

Attenuating indigenous property rights: land policy after the *Wik* decision[†]

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In December 1996, the High Court of Australia handed down its judgement in the *Wik* case finding, by a 4:3 majority, that pastoral leases did not necessarily extinguish native title. An intense political campaign by both pastoral and indigenous interests, and their political representatives, was aimed, in the case of the former, at legislative extinguishment of native title on pastoral leases and, in the case of the latter, at defending property rights which the High Court found had never been extinguished. In this article it is argued that an efficient re-allocation of property rights is unlikely to result from extinguishment, but requires Coasian-type bargains between pastoral and indigenous interests.

1. Introduction

On 23 December 1996, the Australian High Court handed down its judgement in the *Wik* case. The Court decided, by a 4:3 majority that native title might not have been extinguished by the grant and operation of pastoral leases.¹ Further, the Court decided that in some circumstances pastoral

[†] I have greatly profited in writing this article from discussions with Ross Drynan, Robert Batterham, Gordon MacAulay and Victoria Clifford, although none necessarily shares my views. This article has been presented to a variety of forums, and I thank participants for their comments and criticisms (Economics Society of Australia (Queensland Branch) and Kumbari/Ngurpai Lag Higher Education Centre at the University of Southern Queensland; University of Sydney; NSW, ACT and Victorian Branches of the Australian Agricultural and Resource Economics Society). The article was originally written at the Finke Gorge National Park in Central Australia, and I am grateful to the rangers for their hospitality.

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¹ The majority in *Mabo* comprised Chief Justice Mason and Justices Brennan and McHugh, Justices Deane and Gaudron, and Justice Toohey; Justice Dawson dissented. The majority in *Wik* comprised Justices Toohey, Gaudron, Gummow and Kirby (all individual judgements); Chief Justice Brennan and Justices Dawson and McHugh dissented. By mid-1998 Chief Justice Brennan, and Justices Dawson and Toohey, had retired. The next major native title case is therefore likely to be heard by at most two High Court judges (Gaudron and McHugh) who heard the original *Mabo* case.

leases and native title might coexist. The purpose of this article is initially to briefly review the native title background to the *Wik* case — the *Mabo* case and the Commonwealth's 1993 Native Title Act (NTA). The broad economic context of the High Court's *Wik* decision is then evaluated, followed by an evaluation of the Commonwealth's amended 10 point plan.

2. *Mabo* and the Native Title Act²

The High Court's decision in the *Mabo* case of 3 June 1992 re-asserted indigenous common law rights to title in land (*Mabo and Others v State of Queensland*; Mabo 1992). The central issue in the judgement was that 'the High Court of Australia held in *Mabo v Queensland* that the common law of Australia recognises a form of native title' (anon. 1992, para. 1). The case was *common law*, i.e. judge-made law rather than parliamentary statute, and thus not based on interpretation of statute or the Commonwealth Constitution. The decision was controversial because many Australians believed indigenous Australians had never owned land in a way recognised by English law and, further, even if indigenous Australians ever had owned their land they had long since lost possession by 'settlement' or 'conquest'. The *Mabo* decision arose in the specific context of the claim by three Torres Strait Islanders — Eddie Mabo, David Passi and James Rice — for a declaration that they be recognised as the owners of their traditional lands. In the course of examining this particular case, the Court reviewed general principles underlying native title in Australia generally, thus affecting both Torres Strait Islanders and Aborigines. Approximately 9 square kilometres were granted to the claimants by the *Mabo* decision. The High Court's decision prompted both federal and state governments to legislate for indigenous land rights. The approach of the Western Australian government was inconsistent with that of the federal government and the former, together with South Australia, challenged the federal legislation in the High Court; this challenge was dismissed in March 1995.

The majority of judges decided that 'upon the acquisition of sovereignty by the Crown it acquired a "radical" title to the land' but that this "'Radical" title was subject to existing native title the elements of which are to be determined according to the traditional laws and customs of those people with whom the title resides' (anon. 1992, Appendix, paras. 2–3,4).³ The Court thus 'rejected the notion that

²The first part of this section is drawn from Godden (1997, pp. 281–300).

³The *Mabo* judgement was also well summarised by the Chief Justice in *Wik* (Wik 1996, per Brennan; see Appendix).

Australia was *terra nullius* (land belonging to no one) at the time of European settlement and the resulting implication that the absolute ownership of land vested in the Crown' (ibid., Appendix, para. 2). However, 'The High Court's rejection of the proposition that Australia was *terra nullius* at the time of settlement does not mean that indigenous Australians can claim sovereignty under international law' (ibid., Appendix, para. 41). The Crown's sovereignty did confer title for 'those areas of the continent that were "truly uninhabited"' (ibid., Appendix, para. 4).⁴ While the Crown obtained sovereignty, 'the acquisition of sovereignty did not itself effect the automatic extinguishment of native title, where it existed, although certain actions by governments or the loss [by indigenous Australians] of a traditional connection with the land . . . will have extinguished the [native] title in respect of particular areas' (ibid., Appendix, para. 4).

The majority of judges accepted that extinguishment of native title resulted from grant of freehold title (anon. 1992, Appendix, para. 10), although the judges differed over what other actions might have extinguished this title (ibid., Appendix, para. 11). Where native title possibly exists, its continued existence partly depended on 'whether an interest in the land granted by the Crown, or the Crown's actions as an occupier, were inconsistent with the continuing right to enjoy native title, and therefore extinguished that title' (ibid., Appendix, para. 11). Judges' views also varied as to whether or not native title was extinguished by grants of leasehold (ibid., Appendix, para. 12). The Crown's appropriation of land for an existing use probably extinguished native title — 'roads, railways and buildings, such as post offices, were mentioned' — but appropriation for some future use would not extinguish native title (ibid., Appendix, para. 13). Land set aside for a national park or wasteland might not extinguish native title, whereas declaration of a wilderness area might be inconsistent with continuing native title (ibid., Appendix, para. 13). 'Native title might not have been extinguished by the granting of authorities to prospect for minerals', but a mining lease probably would (ibid., Appendix, paras. 14, 19).

While the direct intent of the *Mabo* judgement affected land title, the generic resource 'land' has many economic dimensions. From the Court's judgement, it was unclear as to 'whether the scope of any title might extend to the natural resources of the land, including minerals' or whether native title rights might have only been restricted to resources traditionally used by indigenous Australians (anon. 1992, Appendix, para. 20). For example,

⁴ Native title claims would probably never be denied because the land in question was 'truly uninhabited' since, at the time of the settlement in Sydney in 1788, it was unknown whether or not areas other than Sydney's immediate vicinity were actually uninhabited.

Justice Brennan (with Chief Justice Mason and Justice McHugh concurring) held ‘The nature and incidents of native title must be ascertained as a matter of fact by reference to the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants’ (Mabo 1992, p.2 (iv) and p.42). Justices Deane and Gaudron argued that ‘The traditional law and custom is not, however, frozen as at the moment of the establishment of a Colony’ (Mabo 1992, p.83; cf. Brennan *et al.* in Mabo 1992, p. 44). It was thus unclear whether or not native title only granted rights to exploit resources with traditional technologies (anon. 1992, Appendix, para. 28). Other issues not directly canvassed in the *Mabo* judgement included whether or not native title extended to water resources (surface, sub-surface, marine), littoral (foreshores, beaches, sea-bed), or fisheries (e.g. *ibid.*, Appendix, paras. 6, 19–25).⁵

The general effects of the *Mabo* decision are summarised in figure 1. Land where contemporary indigenous people had no continuing and traditional association had had its native title extinguished (second row of figure 1). Land which had been dealt with so that its use was inconsistent with native title, e.g. freehold land (which explicitly granted exclusive possession), also had had its native title extinguished (second cell of figure 1). Native title has also been extinguished on non-alienated (i.e. ‘Crown’) land with a dedicated use (third sub-cell of cell 1). Opportunities existed for potentially successful native title on vacant Crown land without a dedicated use (first sub-cell of cell 1). The status of pastoral leasehold land (second sub-cell of cell 1 in figure 1) was unclear, partly because there was no such land on the Murray Islands.

