

THE WIK PEOPLES v THE STATE OF QUEENSLAND & ORS  
THE THAYORRE PEOPLE v THE STATE OF QUEENSLAND & ORS

Outline of Submissions of Attorney General for NSW  
(seeking leave to intervene)

(1) PASTORAL LEASE ISSUES

1. (a) The granting of a Crown lease necessarily extinguishes native title. By its grant the Crown confers possessory rights on the lessee and acquires for itself the reversion expectant on the termination of the lease. This reversion expands the Crown's mere radical title to beneficial ownership. The sum of those rights leaves no room for the continued existence of native title rights and interests: **Mabo No 2** (1992) 175 CLR 1 at 61, 68, 69, 71-73 (Brennan J; Mason CJ and McHugh J concurring at 15), 158 (Dawson J); **Coe v Commonwealth** (1993) 68 ALJR 110 at 119 (Mason CJ).
- (b) Alternatively, a Crown lease which grants rights of exclusive possession and which does not contain a reservation in favour of Aboriginal people, extinguishes native title: **Mabo No 2** at 110, 117 (Deane and Gaudron JJ).
2. (a) The leases in question are true leases as opposed to mere rights or profits of pasturage (cf *Thayorre Outline* §14.14).
- (b) The Land Act 1910 (Qld) under which the two Mitchelton Pastoral Holding leases and first Holroyd Pastoral Holding lease were granted and the

Lands Acts 1962-74 (Qld) under which the second Holroyd Pastoral Holding lease was granted authorised true leases. This is indicated by the use of terminology which confirms that pastoral leases have "the incidents of corresponding interests at common law modified by the relevant provisions of the Act": see ***American Dairy Queen (Q'ld) Pty Ltd v Blue Rio Pty Ltd*** (1981) 147 CLR 677 at 686 (Brennan J). See also at 682-3 (Mason J, with whom the other justices agreed). Much more than the mere name of "lease" is involved (contra *Wik Outline* §§11, 29; *Thayorre Outline* §13.01):

	1910	1962-74
"estate or interest"	6(2)	6(2), 160(3)
term	42	53, 61
rent	43, 125-9	59, 61
reservations	6, 190-1	6, 358-9
sublease	121(1)(ix) *	274(2)
forfeiture	123, 130-5	14, 295
surrender	122	333
mortgage	156-60	275-81
transfer	166	286-8
transmission	169	290
easements may burden it	197A **	282-3

\* inserted in 1941, discussed in ***Tweed Motors (Queensland) Pty Ltd v Moran Motors Pty Ltd*** (1965) 39 ALJR 279.

\*\* inserted in 1924.

- (d) The Acts also recognised the distinction between lease and licence (see 1910 Act Part III, Divisions I and II; 1962-74 Act Part III, Division I and III) as did nineteenth century land law: see *Radaich v Smith* (1959) 101 CLR 209 at 218.
  - (e) See also *O'Keefe v Williams* (1910) 11 CLR 171 at 190-193 (Griffith CJ), 196, 197 (Barton J), 208, 209 (Isaacs J); *Goldsworthy Mining Ltd & Anor v The Commissioner of Taxation of the Commonwealth of Australia* (1973) 128 CLR 199 at 212-215 (Mason J); *Minister for Lands and Forests & Anor v McPherson & Anor* (1991) 22 NSWLR 687 at 695F-697A (Kirby P; Meagher JA concurring), 707E-710D and 712G-713D, (Mahoney JA); *North Ganalanja Aboriginal Corporation v Queensland* (1995) 132 ALR 565 at 613-7 (Hill J).
  - (f) In *O'Keefe v Williams*, an annual occupation licence for grazing purposes under s81 of the Crown Lands Act 1884 (NSW) was held to be a lease with an implied right in the lessee to undisturbed possession. Isaacs J (at 208, 209) referred with approval to the decision of the Privy Council in *Falkland Islands Co v The Queen* (1863) 2 Moo PCCNS 266; 15 ER 902, in which it was held that a licence to depasture stock on terms defined in the instrument for twenty years and upon an annual rental, was a lease.
3. The reasoning in the passages cited in para 1 is inconsistent with the appellants' submissions that extinguishment depends on (authorised)

extinguishing conduct by lessees.

