

Land, Rights, Laws: Issues of Native Title



Native Titles Research Unit

Australian Institute of Aboriginal and Torres Strait Islander Studies

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LIGHTING THE WIK OF CHANGE

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Editor: Christine Watson
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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.

Mark Love's paper addresses issues of land management arising from the Wik case. He believes that Wik has highlighted the need for long term planning of the future of rangelands in Australia. According to him, farmers and Aboriginal people hold important knowledge of the potential and limitations of the land in identifying strategies that should be adopted.

Mark is a partner of Corrs Chambers Westgarth's Canberra office. His work in servicing national associations involves him in the national policy initiatives of those clients, the Federal Government and case law with sectorial and national implications. It was in this capacity that he became involved in the National Farmers' Federation's response to the Keating Government's native title initiative. Mark was engaged by the Cape York Cattlemen in the Wik case, and counselled them throughout negotiations leading to the Cape York Heads of Agreement. He is currently engaged in a number of proceedings under the Native Title Act throughout Australia, principally on behalf of farming and mining interests.

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LIGHTING THE WIK OF CHANGE

Mark Love

Introduction

The High Court's confirmation in the *Wik* decision that a 'pastoral lease' will prevail over native title wherever inconsistency arises was proclaimed as a 'win - win' result for landholders and Aboriginal people alike. On the face of it, little had changed; the message from Aboriginal groups was 'business as usual'.

But the *Wik* decision may mark native title as the greatest catalyst for change in land and planning law in Australia's history. It has the potential to irrevocably change land management in Australia. The cry from industry groups is that the Federal and State Governments will have to make even further changes if pastoralists and Aborigines are to work together successfully under the new co-existent regime.

This paper explores the *Wik* decision's impact on Crown Grants and the scope of options available for reconciliation to progress.

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The Impetus For Change

Although '(t)he holders of pastoral leases are left with precisely the legal rights which they enjoyed pursuant to the leases granted under the Land Acts,[1] the 'win - win' only extends to the rights actually conferred by the

grant and in many 'leases' those rights are not defined or are unclear.

Farmers occupying pastoral holdings (amounting to some 42% of the Australian continental land mass) [2] believed they held rights to fully manage the land. It was thought that the statutes under which their rights were granted conferred all the normal rights and interests of the common law rights which the statutory grants imitated. They were the land's custodian, charged with the responsibility of productively using the land to its best advantage. They were subject only to the restrictions spelt out in the 'lease', the (relevant) land Act and the general law. [3]

But the High Court ruled that 'pastoral leases' were not 'leases' according to the common law. A 'pastoral lease' (and hence any statutory grant of rights to Crown land or water) grants only those rights as can be gleaned from the statute under which the grant was made and which are conferred by the grant document itself.

The statutes under which 'pastoral leases' have been granted are largely silent about the activities which can be pursued on the land. Those statutes have changed little since the turn of the century; they are 100 years out of date. What rights are granted will be narrowly interpreted. These factors are the source of the uncertainty pastoralists face and create the impetus for the change.

As the wholesale extinguishment of native title seems to be an unlikely reaction by the Federal Government, like it or not, if pastoral land use is to continue its path of development, farmers, miners, developers and Governments will all have to come to the bargaining table with the traditional owners of Crown land.

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The Decision

The High Court concluded that native title could co-exist with the rights granted to the lessees under pastoral leasehold grants. The seven judges who preside on the Court were divided by a majority of 4 to 3.

The Court declined to give, in the public interest, guidance on the nature of the native title rights which might survive the grant of a pastoral lease, indicating that such an issue must be resolved on the facts of each case. That factor alone sends a clear message to Australian Governments that the Court stands to protect the rights of the litigants before the Court and that it is the Government's role to legislate in the public interest.

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The Reasoning

Two 'leases' were considered by the Court, the Mitchellton Lease (south-west Cape York) issued under the *Land Act 1910* (Qld) and the Holroyd River Holdings Lease (central to the grazing lands of Cape York) issued under the *Land Act 1962* (Qld). The latter lease was selected as typical of the pastoral leases by which the Cape York Cattlemen occupy their stations. Neither lease contained a reservation in favour of Aboriginal

access rights.

