Case Note: The Wik People v The State of Queensland and Others; The Thayorre People v The State of Queensland and Others (1997) 71 ALJR 173

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1. Introduction

The decision of the High Court of Australia in *Wik*[1] provides the latest determination of the common law rights of indigenous Australians to land, in particular over which a pastoral lease has been granted. In relation to native title, *Wik* has resolved two issues of critical importance. First, the statutory grant of a pastoral lease does not necessarily confer on its grantee a right to exclusive possession. Accordingly, the statutory grant of a pastoral lease does not necessarily extinguish all incidents of native title which might subsist on the leased land. Second, determination whether the grant of a lease extinguishes any incident of native title requires comparison of the rights conferred by the lease with the character of the native title asserted. Where the comparison reveals legal inconsistency between the lease and the native title rights, the latter yields to the former to the extent of that inconsistency.

The simplicity with which those principles can be expressed disguises the deep complexity of Australian native title law reflected in the judgments rendered in *Wik*. It is the object of this case note to distil and assess the impact of the findings in those judgments. Parts 2-4 detail the procedural history of the case, the facts and questions which arose before the High Court, and the reasons given in its five judgments. Part 5 analyses the implications for

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1 *The Wik Peoples v The State of Queensland and Others; The Thayorre People v The State of Queensland and Others* (the *Wik* case) (1997) 71 ALJR 173.

the common law of native title and the *Native Title Act* 1993 (Cth) arising from the Court's treatment of the pastoral lease issue.[2]

2. The factual background and procedural history of Wik

A. The nature of the proceedings brought by the Wik and Thayorre peoples

The Wik Peoples commenced proceedings in the Federal Court of Australia on 30 June 1993[3] against Queensland and the Commonwealth of Australia.[4] The Wik sought a declaration that they enjoyed native title over some 28,000 kilometres of traditional land and waters situated south of Weipa in western Cape York Peninsula. They also sought damages, and equitable and other relief if that native title was found to have been extinguished.[5] The Thayorre peoples were added later as a respondent. The Thayorre cross-claimed against Queensland seeking declarations and relief similar to the Wik, over land near the Pormpuraaw settlement, located in western Cape York, between the Coleman and Edward rivers.[6]

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2 The *Wik* case did not deal only with the pastoral lease question. In addition, the Wik Peoples sought to impugn the validity of Special Bauxite Mining Leases granted over the land claimed by them. Those leases were granted by the State of Queensland to the Commonwealth Aluminium Corporation Pty Limited ("Comalco") and to Aluminium Pechiney Holdings Pty Limited ("Pechiney") under Agreements with those companies which were given the force of law by, respectively, the *Comalco Agreement Act* 1957 (Qld) (the *Comalco* Act) and the *Aurukun Associates Agreement Act* 1975 (Qld) (the *Aurukun* Act). The Wik framed these claims in denial of procedural fairness by Queensland, and breaches of trust and fiduciary duty by Queensland, together with, respectively, Comalco and Pechiney. As will be explained, the Court's rejection of these claims was clear and unanimous. As a result, this aspect of the case is not considered in the same detail as the pastoral lease question.

3 (1997) 71 ALJR 173 at 236.

4 Ibid.

5 Id, at 285-286 per Kirby J; Hunter, P, "Unnecessary Extinguishment", in Hiley, G (ed), *The Wik Case: Issues and Implications*, Butterworths, Sydney, 1997, p 8.

6 Id, at 197 per Toohey J; Bottoms, J, "Thayorre People v Queensland", in Hiley, G (ed), *The Wik Case: Issues and Implications*, Butterworths, Sydney, 1997, p 19.

B. The pastoral leases granted over the land claimed in the Wik Case

Two Pastoral leases had been granted over different parts of the lands which were the subject of the Wik claims.[7] The Thayorre people also made native title claims over the land area covered by the second Pastoral lease. Each Pastoral lease other than the second Holroyd lease, was specified to be granted for "pastoral purposes only."[8] Each Pastoral lease was granted subject to reservations of varying number and scope. Broadly, the reservations permitted the entry onto the leased land by the Crown and authorised third parties for purposes including pasturage, and the taking of natural materials and resources.[9]

C. The progress of the Wik Case in the Federal Court of Australia between 1994 and 1996[10]

Following the commencement of the *Native Title Act* 1993 (Cth.) ("*NTA*") in January 1994, the Wik's general law native title claim was adjourned, to enable them to pursue

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7 (1997) 71 ALJR 173 at 198 per Toohey J; The Holroyd River Holding Lease was granted in February 1945 under Part III, Division I of the *Land Act* 1910 (Qld) ("the *Land Act* 1910") for a term of 30 years from 1 October 1944. The holders of that lease surrendered it in December 1973, and were granted a new Pastoral lease on 27 March 1975, having a term of 30 years dated from 1 January 1974. The new lease was granted under s 155 of the *Land Act* 1962 (Qld) ("the *Land Act* 1962"). The first Mitchellton Pastoral Holding Lease was granted on 25 May 1915, under Part III, Division 1 of the *Land Act* 1910, for a 30 year term dating from 1 April. The lease was forfeited on 20 July 1918 for non-payment of rent, and granted again on 14 February 1919 for a 30 year term from 1 January 1919. The lessee transferred his interest to a company in September 1919, which surrendered the lease in October 1921 under s 122 of the *Land Act* 1910. Following correspondence in July 1921 between the Chief Protector of Aboriginals and the Under Secretary of the Home Secretary Department in Brisbane, an Order in Council reserved the land which had been the subject of the leases described, for use by the Aborigines of Queensland: per Gaudron J at 217-218, 229-230.

8 Ibid.

9 Id, at 254-256 per Gummow J; only some reservations were considered by the majority of the Court to be relevant to the outcome in the *Wik* case. It is most useful to describe these reservations in the course of description of each judgment.

