

Land, Rights, Laws: Issues of Native Title



Native Titles Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

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WIK - THE WAY FORWARD

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Editor's introduction

The High Court Mabo decision in 1992, the passing of the Commonwealth Native Title Act in 1993, and the Wik decision in December 1996 mark a fundamental shift in the recognition of indigenous rights in Australia, transforming the ways in which indigenous ownership of land may be formally recognised and incorporated within Australian legal and property regimes.

The process of implementation, however, raises a number of crucial issues of concern to native title claimants and other interested parties. Many of these will have to be decided in the courts. Nevertheless, information about and discussion of the issues are important for those needing to address the matters raised by the claim process.

This series of papers is designed to contribute to the information and discussion. The papers address the shift from notions of statutory land rights to the rights of indigenous peoples that pre-existed colonisation and exist within the broad spectrum of their human rights. Within these rights,

land is an essential component.

Rick Farley's paper, originally given at the Wik Conference organised and sponsored by IPR Shandwick, Clayton UTZ and ECO Managers in Brisbane on 7 February, is a point-by-point extrapolation of the practical implications of the Wik decision for pastoral and mining leases, and of action that needs to be taken at governmental and other levels. This action includes some amendment of the Native Title Act 1993, review of the rights granted by pastoral leases under State and Territory legislation, and an examination of action needed in cases where pastoralists have exceeded the rights granted by their leases.

The paper suggests that native title issues are best resolved at a regional level, and that the Native Title Act should give legislative standing to a system of adequately resourced regional agreements.

Mr Farley is a member of the [Council for Aboriginal Reconciliation](#) and the National Native Title Tribunal. He worked for rural organisations for 19 years and was the Executive Director of the National Farmers' Federation from 1988 to 1995. Mr Farley facilitated the Cape York Land Use Heads of Agreement and the processes for management of Lake Victoria. He is the lead Member for the [National Native Title Tribunal](#) in the Century Zinc Mine negotiations.

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WIK - THE WAY FORWARD

Rick Farley

Introduction

I have learned from my 20 years' involvement in politics that it is essential to deal with what is, rather than what might previously have been understood to be the case, or what different interests may prefer to be the case. Unless that approach is taken, outcomes are compromised and debate is devalued by rhetoric.

Clearly, the High Court's *Wik* decision surprised many people - including me. Prior to the decision, many people believed that a valid pastoral lease, which did not already contain reservations of Aboriginal interest, extinguished native title.

That's all history now. The ground rules have changed and the question now is how best to manage the new legal parameters of native title.

As that debate unfolds, I'd suggest some things need to be understood.

First, the Aboriginal land agenda won't go away. Country is integral to Aboriginal law and culture. While Aboriginal culture survives, there will be an Aboriginal land agenda.

Second, there are mechanisms other than the *Native Title Act* by which Aboriginal peoples can pursue their land agenda - the common law, international treaties and conventions, Commonwealth and State heritage legislation, Commonwealth and State environment legislation.

Third, Australia's treatment of our indigenous peoples is subject to international scrutiny which will increase in the lead-up to the Sydney 2000 Olympics. Our record is poor and can affect our international standing.

In my view, indigenous issues have the same priority and importance as tax reform, industrial relations and the environment. They can't be ignored. They must be dealt with. The way in which that occurs will shape our society, our economy and our place in the world.

The Wik judgment is only the latest development. It is linked inextricably to the original Mabo judgment and the indigenous social justice agenda. Amendments to the *Native Title Act* already were under consideration and the ramifications of *Wik* simply add another dimension.

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Ramifications Of the *Wik* Judgment

Legal experts no doubt will devote millions of words to analysis of the judgment. My layman's assessment is:

1. Pastoral leases do not necessarily confer exclusive possession on the lessee.
2. Native title therefore may exist on pastoral leases and other forms of lease which do not grant exclusive possession.
3. It will be necessary to examine the statutes by which leases are granted to decide whether or not they grant exclusive possession.
4. It will be necessary to examine the same statutes to identify the rights granted to pastoralists and other lessees.
5. Any native title rights yield to the rights granted by statute to the lessee. They are subordinated to the extent of their inconsistency with the lessee's rights.
6. Native title rights may not be extinguished by the exercise of the lessee's rights and may revive when any action by the lessee, which is inconsistent with native title rights, is discontinued.

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In Practice

What does all that mean in practice?

1. The grant of freehold extinguishes native title.
2. All leases granted prior to 1 January 1994 are valid.
3. Some leases granted since 31 December 1993 may be invalid, if State Governments have not followed the future act processes of the *Native Title Act*. However, for practical purposes, there would need first to be a determination of native title, which is a substantial barrier.