Despite populist views to the contrary, the *Mabo* case did not grant land rights to indigenous Australians.⁶ It simply determined the circumstances under which land had not been taken from them, i.e. where native title had *not* been extinguished.⁷ The case did not create new law, but revisited the context in which Australian settlement had occurred and the way that land

⁵ Native title over marine resources was found to exist in the Croker Island case (*Mary Yarmirr & Ors v The Northern Territory of Australia & Ors* 1998). Other claims under the Native Title Act have included claims for freshwater resources (Yorta Yorta claim) (National Native Title Tribunal 1997a).

⁶ ‘But it is important to understand that the decision in *Mabo [No 2]* was not a legislative but a judicial act. It did not declare that thenceforth native title would be recognised. It held that native title had always existed . . . It had survived the advent of the sovereignty of the Crown in Australia’. (Wik 1996, per Kirby)

⁷ Even as late as the final debate on the Native Title Amendment Bill in July 1998, a government member railed against the original *Mabo* decision, calling for a referendum to decide whether or not the Australian people wanted native title (Smith 1998, p. 6063).

	Crown land			Non-Crown land (i.e. alienated)
continuing/traditional association (but not necessarily “frozen in time”)	vacant, no dedicated use opportunity for native title - common law or Native Title Act	pastoral not litigated, no pastoral lease in Murray Is.	dedicated use NO NATIVE TITLE	NO NATIVE TITLE
no continuing/traditional association	NO NATIVE TITLE			

Figure 1 Native title implications following *Mabo*

had been expropriated from indigenous inhabitants. The broad categories where expropriation had not occurred were identified in the judgement and, therefore, the situations in which native title remained unviolated. Since expropriation of resources, even with compensation, is unlikely to be Pareto efficient, especially where there are non-marketed goods involved, the Court’s decision in *Mabo* (and the subsequent Native Title Act) was likely to prevent future Pareto-inefficient seizures of indigenous Australians’ land.

Following the *Mabo* decision, two broad strategies were open to government. First, the decision could have been legislatively ignored, leaving it up to the courts to determine in each particular instance whether or not native title had been extinguished. Alternatively, governments could have attempted to facilitate the process by creating a framework within which an orderly process for determining native title claims could occur. Both Commonwealth and State Governments opted for the latter course, with the Commonwealth’s Native Title Act receiving assent in late 1993 and commencing on 1 January 1994.⁸ The *Native Title Act 1993* implemented the High Court’s decision by importing the relevant common law (French 1994). The political process of arriving at this Act was discussed in Godden (1997, pp. 286–91).

By 4 August 1997, the National Native Title Tribunal, established to facilitate claims for native title and declarations for its extinguishment had dealt with 1342 claims (table 1). The first grant of native title was for 12.4 hectares of land at Crescent Head, NSW, which was immediately

⁸ Unless explicitly noted otherwise, any reference to a Native Title Act is to the Commonwealth Act.

Table 1 Summary data of claims submitted to National Native Title Tribunal: all applications (as at 4 August 1997)

Accepted:	615	Accepted and referred to the Federal Court:	17	Rejected:	15	Withdrawn:	337
Not yet accepted:	132	Dismissed:	59	Determined:	167	Total:	1342

Source: National Native Title Tribunal (1997)

extinguished for compensation (Jopson 1997); the only other grant has been 110 000 hectares at Hopevale on Cape York, mediated by the National Native Title Tribunal (National Native Title Tribunal 1997b) and ratified by the Federal Court on 5 December 1997 (National Native Title Tribunal 1997c).⁹

With respect to pastoral leases, both the *Mabo* decision and the NTA were largely silent. Justice Toohey in the *Wik* case commented that:

The recital in the preamble to the *Native Title Act* that

‘The High Court has: . . .

(c) held 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’

reads too much into the judgments in *Mabo [No 2]* so far as the reference to leasehold estates is concerned unless particular attention is given to what is meant by that term. At their highest, the references are obiter.

(*Wik* 1996, per Toohey)

Even before enactment of the Native Title Act, the *Wik* plaintiffs had begun their action.

3. Wik decision

The majority judges in *Wik*, while each submitting individual reasonings, jointly agreed to a common position in the case, which was presented as a

⁹The slow evolution of native title grants since the High Court’s *Mabo* decision may be viewed through spectacles of various hues. It could be seen as indicating that non-indigenous Australians have little to fear from native title. Alternatively, it could be seen as indicating that the process established by the Native Title Act is too convoluted and thus inefficient in delivering satisfactory outcomes.

postscript to Justice Toohey's judgement. The two key paragraphs of this postscript are:

To say that the pastoral leases in question did not confer rights to exclusive possession on the grantees is in no way destructive of the title of those grantees. It is to recognise that the rights and obligations of each grantee depend upon the terms of the grant of the pastoral lease and upon the statute which authorised it.

So far as the extinguishment of native title rights is concerned, the answer given is that there was no necessary extinguishment of those rights by reason of the grant of pastoral leases under the Acts in question. Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees. Once the conclusion is reached that there is no necessary extinguishment by reason of the grants, the possibility of the existence of concurrent rights precludes any further question arising in the appeals as to the suspension of any native title rights during the currency of the grants.

(Wik 1996, per Toohey)

The key issue — whether or not pastoral leases extinguished native title in principle — was argued in all judgements to require a determination of the nature and incidents of pastoral leases, which could only be assessed in the context of the historical development of pastoral leases in Australia, as this tenure was unknown in English law. Chief Justice Brennan (with Justices Dawson and McHugh concurring) argued, for example, that:

In the present case, it would be erroneous, after identifying the relevant act as the grant of a pastoral lease under the 1910 Act to inquire whether the grant of the lease exhibited a clear and plain intention to extinguish native title. The question is not whether the Governor in Council intended or exhibited an intention to extinguish native title but whether the right to exclusive possession conferred by the leases on the pastoral lessees was inconsistent with the continued right of the holders of native title to enjoy that title.

(Wik 1996, per Brennan)

Because the *Wik* judgment turned on the nature and incidents of pastoral leases, there is a review of the historical development of pastoral leases in each of the judgments (cf. Reynolds 1992).

3.1 Brief history of pastoral leases in Australia¹⁰

Faced with the rapid spread of squatting in the NSW Colony, the colonial legislature enacted the squatting acts which created pastoral licences.¹¹ Licensees were permitted to occupy non-European-settled land for a fixed annual licence fee. The *Crown Lands Unauthorized Occupation Act 1839* (NSW) established a border police for law enforcement beyond the settled areas, and this Act clearly contemplated the co-existence of Aborigines and squatters on these licensed lands. The Imperial Government's *Sale of Waste Lands Act Amendment Act 1846*, implemented locally in 1847, limited these licences to fourteen years, specified that they be for pastoral purposes, and evidenced no intention to exclude Aborigines from such lands. Justice Kirby (and other judges) quoted the following contemporary despatch:

[I]t should be generally understood that Leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such Land as they may require within the large limits thus assigned to them, but that these Leases are not intended to deprive the Natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil except over land actually cultivated or fenced in for that purpose.

(quoted in Wik 1996, per Kirby)

When land settlement commenced in Moreton Bay (Queensland) in 1842, it was part of the NSW Colony and NSW's laws thus applied, including those relating to squatting. Following self-government in NSW in 1855, and in Queensland in 1859, NSW's laws applied until repealed or modified. Queensland 'adopted and elaborated the form of pastoral lease which had earlier evolved in New South Wales' (Wik 1996, per Kirby) with most of the legislation containing 'express provisions conferring rights on third parties over a pastoral lease, inconsistent with the submission that the lease

¹⁰ The first part of this brief history is drawn from Justice Kirby's judgement; the latter from Justice Toohey's. See also Reynolds (1992).

¹¹ 'It is useful to record, briefly, something of the history of the emergence of pastoral leases in Queensland. As a result of the different patterns of availability and utilisation of land in England, such leases were unknown in that country. They are creatures of Australian statutes.' (Wik 1996, per Kirby).

conferred rights of exclusive possession upon the lessee' (Wik 1996, per Kirby).¹² In particular:

Nor did the legislation expressly provide for the curtailment or limitation of Aboriginal rights, or any manner of dealing with the land from which could be inferred the purpose of abolishing Aboriginal native title.