10 A comprehensive procedural history is beyond the scope of this case note. Readers are referred to Hunter, already cited n 5, pp 7-11.

an *NTA* claim.[11] On 26 May 1994, Drummond J ordered five questions to be set down for preliminary resolution, as part of those *NTA* proceedings.[12]

The first question asked whether the *Constitution Act* (Qld) restrained the Queensland Parliament from legislating to grant pastoral leases without preserving native title rights. The second asked whether the grant of a pastoral lease in Queensland, which did not expressly reserve native title rights, necessarily extinguished those rights. The third asked whether the passage of the *Mining on Private Land Act* 1909 (Qld) and/or the *Petroleum Act* 1915 (Qld) extinguished native title rights in minerals and petroleum under the land claimed. The fourth and fifth asked whether the Wik could claim relief against Queensland and Comalco or Pechiney, if the grant of mining rights to Comalco or Pechiney, respectively under the *Comalco* Act and Agreement or *Aurukun Associates* Act and Agreement, was found to have extinguished the native title rights of the Wik.[13] On 29 January 1996, Drummond J answered all five questions against the interests of the Wik and Thayorre.[14]

D. The removal of the Wik proceedings into the High Court of Australia

On 22 March 1996, Spender J granted the Wik leave to appeal to the Full Court of the Federal Court from Drummond J's decision of 29 January. On 15 April 1996, the Full Court of the Federal Court ordered the proceedings removed to the High Court under s 40 of the *Judiciary Act* 1903 (Cth). Of Drummond J's answers to the five questions summarised above, only the pastoral lease

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11 (1997) 71 ALJR 173 at 261 per Kirby J; Drummond J granted that application subject to an undertaking from the Wik that they would not pursue their general law claim.

12 Ibid; on the same date, Drummond J refused an application by the Wik for leave to restore their general law claims.

13 Id, at 259-260.

14 Id, at 198 per Toohey J; previously, the Full Court of the Federal Court had rejected the Wik's appeal against Drummond J's formulation of these questions, and against his Honour's refusal to restore the Wik's general law claims: Id, at 261; cf *The Wik Peoples v the State of Queensland* (unreported, Full Court of the Federal Court of Australia, 6 September 1994).

(second question) and equitable relief claims (fourth and fifth questions) were pressed before the High Court.[15]

In all, nineteen respondents appeared in the High Court proceedings. Leave was also given to several parties to interveners including the Attorneys-General for each State and Territory other than New South Wales and Australian Capital Territory. Numerous Aboriginal groups and land councils also appeared, together with the Australian and Torres Strait Islander Commission, to support the Wik's submissions.[16]

3. The central findings of the Wik case

By majority, the High Court allowed in part and dismissed in part the appeals brought by the Wik and Thayorre. In separate judgments, the majority (Toohey, Gaudron, Gummow and Kirby JJ, Brennan CJ, Dawson and McHugh JJ dissenting[17]) concluded that:

1. none of the Mitchellton or Holroyd pastoral leases conferred a right to excusive possession on their grantees;
2. the grant of the pastoral leases in issue did not necessarily extinguish all native title rights subsisting in the Wik and Thayorre over the leased land;

The entire Court agreed that none of the claims of breach of fiduciary duty or denial of natural justice could be sustained against Queensland, or, respectively, Comalco and Pechiney.

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15 Amended Notice of Appeal filed in the High Court on 28 May 1996: Id, at 199; see also below note 105 and accompanying text.

16 Id, at 199; Hunter, already cited n 5.

17 Of the minority, only Brennan CJ gave reasons for judgment. Justices Dawson and McHugh each agreed with the Chief Justice: Id, at 197 per Dawson J; at 235 per McHugh J.

4. The judgments of the High Court in the Wik case

A. The pastoral lease: creature of common law or statute?

It was common ground in the proceedings that a right to exclusive possession is the primary incident of the common law lease. Thus, the Wik submission that the pastoral leases granted under the *Land Act* 1910 (Qld) and the *Land Act* 1962 (Qld) (the "Land Acts") did not confer exclusive possession required the Court to accept that the statutory pastoral lease bore a different character from a common law lease. In this submission, the Wik succeeded.

For Toohey J, the effect of the pastoral leases in issue was to be determined by critical examination of the statutes granting them, rather than common law leases and other interests in land to which they might bear terminological similarity.[18] His Honour's view of the state of Australian and English authorities[19] indicated that whether a pastoral lease granted under statute could be assimilated to a common law lease was not a question of "nomenclature".[20] Further, a land interest might fit the description of a lease, but yet not confer on its holder a right to exclusive possession.

Justices Toohey and Gummow undertook exhaustive surveys of the development in New South Wales and Queensland of a statutory regime for the administration of Crown lands.[21] For Gummow J, that regime involved the creation of a multitude of statutory land interests, of which the pastoral leases at issue were instances, which were different from those recognised at common law.[22] Of his own survey of authorities,[23] Gummow J observed that

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18 Id, at 203-204; at 225-226 per Gaudron J; at 270, 280-281 per Kirby J.

19 Justice Toohey referred, at 206-207, to *Glenwood Lumber Company v Phillips* [1904] AC 405; *O'Keefe v Malone* [1903] AC 365; *Radaich v Smith* (1959) 101 CLR 209; *Street v Mountford* [1985] AC 809; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199.

20 Ibid.

21 Id, at 207-208 Per Toohey J; at 239-240 per Gummow J.

22 Id, at 239-240.

23 The cases cited included *Andrews v Hogan* (1952) 86 CLR 223; *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115

although the general law operated on interests including pastoral leases created under statute, it did so by ascertaining their meaning from legislative intention, rather than by assimilating them to like categories of property recognised at common law.[24]

Justice Toohey noted that most authorities on the subject of whether a lease conferred a right of exclusive possession had not been concerned with the underlying question whether native title was excluded by the Crown grant of a lease.[25] For that reason, a previous authority which appeared to require a presumption that terms of recognised technical significance, when adopted in legislation, bear the same meaning which they have at common law, was distinguishable.[26] In Gaudron J's view, the authority in question imposed a rebuttable rather than fixed rule of statutory interpretation.[27]

B. History of the Queensland pastoral lease: evidence of a right to exclusive possession?

Historical surveys of the development of the pastoral lease as a form of property in colonial New South Wales and Queensland much influenced the conclusion of the majority that the pastoral leases granted under the Land Acts did not confer a right to exclusive possession.[28] Justice Toohey considered that correspondence dating to 1839 between the Secretary of State and the New South Wales Governor demonstrated an awareness by New South Wales officials that Aborigines lived on lands licensed under Crown grants, and indicated an official intention both that Aborigines were not to be driven from lands under pastoral occupation, and that the holders of pastoral land interests in Queensland were intended to be given an

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CLR 1; *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327; *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

24 (1997) 71 ALJR 173 at 253; at 282 per Kirby, referring to *R v Toohey; Ex parte Meneling Station Pty Ltd*, and *O'Keefe v Malone*.

