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Abstract

This paper critically analyzes the Court's recent jurisprudence concerning pastoral leases and native title. It argues, first, that the approach of the majority in Ward [Ward v Western Australia] is flawed. That approach, which characterizes pastoral leases as statutory interests, overlooks the real possibility that statutory interests are derived from, or are adaptations of, common law leases. It is also inconsistent with the approach adopted by a majority in Wilson [Wilson v Anderson]. Secondly, this paper argues that Wik [Wik Peoples v Queensland], the judicial precursor of the approach in Ward, should be overruled. Significant parts of the reasoning in Wik, when closely examined, are either flawed in their own right or no longer make sense after Ward and Wilson; and the rationale for adhering to the decision is weak.

Keywords

pastoral leases, native title, jurisprudence, Ward v Western Australia, Wik Peoples v Queensland

Cover Page Footnote

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PASTORAL LEASES AND NATIVE TITLE: A CRITIQUE OF *WARD* AND *WIK*

*By Gim Del Villar**

Introduction

On 8 August 2002, the High Court handed down its decision in *Ward v Western Australia* ('*Ward*').¹ It was the climax of the longest and most complex piece of native title litigation that the Court had heard in years.² It threw light on the nature of native title rights, the operation of the *Racial Discrimination Act 1975* (Cth), and the effect on native title of a multitude of tenures. Among these tenures were pastoral leases. By a majority of five judges to two (Gleeson CJ, Gaudron, Gummow, Hayne and Kirby JJ; McHugh and Callinan JJ dissenting), the Court found that such leases in Western Australia and the Northern Territory did not extinguish all native title rights. Only the native title rights to control the access to and use of the land, the majority said, were clearly extinguished; other rights might be able to co-exist with those of the graziers. In making these findings, the majority purported to follow the Court's earlier judgment in *Wik Peoples v Queensland* ('*Wik*').³

On the same day, the Court handed down *Wilson v Anderson* ('*Wilson*').⁴ A differently constituted majority (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting) there decided that this pastoral lease extinguished all native title. The practical implications of the decision were immense. At a stroke, it freed virtually the entire Western Lands Division of New South Wales of native title claims. *Wik*, the majority said, was distinguishable.

This paper critically analyzes the Court's recent jurisprudence concerning pastoral leases and native title. It argues, first, that the approach of the majority in *Ward* is flawed. That approach, which characterizes pastoral leases as statutory interests, overlooks the real possibility that statutory interests are derived from,

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1 (2002) 191 ALR 1.

2 It was not, however, the end of the matter. The High Court remitted some issues to the Full Federal Court for further determination and hearing. On 9 December 2003, the Full Federal Court made orders bringing the case to an end: see *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283.

3 (1996) 187 CLR 1.

4 (2002) 190 ALR 313.

or are adaptations of, common law leases. It is also inconsistent with the approach adopted by a majority in *Wilson*. Secondly, this paper argues that *Wik*, the judicial precursor of the approach in *Ward*, should be overruled. Significant parts of the reasoning in *Wik*, when closely examined, are either flawed in their own right or no longer make sense after *Ward* and *Wilson*; and the rationale for adhering to the decision is weak. Before making these arguments, it is necessary to explore, in greater detail, conclusions reached in *Ward*.

The Ward Decision on Pastoral Leases

Western Australian Pastoral Leases

The Joint Judgment and Kirby J's concurring Judgement

The joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ, with which Kirby J agreed, found that Western Australian pastoral leases which had been granted under various Land Regulations, the *Land Act* 1898 (WA), and the *Land Act* 1933 (WA) were 'non-exclusive pastoral leases' as defined under s 248B of the *Native Title Act 1993* (Cth) ('NTA'). This meant that the leases did not confer a right of exclusive possession over the land that they covered.

Several factors indicated that the leases conferred no right of exclusive possession, despite the use of the language of lease in the Land Acts, regulations, and the instruments. Pastoral leases in Western Australia were a creature of statute or regulation, not the common law. Although the Land Acts and regulations provided for leases and licences as different kinds of interest, in a number of places they were treated without distinction; for instance, forfeiture provisions applied to both. The holder of a pastoral lease was restricted to using the land only for 'pastoral purposes' and obtained no right to the soil or to timber except for those limited purposes.⁵ There were extensive reservations in favour of the Crown and third parties, including a reservation permitting any person to enter and pass through unimproved parts of the land while passing from one part of the country to another.⁶ The interest obtained under the lease was precarious; it could be forfeited for non-payment of rent or for failing to comply with the lease's terms and conditions, and the Minister could sell or dispose of not only mineral land within the lease but also any other portion of the lease.⁷ These factors, some of which were similar to those relied on by the majority in *Wik*, all suggested that the pastoral lease did not confer a right of exclusive possession over the land.

All the leases contained a reservation in favour of Aborigines. The reservation inserted in leases granted under the *Land Act* 1933, for instance, provided for Aborigines to enter 'unenclosed and unimproved parts of the land the subject of the pastoral lease to seek their sustenance in their accustomed manner'. The joint judgment rejected the conclusion of the Full Federal Court that when

5 (2002) 191 ALR 1, 65-66 [180].

6 Ibid 64-65 [178].

7 Ibid 62 [170]-[171].

land was enclosed or improved, native title rights over it were wholly extinguished. Such reasoning wrongly assumed that, but for the reservation, the holder of a pastoral lease had a right to exclude Aboriginal people (and others) from the land. In fact, the leases had not conferred a right of exclusive possession.⁸

As the pastoral leases were 'non-exclusive pastoral leases', the joint judgment pointed out that they were 'previous non-exclusive possession acts'.⁹ Their effect on native title depended on the State counterpart of s 23G of the NTA. This was s 12M of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA).¹⁰ It extinguished any native title rights that were inconsistent with the rights granted by the pastoral leases.¹¹ It also provided for the other rights granted to pastoralists to prevail over, but not extinguish, native title.¹² On this basis, the joint judgment said that the native title right to control access to the land was extinguished, and the same was probably true of any right to burn off. Other rights probably continued to exist. Given the limited findings made by the primary judge and the Full Federal Court, however, the joint judgment found it impossible to say what the application of s 12M would be, so they remitted the issue to the Full Court.¹³

Callinan J

Callinan J wrote the main dissenting judgment. He found that the pastoral leases in Western Australia conferred a right of exclusive possession that extinguished all native title rights and interests in respect of the land. He reached this conclusion after a detailed analysis of *Wik* and the provisions of the Western Australian legislation.

In his Honour's analysis, *Wik* had no ratio decidendi.¹⁴ The majority in *Wik* had reached the conclusion that the Queensland pastoral leases had not conferred a right of exclusive possession because of factors such as the reservations in favour of the Crown and third parties,¹⁵ the vastness of the area covered by the leases,¹⁶ the history of the grant of pastoral leases in Australia,¹⁷ and the existence of a statutory remedy for ejection in s 204 of the *Land Act 1910* (Q).¹⁸ However, Callinan J pointed out that the majority of judges were not

8 Ibid 65 [179], 66-67 [185]-[186].

9 These were essentially valid grants of a non-exclusive agricultural lease or a non-exclusive pastoral lease that took place on or before 23 December 1996.

10 In very general terms, s 12M provided for the extinguishment of native title by the grant of inconsistent rights if that was the effect of the grant at common law; the grant of other rights simply authorized activities that prevailed over, but did not extinguish, native title.

11 (2002) 191 ALR 1, 68 [192].

12 Ibid 68-69 [193]-[194].

13 Ibid 69 [195]-[196].

14 Ibid 197-200 [680]-[690].

15 (1996) 187 CLR 1, 122 (Toohey J), 154 (Gaudron J).

16 Ibid 130 (Toohey J), 154 (Gaudron J), 232-233 (Kirby J).

17 Ibid 110-112, 119-120 (Toohey J), 140-143 (Gaudron J), 226-230 (Kirby J).

18 Ibid 154 (Gaudron J), 194 (Gummow J).

unanimous about the factors that were decisive of a lack of exclusive possession. Nor were they unanimous about whether the same result would have obtained if the provisions had been enacted in a different form.¹⁹ For that reason, *Wik* should only be binding if the provisions of the Western Australian legislation were indistinguishable from those considered in that case.²⁰

Callinan J then set out what he understood to be the correct starting point for examining the Western Australian pastoral leases. The general law of leases, he said, should be presumed to apply to an interest called a 'lease' by the legislature and the parties to it.²¹ It was necessary to inquire into whether particular incidents of the general law (such as the right of exclusive possession) were compatible with the terms of the legislation and the instrument of the grant. The inquiry was not, however, into whether a lease under statute was on all fours with the common law. That confused the issue because it was always possible for Parliament to depart from aspects of the common law with respect to leases but to keep other incidents intact.²²

With that approach in mind, Callinan J found that none of the factors that the joint judgment had pointed to negated the conferral of a right of exclusive possession. Pastoral leases were no more precarious than a tenancy at will;²³ and the provisions of the Land Acts relating to forfeiture for breach of conditions applied to all leases and licences; they did not indicate that pastoral leases were more precarious in this respect than other interests.²⁴ Reservations of timber and minerals had long been found in leases in England and Australia, so their presence in pastoral leases was unexceptional. Australian case law had also demonstrated that extensive rights of entry by the Crown and other parties were compatible with exclusive possession.²⁵ The fact that lessees were restricted to pastoral or grazing purposes carried no significance: practically all modern leases restricted the purposes to which land could be put, and consideration of the activities which graziers might reasonably pursue – something that the majority had failed to do in *Wik* – did not suggest a lack of need for exclusive possession; quite the contrary.²⁶ Likewise, authority before *Wik* offered no support to the idea that pastoral or grazing purposes suggested an absence of exclusive possession.²⁷ The 'vastness' of the leases, moreover, which had impressed some of the majority judges in *Wik*, was an inherently uncertain criterion for imputing to the legislature a lack of any intention to confer exclusive possession, and no reliance

19 (2002) 191 ALR 1, 200 [691].

20 Ibid 202 [695]-[696].

21 Ibid 205 [700]. His Honour quoted from Kirby P in *Minister for Lands and Forests v McPherson* (1991) 22 NSWL 687, 696-697.

22 (2002) 191 ALR 1, 205-206 [701].

23 Ibid 206 [702].

24 Ibid 206 [703].

25 Ibid 206-207 [704]-[707].

26 Ibid 209-210 [710]-[712].

27 Ibid 210 [713].

should be placed upon it.²⁸ Accordingly, the pastoral leases in Western Australia conferred a right of exclusive possession that extinguished all native title rights and interests.

