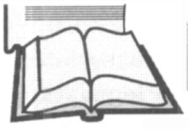
The Australian Journal of
INDIGENOUS EDUCATION



Section E: Reviews

The Wik Case: Issues and Implications

Edited by Graham Hiley QC

Butterworths, 1997, ISBN 0 409 31397 4, 210 pp.

Reviewed by Lesley Jolly, Department of Anthropology and Sociology, The University of Queensland.

Legal justifications for the invasion of Australia have always rested on definitional questions. Although the concept of *terra nullius*, land owned by no-one, does not appear in any legal dictionary between 1701 and 1986, this notion was enshrined in common law and was the legal underpinning of non-Indigenous rights in land until overturned by the High Court's Mabo decision of 1992. Those who invoked this concept were not denying that Aboriginal people lived here and used the land. They were arguing about what constitutes ownership **in law**, that is they were relying on particular definitions of ownership. In the tradition of invaders, ownership of land came about through cultivation of it; so land such as Australia, that the invaders wrongly thought to be uncultivated, could be labelled unowned, even when clearly occupied.

The Mabo decision was revolutionary because it overturned the doctrine of *terra nullius* by allowing the common law to recognise native title in land; that is, title deriving from sources other than those defined as meaningful by British/Australian law. What actual rights granted in native title might be, whether the right to hunt, have access to country or knowledge about it or whatever, were described as depending on local custom. This lack of definition of native title respected the diversity of Aboriginal societies but was to have some serious consequences when it passed into law as part of the *Native Title Act (1993)*. That Act allowed that native title had been extinguished by lawful acts of government and other interests which made the exercise of Native Title rights impossible. So, for instance, freehold title granted by the Crown was held to have extinguished native title because it entailed exclusive possession by the freeholder. In such circumstances, the pursuit of any kind of activity that might qualify as a native title right was deemed to be impossible. The effect of the Act was to validate this kind of extinguishment of native title and to validate the granting of those titles. The Act asserted that pastoral leases also extinguished native title. If this were true it would be a heavy blow to Aboriginal people seeking to gain native title determinations, since so much of the country is under pastoral lease. This is particularly true in the more remote parts where Aboriginal people had in fact continued the observance of many of their classical modes of living, and had reasonably expected to have a good case for recognition of their rights in land.

The argument over whether pastoral leases extinguished native title seemed set to drag on through many individual cases over several jurisdictions until the Wik case was brought to the High Court. This case concerns land falling within the traditional territories of the Wik and Thayorre peoples of eastern Cape York Peninsula. In some parts of the land under consideration leases had only been granted for short periods of time and had never resulted in the erection of any fences, stocking with cattle or any other activity that interfered with the activities of the 300 Aboriginal people living there. The other part of the case turned on whether native title rights, such as for instance the right to fish, could co-exist with pastoral rights. The final judgement was a disappointment to many who wanted a clear-cut decision one way or another, and once again the difficulty was in the definitions. All that the decision found, to quote Graham Hiley, was that 'the granting of a pastoral lease ... did not **necessarily** extinguish **all** native title rights and interests that **might** otherwise exist'. In other words, it depends on how the particular lease is defined, and it depends on the native title rights, if any, demonstrated in any given case. Pastoral lease rights and native title rights may therefore co-exist, but where they were in conflict the court held that pastoral rights should take precedence. It is therefore hard to see, at first glance, where the much-touted 'uncertainty' enters the picture. Hiley's volume goes a long way to teasing out the

issues raised by the decision and the definitional and other legal quagmires that it opens up.

The book contains the whole of the High Court judgement as well as an introduction and ten short essays dealing with different issues. The essays are written by lawyers and others who advised or acted for various parties in the case; Aboriginal groups, governments, pastoralists and miners. At times, especially in the chapters written by lawyers, technical language is used which makes it hard to grasp the point for a lay reader, but on the whole the essays do a good job of pointing out what we can expect to see being debated in the near future.

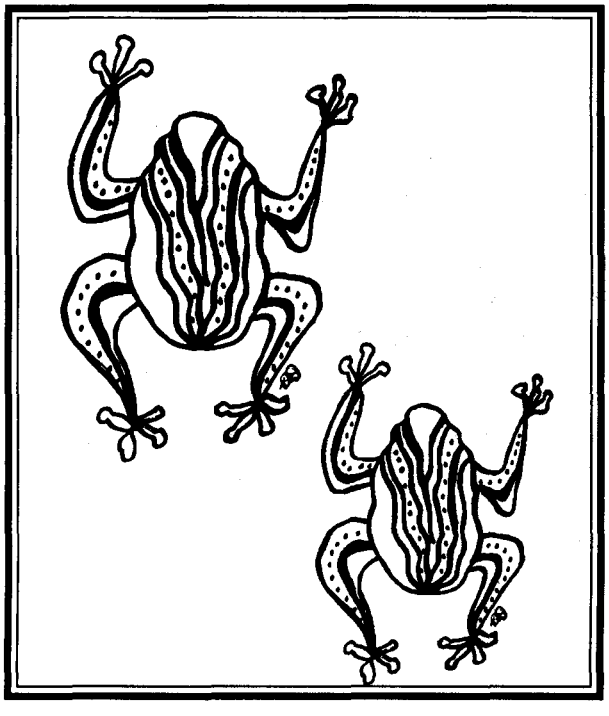
The first two essays are by Phillip Hunter and John Bottoms, who were counsel for the Wik and Thayorre peoples respectively. They review their clients' positions in the case and outline the points of law on which the judgement turned. Hunter's essay, entitled 'Unnecessary Extinguishment', concentrates on the issues of exclusive possession, inconsistency of native title and other rights and the nature of Crown interests in the land. All of these are really questions about how a lease is defined, in terms of the rights leases grant and the relationship between leases and other types of tenure, and these are the questions that preoccupy most of the contributors to the volume.