25 Id, at 207.

26 *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677; Gummow J noted that the subject authority had imputed common law status to a "lease" under Part XI of the *Land Act* 1962, while those at issue were "pastoral leases" prescribed in more complex terms under Part X of the Act.

27 Id, at 226-227.

28 Id, at 207-208; at 219-221 per Gaudron J; at 239-240 per Gummow J; at 282 per Kirby J.

exclusive right only of pasturage.[29] This material made it unlikely that the Queensland legislature had intended to confer on pastoral leaseholders a right of exclusive possession.[30]

Justice Gaudron observed that from the time of the 1847 Order-in-Council which first provided for Crown administration of pastoral leases in New South Wales, the Secretary of State and the New South Wales Governor understood such leases gave an exclusive right only of pasturage.[31] The same correspondence revealed an early concern to permit Aborigines to continue to live peaceably on land the subject of pastoral leases.[32] Further, none of the legislation governing the administration of Crown land which was introduced in Queensland after its establishment as a separate colony in 1859 had ever clearly indicated the nature of the interest created by the grant of a statutory pastoral lease.[33]

Justice Kirby noted that prior to the passage of the *Land Act* 1910, the Queensland authorities administering Crown lands knew of the presence on those lands of Aboriginal peoples. That fact weighed against presuming a legislative intention to authorise the grant of pastoral leases which permitted the exclusion of such Aboriginal people from their lands.[34]

C. Did the Land Acts confer exclusive possession on pastoral lessees?

Before the Court, argument focussed on whether provisions of the Land Acts 1910 and 1962 which penalised trespass onto lands under pastoral lease evidenced or refuted the proposition that the Acts conferred a right to exclusive possession. Justice Toohey focussed on s 203 of the 1910 Act, and s 372 of the 1962 Act. Those provisions rendered as a trespasser on pastoral land a person "not lawfully claiming under a subsisting lease of licence".

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29 Id, at 208.
30 Ibid.
31 Id, at 219-221.
32 Id, at 220.
33 Id, at 221.
34 Id, at 282.

His Honour concluded that those provisions did not confer on the grantees of pastoral leases a right of exclusive possession sufficient to exclude the rights of Aborigines occupying the leased lands in exercise of traditional title.[35] As with a similar provision of the *Crown Lands Alienation Act* 1876 (Qld)[36] which the Court had considered in *Mabo [No 2]*,[37] those provisions were to be read to apply to those "in occupation under colour of a Crown grant or without any colour of right",[38] rather than to Aborigines occupying land by virtue of unextinguished native title.[39] Justice Gummow also noted that the focal concept at play in the provisions, 'unlawful', was understood at common law to mean "forbidden by some definite law." In this instance, no such law existed to forbid exercise of native title rights in the lands leased.[40]

In dissent, Brennan CJ focussed on s 204 of the 1910 Act, which authorised certain Crown officers to complain before a justice to effect the removal of persons in "unlawful occupation of any Crown land or any reserve" or those "in possession of any Crown land under colour of any lease or licence that has become forfeited", and to "take possession of the same on behalf of the Crown". Section 204 permitted the lessee or licensee of Crown land to make a like complaint.[41]

Chief Justice Brennan rejected the Wik's argument that, as the warrant issued for removal of a person in "unlawful possession" required that the Crown take possession of the land, therefore the lessee of a Pastoral lease had no right to possession, let alone any exclusive right.[42] He preferred to read s 204 to mean that a lessee under a pastoral lease over land unlawfully occupied, who successfully made the prescribed form of complaint, would be issued a warrant to take possession of the land in the lessee's own behalf, in

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35 Id, at 223 per Gaudron J; at 249-252 per Gummow J.
36 s 91 *Crown Lands Alienation Act* 1876 (Qld).
37 *Mabo & others v the State of Queensland [No. 2]* (1992) 175 CLR 1 at 66 per Brennan J.
38 Ibid; see also (1997) ALJR 173 at 208-209.
39 (1997) 71 ALJR 173 at 209.
40 Id, at 250-251.
41 Id, at 180-181.
42 Ibid at 181.

the same way that the Crown would if the complaint was brought by a Crown officer.[43]

D. Impact on exclusive possession of reservations on use of pastoral leases

Chief Justice Brennan considered reservations to the Mitchellton and first Holroyd lease which vested in the Governor in Council power to authorise third party entry onto the leased land for any purpose at any time, and a third party right to depasture non-sheep stock on stock routes traversing the pastoral leases.[44] His Honour refused to find that those reservations defeated an imputation of exclusive possession. Rather, the right of exclusive possession was limited in its exercise to the extent of any reservations burdening the lease.[45] Although the Crown had power under the *Land Act* 1910 to resume land given under a pastoral lease, so long as it had not done so, exclusive possession was unaffected.[46]

A lease conferred exclusive possession if that was the substantive effect of the instrument of its creation.[47] Although words alone would not suffice,[48] absent contrary indication, terms of a recognised common law significance were *prima facie* given the same meaning when used in legislation.[49] His Honour noted that the power given under the *Land Act* 1910 was to "demise for a term of years";[50] the grant was for a term over specified land under an obligation to pay "rent"; provision was made for "surrender" of lease.[51] Although the Act did not refer to

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43 Ibid.

44 Ibid.

45 Id, at 182, citing *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199.

46 Ibid.

47 Id, at 182-185; The Chief Justice gave particular attention to the following decisions: *Glenwood Lumber Company v Phillips* [1904] AC 405; *O'Keefe v Malone* [1903] AC 365; *Radaich v Smith* (1959) 101 CLR 209; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677; *Attorney-General of Victoria v Ettershank* (1875) LR 6 PC 354; *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520; *O'Keefe v Williams* (1907) 5 CLR 217, (1910) 11 CLR 171; *Davies v Littlejohn* (1923) 34 CLR 174; *In re Brady* [1947] VLR 347.

48 Ibid.

49 Id, at 183 citing *Radaich v Smith* (1959) 101 CLR 209.

50 s 6(1) *Land Act* 1910.