The reservation in favour of Aborigines did not alter this conclusion. The reservation could not be read as *preserving* any existing native title rights, which were only held by discrete communities who had exercised their traditional rights over particular land or waters. The reservation instead gave rights of entry to *all* members of the aboriginal community. It was, therefore, a statutory provision that confirmed the extinguishment of native title rights by the pastoral leases.²⁹

His Honour's conclusions about pastoral leases and *Wik* were summarized in these terms:

In my opinion, therefore, not one of the features of Western Australian pastoral leases which were identified by the majority in the Full Court leads to a conclusion that the leases did not confer exclusive possession as that expression is to be understood in leasing parlance and in the Native Title Act. The decision in *Wik* dictates no different conclusion. There is no majority opinion in *Wik* as to the features determinative of the existence or otherwise of exclusive possession. The Western Australian legislation and leases are different in form from the relevant Queensland legislation and leases. And, in any event, in my respectful opinion, the majority judgments in *Wik* were not based on a full and proper appreciation of the true nature and extent of the legitimate pursuit of pastoral or grazing purposes. The decision in *Wik*, so far as it relates to exclusive possession, which I take to have the same meaning in the Native Title Act as it has at common law, has application only to leases of approximately the same size, in the same districts, in the same form, and issued under the same Act as those the subject of that case.³⁰

McHugh J

McHugh J also dissented. He agreed with Callinan J that *Wik* had no ratio decidendi. However, he added that even if that analysis were not correct, the case had limited value because the structure, terms and history of the Western Australian legislation differed from those of the Queensland legislation. It was therefore important to determine the effect of the Western Australian pastoral leases as a matter of principle, not by application of *Wik*.³¹

As a matter of principle, a lease or demise involved the transfer of an estate in the land to the grantee,³² along with legal possession of that land.³³ In these respects a lease differed from a licence, which did not confer an interest in the land itself and which did not enable the licensee to sue in trespass.³⁴

28 Ibid 210 [714].

29 Ibid 210-211 [715]-[716].

30 Ibid 212 [720] (citation omitted).

31 Ibid 137 [480]-[482].

32 Ibid 137 [482].

33 Ibid 139 [489].

34 Ibid 142-143 [502]-[504].

The usual words by which a lease was made were 'lease and demise', 'lease', 'let' and 'grant'. But any words that amounted to a grant of legal possession would constitute a lease.³⁵ The use of the term 'demise' in a statute or an instrument, in particular, was a very powerful indication that possession had been conferred, since it was a technical term which meant that an interest in land had passed from the grantor to the grantee. On that point, dictionaries, legal dictionaries, conveyancing texts and precedents and case law were at one.³⁶

McHugh J criticized the majority judges in *Wik* for giving little weight to the ordinary meaning of terms such as 'demise', 'lease' and 'grant'. He claimed that if they had, they could not have found for the claimants unless they found in the statutes some provision that was necessarily inconsistent with the transfer of an interest in land to the pastoral lessees. But none of the provisions to which the majority judges referred, including s 204 of the *Land Act 1910 (Q)*, which provided for a summary remedy of ejection, was necessarily inconsistent with the transfer of an interest or estate in land to the lessees.³⁷

In addition, the majority judges in *Wik* had confused legal possession and occupation. It had long been understood that a person could retain legal possession even though some other person had sole physical occupation of land.³⁸ A lodger in a house was a classic example.³⁹ However, the majority judges in *Wik* had relied on the known presence of Aborigines on pastoral leases to infer that there was no grant of possession and to refuse to give terms such as 'demise', 'lease' and 'grant' their ordinary meanings. McHugh J described the error thus:

The occupation of the land by Aborigines is no more inconsistent with the legal possession of the land being in the pastoral lessee than the sole occupation of a room by a lodger is inconsistent with legal possession of the room being in the owner of the boarding house.⁴⁰

McHugh J added that statements by Toohy and Kirby JJ to the effect that it was not government policy to drive Aborigines into the sea or to confine them strictly to reserves, and so pastoral leases had not been intended to confer exclusive possession, were no more than speculation.⁴¹ A more likely explanation, or speculation, was that the legislature either ignored or turned a blind eye to the position of Aborigines, given the racist society of the time.⁴²

McHugh J found that the pastoral leases in Western Australia granted under the Land Regulations and Land Acts conferred a right of exclusive possession. He said that reservations in favour of Aborigines and others did not negate a right of exclusive possession. Numerous cases had shown that the

35 Ibid 138 [484]-[485].

36 Ibid 139-140 [492].

37 Ibid 146 [514], [516].

38 Ibid 146-147 [518].

39 Ibid 147 [519].

40 Ibid 148 [522].

41 Ibid 148 [526].

42 Ibid 148-149 [528].

reservation of a right to the grantor or others was not only consistent with, but was indicative of, the grantee having the legal right to exclusive possession.⁴³ The fact that the lease was granted for pastoral purposes only did not indicate that the lessee lacked exclusive possession; indeed, that objection was one which his Honour said he found ‘most difficult to understand.’⁴⁴ Unlike the *Land Act 1910 (Q)*, the Western Australian regulations and legislation had no equivalent of s 204.⁴⁵ The right of exclusive possession was conferred on pastoral lessees.

Pastoral leases in the Northern Territory

Pastoral leases in the Northern Territory contained similar features to those in Western Australia. They included reservations in favour of Aborigines as well as covenants that the lessee would not ‘obstruct any public roads, paths, or ways, or interfere with the use thereof by any person, and [would] not interfere with travelling stock lawfully passing through the leased land’.⁴⁶

An important difference, however, was that the reservations in favour of Aborigines were drafted in much broader terms: they did not cease to apply when the lease was fenced or improved. For instance, the reservation in pastoral leases granted under the *Crown Lands Ordinance 1927 (NT)* stated:

[A] reservation in favour of the aboriginal inhabitants of North Australia shall be read as a reservation giving to all aboriginal inhabitants of North Australia and their descendants full and free right of ingress, egress and regress into, upon and over the leased land and every part thereof and in and to the springs and natural surface water thereon, and to make and erect thereon such wurlies and other dwellings as those aboriginal inhabitants have before the commencement of the lease been accustomed to make and erect, and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to do if the lease had not been made.⁴⁷

Another important difference was that at the time of the two most recent pastoral leases s 116A of the *Crown Lands Ordinance 1931 (NT)* provided that a person with a right to a Crown lease had ‘a right of exclusive possession of the land to be included in the lease but that right is subject to reservations, covenants, conditions and provisions contained in the lease.’

The joint judgment found that the pastoral leases did not confer a right of exclusive possession. Providing that those entitled to the grant of a pastoral lease were to have exclusive possession suggested that the lease, when granted, was

43 Ibid 154-155 [551].

44 Ibid 155 [552].

45 Ibid 155 [554].

46 The quoted covenants were contained in the *Crown Lands Ordinance 1927 (NT)* s 34(g). The Court indicated that the later pastoral leases contained similar provisions.

47 In 1978, this reservation was changed. The text of the amended reservation is found in *Ward* (2002) 191 ALR 1, 119 [412].

thought to give that right.⁴⁸ However, the judgment noted that such a right was expressly subject to reservations, particularly the reservation in favour of Aborigines. This took the leases outside of the definition of an 'exclusive pastoral lease' in the NTA. As their Honours explained:

The leases now in question were subject to the reservations in favour of Aboriginal persons that have been noted. In the context of the NTA, that reservation suffices to take the pastoral leases outside the Act's definition of "exclusive pastoral lease". A right of exclusive possession was *not* conferred.⁴⁹

The joint judgment referred to its discussion of Western Australian pastoral leases to reject the findings by the Full Federal Court that the reservations defined or confined the rights that native title holders could exercise. It indicated that because of the Northern Territory equivalent of s 23G of the NTA, the grant of pastoral leases had extinguished the native title right to control access to the land; but the grant of the leases was not necessarily inconsistent with other native title rights, and the issue should be determined on remitter.⁵⁰

Callinan J dissented. He found that s 116A was an unambiguous indication that lessees were given a right of exclusive possession.⁵¹ Nothing, he claimed, turned on the proviso that the right was subject to reservations, covenants, conditions and provisions contained in the lease. That was because every demise was subject to covenants permitting the lessor or other parties to enter, but they did not detract from the lessee's right to enjoy exclusive possession of the land. He further observed that because the reservations conferred rights upon all Aborigines of the Northern Territory, any specific rights of native title holders were lost and subsumed in the rights of that larger group.⁵²

McHugh J also dissented, stating that pastoral leases in the Northern Territory took a simpler form than Western Australian pastoral leases but also gave a right of exclusive possession.⁵³

A Critique of the Majority's Approach in Ward

The Strange Logic of Statutory Interests

As stated earlier, the majority judges in *Ward*, like the majority in *Wik*, found that Western Australian pastoral leases did not confer a right of exclusive possession. As in *Wik*, they emphasized the statutory nature of pastoral leases, and they found that the reservations, the limited purpose of the leases and their precariousness negated the conferral of exclusive possession. It is, however,

48 Ibid 120 [415].

49 Ibid.

50 Ibid 121-123 [417]-[425].

51 Ibid 267 [935].

52 Ibid 267 [935].

53 Ibid 156 [557].

difficult to commend such an approach to pastoral leases or other leases the features of which are partly prescribed.⁵⁴ It does not account for the possibility that such a statutory interest may simply be a modified common law lease; that is, an interest that keeps intact the incidents of a common law lease, including exclusive possession, except where the contrary is indicated by statute. Indeed, without any convincing explanation, it presumes the opposite. Furthermore, it is inconsistent with the approach espoused by the joint judgment in *Wilson v Anderson*. For that reason, it warrants the Court's re-examination.

The failure of the majority to consider whether pastoral leases in Western Australian and the Northern Territory are modified common law leases can be illustrated by their discussion of leases for grazing purposes under s 32 of the *Land Act 1933* (WA). The Ivanhoe lease contained a substantial number of reservations and limitations. It was granted for pastoral purposes. It reserved to the Crown power to resume and enter upon possession of parts of the land for public works. It reserved to the Crown minerals and petroleum, and allowed authorized persons to take timber, quarry, and search for minerals and the like. It imposed a restriction against injuring or destroying live timber or scrub. It permitted the Crown to re-enter and repossess the land if there was a failure to pay rent or if the land was used other than for grazing. It also contained a condition that the public was to have free and uninterrupted use of the roads and tracks which existed on the land. But the majority found that because these features were not set down in the *Land Act 1933* (WA), a right of exclusive possession was conferred. As they explained:

The lease that was granted was not a statutory interest in land. The features of the interest granted were not prescribed by the Act but were determined by the nature of the agreement reached and the grant made. The rights thus granted to Ivanhoe were, therefore, rights as lessee of the land, as that term is understood in the general law. Ivanhoe was thus granted a right of exclusive possession of the land.⁵⁵

This reasoning suggests that a right of exclusive possession would have been conferred even if the lease could have been determined on notice by the Crown; even if it had required the Minister's approval for the erection of certain structures;⁵⁶ and even if it had contained reservations permitting authorized persons to depasture stock on the land in limited circumstances.

54 It seems unlikely that a statute would prescribe all the features of a lease. In *Wik* (1996) 187 CLR 1, two of the majority judges referred to the possibility that pastoral leases might attract equitable relief against forfeiture and the lessee might be able to enforce a covenant for quiet enjoyment: at 197-198 (Gummow J), 245 (Kirby J). Other judges have also noted the possibility that a statutory lease may have the incidents of a lease at common law: see *Ward* (2002) 191 ALR 1, 205 [701] (Callinan J); *Wilson* (2002) 190 ALR 313, 319 [19] (Gleeson CJ).

55 (2002) 191 ALR 1, 110 [369].

56 The Minister's prior approval for the erection of structures was one condition attached to the grant of the Crosswalk lease. The majority in *Ward* found this to be an exclusive

That, however, generates paradoxical results. Suppose that a statute provides for the grant of a pastoral lease with the same reservations and limitations as the Ivanhoe lease, but with the additional features noted above: the ability of the Crown to determine the lease upon notice, a limited right to depasture stock, and a restriction on erecting certain structures. On the majority's approach in *Ward*, that interest would probably lack a right of exclusive possession. The conferral of that right, the majority would likely hold, *could not have been intended* because the lease would simply be for pastoral purposes; it would contain limitations on erecting structures and using timber or scrub; it would have extensive reservations in favour of the Crown and third parties; it would be precarious; and it would not positively indicate that exclusive possession had been conferred. So merely by prescribing the features that, in the Ivanhoe and similar leases, co-exist with exclusive possession, the legislature supposedly indicates that the interest is not really a lease; instead, it is 'sui generis'. This example demonstrates the incongruities that flow from reasoning that because some incidents of a lease are found in a statute, one should reverse the ordinary presumption that, by using the terms 'lease' and 'demise', a legislature intends to create an interest with the incidents of a lease at common law, subject only to statutory modification. Such an approach wrongly rejects the possibility that the legislature intended to modify, or adapt, common law leases by prescribing certain features rather than to create a novel, and essentially unparalleled, statutory interest.

