WIK: IMPLICATIONS FOR STATUTORY LESSEES

DOUG YOUNG*

I. INTRODUCTION

The Prime Minister released his Ten Point Plan in response to the High Court's *Wik* decision stating that it offered the one fair and practical response to the case by providing certainty to pastoralists and miners, while respecting native title. The time taken for the Commonwealth to respond is understandable; the issues created by *Wik* are difficult and complex, and the consequences much wider than a finding that native title is not necessarily extinguished by statutory leases and may coexist on statutory lease land. Rather, the implications are more far reaching; the decision has created a number of both past and future potential liability exposures for the mining and pastoral industries, many of which have not been the subject of public debate.

In particular, present and former holders of all statutory leases, whether granted before or after 1 January 1994, may face substantial damages awards to native title holders following *Wik*. This paper examines some of those exposures which require a legislative response and offers some comments on the Prime Minister's proposals.

II. NON-AUTHORISED ACTIVITIES ON STATUTORY LEASES

Wik places an obligation on statutory lessees not to perform any activities outside those specifically authorised (either expressly or by implication) by the terms of their lease which could impact on any coexisting native title rights. On the more substantial pastoral holdings, these could include sporting fields and tennis courts or tourism related infrastructure. Likewise, mining companies may have built airstrips or other non-authorised infrastructure upon their mining tenures.

If native title exists, the statutory lessee may face a claim for damages for the impairment of native title rights as a result of non-authorised activities and may also be liable to account for the profits where the non-authorised improvements have been used for the purpose of generating income. It is not clear whether any

---

* Partner, Blake Dawson Waldron, Brisbane. I would like to thank Anthony Denholder for his assistance in preparation of this article

limitation period applies. Native title holders may also be able to compel statutory lessees to remove non-authorised improvements, for example, swimming pools or sheds erected for non-authorised purposes and reinstate the land to its former state, or to the approved statutory purpose. It is possible that an injunction may be sought to prevent continued performing of non-authorised activities.

III. DEPRIVATION OF ABORIGINAL ACCESS RIGHTS

Where native title coexists on statutory lease land, the denial of access to land to native title holders (either before or after any determination of native title rights) may give rise to an entitlement to recover damages similar to an 'occupation rent'. Such a claim would be analogous to a rental claim where a tenant-in-common has occupied the common property and excluded another co-tenant.[1]

The difficulty is that until there has been a determination of who (if anyone) holds native title for a particular lease, there is no way for statutory lessees to determine who are native title holders and who are not. For this reason, claims of this type may not be made for many years. The proposals to validate post-1993 tenements do not address this problem.

IV. ISSUES ARISING OUT OF THE OPERATION OF THE *NATIVE TITLE ACT*

A. Holders of Post-1993 Tenements

Many mining tenements and other titles granted by State or Territory governments over existing or former pastoral lease land since 1 January 1994, on the assumption native title had been extinguished by those leases, are now potentially invalid following *Wik* if native title is proven to exist. The NTA expressly provides that these tenements constitute "permissible future acts" (s 235) and can only be validly granted after 1 January 1994 if they have first been authorised by the 'right to negotiate' procedure.

Further, the grant of other primary land titles over land where native title exists will constitute "impermissible future acts". The consequence is that these grants will be invalidated by s 22 of the NTA. This means that the grant of special leases or freehold over former pastoral lease land will also be invalid, if native title is present.

1 *Marriott v Franklin* (1993) 60 SASR 457, *Luke v Luke* (1936) 53 WN (NSW) 101, *Pascoe v Swan* (1859) 54 ER 201, *Turner v Morgan* (1803) 32 ER 307.

B. Holders of All Tenements - Future Acts

Arguably, where activities authorised prior to 1 January 1994 are performed after this date, and additional permits are required, the consent of native title holders may be required. Failure to do so may expose statutory lessees to liability for damages under the general law.[2]

C. Holders of All Tenements - Reversionary Interference

While a statutory lessee's rights 'prevail' over any inconsistent native title rights, it is unclear following *Wik* whether those inconsistent native title rights are extinguished by the lease, or are merely suppressed by it for its duration. If suppressed, native title holders may have a right to dictate the way in which some lease rights are exercised, so as to minimise the effect on the native title rights which will revive at the expiry of the lease. Further, such activities may as a result constitute future acts under the NTA and hence require separate NTA authorisation to be allowable.