51 s 122 *Land Act* 1910; His Honour also noted that the Privy Council had decided that grants of land under the *Land Act* 1862 (Vic) were to be

exclusive possession, that was the focal incident of a common law lease. Further, the distinction drawn between "lease" and "licence" in the Act was meaningless had the legislative intention not been to confer exclusive possession.[52]

The majority, in contrast, reasoned that the pastoral leases in issue did not confer exclusive possession. In relation to the Mitchellton lease, Gaudron J noted that the *Land Act* 1910 contained reservations to pastoral leases in favour of authorised third parties to enter the land to take various natural materials,[53] that the pastoral lessee was prohibited either from cutting or destroying trees, or from preventing other authorised persons from taking timber materials,[54] and that third parties had rights to depasture stock on routes traversing the leaseholding.[55] Her Honour noted also that the size of the areas given under pastoral lease militated against a presumed intention that the Act vested exclusive possession in pastoral lessees.[56]

Some provisions of the 1962 Act in relation to the Holroyd lease supported the conclusion that the pastoral lease granted under it conferred an exclusive right to possession.[57] However, compliance with those provisions,

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treated as common law leases: *Attorney-General of Victoria v Ettershank* (1875) LR 6 PC 354, cited in (1997) 71 ALJR 173 at 183.

52 (1997) 71 ALJR 173 at 185. At 186, the Chief Justice more briefly rejected the Thayorre People's submission that, properly characterised, a "lease" under the *Land Act* 1910 was a statutory *profit à prendre*, authorising entry onto land burdened by native title, solely for the purpose of grazing stock. Queensland case law on the effect of leases granted under the *Land Act* 1910 ran contrary to the submission: *R v Tomkins* (1919) St R Qd 173. Further, if, as the Privy Council had held in *Falklands Islands Co v The Queen* (1863) 2 Moo (NS) 267, a "licence to depasture stock "conferred "exclusive property", *a fortiori* that was the effect of a pastoral lease.

53 s 199 *Land Act* 1910.

54 ss 198 & 200 *Land Act* 1910.

55 s 205; (1997) 71 ALJR 173 at 254-255 per Gummow J; at 270, 282 per Kirby J: in addition to s205, his Honour referred to ss 6(3), 14(3), 139, 199(1), of the 1910 Act.

56 (1997) 71 ALJR 173 at 225-226; cf. per Gummow J at 254-255; per Kirby J at 270, 282.

57 Id, at 230: in contrast to the Mitchellton Pastoral Lease, her Honour noted that the Holroyd River Holding was not expressed to be "for pastoral purposes only". Section 231 of the 1962 Act also extended to pastoral lessees, together with other interest holders, a conditional right to "occupy...and take possession" of their land interest. Various other provisions of the Act, applicable to the Holroyd pastoral lease,

which required improvements to the leased land that, if made, would have the effect of conferring exclusive possession, could be excused by the Minister.[58] Further, the grant of a pastoral lease subject to such conditions did not create an interest in land which extinguished native title rights.[59] Section 4(2) of the Act provided that pastoral interests were intended to be treated as analogous with those granted under earlier Land Acts, including the Act of 1910; that earlier Act did not create a pastoral lease conferring a right to exclusive possession which extinguished native title over the land leased.[60]

Justice Gummow noted that provisions of the 1910 Act[61] treated a "lease" and a "licence" indistinguishably.[62] Statutory conditions fulfilment of which might have indicated an intention to confer on a grantee exclusive possession, such as those authorising land enclosure,[63] or requiring seven years of physical residence,[64] did not apply to the Mitchellton lease, yet *did* apply conditionally to interests described under the Act as "selections", which it could not be asserted bore the character of a common law lease.[65]

Further, obligations associated at common law with a lease, such as the obligation to pay rent, applied under the Act both to pastoral leases and other types of statutory interests.[66] Justice Kirby noted that in relation to neither of the pastoral leases in issue had the traditional and subsisting Aboriginal presence (of which Queensland pastoral authorities were aware) been interfered with.[67]

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pointed to the conferral of an exclusive right to possession, by permitting the grant of a pastoral lease to be made subject to obligations to fence, improve and develop the leased land.

58 Id, at 230, 232-233.

59 Id, at 235; at 256 per Gummow J.

60 Ibid.

61 ss 43(1), 47(2), 129, 131(2), 135, 166, 204 *Land Act* 1910.

62 (1997) 71 ALJR 173 at 254.

63 s 40(1) *Land Act* 1910; (1997) 71 ALJR 173 at 255-256: these included conditions requiring erection of enclosures, internal fencing, a manager's residence, and workmen's quarters; at 273-274 per Kirby J.

64 s 43(iii) *Land Act* 1910.

65 (1997) 71 ALJR 173 at 255-256 per Gummow J.

66 s 61 *Land Act.* 1910 (pastoral leases), s 79 *Land Act* 1910 (occupation licences).

67 (1997) 173 ALJR 173 at 274.

E. Did section 6 Land Act 1910 (Qld) confer an immediate right to exclusive possession in a pastoral lease?

At common law, a lessee enjoys no estate in land prior to entry into possession. At that point in time, the lessee has only an *interesse termini*: a right to enter and bring an action in ejectment, but not an action in trespass. No reversion expectant on termination of the lease arises until after possession, and the lessor's estate remains unaffected until then.[68] Under s 6(2) of the *Land Act* 1910, however, the estate conferred by the pastoral lease vested immediately on the instrument of lease being made in the "prescribed form". While the lessee of the Holroyd River lease had entered in actual possession, the Mitchellton pastoral lessee never had.

Chief Justice Brennan nevertheless concluded that the effect of s 6(2) was to vest in each instance a full leasehold interest immediately on the grant of the pastoral lease under the Act.[69] For Gaudron and Gummow JJ, however, because s 6(2) operated to confer a lease interest absent a requirement of entry into possession by the grantee, its operation strengthened their conclusion that the Act did not confer a common law leasehold interest on its pastoral lessees.[70]

F. Expansion of radical to beneficial title and extinguishment of native title

The Wik and Thayorre submitted that, if a pastoral lease conferred exclusive possession, the effect was only to suspend native title over the subject land for the duration of the lease term, which revived on expiry or early determination of the lease.[71] The premise of the submission was that the *statutory* grant of a lease did not involve the grant of an interest out of the Crown's radical title so as to expand that title into full beneficial ownership. Thus, the argument ran, the Crown's reversionary interest remained the radical title burdened by native title, or the "minimum proprietary interest

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68 Id, at 187 per Brennan CJ.
69 Ibid.
70 Id, at 227 per Gaudron J; at 248, 253-254 per Gummow J.
71 Ibid.

required" to support the pastoral lessee's interest.[72] The Wik supported this submission with reference to s135 of the *Land Act* 1910, which provided that on expiry of a pastoral lease, the land "shall revert to His Majesty and become Crown land, and may be dealt with under this Act." The Wik submitted that the reversionary interest contemplated by s135 was not one based on absolute and beneficial ownership.[73]

The submission was framed so as to avoid the implications of Brennan J's dictum in *Mabo [No 2]* that "[i]f a lease be granted, the lessee acquires possession and Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from the mere radical title and, on the expiry of the term, becomes a plenum dominium".[74] The majority accepted the Wik's submission.