It could, of course, be objected that the NTA contemplates that an instrument called a lease may not confer a right of exclusive possession and, accordingly, it is mistaken to presume that the use of terminology associated with leases shows exclusive possession has been conferred. Gaudron, Gummow and Hayne JJ put forward just that objection in *Wilson*. After referring to the wide definition of 'lease' in s 242(1)(c) of the NTA,⁵⁷ their Honours, with whom Kirby J agreed on this point, stated:

The definition in s 242 of 'lease' is of importance in the present proceedings because it demonstrates that the NTA postulates the existence of an interest which, although described as a 'lease', is not a lease at common law. Further, the scheme of Div 2B of Pt 2 is premised upon the fact that a 'lease' under the NTA may or may not confer a right of exclusive possession. These considerations illustrate the flaw in reasoning that as an interest was described as a 'lease' it is to be presumed that a right of exclusive possession was conferred.⁵⁸

pastoral lease; that is, a lease that conferred a right of exclusive possession over land or waters.

⁵⁷ It provides that a lease includes 'anything that, at or before the time of its creation, is, for any purpose, by a law of the Commonwealth, a State or a Territory, declared to be or described as a lease.'

⁵⁸ (2002) 190 ALR 313, 329 [59].

With great respect, that objection is misplaced. Nothing in the NTA mandates or implies that the ordinary presumption concerning the use of terms such as ‘lease’ and ‘demise’ should be rejected. The definition of ‘lease’ in s 242 of the NTA, which has formed part of the Act from the beginning, is designed to ensure that all manner of interests described as leases, whether or not they are common law leases, can be validated as past acts or intermediate period acts. Division 2B of Part 2 is designed to inject greater certainty into the law after the decision in *Wik*. It confirms that ‘leases’ (as defined under the NTA) which confer a right of exclusive possession over land or waters extinguish native title. Neither s 242 nor Div 2B of Part 2, however, purports to address how one determines if exclusive possession has been conferred by a ‘lease’. They leave that matter to the principles governing the interpretation of statutes and instruments. One of those principles, well established before *Wik* and the enactment of the NTA, is that the use of the terms ‘lease’ and ‘demise’ carries a presumption that the legislature and the parties to the instrument intend to create a genuine lease.⁵⁹ Their Honours in *Wilson* were mistaken in inferring that the NTA somehow rendered that principle inapplicable to State and Territory legislation drafted and enacted well before the NTA was conceived.⁶⁰

The flaws in the approach of the majority in *Ward* become even clearer when one examines the judgment of Gaudron, Gummow and Hayne JJ in *Wilson*.⁶¹ In that case, a majority of the Court found that a pastoral lease granted under the *Western Lands Act 1901* (NSW) conferred a right of exclusive possession, unlike the pastoral leases in *Wik*. For Gaudron, Gummow and Hayne JJ, with whose analysis Gleeson CJ largely agreed, the cardinal difference between these two cases was that the lease in *Wilson* was a perpetual lease. The historical and conveyancing background indicated that perpetual leases were derived from the old Crown grant of the determinable fee simple.⁶² Although the lease stipulated an unrestricted right to proclaim stock routes, camping places and other reserves without compensation; although it enabled land to be withdrawn for reserves and for public purposes such as the provision of water supply or the interment of the dead; and although it obliged the lessee to allow authorized persons to enter the land to search for and remove minerals and examine

59 *Attorney-General (Vic) v Ettershank* (1875) LR 6 PC 354, 370; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199, 212; *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677, 686 (Brennan J); *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687, 691 (Kirby P), 712 (Mahoney JA). See also the authorities, textbooks and forms of precedents cited by McHugh J in *Ward* (2002) 191 ALR 1, 138-142 [484]-[500].

60 If Gaudron, Gummow and Hayne JJ were correct about the NTA, then, by parity of reasoning, the fact that the NTA contemplates that a pastoral lease may or may not confer a right of exclusive possession suggests that pastoral purposes are not a factor against exclusive possession. Yet in *Ward*, the majority relied upon the fact that the leases were granted for pastoral purposes only as an indication that exclusive possession had not been conferred.

61 (2002) 190 ALR 313.

62 *Ibid* 343 [117].

improvements, none of these conditions and obligations was inconsistent with the incidents of a grant of a determinable fee simple.⁶³ Exclusive possession, the judgment found, was conferred on the holder of the pastoral lease.

Wilson makes it clear that the inquiry into whether a statutory interest confers a right of exclusive possession cannot ignore the historical background. It is not enough simply to examine the four corners of the statute and the instrument. If it had been enough, the perpetual lease could not have been distinguished from a pastoral lease for a term, since the *Western Lands Act 1901* (NSW) applied virtually the same conditions, obligations and reservations to all pastoral leases, regardless of their duration.⁶⁴ But if the provisions of the statute do not exhaust the incidents of a pastoral lease, if, indeed, it may be misleading to read the statutory provisions without appreciation of the historical background, the approach in *Ward* is not legitimate. In *Ward*, the majority made no attempt to explore the history of pastoral leases in Australia, Western Australia or anywhere else.⁶⁵ They merely examined the statute and the regulations in isolation⁶⁶ and so reached the conclusion that exclusive possession was not conferred. *Wilson* illustrates that such an approach is incomplete.

One might object that the pastoral leases in *Ward* lacked the historical background that could have made a difference to the outcome. The argument would be that, in contrast to perpetual leases in *Wilson*, there was nothing in the history to suggest that pastoral leases for a term were intended to have the basic characteristic of a common law lease: the right of exclusive possession. Yet that argument would be misconceived. A claim that history does not answer particular legal questions or is unhelpful cannot be accepted without examining the historical materials. So how could the majority in *Ward* have concluded that the history of pastoral leases in Western Australia and the Northern Territory was unhelpful when nothing in the joint judgment hints that they examined it?

In any case, it is not true to suggest that the historical background to pastoral leases in *Ward* could have made no difference to the outcome. The Court was presented with articles, written by a historian, criticising reliance in *Wik* on the argument that pastoral leases in Australia were a unique interest in land which colonial officials had not regarded as common law leases.⁶⁷ It was presented

63 Ibid 342-343 [114]-[115].

64 Section 18E of the *Western Lands Act 1901* (NSW) allowed the Minister to impose terms and conditions of improvement and maintenance on leases in perpetuity. However, other provisions, such as ss 18 and 18D, generally made no such distinction between perpetual leases and leases for a term.

65 Several members of the majority in *Wik* relied on historical considerations in reaching their conclusion. This matter is discussed below.

66 The majority referred to provisions which pastoral leases in Western Australia from 1850 onwards had contained: *Ward* (2002) 191 ALR 1, 58-64 [160]-[177]. However, they made no attempt to consult the historical materials to determine what rights the leases were thought to confer or why certain reservations were originally included.

67 Jonathan Fulcher, 'Sui Generis History? The Use of History in *Wik*' in Hiley (ed), *The Wik Case: Issues and Implications* (1997) 51; Jonathan Fulcher, 'The *Wik* Judgment,

with Hansard references which showed that the Western Australian legislature had narrowed the reservation for Aborigines to unenclosed and unimproved areas⁶⁸ and had envisaged that they could be excluded from lambing paddocks and fenced off parts of the land;⁶⁹ some legislators even adverted to the possibility of pastoralists putting Aborigines off their properties.⁷⁰ It would have been strange for the legislature to have acted on that basis if pastoral leases had never been understood to confer a right of exclusive possession.⁷¹ The Court was referred to Western Australian case law which showed that a pastoral lessee could sue in trespass even when there was no interference with pastoral operations – again, something not readily explicable if exclusive possession had not been conferred on the lessee.⁷² It is implausible to conclude that this legal and historical material,

Pastoral Leases and Colonial Office Policy and Intention in NSW in the 1840s (1998) 4 Australian Journal of Legal History 33.

- 68 The Bill amending the Land Act 1933 (WA) originally provided for Aborigines to enter ‘unenclosed or enclosed but otherwise unimproved parts of the land...to seek their sustenance in their accustomed manner.’ The Bill was amended in the Legislative Assembly to restrict the areas which Aborigines had the right to enter to ‘unenclosed and unimproved parts of the land’. In the Legislative Assembly, Mr Welsh, who successfully moved this amendment, stated: ‘I do not want to give the natives the right to go upon these leases unless they are subject to some control.’ See Hansard, Legislative Assembly, 29 November 1934, 1676.
- 69 The Legislative Council refused to amend the reservation to ‘unenclosed or unimproved parts of the land’ despite the attempts of the Minister to convince them that this was necessary. All parties who discussed the matter thought that leaving the reservation as ‘unenclosed and unimproved parts of the land’ would permit pastoral lessees to exclude Aborigines over land that did not come within the reservation. The Hon L Craig, for instance, said of the Minister’s proposed amendment:
The amendment would take away from the pastoralists the right to exclude natives from a particular paddock...[T]he pastoralists should have the right to tell the native that when they are hunting, they must not go into a certain paddock where there are ewes with lambs. It may be necessary to exclude natives from certain parts of a lease when water may be short for stock.
The Honorary Minister replied that the present provision would mean that ‘the only place where natives could go would be the unenclosed portions of a pastoral lease.’ See *Hansard*, Legislative Council, 20 December 1934, 2247-2248.
- 70 For instance, the Hon L Craig said that he ‘could not imagine any station owner deliberately stating that a native must not go on his property.’ Likewise, the Hon J J Holmes said: ‘If I thought the pastoralists of the North would turn the natives off their holdings in the wholesale manner suggested by the Honorary Minister, I would be the first to champion the cause of the natives.’ See *Hansard*, Legislative Council, 20 December 1934, 2248.
- 71 At the least, the assumptions on which the legislature acted sit ill with the view of the majority that the reservation for Aborigines is not to be read ‘as suggesting that, despite the great generality of the other reservations in the pastoral lease, and the limitations on the purposes to which the land [might] be put, the holder was granted a right, in all other circumstances, to exclude not only other citizens but also the grantor of the interest’: *Ward* (2002) 191 ALR 1, 66-67 [185].
- 72 *Vaughan v Gooch* (1926) 29 WALR 34.

none of which was referred to by the majority in *Ward*, could not have affected their conclusion. That makes the lacuna in their reasoning, evident from the contrast with *Wilson*, even more difficult to justify.

An Unconvincing Rejoinder

At this point the defender of the outcome in *Ward* might accept that the majority's approach is inconsistent with the reasoning and outcome in *Wilson*. But she might respond by claiming that *Ward* is right about pastoral leases and *Wilson* is mistaken. The argument would be that exclusive possession, or legal possession,⁷³ is incompatible with limiting the use of the land to pastoral purposes and with the extensive reservations in favour of the Crown and third parties. In other words, so great were the restrictions imposed in *Wilson* on the pastoralist and so numerous were the rights retained by the Crown and others that the pastoral lessee had never obtained possession of the land.

The problem with this rejoinder, however, is that it does not address the numerous authorities concerning exclusive possession and the presence of significant reservations and limitations. These authorities appear to support the outcome in *Wilson*. Take the issue of purposes. Limitations on the purpose for which land can be used have not denied an interest the character of a lease. In *Falkland Islands Co v R*,⁷⁴ the Privy Council construed a licence to depasture stock as in reality a lease, despite wide reservations in favour of the Crown.⁷⁵ In *Glenwood Lumber Co v Phillips*, the Privy Council again acknowledged that leases could be restricted as to purposes:

If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations and to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.⁷⁶

Holdsworth has pointed out, moreover, that the form of building and mining leases was only settled in the eighteenth century, well after the form of

73 Legal possession and exclusive possession are identical. See Frederick Pollock and Robert Wright, *An Essay on Possession in the Common Law* (1888), 20.

74 (1863) 15 ER 902.

75 There was a reservation 'securing to the Crown the right of re-entering the lands to make roads, canals, and other works of public utility; the right to cut timber, and to search for and carry away stones and other materials required for making or keeping such works in repair, and also reserving to the Crown all mines of gold, silver, precious metals, and coal, with full liberty to search for and carry away the same': *Ibid* 904.

