

1997

## Wik- What the High Court really said

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### Recommended Citation

(1997) "Wik- What the High Court really said," *The National Legal Eagle*: Vol. 3: Iss. 2, Article 7.  
Available at: <http://epublications.bond.edu.au/nle/vol3/iss2/7>

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# WIK – WHAT THE HIGH COURT REALLY SAID

First there was Mabo. Then there was Wik. The High Court, by its decisions, has forced the rest of us to think about justice for the indigenous peoples of Australia.

## THE MABO DECISION

In the 1992 Mabo case, the High Court decided that indigenous peoples in Australia owned the land on which they lived under their own system of native title. It also decided that this native title survived the arrival of the first British settlers and their government's claim of sovereignty.

## DISCUSSION QUESTIONS

1. What legal doctrine relating to ownership of land in Australia prior to the arrival of the British was overturned by Mabo?
2. What did this doctrine mean and what were its implications for the indigenous inhabitants of Australia?
3. What are the implications of the High Court's decision that the indigenous people were, in fact, the legal owners of the land?

The Court said, however, that native title could be extinguished in two ways. The traditional owners could give up their connection with their land and move away. Or, the Crown (the government) could do something that was inconsistent with native title, such as to grant title to the land to someone else.

In Mabo, the people of the island of Mer were able to prove both that they still maintained their traditional ties to their land and that the Crown had never done anything inconsistent with their ownership of it. The High Court ruled, therefore, that they were still the legitimate owners of their land.

## DISCUSSION QUESTION

*After Mabo, could Aboriginal people claim the land on which your school is built? Why or why not?*

## THE AFTERMATH OF MABO

After Mabo, a great hue and cry went up all around the country. Ordinary Australians, not fully understanding the decision, feared that Aboriginal or Islander people would be setting up camp in their backyards. Many of them appealed to their governments to end their uncertainty by extinguishing native title.

There was one reason, however, why they couldn't do this. Under the Racial Discrimination Act, it is unlawful to treat one group of Australians less favourably than others because of their race. The government can acquire anyone's land and, thereby, extinguish their title to it. But they have to pay for it! To extinguish the title of Aboriginal and Islander peoples to their land, without paying them for it,

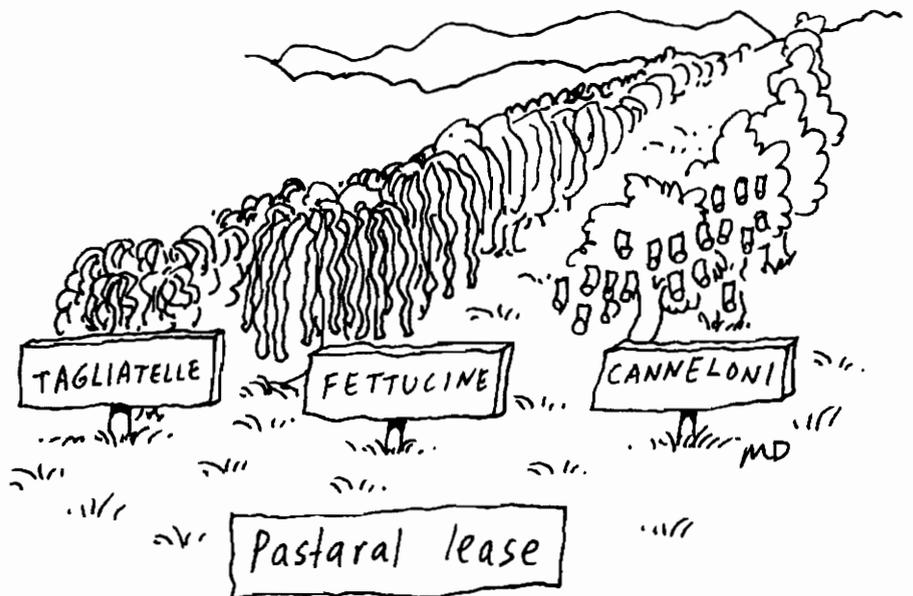
would probably have amounted to unlawful discrimination.

So, the Federal Parliament passed the Native Title Act. This Act set up a system under which native title land could firstly be identified. Then, if there are competing claims to the land, a settlement, which may include fair compensation, can be reached.

## CLASS RESEARCH

1. What are the main features of the system set up under the Native Title Act?
2. Do you think it is a fair system which takes into account the rights and interests of all parties? Why or why not?

Indigenous people set about claiming land which they believed was theirs.



# THE WIK CASE

A question arose, however, which was not answered by the *Native Title Act*. Does the granting of a pastoral lease extinguish native title?

The granting of freehold title certainly did. The owner of a freehold title is entitled to "exclusive possession" of the land until such times as he or she passes the title to someone else. Such a title is quite inconsistent with native title. The rights of traditional owners to come onto the land, to hunt and fish and live on the land are extinguished for all time.

The granting of an ordinary lease probably extinguishes native title as well. If you rent a house to live in, you get the right to exclusive possession of that house for the term of the lease. It was certainly not envisioned by either you or the landlord that native title holders could live there too, or could come into your backyard to catch your pet rabbits.

Vast tracts of Australia are, however, held under pastoral leases. The owners of such leases have the right to use the land "for pastoral purposes" for a certain period of time. In many cases, this land has been in the hands of a pastoral family for several generations. They regard it as theirs.

The Wik people claimed native title to some land in Queensland, which included a number of pastoral leases.

They argued that pastoral leases are not inconsistent with native title and do not, therefore, extinguish it. They argued that the use of land for pastoral purposes is not inconsistent with its use by traditional owners for their purposes: hunting, fishing, gathering, camping and so on.

Alternatively, they argued that native title, like the rights of the

Crown in respect of the land, was not extinguished by the granting of the lease, but was merely suspended during its term. It would, therefore, be revived when the term of the lease expired.

The majority of the judges in the High Court agreed with these arguments.

The judges said that pastoral leases are different to ordinary leases, which have their origin in common law. Ordinary leaseholders do have the right to exclusive possession of their land. During the term of the lease they have the right to exclude everyone, including traditional owners, from coming onto the property. Such leases are, therefore, inconsistent with native title.

The judges said that the rules relating to ordinary leases do not apply to pastoral leases. They looked at the history of pastoral leases in Australia. They were granted, under Acts of Parliament, over vast areas in remote parts of Australia. They were seen as a way of occupying these areas. The Acts of Parliament under which they were granted say nothing of exclusive possession. They say that leaseholders may use the land "for pastoral purposes".

Historical documents show that it was not the government's intention at the time to drive Aboriginal people off these lands. Rather, it was intended that they would continue to live their traditional lifestyle alongside the pastoralists and their animals. The majority of the judges decided, therefore, that pastoral leases do not give their owners the right to exclusive possession of the land.

The decision in Wik does not grant the Wik people native title

over the land that they claim. It simply says that their claim will not automatically fail because of the fact that the land is subject to pastoral leases. They must now go back to the Federal Court and continue with their claim under the *Native Title Act*.

## DISCUSSION QUESTIONS

1. Our prime Minister believes that, with the Wik decision, the pendulum has swung too far in favour of Aboriginal people. Do you agree or disagree? Why?
2. The Australian Government has formulated a "10 point plan" for dealing with the consequences of the Wik decision. What are the 10 points? Why are the pastoralists and their representatives unhappy with it? Why are the Aboriginal people unhappy with it? What is your view? Why?
3. Why is reconciliation between indigenous and non-indigenous Australians important for our nation? Formulate your own "10 point plan" for how it might be achieved.