Justice Toohey questioned the correctness of Brennan CJ's view as to the expansion of radical title into beneficial title, suggesting it curious that the reversion expectant on expiry of a pastoral lease could be one of beneficial title when such title did not exist at the time immediately prior to grant of the lease.[75] Preferring the view of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria*,[76] Toohey J found that the Crown grant of an estate in land out of radical title does not require the assumption of beneficial ownership of title to that land,[77] and concluded that the pastoral leases in issue were granted out of the Crown's radical title. On their expiry, the land in reversion was "Crown land", the subject of a radical title which remained burdened by any subsisting native title rights.[78] The *Land Acts* 1910 and 1962 did not indicate any clear and plain intention to extinguish such native title rights.[79]

In Gaudron J's view, no reversionary interest existed which was sufficient to expand the Crown's radical title

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72 Id, at 190.
73 Id, at 190-191.
74 *Mabo & Ors v the State of Queensland [No 2]* (1992) 175 CLR 1 at 68, 72-73.
75 Ibid.
76 [1921] 2 AC 399.
77 (1997) 71 ALJR 173 at 212-213; A similar conclusion was reached by Kirby J at 281.
78 Ibid; at 229 per Gaudron J.
79 Id, at 214.

into a full beneficial ownership of the land leased. No common law leasehold interest was created to support a reversion,[80] since the pastoral lease vested on grant in prescribed form, rather than on entry into possession.[81] In Gummow J's opinion, Brennan CJ's view of the expansion of radical title into beneficial title was accurate but inapplicable. The pastoral leases in issue were granted out of "Crown Land" under the *Land Acts*, and accordingly no beneficial interest of the Crown existed to extinguish subsisting native title rights.[82] That conclusion was strengthened by s135 of the Act.[83]

In dissent, Brennan CJ rejected the submission. For him, the concept of radical title had no more significance than that it enabled the "English system of private ownership of estates held of the Crown to be observed in the Colony",[84] which system contemplated the interlocking doctrines of estates and tenure. The first exercise by the Crown of its power to alienate an estate in land brought the land within that system. Thus a grant of a leasehold estate by the Crown, with the lessee in possession, vested in the Crown reversion expectant of beneficial title.[85] In Brennan CJ's view, the Wik's alternative submission that, where land was burdened by native title, the reversion of the Crown on the grant of a lease was limited in duration sufficient only to support the demise also failed, because it assumed wrongly that native title was not immediately extinguished by the grant of a lease of land burdened by that title.[86]

G. Inconsistency between pastoral lease and native title: the extinguishment test

Native title is extinguished by laws or acts which manifest "clearly and plainly" the intention to do so.[87] If a lease granted under the *Land Acts* vested rights in land inconsistent with the continued enjoyment of native title,

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80 Id, at 229.
81 Ibid.
82 Ibid; Id, at 247-249.
83 Id, at 248; see above n 73 and accompanying text.
84 Id, at 191 citing *Mabo & Ors v the State of Queensland [No 2]* (1992) 175 CLR 1 per Deane and Gaudron JJ.
85 Id, at 192.
86 Id, at 193.
87 Id, at 236 per Gummow J.

that requisite intention would be manifested.[88] In *Wik*, the Court explained how an inconsistency arises.

In Kirby J's view, inconsistency was to be tested by comparing the *legal* content of competing interests over land claimed to be the subject to native title.[89] Justice Gummow expressed the question as being whether the "respective *incidents* [of title] are such that the existing [native title] rights cannot be exercised without abrogating the statutory right." If the native title interests could not be so exercised, "then by necessary implication, the statute" would extinguish those existing rights.[90]

In Toohey J's view, the *Land Acts* of 1910 and 1962, if they extinguished native title over lands subject to pastoral leases, did so only implicitly. Approving the Canadian authority of *Degamuukw v British Columbia*,[91] Toohey J held that implicit extinguishment of native title by the grant of land under statute occurred only when it was impossible for the two forms of land interest to co-exist.[92] Kirby J concluded that native title was not extinguished by the grant of the Mitchellton or Holroyd Pastoral Leases.[93] Justices Toohey and Gummow reached the same conclusion.[94]

In dissent, Brennan CJ held that native title over the lands the subject of the pastoral leases had been extinguished. The right to exclusive possession which, in his view the leases created, was directly inconsistent with the right of any other person, including a native title holder, to enter the leased land without the lessee's consent.[95]

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88 Id, at 236-237: Gummow J suggested that the relevant intention was that of the legislature, ascertained objectively.
89 Id, at 267, 269, 276-277, 279 per Kirby J.
90 Id, at 246.
91 (1993) 104 DLR (4th) 470 at 525 per Macfarlane JA.
92 (1997) 71 ALJR 173 at 211.
93 Id, at 285.
94 Id, at 209, 214 per Toohey J; at 247-249, 256 per Gummow J; Gaudron J declined to express a conclusion on this question before evidence on it was heard by the Federal Court: at 235.
95 Id, at 190.