76 [1904] AC 405, 408. See also Susan Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* (1998) 529, 536 (observing that it can be misleading to regard estate holders as having a right to use land for any purpose, and the permitted use of land may be similar for estate owners and holders of mere interests).

agricultural leases.⁷⁷ Leases for very different purposes have, in other words, been evolving for well over 250 years. This makes it difficult to imagine why leases for pastoral purposes, or for that matter any other purposes, should necessarily suggest a lack of exclusive possession.⁷⁸

Next take the issue of reservations. It has long been recognized that if the Crown grants a fee simple or lease over the foreshore then that interest will be subject to the public rights of navigation and shipping.⁷⁹ This illustrates the proposition that extensive rights in the hands of others are compatible with exclusive possession in both freehold estates and leases. Another illustration can be found in Crown grants under the *Land Act 1898* (WA). Under the Second Schedule to the Act, which prescribed the form for grants of town and suburban land, the Crown reserved the right to resume and enter possession of any part of the land deemed necessary to resume for roads, tramways, railways and other things in the nature of public works without providing compensation except for improvements and expenditure. It reserved all mines of gold, silver, copper, tin and other metals, ore, gems and precious stones, coal or mineral oil, together with the right to enter at all times to search for and dig for them on any part of the land. It also reserved the right to resume land to search for minerals.⁸⁰ Yet Crown grants were expressed to be grants in fee simple,⁸¹ and they presumably conferred a right of exclusive possession. A further illustration comes from the reservations in a lease to depasture stock in *Falkland Islands Co v R*. Such examples show that the presence of extensive rights in the Crown and third parties, rights which may even render the interest precarious in numerous ways, do not negate exclusive possession.⁸²

77 William Holdsworth, *A History of English Law* (1925), vol VII, 241-242.

78 It is also hard to understand how purpose can deny exclusive possession as a conceptual matter. Exclusive possession is tied to the availability of trespass. That remedy ensures that a person with possession may exercise control over who enters the land and what that person does on the land, subject only to reservations and statutory exceptions. While the importance of having control over the land is more immediately apparent with some purposes (such as residential) than others, it is unclear how a particular purpose by itself can justify inferring that the alleged lessee should not have *any* effective control over what may be done on the land.

79 *Blundell v Catterall* (1821) 106 ER 1190; *Brinckman v Matley* [1904] 2 Ch 313, 325; *Fitzharding v Lord Purcell* [1908] 2 Ch 139, 167; *Attorney-General for British Columbia v Attorney-General for Canada* [1914] AC 153, 171.

80 Almost identical reservations were contained in the Third Schedule of the *Land Act 1898* (WA), which prescribed the form for Crown grants of rural lands.

81 *Land Act 1898* (WA) s 3.

82 In *Wik* (1996) 187 CLR 1, Gaudron J stated that the strongest indication that pastoral leases granted under the *Land Act 1910* (Q) did not confer exclusive possession was to be found in provisions conferring a right upon authorized persons to remove timber, stone and other material; denying the lessee the right to ringbark, cut or destroy trees; denying the lessee the power to restrict authorized persons from cutting or removing timber; and permitting persons to depasture stock if a stock route or road passed through the land: at 154. With respect, that conclusion seems difficult to reconcile with the examples and authorities cited in the text as well as cases such as

It is, therefore, difficult to see how wide reservations in favour of the public and the Crown, including powers to resume land or bring the interest to an end for a variety of public purposes, and a limitation on purpose – factors on which the majority in *Ward* placed great significance – should be thought to deny exclusive possession. *Wilson* was correctly decided.

Wik: A Flawed Judgment

In neither *Ward* nor *Wilson* did the Court have to consider the correctness of *Wik*. In each case, some of the parties asked the court to distinguish the case and hold that the grant of the relevant pastoral leases extinguished all native title. But despite the favourable results for the native title claimants in *Ward*, the precedential value of *Wik* has been undermined. Key aspects of the reasoning of the majority have been thrown into doubt by the Court, while others, for various reasons, must now be recognised as seriously flawed. An examination of aspects of the majority's reasoning demonstrates this.

Questionable Use of History

The first aspect of *Wik* which must now be considered dubious, if not mistaken, is the reliance of the majority on historical materials to show that pastoral leases were not common law leases but were a unique statutory interest in land. Three judges in the majority were heavily influenced by historical materials which, in their view, suggested that pastoral leases were not designed to confer a right of exclusive possession enabling the lessees to drive Aborigines from their traditional lands. After alluding to the origin of pastoral leases in the *Sale of Waste Lands Amendment Act 1846* (Imp)⁸³ and the Order-in-Council of 9 March 1847,⁸⁴ Toohey J stated:

Goldsworthy Mining Ltd v Federal Commissioner of Taxation (1973) 128 CLR 199, *ICI Alkali (Aust) Pty Ltd v Commissioner of Taxation (Cth)* [1977] VR 393 and *Whangarei Harbour Board v Nelson* [1930] NZLR 554.

83 Section 1 empowered her Majesty 'to demise for any Term of Years not exceeding Fourteen, to any Person or Persons, any Waste Lands of the Crown in the Colonies of New South Wales...or to grant to any person or Persons a Licence for the Occupation for any Term of years not exceeding Fourteen of any such Waste Lands'. Section 6 authorized the making of Rules and Regulations by Orders-in-Council for various purposes connected with such Demises and Licences, including the insertion of conditions and clauses of forfeiture.

84 Section 1, Chapter II of the Order dealt with pastoral leases in the unsettled districts. It provided:
It shall be lawful for the Governor for the time being of the said Colony, or the officer for the time being administering the Government of the Colony, and he is hereby empowered to grant leases of runs of land...to such persons as he shall think fit, for any term or terms of years, not exceeding fourteen years in duration, for pastoral purposes, with permission, nevertheless, for the lessee to cultivate so much of the lands respectively comprised in the said runs as may be necessary to provide such

The thrust of contemporary documents, in particular communications by the Secretary of State, Earl Grey, to the Governor of New South Wales make it clear that Aborigines were not to be excluded from land under pastoral occupation.⁸⁵

His Honour quoted from despatches from Earl Grey to the Governor of New South Wales, Sir Charles Fitzroy, in 1848 and 1849. Those despatches suggested that pastoral leases gave the lessees only an exclusive right of pasturage for cattle and of cultivation, but were not intended to deprive Aborigines of their rights to subsistence. Toohey J then observed that English and Australian officials had expressed 'almost constant concern' about the exclusion of Aborigines from leased land. His conclusion indicates the degree to which such matters affected his reasoning:

Against this background, it is unlikely that the intention of the legislature in authorising the grant of pastoral leases was to confer possession on the lessees to the exclusion of Aboriginal people even for their traditional rights of hunting and gathering.⁸⁶

Gaudron J also dwelt on the history of pastoral leases in New South Wales after their introduction in the Order-in-Council of 9 March 1847. She observed that apart from the use of the word 'lease', there was nothing in the Order-in-Council to indicate the nature of the interest conferred by the grant of a pastoral lease. Nonetheless, she found 'some indication' from correspondence between Earl Grey and the Governor of New South Wales, Sir Charles Fitzroy, discussing concern that pastoral leases could be abused with respect to Aborigines who had traditionally used the land.⁸⁷ This was much the same correspondence referred to by Toohey J. Gaudron J further observed that, apart from the word 'lease', there was nothing in subsequent New South Wales or Queensland legislation indicating

grain, hay, vegetables, or fruit for the use and supply of the family and establishment of such lessee, but not for the purposes of sale or barter; and so, nevertheless, that such leases shall in no case prejudice, interrupt, or interfere with the right of the Governor or other officer for the time being administering the Government of the said Colony to enter upon any of the lands comprised in the said leases for any purpose of public defence, safety, improvement, convenience, utility, or enjoyment, agreeably to the provisions for those purposes contained in the 9th section of the second chapter of this Order in Council, or otherwise.

Section 9 of Chapter II provided that nothing in the regulations or any lease granted under them prevented the Governor from making grants or sales of any lands within the limits of the run for public purposes, or from disposing of in such other manner as might seem best in the public interest such lands required for churches, schools, for the construction of high roads or railways or a host of public purposes, including for the use and benefit of Aboriginal inhabitants.

85 (1996) 187 CLR 1, 119.

86 Ibid 120.

87 Ibid 140-141.

the nature of the estate or interest created by the grant of a pastoral lease.⁸⁸ She evidently relied on such matters in rejecting the submission that the terms 'lease' and 'demise for a term of years' in the *Land Act 1910 (Q)* bore their common law meaning, for she said:

Another difficulty with approaching the word 'lease' and the expression 'demise for a term of years' in the [*Land Act 1910 (Q)*] as if they bore their common law meaning is that, whatever may be the position in other areas of law, *there is no very secure basis for thinking that pastoral leases owe anything to common law concepts*. As already indicated, pastoral leases are statutory devices designed to suit the peculiar conditions of the Australian colonies, deriving from the Order-in-Council of 9 March 1847.⁸⁹

Kirby J referred to the same correspondence from Earl Grey as the others,⁹⁰ but he was even more explicit about the weight he gave to such historical considerations:

The context in which the legislation on pastoral leases was enacted in Queensland also makes it highly unlikely that [the conferral of exclusive possession] was the intention of Parliament. As the historical materials demonstrate, it was known that there were substantial numbers of Aborigines using the land, comprised in the pastoral leases, according to their traditional ways. It was not government policy to drive them into the sea or to confine them strictly to reserves. In these circumstances, it is not at all difficult to infer that when the Queensland Parliament enacted legislation for pastoral purposes, it had no intention thereby to authorise a lessee to expel such Aborigines from the land. Had there been such a purpose, it is not unreasonable to suggest that the power of expulsion would have been specifically provided.⁹¹

Unfortunately, it has become clear that the historical materials do not establish either that pastoral leases were *sui generis* interests or were designed to preserve the rights of Aborigines. At best, the interpretation that Toohey, Gaudron and Kirby JJ placed on such materials is open to doubt; at worst, it is mistaken. The reason is that their Honours failed to address important aspects of

88 Ibid 142-143.

89 Ibid 152 (emphasis added). Gaudron J went on to claim that there was nothing to suggest that a right of exclusive possession was either a necessary or convenient feature of pastoral leases in New South Wales in 1847, and there was nothing to suggest that subsequent statutory changes altered the estate or interest: at 153. With respect, this was little more than assertion. Gaudron J made no real attempt to explore the nature of the interests that could be granted under the Sale of Waste Lands Amendment Act 1846 (Imp) or the nature of pastoral leases granted under the Order-in-Council of 1847, nor did she explore the concept of pastoral purposes or consider whether this had any implications for her views on exclusive possession in colonial New South Wales.

90 Ibid 227.

91 Ibid 246.

the history that puncture their argument. At least three deserve mention. First, the legal advice received by Earl Grey firmly contradicted the idea that pastoral leases did not enable the lessees to exclude Aborigines. The opinion of JW Murdoch and Frederic Rogers of the Colonial Land and Emigration Board addressed the legal effect of pastoral leases already granted under the 1847 Order-in-Council in unmistakable terms:

These leases will have conferred upon the holder, not only that exclusive right of *pasturage* which might be conveyed by a mere licence, but an exclusive right of *possession*, subject, indeed, to various conditions specified in the Order in Council but not subject to the condition that any person besides the Lessee whether Native or European, should have the right of entering upon, or in any way using, or ranging over it.⁹²

The authors advised that a new Order-in-Council should be made authorising the Governor to insert conditions into pastoral leases that would secure Aboriginal access over unimproved parts of the lease, enable other persons to enter the leased land to search for minerals, and avoid similar inconveniences to the public.⁹³ Yet none of the majority judges who relied on Earl Grey's correspondence in *Wik* referred to this advice. The only judge who referred to it was Brennan CJ, who dissented.⁹⁴

Secondly, the majority did not consider the brief but telling minute by Benjamin Hawes, the Parliamentary Under-Secretary for War and Colonies, on the advice from Murdoch and Rogers. Hawes wrote this to Grey about the proposal for inserting conditions:

92 Letter from Colonial Land and Emigration Office to Herman Merivale, Under-Secretary of State, 17 April 1849 (emphasis in original). Earlier drafts of the advice by Murdoch and Roger were, if anything, even clearer that pastoral leases extinguished any rights that the Aborigines may have possessed:

Of these lands [already leased out] we apprehend the Crown up to the making of the Lease to have been absolute Master. They might have been disposed of by sale and if so disposed of the purchaser would have received them wholly unencumbered by any native title rights. The legal authorities of New South Wales appear to us justified in supposing that the same will be the case with regard to lessees under the Order in Council who will have received from the Crown not a mere license of occupation but an actual Lease involving possession of the Land subject indeed to the condition that it shall only be used in a particular way, but not subject to the condition that...any beside themselves shall have the right of ranging over it.