(Wik 1996, per Kirby).

Finally, the rights granted to pastoralists were granted for 'pastoral purposes only', without exclusive possession (Wik 1996, per Toohey).¹³

In summary, therefore, the general state of pastoral leasehold tenure, according to the High Court majority in *Wik*, was that pastoral leases did not grant exclusive possession to the lessees. Indeed, both the pastoral leasehold legislation and its administration contemplated the co-existence of pastoral lessees and indigenous people.

¹² 'None of the foregoing Queensland legislation expressly abolished Aboriginal native title. This is scarcely surprising, having regard to the then understanding of the law, that such title had not survived annexation of Australia to the Crown. Nor did the legislation expressly provide for the curtailment or limitation of Aboriginal rights, or any manner of dealing with the land from which could be inferred the purpose of abolishing Aboriginal native title. Again, this is unsurprising, in light of the understanding of Aboriginal legal rights at the time, the provisions in limited legislation about particular aspects of Aboriginal policy and the then prevailing policy of ignoring Aboriginals, leaving them as far as possible untouched by Australian law in the expectation, and hope, that they would become "civilised", assimilated or otherwise disappear as a "problem".' (Wik 1996, per Kirby)

¹³ 'leases granted under the 1910 Act . . . were expressed to be for "pastoral purposes only". "Pastoral purposes" is not defined in the Act nor are the grants of lease specific as to what the expression entails. Clearly it includes the raising of livestock. It also includes things incidental thereto such as establishing fences, yards, bores, mills and accommodation for those engaged in relevant activities. But the use to which the land may be put is circumscribed by the expression "pastoral purposes only"; the rights of the lessee are to be determined accordingly.

'A pastoral lease under the relevant legislation granted to the lessee possession of the land for pastoral purposes. And the grant necessarily gave to the lessee such possession as was required for the occupation of the land for those purposes. As has been seen, each lease contained a number of reservations of rights of entry, both specific and general. The lessee's right to possession must yield to those reservations. There is nothing in the statute which authorised the lease, or in the lease itself, which conferred on the grantee rights to exclusive possession, in particular possession exclusive of all rights and interests of the indigenous inhabitants whose occupation derived from their traditional title. In so far as those rights and interests involved going on to or remaining on the land, it cannot be said that the lease conferred on the grantee rights to exclusive possession. That is not to say the legislature gave conscious recognition to native title in the sense reflected in *Mabo [No 2]*. It is simply that there is nothing in the statute or grant that should be taken as a total exclusion of the indigenous people from the land, thereby necessarily treating their presence as that of trespassers or at best licensees whose licence could be revoked at any time.' (Wik 1996, per Toohey)

The situation with pastoral leasehold was different elsewhere in Australia, with statutory provision for access in Western Australia, South Australia and the Northern Territory. In Western Australia, section 106 of the *Land Act 1993* (WA) provides:

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

(anon. 1994, p.106)

In South Australia, while there are some restrictions on habitation:

the *Pastoral Land Management and Conservation Act 1989* (SA) provides that an Aboriginal may enter, travel across or stay on pastoral land for the purpose of following the traditional pursuits of the Aboriginal people.

(anon. 1994, p.106)

In the Northern Territory, while there are some restrictions on where people may reside and build permanent shelter:

section 38(2) of the *Pastoral Land Act 1992* (NT) provides that where there is a reservation in a pastoral lease in favour of the Aboriginal inhabitants of the territory, it allows Aboriginals who ordinarily reside on the leased land, or who by tradition are entitled to use or occupy the land, and (subject to other laws) to kill wild animals and take natural vegetation for food or ceremonial purposes.

(anon. 1994, p.106)

In NSW, there appears to be nothing in the *Western Lands Act 1901* (as amended) which exhibits 'a clear and plain intention' to extinguish native title in the sense indicated in *Mabo*. The existence of native title in NSW therefore appears to require a search of whether such 'a clear and plain intention' was exhibited for individual leases, and whether or not Aboriginals maintained a continuing and traditional association with the land.

3.2 Depicting property rights in Wik

The property rights involved in the *Wik* case, and similar pastoral leases, can be depicted via figure 2. The outer circle represents the property right(s) encompassing the total of all service flows connected with all natural resources associated with pastoral leases. The inner circle represents rights conferred by the nature of pastoral lease. The first issue in *Wik* was — did the rights enjoyed by pastoralists exhaust the sum total of these rights? The answer of the majority in *Wik* was 'no'; there were 'residual' rights additional

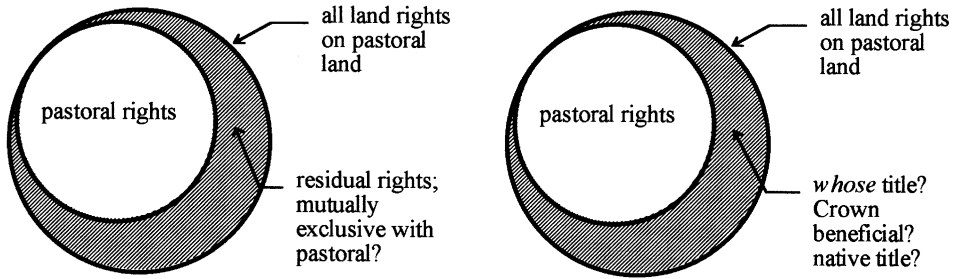


Figure 2 Depicting Wik

to the pastoral rights (the shaded area in figure 2). These rights included, for example, rights of traverse and mineral rights, in addition to any indigenous peoples' rights. The second issue in *Wik* was — given the existence of these additional rights — to whom did they belong? The Court's decision was that, because these additional rights had never been alienated by the Crown, and as long as their exercise did not conflict with pastoralists' rights, native title *may* still exist under principles established under *Mabo* of continuing and traditional association of indigenous peoples with these resources.

3.3 General observations

Pastoralists' representatives generally rejected the majority judgement in *Wik*. For example, McDonald (1997a, emphasis added) argued:¹⁴

All the position that I am putting is that title has been issued over leases and over freehold and all sorts of other arrangements in Australia. They were issued by the representatives of ourselves, by our Parliaments and we believe that they were issued in total good faith to those people to have *exclusive* occupancy of that land. . . . We believe that as the decision in 1993 believed, that native title was extinguished on pastoral leases. . . . We as a nation have given those people that title, unencumbered, with total freedom from intrusion by others.

This assertion, by the Federal President of the National Party of Australia, may be seen as an ambit claim, or a statement of pastoralists' beliefs about

¹⁴ See also: 'Cries of indignant urban outrage that farmers' rights will be hugely expanded in windfall freeholding and fears that they will run riot across the country with bulldozers, clearing the path for myriad outback Disneylands have greeted the National Farmers' Federation's *request for restoration of farmers' pre-Wik rights*.' (Craik 1997, emphasis added)

the status of their lease instruments, rather than a statement of the legal position.

The position apparently created by the *Wik* judgement, i.e. of potentially co-existing access rights to natural resources, is not an unusual legal state. Young (1992, figure 4.1) depicted the concurrent rights that may exist associated with natural resources. For example, mining tenements co-exist with other titles (Nettheim 1997). An excellent, practical example is the access of walkers in England and Wales to some 200 000 kilometres of pathways, much of it over alienated land, in an area somewhat smaller than Victoria's (Riddall and Trevelyan 1992). Property rights are also frequently restricted by covenants and easements.