H. Implied statutory presumption against derogation from native title

The Thayorre submitted that resolution whether the grant of a pastoral lease under the Acts extinguished native title involved application of an implied statutory presumption against interpreting Australian legislation so as to derogate from the rights of native title holders. Only Brennan CJ and Kirby J considered this question. In Brennan CJ's view, the asserted principle assumed a fiduciary relationship between the Thayorre and Queensland, arising from their relative positions of power in the Queensland land law system, which did not exist: indeed, the "sovereign power of alienation was antipathetic" to the protection of native title holders.[96]

His Honour also rejected the existence at common law of a "free-standing fiduciary duty" owed by the Crown to native title holders in exercising statutory powers to alienate land, where the exercise potentially could have the effect of extinguishing native title.[97] The Canadian and United States native rights jurisprudence[98] in which the duty had been accepted, did not apply. In those instances, the duty had been superimposed on the discretionary exercise of a statutory power framed expressly to require the Crown or government to act in the interests of native property interest holders.[99] Because no such fiduciary duty could be imposed on the Crown, the Wik and Thayorre submission that the Court impose a constructive trust over the Crown's reversionary interest in the leased land also failed.[100]

Unlike Brennan CJ, Kirby J *did* recognise the existence of a presumption, applicable to the *Land Acts*, that a statute is not intended to extinguish native title. Although the duty was unrecognised at time of their enactment, an analogous duty owed by the Crown to indigenous people

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96 Id, at 187.
97 Id, at 194.
98 Ibid; His Honour referred to *Guerin v The Queen* (1984) 13 DLR (4th) 321; *Blueberry River Indian Band v Canada* (1995) 130 DLR (4th) 193; *United States v Mitchell* (1983) 463 US 206; *Joint Tribal Council of Passamaquoddy Tribe v Morton* (1975) 528 F 2d 370; *United States v University of New Mexico* (1984) 731 F 2d 703.
99 Id, at 195.
100 Ibid.

under its protection was recognised at the time of the adoption of the 1910 Act.[101] Australian authorities had also previously approved the principle of interpretation adopted in Canada, that Parliament should be presumed to have the objective of "achieving desired results" in relation to indigenous peoples with limited disruption of affected native rights.[102]

I. 'Promise or Engagement' to preserve native title under NSW *Constitution Act*

Section 2 of the *New South Wales Constitution Act* 1855 (Imp) vested the "entire Management and Control of the Waste Land belonging to the Crown in the...Colony...in the legislature of the...Colony." The second of several provisos to that provision stated that "nothing [t]herein contained [was to] affect...any contract or to prevent the fulfilment of any Promise or Engagement made by or on behalf of Her Majesty, with respect to any Lands situate in the...Colony".[103]

The Thayorre had submitted in earlier proceedings that the correspondence which passed between the Secretary of State and the New South Wales contained "promises or engagements" for the preservation of native title for the purposes of that proviso.[104] Although not pressed before the High Court, Gaudron J considered it proper to consider the issue.[105] In her Honour's view, the proviso in the *Constitution Act* 1855 (Imp) was concerned with undertakings to dispose of waste lands or else reserve them for public purposes. The *Constitution Act* proviso in question was concerned with those matters because they were within the scope of enacted waste land legislation. Undertakings to preserve native title were not.

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101 Id, at 283-284.

102 Ibid, citing *Delgamuukw v The Queen in Right of British Columbia* (1993) 104 DLR (4th) 470, approved of in *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 433.

103 Id, at 220.

104 Id, at 222.

105 Id, at 221-222; Toohey J agreed with Gaudron J's reasoning on this question: at 214; no other member of the Court in *Wik* addressed it; in the Federal Court, Drummond J rejected the Thayorre submission, holding that the proviso applied only to undertakings to grants of Crown land made before the entry into force of the *Sale of Waste Lands Act* 1842: (1996) 134 ALR 637 at 663. Justice Gaudron did not comment on the correctness of that view.

Accordingly, Gaudron J dismissed the Thayorre's appeal on this point.[106]

J. Fiduciary claims against Queensland, Comalco and Pechiney

Justice Kirby, with whom Toohey, Gaudron and Gummow JJ agreed,[107] addressed the claims for equitable relief raised by the Wik. Justice Kirby approved the decision of Drummond J, in the Federal Court, to reject the claims.[108] The Wik failed in their submission that the *Comalco Act* should be construed as having the limited purpose of permitting Comalco to bypass the ordinary procedures imposed by the Queensland Mining Acts for the acquisition of a mining lease. The Act was adopted to give the Comalco Agreement the force of law, and the Court could not impugn the Act because of the steps leading to its execution.[109] Any rights of the Wik lost by the adoption of the Comalco Agreement were to be treated as having been occasioned by the passage of legislation and, therefore, as irrecoverable. No damages or other relief could be recovered for alleged breaches of duty which resulted in the adoption of the Act, or from which flowed benefits received by the parties to the Comalco Agreement.[110]

Justice Kirby also rejected the Wik submission that because s 2 of the Act "authorised" the making of the Agreement, but did not require it, an obligation arose to discharge a duty of procedural fairness.[111] The context in which the legislation had been enacted indicated clearly that the parties authorised under the Act to make the Agreement were expected to do so. That provided an adequate source of power to permit the Agreement to be made without the obligation to accord procedural fairness in doing so.[112]

Although the mining leases granted to Comalco under the Agreement made pursuant to the Act did not have

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106 Ibid.
107 Id, at 214 per Toohey J; at 216 per Gaudron J; at 257 per Gummow J.
108 Id, at 288, 291.
109 Id, at 288.
110 Id, at 288-289.
111 Id, at 289.
112 Ibid.

statutory force, nevertheless Kirby J held them excluded from the reach of the equitable relief claimed by the Wik. The mining leases were granted as part of a regime which the Queensland Parliament had clearly intended to protect from precisely such claims, by giving the Agreement which authorised their grant the force of law.[113] His Honour treated substantially as identical the Wik claims against Queensland and Pechiney relating to the Aurukun Act, Agreement and mining lease. His Honour dismissed those claims for the reasons that he rejected the claims related to the Comalco Act and Agreement.[114]

5. Implications

For the purposes of this article, the legal implications of the decision in respect of the pastoral lease issue are separated into two main categories: implications arising for native title at common law, and implications arising by virtue of the operation of the *Native Title Act* 1993 (Cth).

A. Implications arising for common law native title

(i) Inconsistency, intention and extinguishment

In the *Native Title Act Case*,[115] six members of the Court confirmed that for a statute to impair or extinguish subsisting native title rights, or to authorise the taking of steps which have that effect, it would be necessary to show, at least, the intention[116] "manifested clearly and plainly" to achieve that result.[117] In *Wik*, the Court shows how such an intention can be so manifested. All members of the majority expressly declare, or act on the assumption, that the legislative authorisation of activities which are inconsistent at law with the continued exercise of any subsisting rights of native title, manifests the legislative intention to impair or extinguish such rights.[118]

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113 Id, at 290.