4. The Wik Peoples seek to resist the conclusion that Crown leases operated with their normal legal incidents vis a vis native title by suggesting the absence of actual (ie subjective) legislative intention to grant pastoralists the right to assert exclusive possession against the indigenous people (*Wik Outline* §§3-5, 9-10, 15-16). This approach is misconceived for several reasons:

- (a) Any quest for an unexpressed subjective intent of a deliberative body that ignores the language and context of the enactment involved is doomed to failure: *Byrne v Australian Airlines Ltd* (1995) 69 ALJR 797 at 822-3 (McHugh and Gummow JJ); *Dobbie v Davidson* (1991) 23 NSWLR 625 at 634-5 (Kirby P); Shepsle, "Congress Is a 'They' Not an 'It': Legislative Intent as Oxymoron" (1992) 12 *International Review of Law and Economics* 239; Dickerson, *The Interpretation and Application of Statutes* 1975 pp79-83.
- (b) Given that the common law positively rejected native title before 1992 it is doubly fictitious to impute to earlier legislatures an intention that Crown leases should operate otherwise than according to their well-established legal effect. The legislative meaning of the Acts authorising the grant of pastoral leases cannot change by reference to possible native title rights in those circumstances: cf Dickerson *op cit* and pp206-7.

- (c) The legislation in terms authorised the grant of leases whose validity is unchallenged. The impact of a particular grant upon any pre-existing native title is not a matter of the intention of the Crown, but depends on the legal effect of the lease itself: see *Mabo No 2* at 68 (Brennan J); *Western Australia v Commonwealth* (1995) 183 CLR 373 at 422.
- (d) The legislation cannot be recast as if it read "leases are authorised but not to the extent that ...". The passage from *Delgamuukw* cited in *Western Australia v Commonwealth* (1995) 183 CLR 373 at 433 cannot be used to suggest otherwise.

5. The evidence of co-existence between pastoralists and indigenous peoples (relied upon by the Wik Peoples at §§16, 23 and the Thayorre People at §9.00) supports the respondents' position, because it shows that the need to read down the legislation to prevent the exercise of an "unqualified right to turn indigenous people off the land" (*Wik Outline* §5) was not part of the legislative context. The fact that countless indigenous and non-indigenous people would have crossed and recrossed pastoral lands in exercise of limited statutory rights, rights operating under or through grants (eg by way of reservation in favour of third parties) or the permission or non-objection of pastoralists cannot be used to alter the legal impact of a grant, **a fortiori** the legal impact of the **Crown's** action qua extinguishment. In fact Parliament "covered the field" by:

- (a) conferring rights **and obligations** upon pastoralists through the well-

established mechanism of a lease with statutory and common law incidents (The scope of Crown land statutes as the exclusive legal basis for dealings with Crown lands in Queensland was emphasised in **Cudgen Rutile (No 2) Ltd v Chalk** [1975] AC 520 at 533 (PC).);

- (b) reserving rights to the Crown to derogate from the grant, by resumption without compensation from any pastoral holding for public purposes (s148);
- (c) taking account of third party interests through a "vast list of derogations, exceptions and potential exceptions" (*Wik Outline* §§35-36). Most notably these could include reservations (properly so called) for the benefit of aborigines (*Wik Outline* §36(e)). See **Wik Peoples v Queensland** (1996) 134 ALR 637 at 670-1.

- A reservation in favour of a third party is (unlike an exception) regarded as a grant out of the lease: see **City of Keilor v O'Donoghue** (1971) 126 CLR 353 at 365-9 (Windeyer J, Owen J conc). See also *Coke on Littleton* §47a; *Shephard's Touchstone*, p80; **Durham and Sunderland Railway Co v Walker** (1842) 2 QB 940 at 967, 114 ER 364 at 374 (Ex Ch); **Doe d Douglas v Lock** (1835) 2 Ad and Ell 705 at 743-4, 111 ER 271 at at 287; and **Wickham v Hawker** (1840) 7 M & W 63 at 76-7, 151 ER 679 at 685. A reservation of a right of passage is not necessarily inconsistent with the grant of exclusive possession in a lease: **Goldsworthy Mining Ltd v FCT** (1973) 128 CLR 199 (on appeal 132 CLR 463).