In the aftermath of both *Mabo* and *Wik* decisions, there was much contention that the decisions appeared to be aimed at righting past wrongs. This assertion conveniently ignored that both decisions were aimed at *protecting the status quo* with respect to native title, i.e. preventing the future expropriation of native title land, rather than returning previously alienated land to indigenous people. Ironically, however, even if the decisions had been about righting past wrongs¹⁵ by returning expropriated land, there was at least one contemporary international case where the return of previously expropriated land was actually occurring (i.e. in the former East Germany where property confiscated by the former communist government was being restored to its previous owners by the government of the united Germany). And certainly there were situations where indigenous Australians had had their land, or access to their traditional lands, expropriated within a similar time scale.¹⁶

3.4 Uncertainty — about what and for whom?

In early 1997, the Federal President of the National Party of Australia commented: 'that's what we've been asking for since day one — absolute certainty' (McDonald 1997b). Much of the pastoralists' case for rejecting or

¹⁵ Cf. Godden (1997, p. 301).

¹⁶ 'Our tribe of Ngarinyin — maybe 600 people — belong in that country where those 12 small newcomer families are trying to grow their cattle. These families keep changing because cattle don't grow enough money for them to stay there. Now the families are growing their money from tourism. Tourists who want to learn about Ngarinyin culture, visit our sacred waterholes, photograph our living images in the rocks, our Wandjina. They are taking tourists to our cultural sites where we are not allowed to go with our visitors, where we are not allowed to create employment for our young people, where we are not allowed to grow money for our communities, our people are dying from boredom, despair and alcohol in reserves.' (Kamali Council 1997)

overturning the *Wik* decision rested on the uncertainty allegedly engendered by the decision.¹⁷

1. *Uncertainty over pastoral rights.* As far as the High Court majority in *Wik* was concerned, there was no uncertainty over pastoral rights (cf. the postscript to Justice Toohey's judgement quoted above). The rights to which pastoralists were entitled were exactly those conferred by the statutory instrument under which a lease was granted, together with any particular rights or conditions attached to an individual lease. The case is exactly analogous with any other property right: the formal specification of the right determines the entitlements of the right's owner, not what an individual owner might believe, or might be led to believe, their entitlements to be.

2. *Uncertainty over ownership of additional/residual rights.* For the High Court majority, ownership of rights additional to purely pastoral rights would depend on the facts of any particular instance. If the exercise of such additional rights by indigenous people was inconsistent with pastoralists' rights, then clearly no issue of native title would arise. It would then be a matter of the state or courts to decide whether or not these extra-pastoral rights had been conferred on pastoralists (which would be unlikely since pastoral leases were, by definition, not freehold); the state retained the rights (e.g. minerals); or the rights had been acquired by some other person. If native title were consistent with pastoralists' rights, then clearly native title remained with relevant native title holders. As with the earlier *Mabo* decision, most of the uncertainty arising from *Wik* was uncertainty for indigenous people, not for non-indigenous Australians.

3. *Co-existing rights.* The management of co-existing rights is probably never easy.¹⁸ But it is improbable that the annihilation of one party's rights by bequeathing these rights on the other party would lead to an efficient outcome. The solution of such problems is likely to require, unless it already exists, an institutional structure within which negotiations about mutually satisfactory uses of co-existing rights may be undertaken. Such

¹⁷ Similar claims emerged following the *Mabo* judgement (cf. Godden 1997, pp. 299–300) where claims about uncertainty for *non-indigenous* Australians were also used as arguments against that judgement.

¹⁸ Holt (1995) gave one view of the conflict over rights of way in England and Wales; Ramblers' Association (1996) reviewed current campaigns for increasing such access, including 'roaming' where walkers are not confined to defined paths. 'Roaming' appears conceptually similar to some aspects of native title, especially on pastoral leasehold.

negotiations thus might require, in the short run, an institutional structure to address immediate problems over co-existence (e.g. deliberate or inadvertent infringement of pastoral rights or native title) and, in the longer run, negotiations about how to create an appropriate negotiation framework within which particular negotiations might occur.

4. *Uncertainty about uncertainty.* Where there is a lack of information, e.g. as to who the owners of residual rights may be, it is not difficult to exacerbate uncertainty.

Whether or not uncertainty was actually increased by the *Wik* decision is unclear. Even if real, as opposed to synthetic, uncertainty did increase, the challenge is to resolve the uncertainty recognising all rights, rather than simply minimising uncertainty by extinguishing rights inconvenient to powerful interests.

4. Microeconomics of Wik

The economics of potentially co-existing rights of pastoralists and indigenous Australians in pastoral leasehold land may be depicted as in figure 3. The entire set of rights associated with pastoral leasehold land is represented by the horizontal axis in figures 3 (a) and (c). For simplicity, these rights are represented on a continuous axis. These rights are viewed as either being pastoral (the percentage of the bundle of rights in land in which the pastoralist has exclusive interests, read from the left) or indigenous (the percentage of the bundle of rights in land in which indigenous Australians have exclusive interests, read from the right). In figure 3(a), the vertical axes represent the cardinal utility each group obtains from a particular sharing of these interests; the left axis represents the pastoralist's cardinal utility, and the right axis represents the cardinal utility of indigenous Australians.

If pastoralist and indigenous rights are 'competitive', i.e. they are mutually exclusive and cannot be exercised jointly, then the situation in figure 3(a) applies if utility is cardinal and interpersonal comparisons of utility are possible. The pastoralist's benefit from using the land is denoted by 'pastoral value', and is assumed to increase monotonically as the percentage of the total land rights bundle under pastoralist control increases. Similarly, indigenous benefits from using the land are denoted by 'indigenous value', and are also assumed to increase monotonically as the percentage of the total land rights bundle under indigenous control increases. The social benefit from the exercise of rights in land over which there is pastoral leasehold is represented by the curve 'total competitive value', comprising the vertical summation of the pastoral and indigenous value curves. Social benefit is maximised at point *v* in figure 3(a). This social maximum occurs irrespective

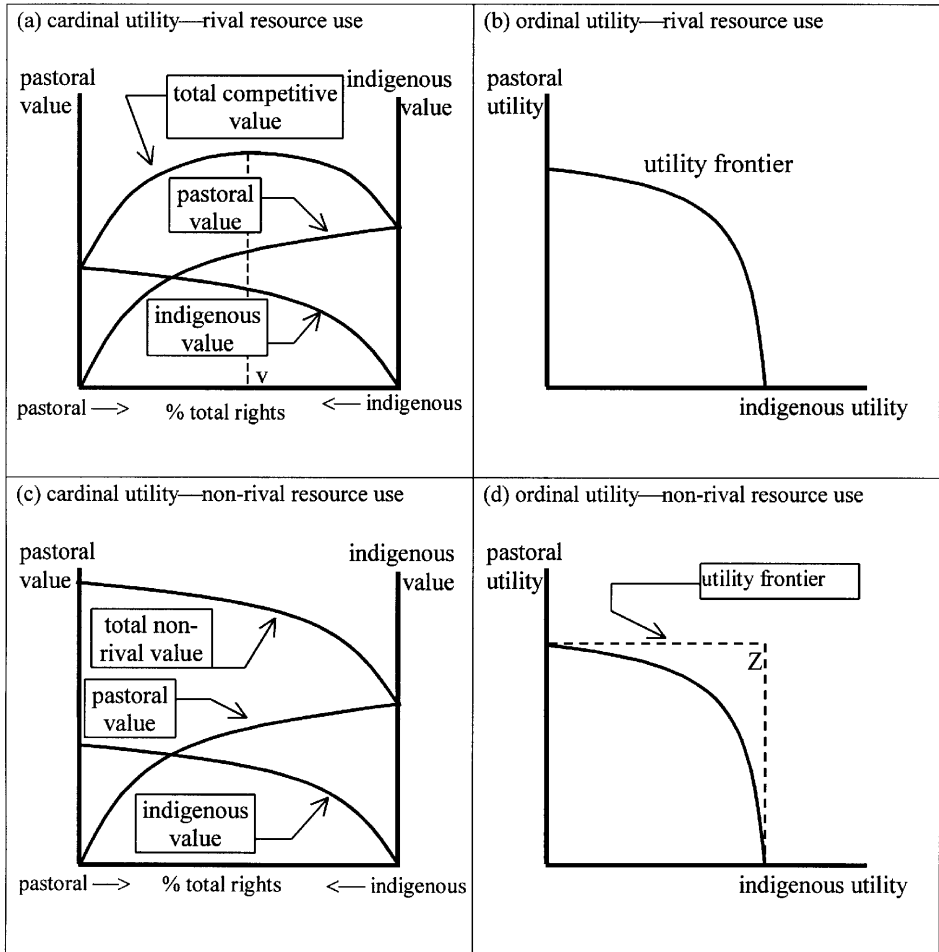


Figure 3 Microeconomics of Wik

of the existence of common law or statutorily recognised native title in pastoral leasehold land. Because ‘indigenous’ uses of land are, by definition, only able to be undertaken by indigenous people, the absence of formally recognised native title does not annihilate these uses; such uses may simply not be able to be exercised. In principle, however, they still exist.