93 Murdoch and Rogers also attached to their advice the draft Order-in-Council giving the Governor the power to insert in all future leases the conditions necessary to prevent public inconvenience and adding a provision to facilitate the insertion of such condition in existing leases with the consent of the lessee.

94 (1996) 187 CLR 1, 81.

The nature and extent of the access of the Natives must surely be defined or far more serious collisions may arise, *than now that they can be restrained?*⁹⁵

The historian Jonathan Fulcher's analysis of this minute is hard to gainsay:

[Hawes] was suggesting that leases enabled Aboriginal people to be excluded and this would prevent clashes. Frontier violence was a matter of constant concern to Colonial Office officials, and Hawes could see benefits in leasing land, thereby legally excluding Aboriginal people and so keeping settlers and Aborigines apart. Hawes clearly believed that leases had this legal effect, or he would not have used the word 'restrained'.⁹⁶

Thirdly, Earl Grey's statements about pastoral leases were more ambiguous than their Honours indicated. On 6 August 1849, Grey sent a despatch to Sir Charles Fitzroy accompanying the new Order-in-Council authorising the Governor to insert the conditions drafted by Murdoch and Rogers. He said:

Comparing the terms of the [*Sale of Waste Land Amendment Act*] with those of the Order in Council of 9th March 1847, there can, I apprehend, be little doubt that the intention of the Government was, as I pointed out in my Despatch of February last, to give only the exclusive right of pasturage in the runs, not the exclusive occupation of the land, as against the Natives using it for ordinary purposes: nor was it meant that the Public should be prevented from the exercise, in those lands, of such rights as it is important for the general welfare to preserve, and which can be exercised without interference with the substantial enjoyment by the lessees of that which his lease was really intended to convey.

In the following sentence, however, Grey appeared to concede that, *as a legal matter*, the Order-in-Council had not reflected this intention:

But I fully appreciate the difficulties which the form of the present Order in Council opposes to the practical execution of that intention, according to the view taken by your legal advisers. They appear to be of opinion that no such conditions as would be requisite for the purpose [of securing Aboriginal access and the rights of the public] could be introduced into Leases to be granted under the Act, without a fresh Order in Council.

Grey's subsequent comments, in addition, do not support the view that pastoral leases granted under Order-in-Council of 9 March 1847 conferred only a right of exclusive pasturage. He said:

95 Minute 6 June 1849 on Commissioner of Colonial Land and Emigration to Herman Merivale, Under-Secretary of State, Colonial Office, 17 April 1849 (emphasis added). Grey's response was this: 'The Order in Council proposed will, I think be sufficient with the suggested explanatory dispatch.'

96 Fulcher, 'Sui Generis History?', above n 55, 56.

The Order in Council, now transmitted, will enable you to insert in all future Leases such conditions as to you may seem requisite for securing the peaceable and effectual occupation of the Lands comprised in such Leases, and for preventing the abuses and inconveniences incident thereto; words amply sufficient to enable you to prevent the injury to the Public which would result from the absolute exclusion of Natives or other persons travelling or searching for minerals, and so forth...

In point of strict law, it appears to me that the Order in Council of March 9th already enables you to enforce those or similar limitations against the holders of existing leases without the insertion of any new conditions at all. Nothing in any lease which you may grant under that Order can prevent you (under Ch: 2 Sec: 9) from *reserving out of the runs* such lands as may be required for the use of Aboriginal Inhabitants. This would strictly enable you, not only to reserve spots which the natives use for their own purposes...but also so much land as might be requisite to give them access to such spots. *Again, although it is thought that you cannot, under the existing Order so interfere with the exclusive occupation of the Lessee as to provide that private persons may enter to search for Minerals*, yet you are yourself empowered under Ch 2 Sec 1 to “enter” upon any of the lands comprised in such leases for any purpose of public defence, safety, improvement, convenience, utility, or enjoyment – words which would protect the entry of persons deputed and authorized by yourself.⁹⁷

Grey was asserting that the purposes sought to be achieved by the insertion of conditions in future pastoral leases – preventing the exclusion of Aborigines seeking their sustenance and persons searching for minerals and travelling – could already be achieved under the powers of the Order-in-Council of 9 March 1847. However, the means that Grey identified for achieving those purposes are revealing. He seemed to echo the opinion of Murdoch and Rogers⁹⁸ in saying that parts of the land could be resumed for the use of Aborigines. He also said that persons could be deputed and authorised by the Governor to search for minerals, and this would ‘protect’ the entry of such persons. If Grey had truly believed that pastoral leases had never conferred a legal right to exclude Aborigines or members of the public travelling and searching for minerals, this advice would be puzzling. Why tell Fitzroy that he could reserve land ‘out of the runs’ for the use of

97 Despatch No. 134, Earl Grey to Governor Fitzroy, 6 August 1849 (emphasis added).

98 Letter from Colonial Land and Emigration Office to Herman Merivale, Under-Secretary of State, 17 April 1849:

we have to observe that the Order in Council (Cap: 2 Sec: 9) empowers the Governor in the largest terms to grant or sell or dispose of in such other manner as for the public interests may seem best any lands within the limits of a pastoral lease which may be required inter alia “for the use or benefit of the aboriginal inhabitants of the Country”. Under this power it would be legally competent to him to take from the lessee the whole of his run and vest it in Trustees for the use of the Natives. And with such a power in his hands we cannot doubt that he will be able to induce even the holders of leases to accede to any reasonable terms in favor of the Natives, if only he were empowered to insert in their leases the conditions necessary for that purpose.

Aborigines and that he could 'protect' persons by deputing and authorising them if the leases granted only conferred a right of exclusive pasturage? These considerations suggest that Grey had accepted the substance of the legal advice presented to him by the Colonial Land and Emigration Board: pastoral leases *did* confer a right of exclusive possession that would enable lessees to exclude Aborigines and members of the public searching for minerals; the conditions would overcome that problem for future leases; and the unreasonable exercise of rights by current leaseholders against Aborigines could be remedied by exercising the Governor's power to reserve or dispose of any lands in the lease. However, none of the judges addressed these aspects of Grey's despatch or their implications for the interpretation of Grey's earlier comments about pastoral leases.⁹⁹

Several commentators have also attacked the soundness of the majority's historical conclusions. Fulcher, for instance, has objected to the 'lack of a full examination of the sources and scholarship related to the history of land settlement in Australia and in other British colonies settled at a similar time.'¹⁰⁰ He has maintained that the majority's view that pastoral leases are a *sui generis* interest, a view derived from the work of Professor Henry Reynolds, does not adequately account for, among other things, Grey's attitudes to Aboriginal title in New Zealand and the legal advice that he received regarding pastoral leases.¹⁰¹

Frank Brennan has also described the approach of the three judges in the majority as 'an incomplete reading of the history'.¹⁰² Their findings, he has said, are 'difficult to reconcile with the specific wording and the political context of post-1849 Orders in Council',¹⁰³ particularly the fact that imperial officials and the

99 Reynolds and Dalziel, *Aborigines and Pastoral Leases: Imperial and Colonial Policy 1826-1855* (1996) 19 University of New South Wales Law Journal 315 have argued that Grey believed that a condition in leases reserving Aboriginal access to leased land was simply declaratory of Imperial intentions in the 1846 Act and the 1847 Order-in-Council. The authors claim that 'such a condition...only resulted from the concern in New South Wales and the United Kingdom that some leaseholders would not fully recognize the mutual rights of lessees and Aborigines and might believe that a lease gave them the right to drive Aboriginal people off their runs; but not due to a belief that Aboriginal people had no rights at all': at 365-366. This argument suffers from several problems. As its authors admit, it is contrary to the legal advice of Murdoch and Rogers, and it offers no satisfactory explanation of why that opinion should be considered mistaken. It does not mention, and thus sees no significance in, Benjamin Hawes' comments about the capacity of Aborigines to be restrained. It finds little support in the text of the Order-in-Council of 1849 (which, with one exception, only permitted the insertion of conditions in *future* leases); and it does not consider the significance of Grey's statements in his 6 August 1849 despatch about reserving land out of existing pastoral leases and deputing persons to enable them to search for minerals.

100 Fulcher, 'Sui Generis History?', above n 55, 52.

101 See Fulcher, *The Wik Judgment, Pastoral leases and Colonial Office Policy and Intention in NSW in the 1840s*, above n 55; Fulcher, 'Sui Generis History?', above n 55.

102 Frank Brennan, *The Wik Debate: Its Impact on Aborigines, Pastoralists and Miners* (1998), 47.

103 *Ibid* 46.

colonial legislatures of Queensland and New South Wales chose not to insert conditions in pastoral leases to allow Aboriginal access.¹⁰⁴

David Tucker has argued, for different reasons, that the majority judges have failed to discharge the burden of showing that the term 'lease' was used in a special sense.¹⁰⁵ Pointing out that it is unclear whether the Queensland Parliament was ever aware that pastoral leases were *sui generis*, he has said:

If the term 'lease' was used in a special way that protected the interests of indigenous Australians, there surely would have been some discussion of what was meant by 'pastoral purposes'. But there is no evidence of any opposition within the Queensland Parliament by pastoralists demanding more clarification of their rights from their representatives. Certainly they wanted freehold title but they were never angry, as they are today, because the leases that were granted afforded no more than a license 'for pastoral purposes only'...[U]ntil *Mabo [No 2]* there was no demand that the Queensland Parliament clarify the meaning of the term 'pastoral lease'. This shows that almost everyone understood that there was exclusive possession and that the term 'lease' was used in its usual way, unless expressly qualified.¹⁰⁶

One might add that the Supreme Court of Queensland had held that pastoral lessees did confer a right of exclusive possession in 1870,¹⁰⁷ and, in providing for pastoral leases, the Queensland Parliament of 1910 could reasonably be taken to have created a statutory interest with the same features.

It seems, therefore, that the history advanced by three members of the court in *Wik*, which was based on a selective reading of the evidence, must be treated as highly debateable, even suspect. The conclusions which they reached about Queensland pastoral leases are weakened accordingly.

Known Presence of Aborigines no longer Seems Relevant

The second, related aspect of *Wik* which now appears flawed is the majority's reliance on the known presence of Aborigines on the land to infer that Parliament did not intend to confer exclusive possession on the lessees. It is no longer clear what, if any, role this consideration should play in determining whether native title has been extinguished. Indeed, the majority's approach in *Ward* and *Wilson* appears to reject it.

In *Ward*, the joint judgment (with which Callinan J agreed on this point¹⁰⁸) emphasized that in determining whether extinguishment by grant had occurred,

104 Ibid 45-46.

105 David Tucker, 'Litmus-Testing Judicial Authority: Comparing the *Wik Peoples and Thayorre People v The State of Queensland* and *United Steelworkers of America v Weber*' (1998) 20 *Sydney University Law Review* 244, 288.

106 Ibid 288-289.

107 *Wildash v Brosnan* (1870) QCLR 17, 18; *Macdonald v Tully* (1870) 2 QCSR 99, 106.