4. Activities on pastoral leases, since 31 December 1993, which require the issue of a specific permit by the State, and which are not valid past acts, may be invalid if the future act procedures of the *Native Title Act* have not been observed. This will only be the case if the activities first are found to be inconsistent with the rights granted by the lease. Once again, in practice a native title determination would also be necessary to test whether native title has been affected.
5. Any compensation arising from a successful legal action by native title holders, where the act proves to be invalid, then the government who authorised the act would normally be responsible.
6. If pastoralists have exceeded the rights granted by their lease, and their actions have impacted on native title rights, they may be liable to pay compensation to native title holders, except where their actions have been authorised specifically by the State or Territory. The test would be whether pastoralists' actions have been necessary or incidental to the pastoral purposes of the lease. Once again, a determination of native title would be necessary before any compensation case could be mounted.
7. The ability of pastoralists to diversify their activities beyond the scope of the rights granted by their lease may be limited. This will depend on whether the proposed activities are deemed to be impermissible future acts. In this respect, State regimes would need to be examined to determine whether the proposed activities would be inconsistent with the rights of freehold titleholders (s.23 of the *NTA*).
8. Pastoralists who do not exceed the rights granted by their lease and who do not seek additional rights (eg upgrading of tenure) are unaffected by native title. The *Native Title Act* allows the automatic renewal of pastoral leases, under the same terms and conditions which now exist, with no right of native title claimants to negotiate on the renewal. Any native title rights yield to the rights of the pastoralist.
9. The position of the mining industry is unchanged, with the exception of leases issued since 31 December 1993.

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The Issues

1. Amendments to the *Native Title Act* are required, if only to deal with the High Court's *Brandy* decision.
2. A second group of amendments then has been proposed to deal with the 'workability' issues of the Act. Some are supported by Aboriginal interests, others are opposed. They cover issues such as:
 - how the right to negotiate should work
 - how to identify the right native title holders and avoid overlapping claims
 - how to ensure that the communal nature of native title is reflected in the claims process
 - how to bind all native title holders to agreements reached with government and industry
 - the role and responsibilities of Native Title Representative Bodies.
3. A third group of amendments no doubt will be proposed in response to the *Wik* decision. Industry already has made it clear

- that any invalid acts by State or Territory Governments in granting interests in land need to be validated before and after 1994.
4. The rights granted by pastoral leases under State and Territory legislation need to be reviewed.
 5. If the review reveals that pastoralists have exceeded the rights granted by their lease, they require validation of such actions.
 6. Mechanisms to manage the relationship between native title and pastoralists need to be developed. I believe this is done best on a regional basis (not case by case) and the Cape York Land Use Heads of Agreement provides one example.
 7. The prerequisite for all of this is for industry and government to accept that indigenous peoples now are an integral part of Australia's political framework. They have rights under the common law - white fella's law - and those rights are protected by the Racial Discrimination Act. Their bargaining position has been improved by the *Wik* judgment and an enduring solution to native title issues requires their co-operation. They must be an equal partner in negotiations and a process for negotiations must be created immediately. That recognition will necessitate a significant change in culture in some areas of government, industry and the community.
 8. I don't see any alternative to negotiations and trade-offs on both a national and regional level. Amendments to the *Native Title Act* will require the support of indigenous peoples to pass the Senate. Even if Mr Howard as a last resort called a double dissolution election and succeeded in passing legislation opposed by Aboriginal peoples in a joint sitting, such legislation would be challenged in the courts. It would not achieve the very certainty it sought to guarantee.
 9. The real issue well may be whether indigenous interests are prepared to negotiate in the same way which occurred in 1993. Historically, they have gained more from the courts than from political processes. Presumably, they would be asked to concede validation of past acts by the States and Territories up front and then trust politicians to deliver on their side of the bargain. That may not be a tremendously attractive proposition, given that the Federal Government has reneged on the social justice package which was an integral component of the deal in 1993.
 10. Banks and other lending institutions have some concern about the impact of native title on validity of leases, but on whether the management of pastoral enterprises will be compromised and profitability reduced. They need to be convinced that, in practice, management and profitability will be unaffected.

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The Psychology of Negotiations

I think it always helps to understand where others are coming from in any negotiation. Aboriginal peoples need to understand the forces at work on pastoralists and miners. Equally, pastoralists and miners need to understand the mind-set of Aboriginal peoples.