Rejection of cardinal utility and interpersonal utility comparisons prevents analysis proceeding via figure 3(a). However, interpreting the pastoralist and indigenous curves depicted in figure 3(a) as ordinal preference functions enables figure 3(b) to be constructed. In this case, rather than a maximum utility point being identifiable, a utility possibilities frontier may be identified; all points outside this frontier are infeasible while all points inside

the frontier are Pareto inferior to a point or points on the frontier. Without an explicit social welfare function, it is not possible to identify objectively the social welfare maximising distribution of land rights. A welfare maximum may, however, still be attainable as a consequence of bargaining between the parties who value the resource.

Native title uses of land may not be competitive with pastoral uses. For example, if native title uses involve traditional food gathering and hunting of native animals, indigenous land uses may be non-rival with pastoral uses because indigenous uses may not impact on pastoral uses. In this case — and for the same pastoral and indigenous value curves as in figure 3(a) — total social benefit now arises from the super-imposition of the indigenous value curve on the pastoral value curve (or vice versa) as in figure 3(c). In this case — and making the same cardinal and interpersonal utility assumptions as for figure 3(a) — social welfare is maximised where both pastoral and indigenous uses have full access to the total bundle of rights.

Again, if cardinal utility and interpersonal comparisons of utility are rejected, an ordinalist interpretation of the utility maps in figure 3(c) may be given as in figure 3(d). In contrast to the ordinal depiction in figure 3(b), however, the welfare maximum may be identified in figure 3(d) (point Z) even without the social welfare function being known or knowable.

The foregoing ignores the nature of traditional indigenous uses of pastoral land, but has merely assumed that its value increases monotonically with the proportion of rights. It is likely, however, that indigenous uses are not simple rival goods. While an individual indigenous user's value may increase as they gain greater access to their traditional lands, this individual's use is unlikely to preclude traditional use by others, at least of the same family group and clan. Use will thus be non-rival, and its total value would aggregate across users. As well as being non-rival, individual users' uses — at least within the customs of the family or clan — are likely to be complementary because an individual user's valuation of access to land will be greater if others of the family or clan also have access compared to a situation where only the individual has access.¹⁹ Attempts to formally value indigenous peoples' use of pastoral land, e.g. by contingent valuation, may therefore need to take account of potentially complex ways in which land access is valued (but cf. below).

The preceding analysis is couched in terms of strong (i.e. cardinal) or weak (i.e. ordinal) concepts of utilitarianism because a right is valued via its use

¹⁹ As also in other societies, e.g. an individual's benefit from or enjoyment of religious observances or football matches may partly be a function of the number of other participants — at least, in the case of sporting activities, the presence of like-minded supporters.

value. Some traditional indigenous uses of land may be utilitarian, or may be approximated by utilitarianism, without too great a violation of reality. However, some indigenous uses of land, including apparently utilitarian uses such as hunting and recreation, may also be bound up with ceremonial and sacred uses which may not be representable in a utilitarian way. Interpretation of the foregoing must proceed within the context of this serious caveat. It may be necessary, especially with respect to indigenous uses, to allow for the existence of non-use values (see below).

5. Discovering optimal solutions: institutional issues

5.1 Quantitative estimation

The preceding analysis provides a framework for characterising the optimal allocation of resources. If this analysis could be made operational, the optimal allocation of resources for pastoral and indigenous uses might be discovered. One possible procedure would be to use conventional valuation methods for pastoral activities, and valuation methods for non-marketed goods to assess the value of indigenous uses of pastoral land. Such estimates might be used to determine that allocation of land for pastoral and traditional indigenous uses which maximised social welfare. Alternatively, if it were decided to exclude indigenous people from pastoral leasehold land, valuation estimates might be involved in the determination of appropriate compensation for indigenous peoples' loss of native title rights.

Estimation of pastoral value is straightforward. Either the net annual value of produce, or the capital value of the leasehold, could be used to estimate the value of pastoral activities. In the case of the latter, the existing lease market determines the current market price for leases and this value could then be imputed to the entire asset stock. Alternatively, the aggregate demand for leasehold land could be estimated synthetically (e.g. by mathematical programming) — the current asset stock presumably has a (long run) marginal value of zero — and the area under this synthetic demand curve represents the total asset value of pastoral activities.

Contingent valuation might be used to assess indigenous peoples' willingness to accept compensation (WTA) for the loss of access to pastoral leases²⁰ or, correspondingly, to assess their willingness to pay (WTP) for access either just to those areas to which they have current access or, additionally, to those areas from which they are currently excluded. Apart from any other issue, indigenous peoples' WTP for access to valued lands is

²⁰ This is a statutory right in WA, SA and the Northern Territory; and a potential native title right there and elsewhere in Australia.

likely to be a function of income and, given that this group has generally low incomes, WTP may substantially under-estimate the value of this access. Similarly, WTA may under-estimate the true valuation if there is little substitutability between marketed goods purchased with money income and traditional land access services.

However, valuation techniques for non-marketed goods may simply be inappropriate if indigenous peoples' valuation of land access is non-utilitarian. It may make as little sense to ask an indigenous person their WTA for the loss of access to traditional living areas from which they derive ceremonial/religious values as it would be to ask a devout Christian how much they would need to be compensated in monetary terms to forswear any practice of their religion. It is not that the estimation is difficult — in the conventional sense of problems with estimating values in contingent markets — but that the entire idea of forswearing for monetary compensation is simply nonsensical.²¹

5.2 Coasian bargaining

However, even if third party (e.g. economists') estimates of indigenous peoples' valuations of land are impossible, *solutions* to land use conflicts are still feasible. Indigenous and non-indigenous Australians are able to assess whether or not they are prepared to accept changes in their access to resources, even if a third party could not in principle quantitatively estimate the relevant values and trade-offs in monetary terms. Indeed, while some bargains may be made denominated in monetary terms (e.g. some but not all of the mining bargains listed below), other bargains may simply relate to types of acts that are permissible, or the times at which acts are permissible (e.g. where mine over-burden may be dumped). Coasian bargains do not require the intervention of third parties or the formal estimation of changes

²¹ 'While courts and tribunals in the future will have to develop principles for the assessment of compensation where native title has been extinguished or impaired, its loss can never be fully expressed in money terms. The centrality of land to culture, to law, to tradition and to identity is not convertible into cash. Global extinguishment of native title under pastoral leases remains inherently discriminatory no matter what level of compensation is offered.' (French 1997)

'The problem lies in trying to equate dollar value to something that can only be valued otherwise. . . . However, [native title in land] represents more to the traditional occupiers than a means of livelihood flowing from land use; its much greater worth is in its cultural and spiritual values. . . . So how can compensation be determined, whether by parliamentary legislation or court award, for something to which the concept of a dollar value cannot be applied? . . . [The resolution] must provide fairness with respect to non-dollar aspects relating to the spirituality of the dispossessed. . . . It will not be easy for us to deal with non-dollar values.' (Maher 1997)

in participants' welfare. All that is required is that the parties to the bargain feel that both have gained or, at worst, none has lost. While it is possible to represent the potential trades in a conventional Edgeworth-Bowley box framework, e.g. with all pastoral rights held by pastoralists and all other rights held as native title, or some other combination, the demonstration of the feasibility of this approach does not require such a retreat to utilitarianism.