114 Id, at 290-291.

115 *Western Australia v Cth* (*The Native Title Act Case*) (1995) 183 CLR 373 at 423 per Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ.

116 Id, at 236 per Gummow J; Rather than any particular state of mind of the legislators, the relevant intention is that of the statute as derived by necessary implication.

117 Ibid.

118 Id, at 211 per Toohey J; at 226, 228 per Gaudron J; at 246 per Gummow J; at 284 per Kirby J.

Accordingly, the incidents of native title will be extinguished to the extent of the inconsistency. What remains unclear is the threshold of inconsistency; when will the legal character of contesting rights be such as to be deemed no longer capable of co-existing?

For the majority, the mere potential for inconsistency seems insufficient to extinguish or impair the incidents of native title. The question which their honours seem to pose is not whether the legal character of rights under a lease are such as to be potentially inconsistent with the incidents of native title, but whether as a matter of law, the incidents of native title are such as to be *potentially consistent*[119] with the rights of the lessee.

For Toohey J it was the *inability* of the two to co-exist which evidenced inconsistency of such a degree as would render rights conferred by native title unenforceable at law, and in that sense, extinguished.[120] For Gummow J the question of inconsistency turned on whether the legal nature of the respective rights were such that the incidents of native title *could not* be exercised without abrogating the statutory right.[121] Kirby J framed the question to be whether at law the continued exercise of native title rights would render the full exercise of powers conferred on the grantee *impossible*.[122]

Framed in these ways, the tests for inconsistency all focus on the legal character of rights rather than on the manner in which those rights are exercised. Yet at least two judges of the majority may be taken to express the view that, in particular circumstances, the activities of the lessee may be relevant to the issue of extinguishment. Thus, in respect of the conditions of the Holroyd pastoral lease which required improvements to be made to the land, both Gaudron and Gummow JJ suggested that it was their satisfaction, rather than their imposition by the terms of the grant, which would bring about the abrogation of some

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119 The concept of potential consistency is also canvassed in *Legal Implications of the High Court Decision in The Wik Peoples v. Queensland*, Current Advice, Attorney General's Legal Practice, Department of the Attorney-General (Cth), 23 January 1997.

120 (1997) 71 ALJR 173 at 211 per Toohey J.

121 Id, at 246 per Gummow J.

122 Id, at 284 per Kirby J.

or all of the incidents of native title.[123] On the face of it, it might be argued that this reasoning is inconsistent with the general principle[124] (confirmed in *Wik*) that native title is extinguished by the *grant* of inconsistent rights and not by the manner of their exercise.

It may be possible to reconcile these views. The reasoning of the majority in *Wik* was founded on two interrelated propositions. First, for a statute to authorise the taking of steps which impair or extinguish the incidents of native title, there must be, at least, the clearly and plainly manifested intention to achieve that result. Second, an authorisation of activities which are inconsistent at law with the continued enjoyment of native title manifests that intention.

The Holroyd River pastoral lease was subject to conditions requiring improvements to the land, such as the construction of an airstrip. The fact that the airstrip could have been constructed on *any part* of the leased land did not amount to an authorisation to transform the *entire* property into an airbase. The lease was a pastoral lease, of which the rights and interests were to be exercised accordingly.

Even if taken at its highest, the grant did no more than authorise the construction of an airstrip as an improvement of vast amounts of land otherwise used for grazing purposes. Given the limited nature of the right, none of the tests for inconsistency mentioned above would be satisfied. There would not be the clearly and plainly manifested intention that the mere imposition of improvement and developmental conditions impaired or extinguished native title over the entire area under lease. As a matter of necessary implication, there would simply be an intention to impair or extinguish native title where the airstrip was constructed. The eventual area over which native title is extinguished may be a question of fact. But that conclusion in no way detracts from the general proposition. It merely illustrates that the activity which is

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123 Id, at 235 per Gaudron J; at 256 per Gummow J.

124 *Mabo & ors v the State of Queensland [No 2]* (1992) 175 CLR 1 at 68 per Brennan J, at 110 per Deane and Gaudron J, at 195-196 per Toohey J.

inconsistent at law with the continued enjoyment of native title is the construction of the airfield. It is this activity which is authorised; it is the authorisation of this activity which manifests the relevant intention.

(ii) The crown's reversionary interest

As we have seen, the Court rejected the submission by the State of Queensland that the grant by the Crown of a lease involved the acquisition of the reversion expectant on the expiry of the term. Queensland had argued that it was this acquisition which expanded the Crown's radical title into a plenum dominium which enabled it to assert absolute and beneficial ownership over the land. Because full beneficial ownership is, as a matter of law, inconsistent with the continued enjoyment of native title, such title was extinguished, so the argument went, upon reversion.

We now know, however, that the expiry or termination of a pastoral lease does not necessarily result in the Crown acquiring full beneficial ownership of the land.[125] Whether it does or not depends on whether the land was granted by prerogative or pursuant to statute, and if by statute, the manner in which the land was to be dealt with upon reversion.[126] Native title may thus survive even after the expiry or termination of a pastoral lease. Indeed, the incidents of native title extinguished or impaired by the grant of a pastoral lease may in fact be found to be capable of full revival. The majority expressly leave open this possibility.[127]

(iii) Position of leases generally

One clear result of the *Wik* decision is that the effect of the grant of a pastoral lease on native title must be ascertained on a case by case basis by reference to the language of the relevant Act and reflected in the instrument of lease. Although the actual decision in *Wik* is limited to the effect of leases issued under the Queensland Land Acts of 1910 and 1962, unless pastoral leases in the other states and territories are found to derive from a

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125 (1997) 71 ALJR 173 at 211 per Toohey J, at 217 per Gaudron J, at 236 per Gummow J, at 285 per Kirby J.

126 Ibid.

127 Id, at 212 per Toohey J, with the concurrence of Gaudron, Gummow and Kirby JJ.

different historical background, or confer rights considerably in excess of the leases examined in *Wik*, it is unlikely that such leases would be held to confer exclusive possession either.

