WIK: ON INVASIONS, LEGAL FICTIONS, MYTHS AND RATIONAL RESPONSES

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I. INVASIONS AND LEGAL FICTIONS

How does law deal with such a meta-legal phenomenon as invasion? One way is by the invention or deployment of legal fictions.

We may contrast two invasions: that of England by the Normans in 1066, and that of Australia by the English in 1788.

The 1066 invasion led to the replacement of the deceased King Harold by William the Conqueror, and the replacement of many of Harold's leading tenants-in-chief by Normans. Most of the English were left in possession of their lands though, in accordance with feudal theory, all were taken to hold their lands on the basis of a Crown grant. This 'theory of tenures' was always, in large part, a legal fiction. But England was not treated as 'terra nullius'; the land rights of the existing inhabitants were largely respected.

By contrast, the arrival of the English in what is now Australia was characterised by the legal fiction that the lands were 'terra nullius'. On that assumption the 'theory of tenures' could be given full rein such that all land holdings had to be derived, directly or indirectly, from a crown grant. It was not until 1992 that Australian law finally acknowledged what became known as 'native title'. To achieve this result in *Mabo* the High Court needed to clear away some of the old legal fictions. But it did so only in part: the theory of tenures applies to non-indigenous land holdings, but not to native title; and the legal fiction of 'terra nullius' remains as far as the acquisition of sovereignty over Australia is concerned, though not in respect of native title.

II. LEASES AND PASTORAL LEASES

The theory of tenures arrived with the First Fleet in 1788, together with the general body of applicable English law, in what was taken to be the 'settled'

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colony of New South Wales. That body of English law included such notions of real property as freehold and leasehold titles. Generally, leases are granted by the owners of freehold title, and represent one prime example of the coexistence of rights in respect of an area of land. The ultimate ('radical') title of the Crown to all land represents another coexisting interest, though it generally finds expression today in specific statutory powers, such as the power to compulsorily acquire land, or the power to grant access to minerals on or under the land.

The reception of English law in and after 1788 was by way of a 'starter kit'. As the colonies acquired their own legislatures they were authorised to develop their own laws suitable to local conditions. The judgments in *Wik* indicate how the notion of the 'pastoral lease' developed as a very specific response to the unauthorised movement of 'squatters', with their herds and flocks, onto back country beyond the limits of the early settlements.

The historical evidence is that the British Government insisted that pastoral leases should not cut across the rights of Aboriginal peoples.[1] Indeed, in over half the continent - Western Australia, South Australia and the Northern Territory - the policy is written into statute law, and leases expressly recognise the right of Aboriginal people to have access to the land. Australian Surveying and Land Information Group (AUSLIG) figures as at 1994 indicate that some 42 per cent of Australia is covered by leases, mostly pastoral leases.[2]

Generally, when an owner of land grants a lease to someone else, a characteristic of the lease (which distinguishes it from, say, a licence) is that the tenant has a right of 'exclusive possession'. This means that the tenant is entitled to keep other people out, even the owner, during the currency of the lease. But when the lease comes to an end the owner's full rights 'revert' to him or her.

Who grants pastoral leases? Presumably the owner of freehold pastoral land can lease it to someone else, in which case the usual rules operate. But most of the Australian pastoral leases were granted by the Crown over lands which were not subject to freehold title held by other people. The High Court's analysis in *Mabo* was that the Crown held the 'beneficial title' only in respect of lands which were not subject to surviving native title; otherwise it held 'radical title' - the ultimate sovereign power to grant titles which might (or might not) extinguish native title. Native title can be extinguished by government acts that show a 'clear and plain intention' to do so, for example, by being necessarily inconsistent with the continuation of native title rights. The grant of freehold title demonstrates such an intention.

The several majority judgments in *Mabo* did not fully clarify whether Crown grants of leasehold titles would extinguish native title. The analyses varied as to the situation of particular leases in the Murray Island group, and the effect of

1 See, for example, H Reynolds and J Dalziel, "Aborigines and Pastoral Leases Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSWLJ* 315.

2 AUSLIG, *Australian Land Tenure* Map No 93/020 as reproduced in H McRae, G Nettheim and L Beacroft, *Indigenous Legal Issues*, LBC (2nd ed, 1997) p 163, see also p 259

those leases was left at large in the actual order of the Court.[3] Of course, none of the Murray Island leases was a pastoral lease. Yet Brennan J suggested that leaseholds generally would extinguish native title.[4] This view was influential in the drafting of the NTA: the Preamble summarises the High Court decision as holding "that native title is 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". But this leaves open the question whether the grant of *particular* leasehold estates *are* inconsistent with native title.