108 (2002) 191 ALR 1, 175-176 [619].

the test was one of objective inconsistency. Any knowledge of native title or the fact of its exercise on the part of those whose act was alleged to have extinguished native title was irrelevant.¹⁰⁹ Consistently with that approach, the joint judgment did not advert to the presence of Aborigines (for which reservations had been expressly provided) on Western Australian pastoral leases. It found that pastoral leases did not confer a right of exclusive possession by examining the relevant statutes and regulations, not by considering the potential impact of such leases on native title holders.

In *Wilson*, the known presence of Aborigines again played no role in the majority's reasoning. The judgment of Gaudron, Gummow and Hayne JJ did not explicitly address the argument by the New South Wales Aboriginal Land Council¹¹⁰ that the known presence of Aborigines, combined with the lack of an express conferral of exclusive possession, suggested that Parliament had had no clear and plain intention to extinguish native title by providing for the grant of pastoral leases.¹¹¹ However, it is clear from their findings about exclusive possession that the argument was not accepted.

The judgment of Gleeson CJ reached the same conclusion, but he was more forthcoming about the relevance of Aboriginal presence. He opined that the key question was whether there was an intention to create an estate the incidents of which were inconsistent with native title. The fact that native title holders might be on the land was not relevant to answering that. As he explained:

It is not suggested that, in deciding whether a grant of an estate in fee simple extinguishes native title, it is relevant to enquire whether the parties to the grant addressed their minds to the position of people who might have had native title rights and interests in the land. What is relevant is that, objectively considered, there was an intention to create an estate that was inconsistent in its incidents with continuing native title rights and interests. The same applies to the creation of a leasehold estate which confers a right of exclusive possession in the lessee.¹¹²

His later observations on *Wik* can be read as an implicit criticism of the approach of some of the majority judges in that case:

Partly because of the size and location of the subject land...the consequences for Aboriginal people were regarded by some members of the Court [in *Wik*] as having a bearing upon the question of construction. But, insofar as there was a question of intention to be decided, the question was whether the intention was that the lessees should have exclusive possession of the land.¹¹³

109 Ibid 35-36 [78].

110 Submissions [5.24].

111 The fact that an earlier pastoral lease had contained such a reservation was mentioned by Callinan J: (2002) 190 ALR 313, 357 [175].

112 Ibid 317 [12].

113 Ibid 318 [14].

Callinan J (with whom McHugh J agreed) rejected any role for a 'clear and plain intention' to extinguish native title. He described the imputation to the parties to pastoral and other leases of an intention that native title was or was not to subsist as 'entirely artificial' and 'contrary to the known facts'.¹¹⁴

The judgments in *Ward* and *Wilson* thus demonstrate that the known presence of Aborigines on the leased land, on which Toohey and Kirby JJ had placed considerable importance in *Wik*, probably is not a legitimate factor in determining whether exclusive possession has been conferred. The majority's emphasis in both *Ward* and *Wilson* on the irrelevance of knowledge about native title rights and interests for extinguishment, and the fact that they did not consider Aboriginal presence in determining the rights granted under the pastoral leases in either case, make it difficult to see how the consequences for Aborigines on the land can still be used to infer that exclusive possession is missing. Since that is so, another aspect of the majority's reasoning in *Wik* has been undermined.

Provisions for Vesting upon Grant do not Suggest a Lack of Exclusive Possession

The third flaw in the majority's reasoning in *Wik* is the inference that because leases under the *Land Act 1910 (Q)* vested upon the making of the grant, exclusive possession had not been conferred. Gaudron J offered a number of reasons for concluding that pastoral leases in the *Land Act 1910 (Q)* were not common law leases and, by implication, did not confer exclusive possession. One reason was that s 6(2) of the *Land Act 1910 (Q)* provided that the interests granted under the Act vested upon the making of the grant, not upon entry into possession.¹¹⁵ She explained the significance of s 6(2) as follows:

A...difficulty with attributing the features of common law leases to the holdings described as 'pastoral leases' in the 1910 Act is that, at least in one significant respect, the Act prescribes a quite different feature. As the common law stood in Queensland until 1975, a leasehold estate vested only on entry into possession. In contrast, s 6(2) of the Act provided that it was the making of a grant in the prescribed form which operated to convey and vest the interest thereby granted.¹¹⁶

Gummow J placed similar reliance on s 6(2), noting that it marked off, to a significant degree, pastoral leases from leases granted under the common law.¹¹⁷

114 Ibid 364 [194].

115 Subsection 6(2) provided: 'The grant or lease shall be made subject to such reservations and conditions as are authorised or prescribed by this Act or any other Act, and shall be made in the prescribed form, and being so made shall be valid and effectual to convey to and vest in the person therein named the land described therein for the estate or interest therein stated.'

116 (1996) 187 CLR 1, 153.

117 Ibid 198.

The reasoning of Gaudron and Gummow JJ, however, is difficult to reconcile with that in *Ward*. In that case, the joint judgment¹¹⁸ found that leases granted under s 32 of the *Land Act 1933* (WA),¹¹⁹ including the Ivanhoe and Crosswalk leases, conferred a right of exclusive possession. Such leases, it said, were not statutory interests in land; they conferred on the holder of the lease the rights of a lessee of land, as that term was understood in the general law.¹²⁰ In other words, the 'leases' were just like common law leases. The joint judgment reached that conclusion despite referring to s 7(2) of the *Land Act 1933* (WA),¹²¹ which ensured that all interests under the Act vested upon the making of the grant or other instrument, not upon entry into possession.¹²² *Ward* therefore shows that an interest described in statute as a 'lease', although it vests upon the making of the grant, can have the essential characteristics of a common law lease. If that is accepted, then the inference that Gaudron and Gummow JJ drew in *Wik* was plainly mistaken.¹²³

Perpetual Leases do not Suggest a Lack of Exclusive Possession

The fourth flaw in the majority's reasoning is its reliance on provision for perpetual leases to suggest that a right of exclusive possession had not been conferred. Gaudron J indicated that a reason the term 'lease' in the *Land Act 1910* (Q) could not be regarded as bearing its common law meaning, and therefore as conferring a right of exclusive possession, was that the *Land Act 1910* (Q) referred to perpetual leases. These did not exist at common law. She put the matter this way:

Finally, there is the difficulty of construing 'lease' in the 1910 Act as the equivalent of a lease at common law in a context in which the Act clearly

118 Callinan J reached the same result for much the same reasons: see (2002) 191 ALR 1, 218-223 [749]-[765].

119 Section 32 of the *Land Act 1933* (WA) relevantly provided: 'When any reserve is not immediately required for the purpose for which it was made, the Governor may grant a lease or leases thereof...for any purpose, at such rent and subject to such conditions as he may think fit'.

120 (2002) 191 ALR 1, 110 [369]-[370]. The joint judgment was here speaking of the Ivanhoe lease, but the same reasoning was used to explain why the other leases extinguished native title.

121 Ibid 110 [368].

122 Subsection 7(2) of the Act provided: 'All grants and other instruments disposing of any portion of Crown lands in fee simple or for any less estate made in accordance with this Act shall be valid and effectual in law to transfer to and vest in possession in the purchasers the land described in such grants or other instruments for the estate or interest therein mentioned.'

123 It is not possible to distinguish the result in *Ward* on the basis that the leases under s 32 were not statutory interests. The majority in *Ward* also concluded that special leases granted under s 116, which were statutory interests, conferred a right of exclusive possession. They did not mention the fact that these interests vested upon grant, which suggests that the factor was treated as irrelevant: see (2002) 191 ALR 1, 107-108 [354]-[357].

used the word 'lease' to refer to something quite foreign to the common law conception of a lease. At common law, a lease is normally a demise for a term of years. However the 1910 Act authorised the grant of perpetual leases which...were expressed to be 'leases in perpetuity', an expression which is unknown to the common law and which cannot possibly take its meaning from it.¹²⁴

Gummow J also referred to the fact that the *Land Act 1910 (Q)* and the *Land Act 1962 (Q)* provided for leases in perpetuity as evidence of those Acts creating sui generis statutory interests.¹²⁵

It is clear from *Ward and Wilson*, however, that these claims are unfounded. Perpetual leases confer a right of exclusive possession, as do common law leases. Accordingly, the fact that the *Land Act 1910 (Q)* and *Land Act 1962 (Q)* provided for the grant of 'leases in perpetuity' could not have supported any inference that the word 'lease' in those Acts bore other than its normal meaning or did not confer exclusive possession on pastoral lessees. In this respect, the judgments of Gaudron and Gummow JJ in *Wik* must now be treated as incorrect.

Mistaken Views about Summary Remedies for Ejection

The fifth flaw in the majority's reasoning is its reliance on the summary remedies for ejection in s 204 of the *Land Act 1910 (Q)* and s 373 of the *Land Act 1962 (Q)*. Section 204 provided:

Any Commissioner or officer authorised in that behalf by the Minister who has reason to believe that any person is in unlawful occupation of any Crown land or any reserve, or is in possession of any Crown land under colour of any lease or license that has become forfeited, may make complaint before justices, who shall hear and determine the matter in a summary way, and, on being satisfied of the truth of the complaint, shall issue their warrant, addressed to the Commissioner or such authorised officer or to any police constable, requiring him forthwith to remove such person from such land, and to take possession of the same on behalf of the Crown; and the person to whom the warrant is addressed shall forthwith carry the same into execution.

A lessee or his manager or a licensee of any land from the Crown may in like manner make a complaint against any person in unlawful occupation of any land comprised in the lease or license, and the like proceedings shall thereupon be had.

Subsection 373(1) of the *Land Act 1962 (Q)* was virtually identical, except it also permitted a person who was purchasing any land from the Crown to make a complaint against any persons in unlawful occupation of the land being purchased. Gummow and Kirby JJ, for different reasons, thought that these

124 (1996) 187 CLR 1, 153.

125 Ibid 201.

provisions suggested that pastoral leases did not confer a right of exclusive possession.

Gummow J first found that the meaning of the phrase ‘unlawful occupation’ in s 204 would be inconsistent with the conferral of exclusive possession on pastoral lessees. The terms ‘unlawful occupation of any Crown Land’ in the first paragraph of s 204, he indicated, should not be read as directed to authorising the Crown to expel indigenous inhabitants from occupation of land enjoyed in the exercise of their unextinguished native title.¹²⁶ As that was so, the phrase ‘unlawful occupation’ in the second paragraph of s 204 should be given the same meaning. It would, however, be at odds with this interpretation of ‘unlawful occupation’ to conclude that native title holders were rendered trespassers as a result of the rights given by pastoral leases.¹²⁷

Secondly, Gummow J suggested that s 204 blurred the common law distinction between leases and licences. He noted that the second paragraph of s 204 authorised a lessee or licensee from the Crown to take proceedings in the same manner as a Land Commissioner or officer authorised by the Minister. If successful, this led to a warrant for removal and the taking of possession on behalf of the Crown lessee or licensee. Gummow J remarked that the section treated indifferently the nature of the enjoyment of such a lessee or licensee by the use of the same term, ‘possession’, to identify it. At common law, however, exclusive possession served to distinguish lessees from licensees. This meant that the *Land Act 1910 (Q)* did not treat leases and licences as having the characteristics which those interests would have at common law.¹²⁸ His Honour inferred from this and other provisions that one could not rely on the language of lease in the *Land Act 1910 (Q)* to find that exclusive possession was conferred on pastoral lessees.¹²⁹

Kirby J construed s 204 of the *Land Act 1910 (Q)* and s 373(1) of the *Land Act 1962 (Q)* very differently. He found in them an indication that the Crown, not the lessee, retained the right of possession. As he said:

These sections uniformly provide for the removal of trespassers ‘on behalf of the Crown’. This is one of a number of indications in the *Land Acts* that, by their terms, exclusive possession did not repose in the lessee. A residue of actual possessory right was retained to the Crown, not a mere reversion expectant.¹³⁰