The majority of the judges found that, unlike British leases deriving ultimately from feudal practice, Australian leases are creatures of statute. This means that the rights and powers associated with them are those specified in the legislation creating them only. Justice Kirby pointed out that the enabling legislation in Queensland made it highly unlikely that the government intended to grant exclusive possession on leaseholders. Governments have usually created leases as ways of encouraging development without losing ultimate control of the land. The government's intentions in this matter are crucial since the *Native Title Act* only recognises the extinguishment of native title by other titles, where there is clear intention to do so. The question then arises whether other jurisdictions' pastoral leases did enshrine an intent to extinguish native title. In his essay reviewing the case in Western Australia, Greg McIntyre argues that there is even less evidence of intent to extinguish than in Queensland, thanks to provisions that reserve access rights in specified circumstances, including:

> The Aboriginal natives may at all times enter upon unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner.

This kind of provision seems to allow for the co-existence of pastoral and native title rights but in Queensland, where the situation was less explicit, there was still some argument on this point. Some lawyers wanted to argue that just the granting of a lease, even if it was not acted upon, constituted extinguishment. The majority decision did not take this view and Justice Kirby pointed out that 'nothing of relevance had occurred to their [Thayorre] land except for ... the signing of documents by people in Brisbane'. However, the law rests not on common sense but on definitions and the Chief Justice argued that the fact that those documents had been signed, and the leases later reverted to the Crown, changed the nature of the Crown's interests in the land in such a way as to extinguish native title. We can be glad that this was not the view adopted by the majority.

While the contributors who acted for Aboriginal interests tend to review the points of law in the decision, other contributors do a good job of describing what the decision means for pastoralists, miners and government. Perhaps the most revealing essay in the collection, for this reviewer, was Mark Love's 'The Farmgate Effect'. This essay describes the assumptions on which pastoralists



have always depended and why these have now been cast into question, creating real 'uncertainty'. Whether they realised it or not, pastoralists have always been pensioners of government. Although they have been encouraged to think of the land as theirs, in law they were granted access to it for pastoral purposes only. As Love points out, 'The State's intended outcome of pastoral management is to improve the land, increase the economic viability and capacity to sustain a population'. So long as governments could ignore the rights of their Aboriginal citizens to be included in that population whom the land should sustain, their interests and pastoral interests coincided. So, in recent years, governments could encourage pastoralists to diversify into other pursuits, such as tourism, to protect the environment and improve the economy. However, the *Native Title Act* contains the provision that any future enterprise (i.e. after 1 January 1994) likely to impair or extinguish native title must be the subject of negotiation with native title holders and/or compensation must be paid. The uncertainty for pastoralists, then, is whether they can proceed in activities they have been encouraged to think were legitimate pastoral pursuits without laying themselves open to action at law and compensation claims. Simon Williamson's paper on the implications of the decision for the mining industry makes it clear that it is the question of the validity of titles granted since 1994 without negotiation or compensation that is of concern to them also. Both pastoralist and mining interests quite understandably look to government to resolve this dilemma for them.

The papers here dealing with the implications of the Wik decision for government make the most disheartening reading. After reading the paper by Raelene Webb and Kenneth Pettit 'The Effect of *Wik* on Pastoral Leases with Provision for Access by Aboriginal People', one is left with the impression that governments are only interested in extinguishing native title rights rather than seeking, as Williamson suggests is necessary, 'a politically and socially [enduring] solution ... providing certainty and security for all parties'. Paul Smith's paper makes the point that, since the decision has not resolved whether all pastoral leases do or do not extinguish native title, the string of single instance cases that the *Native Title Act* was intended to prevent is inevitable. Governments find this process too cumbersome and want to find a blanket solution. They also don't like to admit that much of the confusion and uncertainty was of their own making and so propose a solution that seeks to return to what they thought was the *status quo* and also manages to suggest that the problem lies with unreasonable Aboriginal demands. However, although government has the power to legislate for anything it wishes, that power is constrained by past Acts of government. Here, the relevant past Acts are provisions in the Constitution, Section 51(xxxi), and the *Racial Discrimination Act*, which protect the interests of Aboriginal title holders. Young, Briggs and Denholder's paper on the relationship between these provisions and the *Native Title Act* is highly technical and sometimes descends to legal jargon. What emerges is that the *Racial Discrimination Act* can be amended by government so as to allow them to extinguish native title, but probably only insofar as some corresponding benefit is offered. Similarly, the Constitution's provision that a citizen has the right to compensation where property rights are impaired is likely to be expensive. We can be sure that whatever the final shape of the legislation in response to Wik, there will be lots more argument.

One of the most encouraging aspects of this book was the way in which so many of the contributors, representing all sides of the question, recognised the need to seek a balance that acknowledges and incorporates what are now admitted to be legitimate Aboriginal interests. The way forward cannot be by self-serving tinkering with definitions. It can only be by admitting Aboriginal people and their interests so our ongoing project of making and understanding Australia. □