The signatories to the Cape York Peninsula Heads of Agreement in 1996 were the Cape York Land Council, the Peninsula Regional Council of the Aboriginal and Torres Strait Islander Commission, the Cattlemen's Union, the Australian Conservation Foundation and the Wilderness Society. The Agreement recognised original Aboriginal habitation and resulting rights, recognised pastoral landholders' rights, and recognised significant 'conservation and heritage value encompassing environmental, historical and cultural features' (Cape York Heads of Agreement 1996a). The parties recognised that 'The Heads of Agreement is only the first step towards a Regional Agreement under Section 21 of the Commonwealth Native Title Act' (Cape York Heads of Agreement 1996b). Key points of the Agreement include (Cape York Heads of Agreement 1996a):

5. All parties are committed to work together to develop a management regime for ecologically, economically, socially and culturally sustainable land use on Cape York Peninsula, and to develop harmonious relationships amongst all interests in the area.

9. The Aboriginal people agree to exercise any native title rights in a way that will not interfere with the rights of pastoralists.

10. Pastoralists agree to continuing rights of access for traditional owners to pastoral properties for traditional purposes. These rights are:

- right to hunt, fish and camp;
- access to sites of significance;
- access for ceremonies under traditional law;
- protection and conservation of cultural heritage.

11. These rights shall be attached to the lease title and shall be consistent with a detailed code of conduct to be developed between pastoralists and traditional owners.

21. The parties are committed to pursuing agreements with the mining and tourism industries.

It was no doubt difficult to achieve these Heads of Agreement — the process began in mid-1993 and took until February 1996 to achieve the agreement framework — and will probably not be easy to finalise the process.

Other examples of bargains successfully completed between indigenous and non-indigenous people include:²²

- an agreement over the Yandicoogina iron ore mine in the Pilbara in Western Australia between the miner Hamersley Iron (a subsidiary of RTZ-CRA) and the Gumala Aboriginal Corporation, under which it is proposed to return \$60m to Aboriginal people over 20 years with employment priority for Aboriginal people and continued access for areas not used for mining (Woodford 1997b; Hextall 1997b);
- the Murrin Murrin nickel project in Western Australia, the agreement being the North East Goldfields memorandum of understanding between the miner Anaconda Nickel and the Bibila-Lungutjarra and Goolburthunoo people, returning \$1 million per year over 30 years plus an employment target of a 20% Aboriginal workforce (Hextall 1997a);
- an agreement between Ross Mining and the Bundjalung people of the Tabulam area in NSW, for open-cut goldmining on the Timbarra plateau for a reported \$1.3m (Harvey 1997);
- an agreement between AGL and Aboriginal people for a gas pipeline route in central western NSW (Phelan 1997);
- a series of agreements between the Walpirri people of the Tanami desert in central western Northern Territory and numerous gold prospectors and miners, facilitated by the Central Land Council; these agreements cover approval to prospect (and therefore mine) and provide monetary returns to the Walpirri people and also give them the power to approve the specific form of activities such as the location of mines and waste dumps (e.g. Howitt 1991). These agreements occur under the *Aboriginal Land Rights Act (Northern Territory) 1976* which grants significantly greater powers to indigenous people than the NTA.

The Cape York Heads of Agreement does not involve monetary compensation whereas the mining examples listed do. Not too much should be read into these differences. First, the Cape York Heads of Agreement is a framework agreement, not one which involved specific aspects of resource

²² The National Native Title Tribunal has an 'agreements' page on its Internet Web site with three agreements listed ('Model for a Regional Agreement between Native Title Parties and Mining and Exploration Interests in the Kalgoorlie — Goldfields Region') (<http://www.nntt.gov.au/nntt/agrment.nsf/area/homepage>). National Native Title Tribunal (1998) claims that there have been 1244 agreements over native title in Australia. See also Manning (1997, 1998).

access; should it eventually result in detailed agreements, monetary exchange might be included. Second, while the mining examples do involve monetary compensation, they are not exclusively monetary. For example, the Yandicoogina and Murrin Murrin projects involve employment targets which have social as well as monetary implications, and Walpirri bargains involve decisions over aspects such as disposal of mine wastes.

The key to a successful bargain is that both parties must have something to bargain over — in the sense that both must have something to gain — and both parties must have something to bargain with — in the sense of both parties having something to withhold to induce the other party to offer or accept an offer. Without both parties having something to gain and withhold, the bargain is illusory.²³ Part of the concern about the Commonwealth Government's 'Amended Wik 10 point plan' was that it substantially reduced indigenous peoples' capacity to bargain by limiting their power to withhold. These limitations related both to provisions of the existing NTA and also pastoral leasehold.

6. The policy process in Wik

In contrast to the delayed response to the earlier *Mabo* decision, the political response to *Wik* was swift.²⁴ Indeed, it was pre-emptive, since the Deputy Prime Minister began by criticising the High Court for its tardiness in delivering its judgement — provoking a polite slanging match between politicians and judiciary (e.g. Woodford 1997a; Marr 1997). Pastoral lessees, particularly in Queensland, demanded total extinguishment of native title on pastoral leases.²⁵ The Queensland State President of the National Party asserted that National Party and/or Queensland parliamentarians' duty to their constituents required extinguishment of native title; it was unclear as to whether this duty just related to pastoral leases (Russell 1997). What these

²³ For example, consider a case where it was determined that native title existed on a pastoral lease and coexisted with that lease. Further, suppose that there was an important indigenous site close to where cows normally calved, that use of this site might disturb calving, and that easy access to the site required traverse over areas which were incompatible with coexisting native title. The pastoralist has something to gain in discouraging use of the site during calving, and the native title holders have something to gain by acquiring easy access to the site. Conversely, both have something to bargain with: the pastoralist can offer easy access and native title holders can offer non-disturbance to calving.

²⁴ For example, the Commonwealth Attorney-General's advice was available within a month (Attorney-General 1997).

²⁵ See quote from Federal President of National Party (McDonald) above and subtended footnote with quote from National Farmers' Federation Executive Director (Craik).

parliamentarians' indigenous constituents thought of this assertion is unknown. Even former Federal National Party parliamentary leader Mr Ian Sinclair thought that the National Farmers' Federation television advertisements were 'in very poor taste' and 'unnecessary' (Sinclair 1997). In response to this concerted campaign, the Prime Minister said on numerous occasions: 'let me say to the farmers of Australia, "I won't let you down"' (e.g. Howard 1997a; Short and Emerson 1997).²⁶ No similar commitment was recorded that the government would not let indigenous people down.²⁷

6.1 Background

The Commonwealth Government's response to the *Wik* decision cannot be seen in isolation, since some of the key aspects of this response pre-date the High Court's decision. In 1996, the then-new Commonwealth Government proposed a series of changes to the *Native Title Act 1993*. In particular, these proposals included (Commonwealth of Australia 1996):

27. . . . It was also assumed that most, if not all, mineral exploration and prospecting activity would answer this description ['minimal effect' on native title], so that this activity could be readily excluded from the right to negotiate process by administrative means. This has not turned out to be possible under the NTA as currently drafted. It was also not envisaged that there would be a right to negotiate in relation to exploration and mining activity on pastoral leases. . . .

28. It is clear that the right to negotiate at the exploration stage is of limited use because exploration itself is frequently a loss-making activity, with profits not flowing until the production stage. . . .

Since indigenous people have been largely excluded from lands with value for purposes other than mining, limitation of their right to negotiate over minerals — whether the royalty value of the minerals or the kinds of activities that might occur — effectively removes indigenous peoples' power to negotiate to obtain significant returns over land to which they currently have traditional access. Further, the power to negotiate over the exploration stage is potentially of key importance to indigenous people since the

²⁶ In his address to the nation on 30 November 1997, the Prime Minister referred continually to 'farmers' as being affected by native title under *Wik*, never once to 'pastoralists' (Howard 1997d). The Prime Minister's final speech to the House on the amendments also only referred to 'farmers' (Howard 1998a, b).

²⁷ Cf. the then Opposition's similar assertions in the wake of the *Mabo* decision to ensure the security of land title, where clearly such security excluded *native* title (Godden 1997, p. 290).

identification of significant reserves associated with areas of cultural significance may lead to enormous and unwanted pressure to mine these sites.