(Reservations **out of a lease** are different from the type of reserve discussed in **Mabo No 2** at 66-7.)

6. A lease, like any other document of title is designed to confer and regulate interpersonal rights if "push comes to shove". To suggest that its operation abates by some doctrine of non-enforcement is to turn against the lessee and the lessor (who may be liable for the lessee's authorised acts) the very principle of non-derogation from legal rights upon which the appellants rely. The submission also overlooks the fact that with grants, it is the **Crown's** act (as distinct from the lessee's) which effects an extinguishment of native title: **Mabo No 2** at 68.

7. The statutory offence of trespass (1910 Act, s203; 1962 Act, s372) reinforces, rather than undermines, the rights of grantees. It proceeds on the basis that persons "not lawfully claiming **under**" a lease etc (emphasis added) have no **right** to occupy. These statutory remedies should be read in a non-discriminatory way: cf **Walker v New South Wales** (1994) 182 CLR 45.

8. Covenants or statutory conditions limiting the lessee's use to particular purposes operate in the realm of contract, obviously as a form of land use control similar to modern zoning. They do not derogate from the lessor's reversion or the lessee's possession. Breach may lead to forfeiture, but this right may be lost or waived or relieved against: see eg **Barina Properties Pty Ltd v Bernard Hastie (Australia) Pty Ltd** [1979] 1 NSWLR 480 at 483D.

## (2) FIDUCIARY ISSUES

9. The appellants assert the existence of a fiduciary duty owed to persons with a right to enjoy native title: *Wik Outline* §§70-71; *Thayorre Outline* §§18.03-18.033. It is unclear whether the duty is said to be owed by the executive or the legislature.

10. The appellants' attempt to erect a remedy based on breach of fiduciary duty directly challenges the majority decision in *Mabo No 2* (at 15) that the extinguishment of native title by inconsistent grant was not wrongful and did not give rise to a claim for compensatory damages.

11. There was no fiduciary duty owed by the Queensland Parliament to the appellants. The legislature of a State has the capacity to extinguish, alter or affect a variety of common law rights against the will and without the consent of the individuals who enjoy those rights. There is no authority for the proposition that the legislature has fiduciary obligations in relation to groups of its citizens who are or may be affected by an exercise of legislative power. The idea of a justiciable breach of fiduciary duty by Parliament itself ignores the plenitude of legislative power, and the function of Parliament as a mechanism for resolving differences between competing interests.

12. Even absent statute, there was no fiduciary duty owed by the Crown to the appellants.



- (a) There is a disparity in power between the Crown and all individuals. That in itself does not generate fiduciary obligations on the part of the Crown.
- (b) The fact that native title is inalienable, except to the Crown, does not create an extraordinary or unique vulnerability giving rise to fiduciary obligations on the part of the Crown: contra **Mabo No 2** (1992) 175 CLR 1 at 203 (Toohey J). Some other conduct by the Crown would be required, such as accepting a surrender of native title and promising to grant a tenure in land to the native title holders: **Mabo No 2** (1992) 175 CLR 1 at 60 (Brennan J), see also at 112-113 (Deane and Gaudron JJ).
- (c) An undertaking on the part of the Crown to act in the interests of the appellants has not been established by a course of conduct in this case. Any protection of the interests of the appellants by the Crown has been gratuitous and discretionary: see L Di Marco, "A Critique and Analysis of the Fiduciary Concept in **Mabo v Queensland**" (1994) 19 MULR 868 at 872-873, 878-879.
- (d) It is meaningless merely to describe a person as a fiduciary without further analysis (see **Commissioner of Taxation v B&G Plant Hire Pty Ltd** (1994) 52 FCR 257 at 265 (Gummow J)), all the more so to speculate on the consequences of that relationship without a clear picture of its scope and incidents.