In reaching its conclusion, the majority of the Court (whose reasons were given in four separate judgments) made some general statements in respect of the nature of Crown grants over land. Their observations are applicable to all Crown land dealings adverse to native title as they are to pastoral leases. Thus, the effect of the *Wik* decision will extend to all aspects of statutory grants over land and water.

The Court confirmed that where inconsistency arose between the rights and interests granted under a statute and native title rights, the rights granted will prevail.^[4] However, this protection only extends to the rights actually conferred.

The extent of rights conferred by any given statutory grant can now become a core issue in native title cases. A 'lessee' or 'licensee' can no longer assume that the rights they hold are analogous to leasehold rights. Only those native title rights inconsistent with the grantee's rights are affected by the grant. The balance of native title rights (so far as they actually exist) are left unaffected and able to be protected by the common law and relevant statutes.

This creates the possibility of a direct right of action by a native title holder against the grantee, for which the grantee may be directly responsible for losses to the native title holder.^[5] It also gives rise to a direct interest in the native title claimant to challenge the extent of the rights granted to the grantee.

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The Prior Understanding

Farmers throughout the country had occupied their runs believing that they held title free from all people other than those who could claim a right under the Crown. *Mabo No. 2* seemed to do little to interrupt this, as the view was taken that:

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.^[6]

Farmers believe that they have validly exercised rights to fully manage the land. They, as far as the Crown was concerned, were its custodians charged with the responsibility of productively using the land to its best advantage, subject only to the restrictions spelt out in the lease, the (relevant) land Act and the general law. Such was the acceptance of the position that it is reflected in the preamble of *the Native Title Act*:

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.[7]

Prior to the *Wik* case, as Toohey J puts it, 'the authorities point to exclusive possession as a normal incident of a lease' [8] and it had been assumed, when ascertaining the nature of the rights and interests granted by a so-called 'pastoral lease', that:

By adopting the terminology of leasehold interests, the Parliament must be taken to have intended that the interests of a lessee, transferee, mortgagee or sublessee are those of a lessee, transferee, mortgagee or sublessee at common law, modified by the relevant provisions of the Act. - *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd*. [9]

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The Misunderstanding

The *Wik* decision removes the assumptions of the prior understanding. Toohey J observes that the premise on which the *Native Title Act* was passed is wrong:

(it) 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. [10]

He also says that application of the prior authorities to answer the native title question is wrong:

Certainly, the authorities point to exclusive possession as a normal incident of a lease. They do not exclude, however, an inquiry whether exclusive possession is in truth an incident of every arrangement which bears the title of lease. Furthermore, those (past) authorities, which are directed to commercial transactions between individual persons or corporations, are not concerned whether something that is underpinned by common law recognition, namely, native title rights, are excluded by the grant by the Crown of what is described as a pastoral lease over land to which those rights attach. [11]

The accepted authorities have developed almost exclusively through the course of 'commercial transactions'. That development has taken place in a legal environment where it has been assumed that all rights to land had flowed from the Crown. Other conflicts over land use could be (and were) resolved pursuant to the remedy of 'self help', [12] only those who could point to a Crown entitlement could challenge the efforts of the pastoral lessee to remove them from the land. [13] Now, those authorities are not relevant in the face of a non-Crown title. [14] Native title does not derive its force from the Crown and must be dealt with by the Crown if it is to be overridden.

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The New Test

The test for extinguishment of native title, as it was previously understood, favoured the power of the Crown to have granted all those rights which were implicit in the grant; a 'lease' would have carried with it the rights to manage the land and to exclude people from the land where they saw disturbance to their farming practice.