The general statements by Brennan J in *Mabo* were also influential on the National Native Title Tribunal (NNTT) and the Federal Court in the *Waanyi* litigation[5] and the earlier stages of the *Wik* litigation. But the majority of the High Court in *Wik* held that the Queensland pastoral leases in question did not grant 'exclusive possession' so as to be inconsistent with the continued existence of native title. However any inconsistency would be resolved in favour of the pastoral lease so that any native title rights and interests would have to fit around the edges of the pastoralist's rights.

III. MYTHS

The response of some politicians to the *Wik* decision has been quite hysterical and appears to be directed to advancing particular political agendas. One myth being propagated is that the NTA intended that pastoral leases would extinguish native title, and should now be amended to achieve that result (outside the limited category of validated 'past acts'). Another myth is that the High Court majority acted with constitutional impropriety in 'creating' law.

A further myth is that you cannot have coexisting rights in the same area of land. The High Court analysis clearly indicated the contrary. Even freehold titles may be subject to various easements and rights of entry. And governments are able to grant mining interests over most land, whether freehold or leasehold.[6]

Yet another myth is that principles of racial equality require that native title be extinguished under pastoral leasehold lands. The argument bears some similarity to a broader argument, that native title may be held only by Aborigines and Torres Strait Islanders, whereas equality requires a system of titles which are available to all. This broader argument was rejected in *Mabo (No 1)*. But principles of racial equality would also undermine proposals to extinguish

3 *Mabo* at 15-16, per Mason CJ and McHugh J; at 76, per Brennan J; at 119, per Deane and Gaudron JJ, at 217, per Toohey J.

4 *Ibid* at 68-9. Mason CJ and McHugh J agreeing generally at 15-16.

5 *Re Waanyi People's Application (No 1)* (1994) 129 ALR 100; *Re Waanyi People's Application (No 2)* (1995) 129 ALR 118; *North Ganalanja Aboriginal Corporation v Queensland* (1995) 132 ALR 565 (Federal Court), see also (1996) 135 ALR 225 (High Court).

6 M Tehan, "Co-existence of Interests in Land: A Dominant Feature of the Common Law", in Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Land, Rights, Law. Issues of Native Title*, Issues Paper No 12, January 1997

underlying native title when overlaid by pastoral leases granted by the Crown. Consistency would require that other forms of underlying title also be extinguished, for example, the title of freehold owners who have leased their land to others, and the title of freehold or leasehold lands over which the Crown has granted mining leases.

Of course, the political and financial costs of extinguishing native title are potentially so immense as not to be justified if there are less costly ways of resolving any problems thrown up by *Wik*. The financial costs are those of providing just terms compensation for the acquisition of native title property rights. The political costs involve domestic discord and international criticism.

What, then, are the problems thrown up by *Wik*?

IV. PROBLEMS FOR PASTORALISTS

The Queensland Minister for Natural Resources, Mr Howard Hobbs, has claimed 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 consent of the traditional owners".[7] The advice of the Commonwealth Attorney-General's Legal Practice suggests the same thing.[8] Legal advice to the National Farmers' Federation also suggests that there are significant question marks over what pastoralists may do.[9]

The concern arises partly from the high threshold set by the majority judges in *Wik* for the extinguishment of native title rights and interests, partly from the very limited specification in legislation and pastoral leases of what pastoralists may do, and partly from the perceived need for pastoralists to diversify the range of their economic activities. It also arises from contending arguments as to whether such activities as digging dams are covered by the definition of "past act" in s 228 of the NTA so as to be authorised by a valid pastoral lease, even though occurring after the commencement of the NTA. If not, such activities would fall under the 'future acts regime' such as to require compliance with NTA processes (see below).

Interestingly, the representative Aboriginal and Torres Strait Islander bodies under the NTA appear to be arguing that pastoralists are entitled to do all things that pastoralists generally do, and have offered to support any amendment to confirm this.

This particular set of concerns might be met by a negotiated minor amendment to the NTA, perhaps commencing with the words "To allay any doubt...". The clause could list categories of pastoral activities coming within the definition of

7 Howard Hobbs MLA, "*Wik* Decision Puts Land Dealings, Development on Hold", Media Release, 8 January 1997

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

9 For a balanced and informative account of the concerns of pastoralists, see M Love, "Lighting the *Wik* of Change", in Native Title Issues Unit, Australian Institute of Aboriginal and Torres Strait Islander Affairs, *Land, Rights, Laws: Issues of Native Title*, Issues Paper No 14, February 1997.

"past act" and to be treated as Category D (thus not extinguishing native title) for the purposes of ss 15(l)(d) and 232. Or the amendment might authorise negotiated agreements at State/Territory or regional level, to respond to differing legislation or differing regional circumstances.