13. The appellants assert that the existence of the duty has (at least) three consequences:

- (a) The entry by the State of Queensland into an agreement with Commonwealth Aluminium Corporation Pty Ltd and the grant of a lease to Comalco pursuant to the agreement was a breach of fiduciary duties owed by the State to the Wik and Thayorre peoples; and the Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957 (Qld) did not preclude those claims from being brought: see *Wik Outline* §§76-91; *Thayorre Outline* §§18.01-18.07.
- (b) The existence of a fiduciary duty is relevant to the question of construction of a statute said to extinguish native title: see *Wik Outline* § 73; *Thayorre Outline* §§18.01, 18.06-18.07.
- (c) If a pastoral lease would otherwise extinguish native title so that on expiry of the term the Crown's title becomes a *plenum dominum*, the Crown holds "the reversion" (by which is meant, it appears, both the reversion and, on expiry of the term, full beneficial ownership) on a constructive trust for the "traditional owners": see *Wik Outline* §§70-72; *Thayorre Outline* §§26.00.

14. Assuming for the purposes of argument the existence of a fiduciary duty between the Crown and the appellants, none of the consequences in para13 can be accepted in this case.

- (a) As to 13(a), the Comalco Act s3 (read with clause 8 of the Comalco Agreement) made it a statutory obligation for the Crown to grant the leases. In those circumstances it would be contrary to the doctrine of parliamentary supremacy to hold that such action involved a breach of any common law or equitable duty: **Wik Peoples v Queensland** (1996) 134 ALR 637 at 696 (Drummond J); **British Railways Board v Pickin** [1974] AC 765 at 782, 787 (Lord Reid), 792 (Lord Morris), 795-796 (Lord Wilberforce), 798 (Lord Simon), 802 (Lord Cross). If an agreement is authorised by statute it is valid: **Ansett Transport Industries (Operations) Pty Ltd v Commonwealth** (1977) 139 CLR 54 at 77 (Mason J). A Trustee Act may authorise conduct which would otherwise be a breach of trust, and a necessary consequence is that the conduct is not actionable. A similar principle applies as regards statutorily authorised "breaches of contract": see **Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation** (1948) 77 CLR 1 at 28 (Dixon J). Similarly, there is no avenue for legal redress in these circumstances: **Wik Peoples v Queensland** (1996) 134 ALR 637 at 700 (Drummond J); **Director of Aboriginal and Islanders Advancement v Peinkinna** (1978) 52 ALJR 286 at 291 (PC).
- (b) As to 13(b), the applicable test for construction of a statute said to extinguish native title cannot be set any higher on account of a supposed fiduciary duty than it already is on account of the right to enjoy native title itself.

- (c) As to 13(c), if native title is extinguished by a lease granted pursuant to statute, the principles referred to in response to 13(a) are a good answer to the suggested existence of a constructive trust. The statutory authority invoked in the extinguishment is neither explicitly nor implicitly limited in scope so as to leave room for a constructive trust in favour of native title holders.

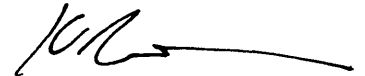
### (3) NATURAL JUSTICE

15. The appellants assert that the entry by the Crown into the lease agreement was done in contravention of applicable requirements of procedural fairness: *Wik Outline* §§92-108, 116-121.

16. The provisions of the Agreement "have the force of law as though the Agreement were an enactment" (s3 Comalco Act 1957) and cannot be challenged on the ground of procedural inadequacies in their enactment: ***British Railways Board v Pickin*** [1974] AC 765 at 782 (Lord Reid); ***Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations*** (1986) 7 NSWLR 372 at 387 (Street CJ), 404-405 (Kirby P).

17. As to the lease granted under the Act, the clear implication from a statute that authorises and requires the Crown to issue a lease is that procedural fairness is excluded: ***Annetts v McCann*** (1990) 170 CLR 596 at 598-599; ***Ainsworth v Criminal Justice Commission*** (1992) 175 CLR 564 at 576. A relevantly

unconditional statutory obligation on the executive to grant a lease does not attract the requirements of procedural fairness: *Wik Peoples v Queensland* (1996) 134 ALR 637 at 697-698 (Drummond J). Another way of making the same point is to say that according procedural fairness would be **futile** and could not possibly alter the result: de Smith, Woolf & Jowell *Judicial Review of Administrative Action* London, Sweet & Maxwell, 1995, Ch 10 esp 10-031 - 10-036. See also *Gardner v Dairy Industry Authority of New South Wales* [1977] 1 NSWLR 505 at 519 (Hutley JA), 534 (Samuels JA).



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28 May 1996