The Wik decision removes the implication of the common law incidents of lease from the grant of a statutory lease. It presumes that subsisting native title rights will prevail unless there is a forceful reason to regard them as overridden. Where there has not been a deliberate or express extinguishment, the burden will rest with the grantee to establish the extent of the rights they claim to hold in defence of a native title claim. If those rights cannot be clearly found in their grant, their rights will be read down to accommodate the continued enjoyment of the native title:

If inconsistency is demonstrated in the particular case, the rights under the pastoral lease will prevail over native title. If not, the native title recognised by our law will survive.^[15]

It is that inconsistency that renders the native title rights unenforceable at law and, in that sense, extinguished. If the two can co-exist, no question of implicit extinguishment arises and it is implicit extinguishment with which (the pastoral leasehold questions) are concerned.^[16]

There is a strong presumption that a statute is not intended to extinguish native title. The intention to extinguish native title must be clear and plain, either by the express provision of the statute or by necessary implication. **General provisions of an Act are not construed as extinguishing native title if they are susceptible to some other construction.**^[17]

The expression 'clearly and distinctly' emphasises the burden borne by a party seeking to establish the extinguishment of subsisting rights not by express legislative provision but by necessary implication from the provisions of a statute.^[18]

The search must therefore be one which is first directed at the legal rights which are conferred on a landholder by the Australian legal system. This is because legal title and its incidents should be ascertainable before the rights conferred are actually exercised and indeed whether they are exercised or not.^[19]

In other words,

- where there is room to construe the rights granted by the Crown in a way which does not interfere with the alleged native title rights, the grant will be given that narrow construction;
- grantees cannot rely on the development of their rights over time by the practises they have employed on the land. They derive their rights only from the grant of rights to them;
- for a statute to expressly provide for the extinguishment of native

- title rights the expression must be distinct and clear;
- unless the statute expressly provides for the extinguishment of native title rights, the burden will be borne by the grantee to establish that implied rights have been granted to extinguish the native title rights claimed; and
 - for extinguishment to arise from the implication of rights (in the absence of a clear expression of extinguishment) the implied right must be a necessary aspect of the right expressly granted and must be such that the native title cannot be enjoyed compatibly with that implied right.

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What Rights?

The farmers' understanding of their rights has been based on the implication of the common law rights which their statutory grants were thought to have imitated. Neither the 1910 nor the 1962 Queensland Land Acts say much about the actual rights conferred by the so-called 'pastoral leases' granted to pursuant them. Similar Acts in other States suffer the same deficiency. The way in which the law will now apply is best seen from the treatment by Toohey J of the Holroyd River Holding Pastoral Lease. He states, notwithstanding the positive obligations in the Holroyd River Holding Lease to erect accommodation, sow pasture, erect yards and fences and notwithstanding that there was no limitation in the 1962 Act which restricted the activity on the land to 'pastoral purposes only':

While the lease is not expressed to be for pastoral purposes only, no other activity is authorised.[\[20\]](#)

Industries which are granted very specific rights are in a more comfortable position. For instance, the *Forestry Act* (Vic) grants limited rights to mill owners to harvest timber. The rights are quite specific and well documented. There are aspects of operation not stated within the grants, such as the capacity to 'push' tracks to the log dumps for the purpose of allowing the logging trucks to remove the harvest. The right to undertake that activity should be regarded as so incidental to the subject of the grant that it should reasonably be regarded as a right which is implicit in the grant.

But pastoral management does not consist of merely depasturing stock and building yards. Till now, the farmer, in the absence of regulation, could reasonably assume that new techniques to improve yield and add value to the land could be employed to develop the farm business. To develop their land, farmers looked to the State as their landlord, which applied its regulation essentially through the process of the planning and development regime; what rights the farmer did not have in respect of the land would be controlled and regulated by the State.

