native title over pastoral leases, others wanting legislative confirmation of the validity of all pastoral leases (especially those issued post 1994), and many questioning the best way to advance negotiations to manage the dual interests. The Commonwealth Government, whose legislation was in part based on an 'extinguishment view' of pastoral leases has yet to formulate its position, though the issue seems certain to generate much ongoing debate.

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References

1. The Wik Peoples subsequently lodged an application under the NTA and the common law action was put 'on hold'. However, the preliminary questions of law were set down under the common law action.
2. The argument of those supporting extinguishment was based on Brennan J's reasoning in *Mabo (No. 2)* (1992) 175 CLR 1 at 68 that once the Crown granted the leasehold interest, it gained the 'reversionary' interest (the future right of possession upon the expiry of the lease), and that upon the expiry of the lease, the Crown had the total legal and beneficial interest in the land, the plenum dominium. Toohey J concluded that 'reversionary' interests only arose where the holder of an estate in fee simple (ie a holder of an interest from the Crown) issues a lesser interest, not where the Crown itself is granting an interest.
3. The term 'radical title' was used by the court in *Mabo (No. 2)* to describe the Sovereign Crown's interest before it gained the full beneficial interest in the land through an appropriate exercise of sovereign power. See Rogers, 'The Emerging Concept of "Radical Title in Australia"', (1995) 12 *Environmental and Planning Law Journal* 183 at 185-6.

Youth Affairs column continued from p.39

The process before the tribunal remains an adult forum which is unlikely to be user-friendly to children. In addition, cl.45 requires a fee to be lodged with an appeal, the fee to be fixed under regulation. It is unclear whether this can be waived if a child is an applicant.

The main area where children can bring an appeal is the new provisions in relation to *The Children's Services Act*. This is to be welcomed in that children in care are a particularly vulnerable group. However, in view of the comments just made and the fact that a child may well not be supported by their Family Services Officer or parents/foster parents in making an appeal, it is unclear how accessible the system will be to these children. This indeed, is the fundamental flaw. There remains no-one who is 'there' for children. Only someone who judges them and their complaint. There is no-one to assist them to bring a complaint and advocate for them and support them during it.

Conclusion

The whole point has been missed — a Children's Commissioner should be a true *advocate* for children, that is, someone who listens to them and speaks up for and with them wherever children themselves identify issues of concern to them. Nowhere does this legislation ever mention 'the best interests of the child' or articulate any of the 'rights' as opposed to 'protection' based Articles of the Convention on the Rights of the Child. Nowhere is the 'Gillick' principle as stated by the House of Lords in 1985 and accepted into Australian law in *Marion's* case in 1992 considered. (See (1992) 106 ALR 385.)

Thus, while the politicians congratulate themselves on dealing with the issue of paedophilia, they have failed to see that children are human beings and citizens *who should be heard on all matters affecting them*, not simply on issues where adults feel 'safe' in allowing them to be heard. The 'cutting edge' needs much sharpening before Queensland can really be said to have done anything significant for its children.

National Children's & Youth Law Centre

[**Co-editor's note:** Since this item was written a Children's Commissioner, Normal Alford, has been appointed. He has already attracted some attention. According to the *Courier Mail* of 18 January 1997, the new Commissioner has been accused of being 'authoritarian' and 'out of touch' with children's issues. Apparently the new Commissioner expressed approval for laws in Singapore in relation to graffiti and similar social order laws, where a tough approach was adopted to offenders, extending even to public canings.

According to the *Courier Mail*, the Commissioner did not advocate similar laws in Australia but representatives of youth groups expressed concern about how 'in touch' the new Commissioner was with youth culture. The new Commissioner said his office had been 'inundated' with complaints against the Department of Family, Youth and Community Care in its opening weeks. Norman has made an interesting start. [PW]]