Moreover, it should be noted that by the mid 1940s there were approximately 70 different kinds of Crown leasehold and Crown perpetual leasehold tenures in Queensland alone.[128] All of these sprung from over a century of legislation designed to control the management and disposal of Crown lands. They include the grant of such things as mining leases. The position of all of these tenures, other than estates or interests in fee simple[129] or leases for a term[130] must "remain to be elucidated in later cases".[131] Given that the multiplicity of such tenures is not unique to Queensland, the result in *Wik* "introduces an element of uncertainty into land title in Australia... However, this is no more than the result of the working out of the rules adopted in *Mabo [No 2]*".[132]

This lack of certainty must be seen in context. It is only uncertainty about whether particular estates or interests in land confer exclusive possession. It is not uncertainty about the validity of those estates or interests, or about the primacy of the rights of the grantees which are the incidents of such estates or interests. To say that pastoral leases, and perhaps some other types of estates or interests granted by the Crown, do not confer exclusive possession on the grantees is, as the majority in *Wik* noted, in no way destructive of the title of those grantees. It is "simply the recognition of the fact that the rights and obligations of each grantee depend upon the terms of the grant and upon the statute which authorised it".[133] To the extent of any inconsistency between such rights and the rights and interests conferred by native title, the former will prevail.

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128 Id, at 201 per Toohey J citing Fry (1946-1947) 3 *Res Judicatae* 158.
129 Id, per Gummow J at 241, per Kirby J at 285.
130 Ibid.
131 Id, at 285 per Kirby J.
132 Ibid.
133 Id, at 215 per Toohey J, with the concurrence of Gaudron, Gummow and Kirby JJ.

(iv) Pastoral purposes

Of course great difficulties arise in the application of the sentiments of the previous paragraph where, as was the case in *Wik*, the lease under consideration is merely specified to be for 'pastoral purposes', and little other guidance is offered as to the activities authorised by the lease. In *Wik*, some members of the majority commented on what constituted 'pastoral purposes'. Such included the "raising of livestock, [and] things incidental thereto such as establishing fences, yards, bores, mills and accommodation for those engaged in relevant activities",[134] as well as the "feeding of cattle or other livestock upon the land [including perhaps] activities pursued in the occupation of cattle or other livestock farming".[135]

B. Implications arising from the operation of the Native Title Act

(i) Validation of past acts

After the decision in *Wik*, we now know that native title rights can co-exist with the rights of lessees under a pastoral lease, yielding to such rights only in the event of inconsistency at law, and then *only to the extent of the inconsistency*. As a matter of law, this proposition applies to pastoral leases granted before the commencement of the *Racial Discrimination Act* 1975 (Cth) (RDA) on 1 October 1975. The past act regime of the NTA has enshrined notable differences in respect of the extent to which native title is extinguished for leases granted and possibly even renewed after that date. Space constraints prevent a more thorough examination here. It suffices to note that Gal has shown the operation of the NTA to be such as to effect the extinguishment of *all* native title subsisting on pastoral leased land where the lease was granted or, in some cases, renewed, between 1 October 1975 and 1 January 1994 and current at that latter date.[136]

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134 Id, at 205.

135 Id, per Gummow J at 255.

136 Gal, D "Implications arising from the operation of the native title act for the existence of native title on pastoral leases" (1997) 71 ALJ 487; given that all the States and Territories, with the exception of Western Australia, have enacted complementary native title legislation in accordance with s 19 of the NTA, the arguments made in respect of that Act apply equally to those jurisdictions.

(ii) Mining leases

Since the commencement of the NTA on 1 January 1994, the grant of mining or exploration titles over land on which native title may subsist must go through the "right to negotiate" process established by the Act.[137] Accordingly, all grants of such titles made after 1 January 1994 should have gone through this process. Any grant that did not can be found to be invalid.[138]

(iii) Future Acts

In respect of onshore places, the "future acts" regime of the NTA is designed to protect native title. Under this regime, the making, amendment or repeal of legislation after 1 July 1993 is permissible only if it affects[139] native title holders in the same way that it would affect the holders of ordinary title, or if it does not put them in a more disadvantageous position at law than they would be if they instead held ordinary title.[140] Acts which are not 'permissible' are impermissible future acts,[141] and are invalid to the extent that they affect native title.[142]

Now that we know that native title is not necessarily extinguished by pastoral leases, the NTA may operate to limit the ability of governments to grant further rights and interests over the leased land. To the extent that such acts *affect* native title, and could not be done if the holders of native title held ordinary title instead, then those acts will be invalid. From 1 July 1993, native title can only[143] be

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137 *Native Title Act* 1993 (Cth), Part 2, Division 3, Subdivision B.

138 Given that the same process applies to compulsory acquisition under a "Compulsory Acquisition Act" (s.26(1)(d)), the implications are the same for any such acquisition which did not go through the right to negotiate process.

139 An act "affects" native title within the meaning of the Act if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise: s 227 *Native Title Act*.

140 s 235(2).

141 s 236. It should be noted that future acts relating to an offshore place (s 253), or having a "low impact" on native title (s.234) or being covered by particular agreements made by native title holders (s 21) are exceptions and are thus also "permissible": *Western Australia v Cth (The Native Title Act Case)* (1995) 183 CLR 373 at 457 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

142 s 22.

143 s 11.

extinguished by agreement with the holders of native title[144] or by the acquisition of native title under a compulsory acquisition act.[145]

6. Conclusion

Bartlett has observed of the decision in *Mabo [No. 2]*, that "[a]ny determination by the High Court at such a late date in Australia's development was bound to be controversial and so it has proven to be."[146] Those sentiments apply with equal force to the *Wik* decision. While the Court's decision may have revealed further uncertainty about the status of some forms of land tenure in Australia, that such uncertainty should reveal itself is unsurprising. Having rejected the legitimacy of the proposition that the continent was, for legal purposes, unoccupied, it is fundamentally important to conform the operation of the system of land tenure built upon that false assumption to the modern legal reality that native title survived annexation. The *Wik* judgment does so, by clarifying that the "rights and obligations of each grantee depend upon the terms of the grant [of land] and upon the statute which authorised it". Hopefully, this clarification will be used to advance the objective of negotiation between indigenous and non-indigenous land and resource interest holders, in order that for each group a just, fair reconciliation of their rights under the law may be secured.

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144 s 21.
145 s 23(3).
146 Bartlett, R. H, *The Mabo Decision*, Butterworths, Sydney, 1993, v.