Clearing and burning, excavation for water storage and damming of water courses have long been part of pastoral management. Sowing of pasture, ripping for growth promotion and water retention, the control of vermin and natural fauna have been employed as means to improve yields on leases. More recent advances in managing pasture are more 'agricultural' than 'pastoral' [\[21\]](#) - all these things have impacted and continue to impact

on the enjoyment of many native title rights.[\[22\]](#)

Exposure to the fluctuations of international markets have added pressure on farmers to ensure their business remain competitive. Recommended rangeland strategies urge farmers to diversify their use of the land away from sole reliance on grazing, to ensure their businesses' cashflows sustain them in lean years. Few, if any, of the activities undertaken under a pastoral lease or like tenure are expressly permitted in the grant or the statute. The farmers' use of methods to improve land outside traditional or core activities could now become 'future acts' within the meaning of the *Native Title Act*.[\[23\]](#)

The statutory regimes under which pastoral and agricultural leases and licences in Victoria are granted have changed little since the turn of the century. There has been little perceived need, until now, to develop the extent of the rights granted. The checks and balances which curtailed the environmental impact of modern pastoral practices, of which few have existed, have vested in Ministerial discretion, with local court sanction for breach. Now, having not needed State approval to pursue most of those activities, State sanction will not be sufficient. *Native Title Act* sanction becomes necessary. That means native title claimants have a 'right to negotiate' over development of land in a manner not specifically authorised by the particular grant concerned.[\[24\]](#)

On the other side of the coin, native title rights are and should be afforded the full recognition of the law. Claimants who can satisfy the Court of their rights are entitled to protection where their rights are threatened and to damages where they are infringed. As the extent of native title which can potentially exist over Crown land is the difference between fee simple and the rights which the Crown has validly granted, a fertile field of dispute exists. The native title claimant has a direct interest in establishing that the Crown grantee has very narrow 'authorised' rights and a direct interest in keeping the Crown grantee within those authorised rights (as the native title rights in such circumstances could be infringed).

Plainly, any attempt to pursue practices or activities on Crown land in a manner which transgresses a native right risks an injunction, damages and orders for rectification of the land.

In all cases, Crown land used by grantees will require either negotiated or statute regulation to establish clear boundaries of interaction. For farmers, the extent to which rights granted under pastoral leases has been upset by the *Wik* decision will have some bearing on this. If, as the Queensland Government has been advised, the change is great, there will be significant pressure to re-establish pastoral rights. Politically, that will require accommodation of the Aboriginal position.

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The Solution?

The *Native Title Act* was passed on the presumption that native title was inconsistent with the grant of a pastoral lease. The Act anticipated that native title rights were more susceptible to extinguishment than the High Court believes. It is not a foregone conclusion that even an agricultural

lease or licence will be immune from native title, though it is clear that what rights have been specifically granted will be upheld.

The upshot of this is that the protection of native title by the *Native Title Act* extends to circumstances which were not contemplated. Because the Acts under which Crown grants have been made are largely silent about the activities which can be pursued on the land, strategies to diversify activity away from the subject of the grant are at risk.

It is reasonable to expect that the Federal Government will amend the *Native Title Act*. It is also reasonable to expect that the States will move to extend the rights on statutory grants to accommodate modern pastoral, horticultural and agricultural practices. Against this must be balanced a broad-based acceptance of native title and the traditional owners' rights to be recognised and respected. On that basis it is reasonable to assume that the Federal and State Governments will move to regularise the 'rules' for co-existence.

If considering a response, Australian Governments face an almost unprecedented task. The two 'populist solutions' are:

1. the nothing really happened approach, whereby the current law will continue largely unchanged and the existing system, with the *Native Title Act* modified to account for the *Brandy* case, would be left to resolve conflict and dispute as it arose; or
2. extinguishment of native title over pastoral leasehold land, perhaps with the granting of statutory rights in place of the extinguished rights.

There is a broad range of possible responses to the decision at both Federal and State level. Any State response must either seek dispensation from the constraints of the *Native Title Act* or comply with the *Compulsory Acquisitions Act* future act regime. In both cases the *Racial Discrimination Act* must be adhered to.

At its extreme, the Federal Government could use native title as the constitutional ground to impose a 'national range land strategy'. The Draft National Strategy for Rangeland Management [25] emphasises that much of Australia's wealth generating industries rely on the rangelands and that it is important to manage them in a way in which all uses and values can be accounted for. The Strategy states 'the commissioning of the (strategy) is a recognition that the problems faced by the rangelands cannot easily be resolved with the current legislation and institutions....Change is needed'. As native title has at least the potential to exist throughout the overwhelming majority of the rangelands, as native title rights directly relate to the rights held and exercised by all other grantees and as Aboriginal interests in the rangelands are a key aspect of its future management,[26] the power to plan and manage the rangelands could now vest in the Federal Government.