With great respect, however, their Honours’ reliance on s 204 and its later equivalent was erroneous. Gummow J’s first argument fails to recognise that the incidents of any particular lease under the *Land Act 1910 (Q)* cannot be determined by parsing the phrase ‘unlawful occupation’.¹³¹ According to his

126 Ibid 194.

127 Ibid 201.

128 Ibid 194-195.

129 Ibid 201.

130 Ibid 246.

131 In *Wik*, Gummow J said that the question at issue was whether the *Land Act 1910 (Q)* contained clear and plain provisions necessarily inconsistent with the continuation of

Honour, native title holders were never in ‘unlawful occupation’ of land leased from the Crown, and that explained why pastoral leases did not confer a right of exclusive possession. However, this approach generates a logical problem. The second paragraph of s 204 applied to any ‘lessee...of any land from the Crown’; it was not limited to pastoral leases. Therefore, by his Honour’s logic, no lease under the *Land Act 1910* (Q) could have conferred a right of exclusive possession. Even special leases for manufacturing, residential and industrial purposes granted under s 179 would not have enabled lessees to treat native title holders as trespassers, since that conclusion would have been at odds with the interpretation of ‘unlawful occupation’ in s 204.¹³² This *reductio ad absurdum* demonstrates the error of using s 204 and its later equivalent to ascertain the rights conferred by a lease. The correct approach, as Gaudron J seems to have recognised, is to ascertain the nature of the rights conferred by the lease to determine if the presence of native title holders constitutes ‘unlawful occupation’.¹³³

The rejoinder to Gummow J’s second argument and the conclusion flowing from it is equally clear: s 204 and its later equivalent do not suggest that leases and licences have the same underlying interest in land. The requirement to take ‘possession’ on behalf of a lessee or a licensee does not imply that leases and licences under the Land Acts must be similar in nature and must differ from those at common law any more than it implies that a lessee’s manager enjoys the same kind of interest in land as the Crown. It simply means that lessees and licensees, like the managers of lessees and persons purchasing land from the Crown, can invoke the statutory remedy that is available to the Crown to remove trespassers. This understanding of how the provisions operate is readily compatible with leases and licences bearing their common law meanings. Consider the example of a perpetual lessee and the holder of an occupation licence.¹³⁴ On the authority of *Ward* and *Wilson*, the former would almost certainly have had a right of exclusive possession,¹³⁵ whereas the latter probably would not; yet each, in terms, could

native title: at 195. He added that answer to that question was not to be found by passing through a gateway erected by a particular construction of ‘unlawful’ in s 204. His later analysis of s 204, however, appears to ignore this warning.

132 Subsection 179(1) provided: ‘The Governor in Council may issue a lease of any portion of land to any person for any person for any manufacturing, residential, or business purposes, or for any racecourse or recreation purposes, for such term not exceeding thirty years and upon such conditions as to rent and otherwise as the Governor in Council thinks fit.’

133 (1996) 187 CLR 1, 147 (Gaudron J). See also *Ward* (2002) 191 ALR 1, 227-228 [779] (Callinan J).

134 Such licenses were provided for in Part III, Division II of the *Land Act 1910* (Q).

135 For an argument that perpetual leases granted under the *Pastoral land Act 1992* (NT) may not confer a right of exclusive possession, despite the findings in *Ward* and *Wilson*, see Daniel Lavery, ‘Does a Perpetual Pastoral Lease in the Northern Territory Confer a Right of Exclusive Possession?’ (2002) 5 *Native Title News* 206. The author, however, bases his conclusion largely on a very wide reservation in favour of Aborigines in the Northern Territory legislation. There was no equivalent reservation for perpetual leases granted under the *Land Act 1910* (Q).

have invoked s 204 against unlawful occupiers. The section would have applied regardless of the conferral of exclusive possession on one but not the other. As this discussion and example show, s 204 and its later equivalent do not suggest that the incidents of leases and licences must be blurred throughout the Land Acts. There is no sound basis for drawing such an inference.¹³⁶

Kirby J's error concerning s 204 and s 373(1) was more patent. As McHugh J pointed out in *Ward*,¹³⁷ his Honour did not appear to grasp that they provided for two separate remedies: one enabling Land Commissioners or authorised officers to take possession of Crown land (which *did not* include land held under pastoral lease¹³⁸) 'on behalf of the Crown'; the other enabling 'a lessee or licensee of any land from the Crown' to recover land comprised in the lease or licence. When that is understood, s 204 and its successor give no support to the idea that, in terms, the Crown had an actual possessory right that was denied to the lessee. Indeed, such an interpretation of s 204 was rejected by Brennan CJ¹³⁹ in *Wik* (with whom Dawson and McHugh JJ agreed) and does not seem to have been accepted by other members of the majority.

It follows from all this that the reliance of two judges in the majority on provisions for a summary remedy for ejection in *Wik* should be recognised as mistaken.

Holroyd Lease not for Pastoral Purposes only

The sixth flaw in the majority's reasoning is the assumption that all the pastoral leases there (the Mitchellton and Holroyd leases) authorised only pastoral activities. Although the judges in the majority correctly noted that the Mitchellton leases were granted for pastoral purposes only, they appeared to think that the same was true of the two Holroyd leases.¹⁴⁰ Toohey J mentioned that the second Holroyd lease, granted in 1975 under the *Land Act 1962* (Q), was not

136 Gummow J's inference from s 204 is curious in another way. His logic suggests that if the second paragraph of s 204 had referred simply to a lessee, then it would have reflected the common law position that lessees, but not licensees, had a right of exclusive possession. But by extending the same remedy to licensees, by ensuring that they too had a remedy against unlawful occupiers, the Queensland Parliament thereby indicated that lessees under the Act were no longer to enjoy exclusive possession.

137 (2002) 191 ALR 1, 146 [515].

138 'Crown Land' was defined in s 4 of the *Land Act 1910* (Q) as all land in Queensland, except land which was, for the time being, lawfully granted or contracted to be granted in fee simply by the Crown, reserved for or dedicated to public purposes, or subject to any lease or license lawfully granted by the Crown.

139 (1996) 187 CLR 1, 72-73.

140 Gaudron J and Gummow J noted that the Holroyd leases, in accordance with the prescribed form, were not expressed to be granted for pastoral purposes only. However, they did not mention the other purposes which the leases authorised and did not refer to the amendments to the *Land Act 1962* (Q): Ibid 165 (Gaudron J), 202 (Gummow J).

expressed to have been granted for pastoral purposes only,¹⁴¹ but he later said: ‘While the lease is not expressed to be for pastoral purposes only, no other activity is authorised.’¹⁴²

Kirby J appears to have shared the same assumption. He made these comments in accepting the submissions of the claimants:

[T]here are several indications which support the contention of the Wik and Thayorre that the interest in land which was granted to the pastoralist was a limited one: for “grazing purposes only”, as the leases stated. Such an interest could, in law, be exercised and enjoyed to the full without necessarily extinguishing native title interests.¹⁴³

He also remarked that the interests acquired by pastoral lessees under the *Lands Acts* were similar to those which, at common law, were known as profits a prendre.¹⁴⁴

Their Honours’ assumptions about the limited nature of the activities which could be pursued under the second Holroyd lease, still in effect at the date of hearing, were wrong. In 1986, the *Land Act Amendment Act 1986 (Q)* amended the general conditions applicable to pastoral leases.¹⁴⁵ It inserted the following paragraph in s 61 of the *Land Act 1962 (Q)*:

- (f) The lessee of a pastoral lease shall use that holding for pastoral or agricultural purposes or for such other purpose as the Minister has first approved in writing, and for no other purpose.
The provisions of this paragraph shall apply to all pastoral leases which subsist at or are granted after the date of the passing of the *Land Act Amendment Act 1986*.

In 1991, the *Lands Legislation Amendment Act 1991 (Q)* replaced that provision with s 61C. It provided:

- 61C. A lease, regardless of when it was or is granted, is to be used only for grazing or agricultural purposes unless the Minister has otherwise first approved in writing.

Each of these provisions makes it clear that the second Holroyd lease allowed pastoral lessees to use the land not simply for pastoral purposes but also for agricultural purposes and, indeed, any other purpose which the Minister approved in writing. Each therefore makes it far more difficult to regard the second Holroyd lease, and indeed all pastoral leases subsisting from 1986

141 Ibid 105.

142 Ibid 115.

143 Ibid 243.

144 Ibid 247.

145 I am indebted to Peter Jeffery for bringing this and other amendments to the *Land Act 1962 (Q)* to my attention.

onwards, as limited interests in land akin to profits a prendre.¹⁴⁶ Regardless of why the Court failed to consider these provisions, their existence undermines a key aspect of the majority's reasoning that none of the pastoral leases in *Wik* conferred exclusive possession.

Unclear whether Vastness and Remoteness are still Relevant

The final aspect of *Wik* which must be questioned is the reliance of the majority on the vastness of the leases. Toohey, Gaudron and Kirby JJ were influenced by the size of the leases granted and able to be granted under the *Land Act 1910* (Q) and the *Land Act 1962* (Q). They regarded this as a factor that told against exclusive possession being conferred on the lessees. Gaudron J, for instance, remarked:

[T]he vastness of the areas which might be made the subject of pastoral leases and the fact that, inevitably, some of them would be remote from settled areas militate against any intention that they should confer a right of exclusive possession entitling pastoralists to drive native title holders from their traditional lands.¹⁴⁷

In a similar vein, Kirby J noted:

Pastoral leases covered huge areas as extensive as many a county in England and bigger than some nations. In these circumstances, it seems distinctly unlikely that there can be attributed to the Queensland Parliament an

146 The effect of the 1986 and later amendments to the *Land Act 1962* (Q) will depend on the *Racial Discrimination Act 1975* (Cth) (RDA) and the *NTA*. My analysis of the way in which these Acts would operate is as follows. If the amendments expanded the range of purposes which could lawfully be pursued on pastoral leases and conferred a right of exclusive possession, they probably would have been inconsistent with the *RDA* because they impaired native title and only native title. But if so, the amendments would have been validated as category D past acts under the *NTA* and ss 8 and 13 of the *Native Title (Queensland) Act 1993* (Q). Although the non-extinguishment principle would apply, the rights that the amendments conferred on pastoral lessees could be exercised to exclude native title holders from the leased property. This means, in turn, that the pastoral leases would be 'exclusive pastoral leases' as defined under s 248A(a) of the *NTA*. As exclusive pastoral leases, moreover, they would be previous exclusive possession acts that extinguished native title from the date of the grant: see s 23B(c)(iv) and s 23C(1) of the *NTA*; ss 20 and 22 of the *Native Title (Queensland) Act 1993* (Q).

This analysis assumes that the previous exclusive possession act regime is intended to apply to leases or other interests which, when originally granted, did not confer exclusive possession but subsequently (because of legal amendment) did so. For support for this view, see *Ward* (2002) 191 ALR 1, 254 [876] (Callinan J) (observing that the grant of an interest subsequently cured by registration under Torrens legislation does not take it outside of the previous exclusive possession act provisions).

147 (1996) 187 CLR 1, 154.

implied purpose of granting a legal right of exclusive possession to the pastoralist (including as against Aboriginals known to exist on the land and unmolested in their continuing use of it) where that Parliament held back from expressly so providing.¹⁴⁸

However, it is unclear what, if any, weight should now be accorded to this factor.¹⁴⁹ In *Ward*, the joint judgment did not refer to the actual or potential vastness of pastoral leases under the *Land Act 1933* (WA) and its predecessors in concluding that those interests did not confer a right of exclusive possession. Callinan J, on the other hand, expressly rejected vastness as a criterion for imputing a lack of exclusive possession to pastoral leases, saying that it was too uncertain.¹⁵⁰

Likewise, in *Wilson*, none of the judges in the majority endorsed vastness as a factor that told against exclusive possession. Gaudron, Gummow and Hayne JJ did not mention it. Gleeson CJ noted that some members of the majority in *Wik* had considered the size of the land to be relevant, but appeared critical.¹⁵¹ Callinan J, with whose reasons McHugh J agreed, stated that he agreed with Beaumont J in the Full Federal Court that there was no principled basis for holding that 'large and remote pastoral leases do not confer exclusive possession but smaller ones supposedly nearer to more settled places do.'¹⁵²

Given the lack of any endorsement of vastness by the majority in either *Ward* or *Wilson*, and its rejection by Callinan and McHugh JJ, it is uncertain whether it has any continuing role to play. The soundness of another aspect of the majority's reasoning in *Wik* is therefore unsettled.