D. Uncertainty About Demarcation Between Statutory Lessee's Rights and Coexisting Native Title Rights

There is great uncertainty about which activities statutory lessees can perform without running the risk of impacting upon possibly surviving native title rights. Many activities incidental to carrying out the purpose of the lease may expose the lessee to the risk of actions seeking injunctions, reinstatement of land or rehabilitation, damages and declarations of invalidity. There is similar uncertainty for those claiming native title to statutory lease land; particularly, when will the exercise of their rights infringe a lessee's rights?

E. Effect of Statutory Vesting - Native Title Extinguished or Coexisting?

Governments face further uncertainty as *Wik* has cast doubt upon whether legislation vesting land and waters in a State operates to extinguish native title. Following *Mabo*, it was thought vesting would extinguish native title, now it probably does not and native title may coexist in such land and waters.

F. Right to Negotiate

The right to negotiate is not a feature of common law native title, but a statutory right which the legislature did not intend to confer over pastoral lease land in 1993. However, one effect of *Wik* is to confirm that this right now applies to present or former pastoral lease land and that in order to ensure the validity of grants of rights anywhere other than on present or former freehold land, the NTA procedures must be invoked.

Where native title claims are lodged, there may be a time delay of a year or more, if agreement cannot be reached. Further, the government resources

---

2 See Attorney-General's Legal Practice, "Legal Implications of the High Court decision in the *Wik Peoples v Queensland*", Department Advice, 23 January 1997, p 15.

required for the purpose of negotiating in good faith will place an enormous burden on government.[3]

V. COMMENTS ON THE TEN POINT PLAN

A. Validation of Acts / Grants Between 1 January 1994 and 23 December 1996

The Prime Minister proposes to validate grants made over non-vacant Crown land during this period, presumably by adopting the technique already found in the NTA for validating pre-1994 titles. Validation may create an entitlement to compensation although the proposal does not say by whom it will be borne.

B. Confirmation of Extinguishment of Native Title on Exclusive Tenures

States and Territories will be able to confirm that 'exclusive' tenures such as freehold and commercial leases extinguish native title. This appears unnecessary as the High Court has already stated that freehold extinguishes native title and that tenures granting exclusive possession do likewise. Hopefully, this will produce something of greater effect than the illusion of s 212 of the NTA.

C. Native title and Pastoral Leases

The proposal makes it clear that native title rights which are inconsistent with those of a statutory lessee will be permanently extinguished and not merely suppressed for the duration of the lease. Further, all activities pursuant to, or incidental to, "primary production"[4] 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. This will require amendments to relevant State and Territory legislation so as to provide for wider authorised activities on such leases; otherwise, native title holders could seek an injunction where non-authorised activities were being carried out. Native title holders will again be able to seek compensation for any impairment of their rights.

D. Sunset Clause

The Prime Minister proposes the introduction of a sunset clause into the NTA within which new claims would have to be made. It is arguable that the removal of the right to make a native title claim after the nominated date will amount to an acquisition of property under the *Constitution* so as to require the payment of just terms compensation if it is to be valid.

---

3 See, for example, the Federal Court's interpretation of the "good faith" obligation on government in *Walley v The State of Western Australia* (1996) 137 ALR 561 at 576-7, per Carr J

4 See Appendix B.

E. Right to Negotiate

As the right to negotiate is a statutory right and not an incident of common law native title, the Commonwealth could remove its application to statutory lease land without incurring any "just terms" compensation liability under section 51(xxxi) of the *Constitution*, nor would it be contrary to the principles of the RDA. Removing the right to negotiate would simply ensure native title holders had the same say, but no greater say, than did, for example, the lessees of pastoral properties where exploration or mining could occur. Consistent with the 1996 proposed amendments to the NTA, it is proposed to restrict access to the right to negotiate, and the areas to which it will apply, by means of a more stringent threshold test and excluding particular types of land.

VI. CONCLUSION

There is substantial exposure for holders of past and present titles, and difficulties to be encountered by those seeking titles in the future, following *Wik*. The difficulty with the Prime Minister's plan is that it fails to address a number of the issues arising from the High Court's decision which were outlined above. It is important that the Commonwealth's legislative response deals comprehensively with the implications of *Wik* so that Australia's land tenure system and its stakeholders will once again have certainty.