Court Notes

By Mark Hunter

The Wik Peoples -v- The State of Queensland & Ors
The Thayorre Peoples -v- The State of Queensland & Ors
High Court of Australia

Judgement delivered 23 December 1996

ABORIGINALS AND TORRES STRAIT ISLANDERS - NATIVE TITLE - PASTORAL LEASES

A single judge of the Federal Court of Australia (Drummond J) ruled in respect of a number of interlocutory questions raised by the claims of the Wik Peoples ("the Wik") and the Thayorre People ("the Thayorre") to an area of land in northern Queensland affected by earlier grants of pastoral leases under Queensland law.

The questions isolated for consideration by Drummond J concerned:

1. Whether the power of the Queensland Parliament to enact laws providing for pastoral leases without preserving native title rights was limited in law. (The State Constitution question.)

2. Whether a grant of a pastoral lease in Queensland, without express reservation of native title rights, necessarily extinguished native title, including that of the Wik and the Thayorre. (The pastoral lease question.)

3. Whether the passage of the *Mining on Private Land Act* 1909 (Q) and/or the *Petroleum Act* 1915 (Q) had extinguished any native title rights which the applicants may have had in minerals and petroleum beneath the subject land. (The mineral rights question.)

4 & 5 Whether the applicants could claim relief in the event of native title rights being extinguished having regard to the *Commonwealth Aluminium Corporation Pty Limited Agreement Act* 1957 (Q) and the *Aurukun Associates Agreement Act* 1975 (Q).

Drummond J answered each of the foregoing questions adversely to the Wik and the Thayorre, holding that each of the pastoral leases in question conferred on the lessees "rights to exclusive possession" of the land. Drummond J ruled that the grant of each lease "necessarily extinguished all incidents of Aboriginal title ... in respect of the land demised under the pastoral lease."

An appeal was taken to the Full Court of the Federal Court of Australia. An application for removal of that appeal into the High Court was granted on 22 March 1996 pursuant to section 40 of the *Judiciary Act* 1903 (Cth).

Central to the native title claims in question was the argument that native title rights survived the granting of the pastoral leases and co-existed with the interests of the lessees.

The Wik claim to land known as the Holroyd River Holding Lease ("Holroyd"), as granted under the *Land Act* 1962 -74 (Q) ("the 1962 Act"). The Thayorre claim was over part of the land the subject of the Wik claim and over other land which involved the Mitchellton Pastoral Lease ("Mitchellton"), as granted under the *Land Act* 1910 (Q) ("the 1910 Act").

In respect of each area of land, an earlier lease had been granted but surrendered some years later. Unlike the Mitchellton however, possession was never taken under the Holroyd by the lessees.

In a majority decision (Brennan CJ, Dawson J and McHugh J dissenting) the High Court HELD:

1. The pastoral leases in question did not confer on the lessees the right to exclusive possession of the subject land.
2. The rights and obligations of each lessee depended upon the terms of the grant of the pastoral lease and upon the statute which authorised the lease.
3. The grant of pastoral leases under the Acts in question did not of itself extinguish native title rights.
4. In respect of inconsistency between native title rights and rights conferred under statutory grants, the former are extinguished to the extent of any inconsistency with the latter.
5. Native title rights may exist concurrently with rights conferred under statutory grants.

Per Toohey J – The pastoral lea a creature of statute. To argue th pastoral lease must confer exclusive session on the lessee is to focus "unc on the leasehold interests as knov common law.

The regime under which pas leases were granted was establishec century and contemporary docun make clear that Aborigines were n be excluded from the land under pas occupation.

Per Gaudron J – The 1910 Ac not confer a right of exclusive po: sion. Various provisions in the Ac thorised different persons to ente land and remove different mate Other provisions denied the lesse right to destroy trees or interfere other persons authorised to remove ber from the land.

Per Gummow J – The term "le may be used in a statute in a limited s only. There is nothing remarkable i use of a term such as "lease" in a sta to identify a new institution not ful be identified with the term as unders at common law.

Per Kirby J – The case books "full of warnings" against a proces reasoning by which the very use o term "lease" in legislation imports a the features of a common law lease

At the time when the Acts in ques were passed, it was known that subs tial numbers of Aborigines were u the subject land according to their tr tional ways; ".... It was not governn policy to drive them into the sea c confine them strictly to reserves".

Per Brennan CJ – A pastoral l is not a mere "profit à prendre" allov the pastoralist to enter the land for purposes of grazing stock. The past lessee has an exclusive right to the l Native title rights are extinguishe inconsistent with the rights of a past lessee because the law cannot recog the co-existence in different hand rights which cannot be exercised sin taneously.