The government's determination to restrict indigenous peoples' power to negotiate over mining may have several sources. One possible source of government concern is that bargains between indigenous people and miners are emerging which return significant monetary gains to indigenous people (section 5). Wealth acquisition limits governments' power to manipulate indigenous people; while government professes the desire to make indigenous people independent of welfare, it may not suit government to have such groups actually financially independent and less subject to government desires.²⁸

6.2 Response to Wik decision

The Commonwealth Government had obtained legal advice relating to native title on pastoral leases *prior* to the *Wik* decision (Commonwealth of Australia 1996):²⁹

24. The Government's advice is that if native title has survived the valid grant of a pastoral lease, then its blanket legislative extinguishment by the Commonwealth would probably be regarded as inconsistent with the principles of the [Racial Discrimination Act]. In addition such extinguishment would, in all likelihood, involve an acquisition of property rights and thus require the Commonwealth to provide just terms compensation. Failure to do so could lead to the legislation being held to be invalid. Even if the Commonwealth legislation provided for just terms compensation (and it could be of a substantial amount), there are a number of other legal arguments available to indigenous interests. The ensuing litigation would pre-empt the certainty sought by the proponents of the legislative extinguishment option, possibly for a long period.

25. In the circumstances, the Government is of the view that to legislate to extinguish native title on pastoral leases or to allow the States and Territories to do so would be seen as inconsistent with its election commitments.

In the aftermath of *Wik*, the government sought to achieve a solution which fell short of 'blanket legislative extinguishment' but which would provide

²⁸ The current intention of the Northern Territory Government to break up that Territory's two Land Councils is possibly an analogous case.

²⁹ Cf. Forbes (1995) on attenuation of property rights.

the ‘bucketloads’ of extinguishment sought by the Deputy Prime Minister on behalf of his rural constituents (Brough 1997).³⁰

The Prime Minister’s ‘Amended Wik 10 Point Plan’ (Howard 1997b) was a Sherlock Holmes plan.³¹ Nowhere does this plan explicitly acknowledge the possible existence of native title on pastoral leases. There is no reason that the first point of this plan should not have been: ‘That native title rights on pastoral leases exist unless they are clearly extinguished by inconsistent grants of title or inconsistent use’.³²

Of the 20 points and sub-points in the Prime Minister’s ‘Amended Wik 10 Point Plan’, nine related to native title on pastoral leases explicitly, seven related to the NTA generally, and four related to both. Nineteen of these 20 points were directed towards extinguishment or substantial restriction on native title, and one was a transitional arrangement (table 2). The ‘Amended Wik 10 Point Plan’ is therefore accurately described, as indigenous representatives have done, as an ‘extinguishment’ plan, and one which went much wider than the specific ‘Wik’ issue of native title on pastoral leases. This plan may fairly be described as one primarily about distribution, about taking as much as possible from indigenous Australians and giving as much as possible to (largely non-indigenous) pastoralists and other Australians.

The ‘Amended Wik 10 Point Plan’ appears to have been developed with little or no input from indigenous people. Rather, this plan appears to have been presented to them on a take-it-or-leave-it basis. Despite having developed its ‘Amended Wik 10 Point Plan’ in isolation from indigenous Australians, the government apparently expected indigenous Australians to

³⁰ Mr Fischer had rapidly converted his assertion that ‘the [Wik] bill would contain “bucket-loads of extinguishment” of native title’ to ‘There are bucketfuls of native title to be obtained onward [sic] by indigenous people, especially with regard to the large tracts of vacant Crown land’ (Brough 1997). But, of course, native title on *Crown* land was already available under Mabo and the NTA; no amendments to the 1993 Act were required.

³¹ “‘Is there any point to which you would wish to draw my attention?’ “To the curious incident of the dog in the night-time.” “The dog did nothing in the night-time.” “That was the curious incident,” remarked Sherlock Holmes.’ (Doyle 1981)

³² Cf. the preamble to the *Native Title Act 1993*:

The High Court has:

(a) rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement; and

(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and

(c) held 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.

Table 2 Wik and supra-Wik aspects of Amended Wik 10 Point Plan

Wik point	Ref.	Effect
1. Validate all uncertain acts/grants on non-vacant Crown Land between passage of Native Title Act and Wik case.	Wik	extinguish
2. Confirmation of extinguishment of native title on titles such as freehold, residential and commercial.	NTA	extinguish
Agricultural leases also covered to extent . . . reasonably said . . . exclusive possession must have been intended.	Wik	extinguish
Any current or former pastoral lease conferring exclusive possession would also be included.	Wik	extinguish
3. Impediments to provision of government services in relation to land on which native title may exist would be removed.	NTA	extinguish
4. As provided by Wik decision, pastoral rights would prevail over native title rights.	Wik	extinguish
Farmers allowed to pursue all activities constituting primary production, including farmstay tourism.	Wik	extinguish
Upgrading to freehold would require acquisition of native title.	Wik	extinguish
5. Where registered can demonstrate current physical access to pastoral lease, continued access legislatively confirmed until native title claim determined.	Wik	transitional
6. Reduction of Aboriginal right to negotiate about mining activities:	Wik & NTA	extinguish
. higher registration test, no negotiations on exploration.		extinguish
. mining on other 'non-exclusive' tenures . . . compensation taking account of co-existing native title.		extinguish
7. Non-urban vacant Crown land, Aborigines right to negotiate removed for compulsory acquisition of native title rights for third party government- <i>type</i> infrastructure; no compensation.	NTA	extinguish
Acquisition on non-exclusive tenures, with compensation.	Wik	extinguish
Similarly, negotiation rights removed for third party <i>urban</i> land acquisition.	NTA	extinguish
. eliminate native title claims affecting management of national parks or forests.	NTA	extinguish
. timber/gravel extraction on pastoral leases authorised.	Wik	extinguish
8. Governments' powers over all water management and airspace to be put beyond doubt.	NTA	extinguish
9. An overhaul of the native title claims process and the inclusion of a sunset clause.	NTA	extinguish
10. The establishment of a framework to allow voluntary but binding agreements between Aborigines and other parties.	NTA & Wik	already available

Source: derived from Howard (1997b)

accept this plan without negotiation. Indeed, the Prime Minister was adamant that the Plan is itself a compromise — although indigenous Australians do not appear to have been parties to this compromise — and that further negotiation was both unnecessary and undesirable.³³

The Prime Minister and Deputy Prime Minister, who carried the bulk of the public argument on behalf of the government, quite blatantly spoke to two different audiences (Henderson 1997a, b; cf. Howard 1997c). To pastoralists — and, implicitly, to Coalition voters flirting with the nascent Hanson One Nation Party — the message was that the Commonwealth Government's decision would provide 'bucketloads' of extinguishment of native title. To the rest of Australia, the message was that there would not be wholesale extinguishment of native title on leasehold land.

The government's strategy of largely ignoring indigenous Australians in developing a legislative framework in response to *Wik* was (and remains) a high risk strategy. By largely freezing indigenous Australians out of the policy development process, the government is likely to foster considerable resentment among indigenous Australians. This resentment will reinforce the considerable resentment engendered by the government's failure to respond empathetically to the Human Rights and Equal Opportunity Commission's 'Stolen Generations' report, and also by its failure to effectively combat attacks on the Aboriginal 'industry' from within the national government and outside conservative groups. Unless indigenous Australians feel an integral part of the policy process — 'own' the process in the current political jargon — they are likely to be even more determined to extract tangible results from the legal process.

Implicitly encouraging indigenous Australians to resort to the legal process to claim compensation for extinguished native title is unhelpful for several reasons. First, it encourages adversarial solutions when negotiated solutions are increasingly emphasised in the legal system. Second, it emphasises monetary compensation as an objective when it appears that indigenous Australians are primarily interested in the incidents of native title rather than a monetary equivalent. Third, depending on the courts' generosity, monetary compensation for extinguished native title may exceed the monetary value of exclusive possession on pastoral leases. Fourth, the outcome of the legal process is highly uncertain for government on taxpayers' behalf, and indigenous Australians; the policy process only delivered certainty to pastoralists.