At the other extreme, the Federal Government might return the responsibility for native title back to the States. It could allow the States to deal with native title in the ordinary course of development and planning. Issues would arise and be dealt with on a block by block, development by development basis.

In all cases, Crown land tenure used by farmers and others with competing

rights will require either negotiated or statute regulation to establish clear boundaries of interaction, so the respective (and often incompatible) rights can be clearly understood by both sides.

One solution may be codified 'farm management' and 'native title' rights,^[27] such as envisaged by the Cape York Heads of Agreement. These could operate at 'farmgate' level, on a farm to family group basis as current access rights are enjoyed. Regional agreements occupy a second level, and State or National operation is the ultimate extension of this model.

Under the existing legislative regime there are problems with the long term enforcement of 'farmgate agreements' without State involvement.^[28] As contracts, they would have limited privity and would constitute personal rights only. If the agreements are to be arrangements made by the parties affected, and not terms dictated by the State, then the role for the State or Federal Government would be maintain a register of agreements and to endow them with enforceability.

Even with State sanction, the way in which native title rights can be held creates uncertainty as to whether the agreement 'solves the problem'. The issue to which I allude is the capacity of the willing majority of native title holders to deal with the rights of a disenfranchised minority. Thus, for such an arrangement to deliver a secure solution, a role for the Representative Bodies ^[29] in administering the rights granted would prove useful. This then impacts on the common law enforceability of the native title rights, which seems to indicate that some form of native title code ^[30] administered and enforced through the Representative Bodies could be inevitable.

Working from that simple model various abstractions can be derived as the model moves both geographically in respect of the scope of the agreement (ie, beyond the farmgate into regional application) and moves constitutionally away from the people who will be affected by it into the hands of State or Federal Government. Those two movements are linked to a considerable degree, the result being that as the agreement moves further and further from the farmgate, the more compulsion is imposed in establishing the terms of the agreement and less the parties to it will have a sense of ownership and responsibility for it.

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Conclusion

The consequences of the *Wik* decision must be given full regard and respect, both in respect of the existence of native title and in the rights native title confers. Acceptances of those consequences include an appreciation of the effect of the narrow construction of statutory grants and the ramification of people acting outside their 'authorised' rights on assumptions which have been relied on for as much as 150 years.

The review by the States' of their Land Acts ^[31] creates an opportunity for change by which the utility of rangeland may be given new lease on life, refocussing the Government on the best use for the Australian public at large. In doing this, recognition of the losses to Aboriginal people and

farmers must be made and both should be given the opportunity to protect what is important to them and to allow them to take advantage of the new opportunities as they arise.

Generally, the farmers and the Aborigines have the greatest appreciation of the land and its potential and its limitations. They should play the greatest role in determining the outcomes. It is important that issues of principle do not impede that progress, nor the national interest. It is also important that quick fix solutions to 'the native title problem' do not create a bigger impediment to the social and economic advancement of the occupiers of the rangelands, leaving the two worse off and neglected sections of Australia even worse off.

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FOOTNOTES

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[\[1\]](#) *The Wik Peoples v the State of Queensland & Ors* , p. 224 per Kirby J.

[\[2\]](#) Western Australian Government submissions in the Wik case.

[\[3\]](#) The rights of others were dealt with by reservations in the lease. Such reservations in favour of Aboriginal access were common place in Australia and still exist in WA, SA and the NT. Similar reservation protection of 'native title rights' were provided for in the 'Sardine Factory Lease' in the Mabo case. Such a reservation first became an issue when Earl Grey, writing to Governor Fitzroy in 1846, denied an intention to grant leases which excluded Aboriginal people from the land. But the advice to Fitzroy from his legal advisers was that to allow continued Aboriginal presence, a reservation in the lease was required. To do that, he needed the power of an Order in Council, such an Order was finally granted in 1849, but Fitzroy didn't act on it except for the benefit of the miners.