Anything which enlarges the duration or tenure of pastoral leases, or alters the use of the land, would not be covered and, if there were native titleholders, would need to be dealt with as a "future act" under the NTA.

V. THE PROBLEM OF POST-1993 GRANTS

Any post-1993 acts by governments which are not subsumed under the extended definition of "past acts" in the NTA are, if they affect native title, "future acts" which are permissible only to the extent that they would be permissible in relation to freehold title or if they come within the definition of "low impact future acts" (s 234), or are covered by an agreement under s 21 (see s 235). In addition, "future acts" in relation to mining and some compulsory acquisitions attract the "right to negotiate" processes (s 26) which are set in train by the issue of s 29 notices. "Future acts" may be valid if there is no response within two months to a non-claimant application (s 67).

It appears that some State/Territory governments have issued titles in respect of land since the commencement of the NTA on 1 January 1994, without complying with NTA procedures. The Queensland Minister for Mines and Energy has stated that 4600 mining tenures were issued in that State between 1 January 1994 and 23 December 1996, the date *Wik* was handed down. It also seems that this disregard of the NTA was not confined to pastoral lease lands: the NNTT's Annual Report for 1995/6 states that, for the year in question, it received 5114 s 29 notices from Western Australia but only three from Queensland.

Miners, naturally, seek validation of these leases. They argue, reasonably enough, that they took those titles in good faith and that any failure was that of the government. Native title holders, equally reasonably, ask why their interests should be jeopardised by yet another retrospective validation of the interests of others.

A response to this particular problem also needs to be negotiated. One possible outcome might be agreement to a legislated validation which is conditional. The conditions might include the following requirements:

- that NTA processes that should have been followed previously should be followed now, with provision for extended times for representative bodies to respond to the backlog;
- that those governments which chose to ignore NTA processes should contribute sufficient funds to the representative bodies to give them the resources to deal with these processes now; and

- that such governments deposit all or some of royalty revenues derived from such grants in trust against any payments that may become due to native title holders.

VI. TRADE-OFFS FOR INDIGENOUS PEOPLES

In regard to both these sets of problems, indigenous Australians are being asked to ensure the validity, or the validation, of the interests of others. It is not unreasonable that a response to the *Wik* decision should also provide some immediate benefits to native title holders. As Noel Pearson pointed out at the *Wik Summit* in Palm Cove in January 1997, the commencement of the NTA on 1 January 1994 delivered immediate benefits to non-native title holders whose post-1975 grants were validated; but the promised benefits to native title holders, in terms of determinations of native title and compensation, had yet to materialise and required immense commitment of resources and energy from the native title holders and their organisations.

What might those trade-offs be? There ought to be something more positive than amelioration of the threats of extinguishment of native title and dismantling of the right to negotiate. Representative Aboriginal and Torres Strait Islander bodies will undoubtedly have their own ideas to present.

What is essential is that the response to *Wik* be other than the usual Australian resort to lateral legislated solutions. There needs to be negotiation at the national level to devise an overall strategy which might be supplemented by agreements at a regional level.

VII. CONCLUSION

It is taking many non-indigenous Australians some time to adjust to the notion that some indigenous Australians have property rights attracting the protection of Australian law. Myths and legal fictions are slow to disappear. But an enforced return to the comfortable pre-*Mabo* or pre-*Wik* days is not a serious option.

Wik has created some problems for non-indigenous interests. Some of the amendments to the NTA proposed by the Howard Government during 1996 pose serious problems for native title holders.[10] The negative attitudes of State and Territory governments have been a prime factor in impeding the operation of the NTA in producing agreed determinations of native title.

What is clearly needed now are negotiations among the various 'stakeholders' conducted in an atmosphere of constructive goodwill, mutual respect and

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10 S Beckett, "Workability in Whose Interest? The Native Title Amendment Bill 1996" (1996) 3 (84) *Aboriginal Law Bulletin* 4, S Beckett "But Wait. There's More! Federal Government Releases More Amendments to the Native Title Act" (1996) 3(87) *Aboriginal Law Bulletin* 8; ATSIC, *Proposed Amendments to the Native Title Act 1993. Issues for Indigenous People,* November 1996.

generosity of spirit.[11] Most indigenous peoples' representatives and some of the industry groups appear willing to proceed in this fashion. Regrettably, most of the State and Territory political leaders seem incapable of proceeding in this way when they perceive short-term political advantages in extravagant claims and demands. It is not in the interests of Australia as a whole that they prevail.

11 R Farley, "*Wik* - The Way Forward", in Native Titles Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Affairs, *Land, Rights, Laws: Issues of Native Title*, Issues Paper No 13, February 1997