Many pastoralists feel they are under siege. Wool and cattle prices have been low for years, there's been a run of bad seasons, social structures are changing rapidly, services are contracting and more and more conditions are being imposed on their use of land. Native title is another imposition, another threat, and because it's new, it's not well understood. They

naturally are fearful.

For their part, miners need absolute security of title to safeguard the interests of their shareholders. They also need to generate dividends for shareholders or investment will fall away.

Indigenous people are absolutely frustrated at having first to constantly establish their rights and then fight to have them accepted. The reaction of the non-indigenous community is regarded as mean-spirited - always grudging and looking for loopholes to wind back the gains they make. That's why so much anger exists.

I think the psychology of the interest groups then is transmitted to the policy debate. The pastoralists are defensive and fearful, so they look at the worst case scenario. So do the miners because they must protect the investment of their shareholders. Government then is influenced by the industry position and their own political assessments, geared to maintaining power.

On the other side of the table, it is hard for indigenous peoples to maintain a reasonable political position when historically that hasn't delivered the goods. The courts have done more to advance indigenous rights than the political system.

The net result is a debate characterised by the politics of fear and division, rather than the politics of inclusion. Trust evaporates and everyone concentrates on worst case outcomes. That's very destructive and creates its own momentum.

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The Canadian Approach

Other countries have faced up to similar issues and their conclusions may provide some lead to Australia. In Canada, a Royal Commission on Aboriginal peoples published its report late last year, entitled 'People to People, Nation to Nation'.

These are some selected extracts:

- 'Seeking a better balance of political and economic power between Aboriginal and other Canadian governments was the core and substance of our work. Progress on other fronts, unless accompanied by this transformation, will simply perpetuate a flawed status quo.'
- 'We emphasise the importance of an understanding of history. We cannot expect to usher in a new beginning unless we reckon first with the past.'
- 'It is wrong to suggest that all people should be treated the same, regardless of inequalities in their situation.'
- 'It is wrong to turn a blind eye to the dispossession and racism that distort the circumstances of Aboriginal people and limit their life chances.'
- 'It will take an act of national intention - a major, symbolic statement of intent, accompanied by the laws necessary, to turn intentions into

action.'

The Royal Commission then assessed the cost to government of maintaining the status quo. It concluded:

'If current trends continue, the yearly economic loss to Canada will rise from \$7.5 billion to \$11 billion (in 1996 dollars) over the next 20 years, in response to population increase alone.'

The Royal Commission advocated:

- an Aboriginal Nations Recognition and Government Act
- an Aboriginal Treaties Implementation Act
- an Aboriginal Lands and Treaties Tribunal Act
- an Aboriginal Parliament Act
- an Aboriginal Relations Department Act
- an Aboriginal Peoples Review Commission
- programs for healing, economic development, development of human resources and institution building.

The Royal Commission concluded:

'The point where fiscal gains from our strategy begin to outstrip its costs will be reached within 20 years of the start of the strategy.'

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The Bottom Lines

1. Aboriginal issues won't go away.
2. There are mechanisms other than the *Native Title Act* for Aboriginal peoples to pursue their agenda.
3. Significant amendments to the *Native Title Act* are required.
4. Extinguishment of native title is not a viable political option. Such legislation would not create certainty because it would be challenged in the courts, even if it was enacted.
5. An enduring solution to native title issues requires the co-operation of indigenous peoples.
6. The first step must be a negotiation process where Aboriginal interests have equality and equity.
7. Any invalid acts by State or Territory Governments in granting interests in land need to be validated, provided that does not extinguish any remaining native title.
8. The rights granted by pastoral leases need to be reviewed and any necessary amendments validated.
9. There must be a process to identify the correct native title holders and avoid overlapping claims.
10. The communal nature of native title must be reflected in the claims process.
11. There must be a mechanism to bind all native title holders to agreements which are reached with industry and government.

12. Native title issues are resolved best at regional level. The *Native Title Act* should give legislative standing to regional agreements and resources should be provided to assist their development.
13. Aboriginal interests need to put their agenda on the negotiating table.

Canada has produced a blueprint to achieve its objectives through a Royal Commission. In Australia, the Council for Aboriginal Reconciliation last year convened meetings of the major stakeholders. Justice French has proposed an inquiry by the National Native Title Tribunal into the relationship between native title and pastoral leases.

In my view, creation of a negotiating forum and process is the first step. The issues are incredibly complex - two laws and many cultures are meeting. The onus is on all parties to respond in a measured, constructive and respectful way. The outcome will determine whether Australia becomes an harmonious society, or one racked by division and strife.

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