Whether or not inconsistency ex between the manner in which diffe rights are in fact exercised is irrelev The orderly enjoyment in successio

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land is provided for by the doctrines of tenure and estates. These doctrines cannot operate without recognising in the Crown the full reversionary interest expectant on the expiry of a lease. Native title rights are therefore not merely suspended by a lease because they are inconsistent with the Crown's title to the land on reversion. In this regard, it is "too late" to develop an new theory of land law.

The High Court also considered a challenge by the Wik to the validity of special bauxite mining leases granted by Queensland pursuant to State "Agreements" and State legislation. The challenge was based upon default or impropriety in the process leading to the execution of the Comalco and Arukun Agreements. The Court acknowledged that the Agreements may have caused the Wik to lose rights previously held by them. The Court, however, unanimously HELD:

1. The Agreements were sanctioned by State legislation and represented the exercise of legislative power.
2. No action for damages or other relief lay with the Wik or Thayorre in respect of any failure to accord natural justice or procedural fairness, or to perform a fiduciary duty, in the execution of the Agreements.
3. The bauxite mining lease appeals should then be dismissed.

Commentary

The Mabo decision recognised for the first time native title at common law in Australia.

In the Northern Territory, two regimes operate in the exercise of native titles rights. *The Aboriginal Land Rights (Northern Territory) Act* (Cth) has since 1976 allowed for grants of inalienable freehold title to Aboriginal people through land trusts. Areas including Uluru and Katherine Gorge are the subject of such grants. Grants under this legislation do not extinguish native title to the subject land. (see *Pareroultja -v- Tickner* 42 FCR 32). Native title claims are also made under the *Native Title Act* (Cth) which implements the Mabo decision.

Like more than ninety percent of the Territory and a substantial proportion of the of the rest of mainland Australia, Uluru and Katherine Gorge were subject to pastoral leases last century. The minority judgments in Wik would therefore extinguish native title rights at common law over these places.

Each of the majority judgments focuses on the nature or character of the rights granted rather than the actual use of the land in determining whether native title rights are extinguished. Gaudron and Gummow JJ did, however, consider that the performance of conditions in a lease (eg. construction) could extinguish or impair native title rights.

It is difficult to see how the use of land by lessees can be overlooked in determining the extent to which different rights will co-exist.

The High Court left open the question of whether extinguishment of native title rights by the grant of inconsistent rights is permanent. The special nature of the pastoral lease, as emphasised by the majority judgments, leaves open the position in relation to other types of leases. Leases involving more extensive use or disturbance of subject land may have a greater impact on native title rights.

CRIMINAL LAW – SECTION (8)2 BAIL ACT

IN THE MATTER of an application for bail by MARCUS JOSEPH KIRKMAN.

Judgment of Kearney J delivered 20 December 1996 (unreported).

The applicant was convicted of several dishonesty offences in the Court of Summary Jurisdiction at Yulara on 14 November 1996. An aggregrate sentence of twenty months' imprisonment was imposed by Donald SM.

On 12 December a different magistrate was asked to grant bail pending the hearing of a severity appeal which the applicant lodged in the Supreme Court on 22 November. Bail was sought pursuant to section 168(1) of the *Justices' Act*. The Magistrate ruled that by virtue of section 8(2)(b) of the *Bail Act* there is a "presumption against convicted persons getting bail". In refusing bail, the Magistrate referred to the circumstances in which bail would be granted to a convicted person as being "really extraordinary".

A further application for bail was made to the Supreme Court pursuant to section 37 of the *Bail Act* and this was heard by his Honour on 19 December. Although he refused to grant bail, his Honour considered the bail procedings before the Magistrate and stated:

1. Section 8(2) removed the applicant's entitlement to bail leaving neither a presumption in favour of nor a presumption against bail;

2. A presumption against bail only exists where the applicant is charged with an offence which falls within section 7A of the *Bail Act*;

3. It was not encumbent upon the applicant to show exceptional circumstances before he could be granted bail.

APPEARANCES

Appellant
Counsel: Cain
Solicitors: CAALAS

Respondent
Counsel: Roberts
Solicitors: DPP

COMMENTARY

Section 7A restricts the presumption against bail to charges of murder, treason and particular drug offences.

"Exceptional" or "special" circumstances must only be made out of respect of an application for bail pending an appeal to the Criminal Court of Appeal.