³³ Unless there have been significant secret and unreported negotiations with indigenous Australians, the notion of the 'Amended Wik 10 Point Plan' as a compromise smacks of paternalism — non-indigenous Australians know what is best for indigenous Australians and thus negotiations can be undertaken on their behalf without their being represented.

The federal government's principal strategy for addressing problems that may arise from its policy response to *Wik* seems to be to change the judges on the High Court.³⁴ This is itself a risky strategy since it depends on a new Court's willingness to overtly reject the precedents of *Mabo* and *Wik*, or covertly overturn these precedents by 'distinguishing' future cases from these precedents. The 'stacking the Court' strategy is also risky because individual judges' decisions, once they have ascended the Court, are not necessarily predictable from their prior actions or declarations. A subsidiary defence strategy adopted by the Federal Government for limiting collateral damage from its *Wik* policy process — albeit largely taken for other reasons — appears to be to starve indigenous Australians of the funding required to undertake legal actions. The reduced funding for ATSIC forces indigenous Australians to make increasingly difficult choices between funding for legal activities and funding for basic services such as housing and infrastructure.

6.3 Implementation

A draft of the proposed legislation was prepared in June 1997 (Wik Task Force 1997). The Bill was tabled on 4 September 1997 and referred, on the government's motion, to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund (House of Representatives 1997). While passing the House of Representatives, the Bill failed in the Senate in December 1997. The 'sticking points' between the government and the Senate were (Fischer 1998):

- the right to negotiate — between native title holders and those holding other land interests, over the use of land;
- the sunset clause — a proposed 6-year time limit for lodgment of native title claims under the NTA;
- subordination of the NTA to the *Racial Discrimination Act 1975* (RDA); and
- strengthened threshold test — conditions that have to apply before a claim for native title can be accepted for determination.

³⁴ 'In the wake of recent controversies in Australia, proposals have been made, for the first time, that judges should be appointed for a term of years or chosen with the participation of the people. The retirement from the High Court of Australia of two of the seven Justices and the pending retirement of the Chief Justice . . . led to a declaration by the Deputy Prime Minister of Australia, that the Government would appoint "capital C conservatives" to replace the retirees. . . . in Australia we have not, until now, had such a clear indication that ideological leaning, rather than professional reputation or intellectual merit, will be the chief criterion for appointment to judicial office.' (Kirby 1998)

The government re-submitted the Bill to Parliament in April 1998, whereupon the Senate again rejected the government's Bill at the eleventh hour, thus creating grounds for a double dissolution of Parliament.³⁵ The bombshell of the One Nation Party's success in the Queensland election in June 1998 provided the impetus for the government re-assessing its prospects at a double dissolution election. Negotiations between the government and Senator Harradine led to the sunset clause being abandoned and a technical subordination of the NTA to the RDA. Most significantly, the right to negotiate was not retained as an inviolate right. The last word on the amended Act belongs to Senator Harradine who had sought (Harradine 1998, p.4961):

. . . an honourable, fair, just and workable outcome which will acknowledge and protect the common law native title rights of indigenous Australians and provide fairness and certainty to farmers and miners.

But, as the senator noted: 'I understand the disappointment of indigenous people that, once again, their rights are to be diminished in order to overcome a problem not of their making.'

7. Conclusion

The issue of native title in Australia — originally arising from the 1992 *Mabo* decision, and subsequently the Commonwealth Government's *Native Title Act 1993* and the High Court's *Wik* decision — affronts many non-indigenous Australians. The existence of native title forces non-indigenes to ask how such title still exists — indeed, how it ever existed in the first place — and why it is recognised by the courts. But native title has been extinguished for most of Australia's natural resources and, in particular, on most of the valuable natural resources. Areas where native title has not been extinguished are generally those of little economic value to non-indigenous Australians — most vacant Crown land claimable as native title under the *Mabo* decision, and subsequently the Commonwealth Government's *Native Title Act 1993*, is desert. Apart from Arnhem Land, much of the land that has been returned to Aborigines under various forms of title is, at best, semi-

³⁵ A double dissolution was not inevitable following the Senate's second rejection of the Native Title Amendment Bill. This rejection simply provided an opportunity for the Government to seek dissolution of both houses if it so chose. Whether or not the Bill would have been enacted following such an election would have depended on whether (a) the Coalition retained government and won control of the Senate; or (b) a re-elected Coalition Government without control of the Senate obtained sufficient seats in the lower house to force the Bill through a joint sitting. Senator Harradine's (1998, p. 4961) assertion that 'The passage by the Senate of the amended bill will avert the divisive double dissolution race based election' was incorrect.

arid; in the case of the Pitjijarra lands, these areas are also radioactively contaminated. Even those pastoral lands the subject of the *Wik* decision are relatively low-valued lands. Because arid and pastoral lands were of relatively low economic value, they were never alienated to non-indigenes. The issue of native title forces non-indigenes to confront the historical reality that the most valuable natural resources in Australia were simply expropriated from their original owners.

This historical reality ought to be disturbing to contemporary micro-economists, tutored in the centrality — if not sanctity — of property rights. Any remaining native title represents the seriously attenuated vestiges of property rights originally held by indigenous Australians. The newly-amended Native Title Act further seriously attenuates the property rights of indigenous Australians. If property rights may be attenuated without compensation, then efficient resource re-allocation is uncertain. Further, from a political perspective, if property rights belonging to a particular group can be highly attenuated — to the extent of expropriation — then no group's or individual's property rights are sacrosanct.

Appendix

Justice Brennan's Summary of *Mabo* (Wik 1996, per Brennan)

As I held in *Mabo [No 2]*, native title 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'[74]. Those rights, although ascertained by reference to traditional laws and customs are enforceable as common law rights. That is what is meant when it is said that native title is recognised by the common law[75]. Unless traditional law or custom so requires, native title does not require any conduct on the part of any person to complete it, nor does it depend for its existence on any legislative, executive or judicial declaration. The strength of native title is that it is enforceable by the ordinary courts. Its weakness is that it is not an estate held from the Crown nor is it protected by the common law as Crown tenures are protected against impairment by subsequent Crown grant. Native title is liable to be extinguished by laws enacted by, or with the authority of, the legislature or by the act of the executive in exercise of powers conferred upon it[76]. Such laws or acts may be of three kinds: (i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title which are inconsistent with the continued right to enjoy native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title.

A law or executive act which, though it creates no rights inconsistent with native title, is said to have the purpose of extinguishing native title, does not have that effect 'unless there be a clear and plain intention to do so'[77]. Such an intention is not to be collected by enquiry into the state of mind of the legislators or of the

executive officer but from the words of the relevant law or from the nature of the executive act and of the power supporting it. The test of intention to extinguish is an objective test.

A law or executive act which creates rights in third parties inconsistent with a continued right to enjoy native title extinguishes native title to the extent of the inconsistency, irrespective of the intention of the legislature or the executive and whether or not the legislature or the executive officer adverted to the existence of native title[78]. In reference to grants of interests in land by the Governor in Council, I said in *Mabo [No 2]*[79]:

A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. The extinguishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy the native title.

Third party rights inconsistent with native title can be created by or with the authority of the legislature in exercise of legislative power but, as the power of State and Territory legislatures is now confined by the *Racial Discrimination Act 1975* (Cth), a State or Territory law made or executive act done since that Act came into force cannot effect an extinguishment of native title if the law or executive act would not effect the extinguishment of a title acquired otherwise than as native title[80]. (Wik, per Brennan)

. . . (several paras down)

In considering whether native title has been extinguished in or over a particular parcel of land, it is necessary to identify the particular law or act which is said to effect the extinguishment and to apply the appropriate test to ascertain the effect of that law or act and whether that effect is inconsistent with the continued right to enjoy native title. In the present case, it would be erroneous, after identifying the relevant act as the grant of a pastoral lease under the 1910 Act to inquire whether the grant of the lease exhibited a clear and plain intention to extinguish native title. The question is not whether the Governor in Council intended or exhibited an intention to extinguish native title but whether the right to exclusive possession conferred by the leases on the pastoral lessees was inconsistent with the continued right of the holders of native title to enjoy that title.

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