[\[4\]](#) This is the basis upon which the decision has been declared a 'win - win' result for landholders and Aboriginal people alike.

[\[5\]](#) To succeed in a private action against the grantee, the claimant must establish their native title right. The costs in prosecuting or defending that point alone are likely to cause a significant burden.

[\[6\]](#) (1992) 175 CLR 1 at 68 per Brennan J; see also 94 and 197.

[\[7\]](#) That this extended to include pastoral leases is plain from the treatment of 'invalid' pastoral leases.

[\[8\]](#) *The Wik Peoples v the State of Queensland & Ors* , p. 65 (page references to the Wik decision refer to the High Court's published reasons).

[\[9\]](#) (1981) 147 CLR 677 at 686.

[\[10\]](#) *The Wik Peoples v the State of Queensland & Ors* , p. 74

[\[11\]](#) *The Wik Peoples v the State of Queensland & Ors* , p. 65 and see also Toohey, p. 66 in reference to the *American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd* extract quoted above in footnote 4.

[\[12\]](#) see *McPhail v Persons Unknown* [1973] 2 All ER 393.

[\[13\]](#) The reservations in pastoral leases in favour of Aboriginal use and access to land were seen as the basis upon which 'co-existence' could exist between the farmer and the traditional owners. That reservation was the manifestation of the intent to deny the wholesale extinguishment of

native title, where those reservations existed. That position coincided with the legal advice to Gov. Fitzroy which led to the 1849 Order in Council.

[14] which, on the principles of *Perry v Clisshold* [1907] AC 73 and *McPhail v Persons Unknown* [1973] 2 All ER 393, would have required resort to the Courts to resolve conflicts of entitlements.

[15] *The Wik Peoples v the State of Queensland & Ors*, p. 224 per Kirby J.

[16] *The Wik Peoples v the State of Queensland & Ors*, p. 75 per Toohey J.

[17] *The Wik Peoples v the State of Queensland & Ors*, p. 221 per Kirby J.

[18] *The Wik Peoples v the State of Queensland & Ors*, p. 148 per Gummow J.

[19] *The Wik Peoples v the State of Queensland & Ors*, p. 211 per Kirby J.

[20] *The Wik Peoples v the State of Queensland & Ors*, p. 62.

[21] Ripping and cross contour grading for grass growth and water retention, sowing of high protein grass species, establishing of fattening paddocks, feed lots and fodder cropping.

[22] Naturally, if these are considered 'necessary incidents' of the authorised grazing activities, then those rights prevail and in all likelihood extinguish native title to that extent. The issue is 'are these necessary' or 'just convenient ways to increase yield'. To the extent that these activities were undertaken prior to 1 January 1994, the acts have been validated under the NTA.

[23] These could potentially found rights of action by a native title claimant against the farmer.

[24] The act of granting the development right would have to 'affect' native title. It then becomes either a 'permissible future act' or an 'impermissible future act'. As a 'permissible future act' it would have to be done under a 'Compulsory Acquisition Act' and then becomes subject to the right to negotiate pursuant to s.26(2)(d) NTA. As an 'impermissible future act' I assume it cannot be done at all.

[25] Draft National Strategy for Rangeland Management 1996 prepared by the Australian and New Zealand Environment and Conservation Council and Agriculture and the Resource Management Council of Australia and New Zealand.

[26] as recognised by the Strategy and by the fact of the likely extensive existence of native title.

[27] This contemplates a similar change from Old System Title to Torrens Title, but with a descriptive registration of the native title rights held and by whom. Given the High Court's assurances in *Wik*, descriptions of rights should be given full effect in practice.

[28] This is so, whether reached under the mediation process or the s.21(1)(b) power.

[29] Or similar Aboriginal administration.

[30] As contemplated above.

[31] I refer to these generically.

[1] Test footnote only. Click on the **footnote number** to go back to the top of the document. Or go back to [top of footnotes](#).

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