Wik Should Be Overturned

The analysis in Part IV has demonstrated that the majority's decision in *Wik* can no longer be sustained. The majority's reasoning is so flawed that the precedential value of the decision is minimal: various members of the majority founded their conclusions on questionable historical arguments; approached Aboriginal presence in a way at odds with *Ward* and *Wilson*; drew erroneous inferences from provisions for vesting of interests upon grant and for perpetual leases; misconstrued sections providing a summary remedy for ejection; wrongly assumed that pastoral leases only authorised pastoral purposes; and, moreover, relied on vastness as an indication that exclusive possession has not been conferred – something now open to doubt. It is implausible to suggest that the conclusion in *Wik* can stand despite these difficulties because they are not central

148 Ibid 244.

149 It is worth noting that some pastoral leases under the *Land Act 1910* (Q) were very small. Glengalder North in the Kennedy North District of Queensland, for example, was one square mile in area.

150 (2002) 191 ALR 1, 210 [714].

151 (2002) 190 ALR 313, 318 [14].

152 Ibid 364 [196].

or indispensable to the majority's reasoning. Not only would it be very hard to distinguish between the central and peripheral parts of the majority's reasons,¹⁵³ but such an endeavour also would fail to acknowledge that arguments can support a conclusion collectively, just as four legs support a dinner table without any one leg being central or more important than any other.¹⁵⁴ If the reasoning in *Wik* is as flawed as this paper has contended, then suggesting that it can stand is as fanciful as claiming that a dinner table will remain upright after two or three of its legs are lopped off.

It does not, however, follow from the fact that the reasoning and result in *Wik* is wrong that it should be overruled. The High Court has recognised that a decision to overrule previous authority involves several considerations. In *John v Federal Commission of Taxation*, the Court expressed these as follows:

Although there is, in the words of Dixon J in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)*, 'no very definite rule as to the circumstances in which [the Court] will reconsider an earlier decision', in the *Commonwealth v Hospital Contribution Fund*, Gibbs CJ, with whom Stephen J and Aickin J agreed, specified four matters which in that case justified departure from earlier decisions. The first was that the earlier decisions did not rest upon a principle carefully worked out in a succession of cases. The second was a difference between the reasons of the justices constituting the majority in one of the earlier decisions. The third was that the earlier decisions had achieved no useful purpose but on the contrary had led to considerable inconvenience. The fourth was that the earlier decisions had not been independently acted on in a manner which militated against reconsideration, as had been the case in *Queensland v The Commonwealth*.¹⁵⁵

The Court added, however, that special considerations applied to cases of statutory construction. It quoted and approved of these remarks of Mason J in the case of *Babaniaris v Lutony Fashions Pty Ltd*:

The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute. If an appellate court, particularly an ultimate appellate court, is convinced that a previous interpretation is plainly erroneous then it cannot allow previous error to stand in the way of declaring the true intent of the statute...It is no part of a court's function to perpetuate error and to insist on an interpretation which, it is convinced, does not give effect to the legislative intention.¹⁵⁶

153 The efforts of Beaumont J in *Anderson v Wilson* (2000) 97 FCR 453, 513-515 [244]-[254] to distill a ratio from *Wik* and to classify some elements of the reasons as more or less important were not notably successful, as the appeal to the High Court showed.

154 A very similar analogy about the combined force of arguments can be found in Dennis Rose, 'Judicial Restraint' (Paper presented at the Supreme Court of New South Wales Annual Conference, Sydney, 22-23 June 1995) 15.

155 (1989) 16 CLR 417, 438-439 (citations omitted).

156 (1987) 163 CLR 1, 13.

With one possible exception, these considerations suggest that *Wik* should be overruled. First, on no view could the decision in *Wik* be said to ‘rest upon a principle carefully worked out in a succession of cases.’ As Callinan J observed in *Ward*,¹⁵⁷ the majority in *Wik* had distinguished or not applied statements in a series of cases ranging from *Macdonald v Tully*¹⁵⁸ to *Mabo [No 2]*.¹⁵⁹

Secondly, there were clear differences between the reasons of the justices in the majority. For example, Gummow J did not rely on the historical materials which formed an important part of the reasons of Toohey, Gaudron and Kirby JJ; Toohey J and Kirby J, unlike Gaudron J and Gummow J, did not place any weight on sections dealing with the vesting of pastoral leases upon grant or providing for perpetual leases; and Toohey J and Gaudron J did not regard s 204 of the *Land Act 1910* (Q) as suggesting that leases and licences lacked exclusive possession.¹⁶⁰ So varied are the reasons of the majority in *Wik* that it is hard to disagree with the conclusion of Callinan J and McHugh J in *Ward* that the case lacks a *ratio decidendi*.¹⁶¹

Thirdly, *Wik* has occasioned considerable inconvenience. By finding that valid pastoral leases did not extinguish native title in entirety, the Court overturned the assumption on which the NTA had been drafted, an assumption recorded by Parliament in the preamble. In doing so, it rendered the future act regime of the original NTA unworkable. As it stood before the *Wik* amendments, the NTA distinguished between permissible and impermissible future acts. Permissible future acts, in relation to onshore places, relevantly were acts which took place on or after 1 January 1994 and which could be done in relation to the land if the native title holders held ‘ordinary title’ to it;¹⁶² that is, freehold or its equivalent.¹⁶³ Impermissible future acts consisted of all other future acts.¹⁶⁴ Since the ordinary activities authorised by a pastoral lease, such as building dams, establishing fences and sowing pasture, obviously could not have been done by a pastoralist on freehold land which was held by native title holders, the effect of *Wik* was, potentially, to convert such activities into impermissible future acts

157 (2002) 191 ALR 1, 280 [969].

158 (1870) 1 QCLR 17.

159 (1992) 175 CLR 1.

160 Gaudron J did regard the absence of an equivalent to s 76(1) of the *Land Act 1910* (Q) for pastoral lessees as an indication that exclusive possession had not been conferred upon them: (1996) 187 CLR 1, 154. Subsection 76(1) permitted the selector of agricultural holdings to take possession of the land on and from the date he or she had received a licence to occupy. It is worth pointing out, however, that other leases that almost certainly did confer a right of exclusive possession, such as special leases under s 179, also lacked an equivalent of s 76(1).

161 (2002) 191 ALR 1, 137 [480] (McHugh J), 202 [696] (Callinan J).

162 *NTA* s 235(5) (as in force on 1 January 1994). Permissible future acts also included ‘low impact future acts’, which were defined in s 234. It is not necessary to discuss these further.

163 ‘Ordinary title’ was defined in s 253 of the *NTA*.

164 *NTA* s 236.

which were invalid.¹⁶⁵ Faced with pastoral leases covering more than 40% of Australia, Parliament extensively amended the future act regime and enacted provisions for validating intermediate period acts, which were, among other things, acts that took place between 1 January 1994 and 23 December 1996 (the date of the *Wik* decision) on valid leases and freehold estates.¹⁶⁶

The inconvenience generated by *Wik* was not limited to the future act regime of the NTA. *Wik* also introduced the spectre of extensive litigation to establish when leasehold interests extinguished native title. After finding that native title could exist on the Queensland pastoral leases, Kirby J commented: 'The position of the countless other leasehold interests in Queensland...and of the pastoral and other leasehold interests elsewhere in Australia remains to be elucidated in later cases.'¹⁶⁷ He acknowledged that this would add 'an element of uncertainty into land title in Australia', but he regarded it as a result of the working out of the rules in *Mabo [No 2]*. It was the express aim of the government, in introducing Div 2B of Part 2 of the NTA, to eliminate some of the uncertainty that *Wik* had created on this score.¹⁶⁸ That it became necessary to provide for a regime of extinguishment by previous exclusive possession acts once more shows the problems which *Wik* caused.

Furthermore, as an authority, *Wik* has proven about as simple to pin down and as useful as a Rorschach ink blot. It has bedevilled judges and litigants alike, as *Wilson* illustrates. In that case, Gaudron, Gummow and Hayne JJ relied on the lease being in perpetuity to find that exclusive possession had been conferred. That was the decisive consideration for them. But to say this turn was unexpected would be an understatement. In *Wik*, both Gaudron J (and Gummow J in passing) had referred to perpetual leases in the *Land Act 1910 (Q)* to suggest that pastoral leases and other leases under that Act could not bear their common law meaning and did not confer exclusive possession. In the Federal Court, Black CJ and Sackville J relied, among other things, on her Honour's comments about perpetual

165 NTA s 22. This consequence was not limited to pastoral leases. Any land where native title rights co-existed with other rights and could be affected by their exercise, such as in national parks, brought the future act regime into play. However, given the amount of Australia's land mass covered by pastoral leases, the finding in *Wik* meant that the scope for impermissible future acts increased dramatically.

166 NTA Pt 2, Div 2A; s 232A. In a nutshell, intermediate period acts consist of acts which were done on or after 1 January 1994 and before 24 December 1996, which were invalid because of native title and were over land covered by a valid freehold estate, a lease (other than a mining lease) or a public work. The NTA ensures that an intermediate period act attributable to the Commonwealth is valid and is taken always to have been valid. Its effect on native title, however, depends on the category of intermediate period act involved; for example, a category A intermediate period act would extinguish native title completely but a category B act would only extinguish native title to the extent of any inconsistency. The States and Territories are allowed to pass laws validating intermediate period acts.

167 (1996) 187 CLR 1, 250. See also at 221.

168 *Native Title Amendment Bill 1997: Explanatory Memorandum*, 53.

leases to find that exclusive possession had not been conferred.¹⁶⁹ On appeal to the High Court, neither the appellants nor the respondents regarded the fact that the lease was perpetual as decisive: the appellant simply argued that a perpetual lease should not be regarded as less secure than a lease for a term, an argument accepted by Callinan J and McHugh J;¹⁷⁰ the respondents argued that a perpetual lease was unknown to the common law and hence should not be taken to confer exclusive possession. But no one in the lower courts or before the High Court argued, or even appeared to conceive, that *Wik* was distinguishable *because* the lease in *Wilson* was a lease in perpetuity. *Wilson* thus demonstrates just how difficult it has been to understand what *Wik* stands for and to predict with any confidence how it will be applied.¹⁷¹

Fourthly, *Wik* was essentially an exercise in statutory interpretation. The conclusions of the majority were based largely on their construction of the *Land Act 1910* (Q) and the *Land Act 1962* (Q). If a later Court is convinced that the construction placed upon those Acts was mistaken, then *John v Federal Commission of Taxation* demonstrates that its responsibility is to give effect to the legislative intention rather than to adhere to precedent.¹⁷²

The only factor which may suggest that *Wik* should not be overturned is the fact that Parliament has acted upon it. In *Ward*, Kirby J expressed the view that the holding in *Wik* should not be reopened 'given that substantial and complex amendments to the NTA were enacted by the federal parliament upon the basis that *Wik* correctly stated the law.'¹⁷³ In *Wilson*, Gleeson CJ made observations to like effect:

It was not submitted by any party, in the present case, that the Court should refuse to follow *Wik*. Any such submission would have faced the obvious difficulty that Parliament has enacted legislation in response to, and on the basis of the principles accepted and applied in, *Wik*. In *Brodie v Singleton Shire Council* I stated my views about the importance of adherence to precedent in cases where the legislature has acted on the faith of judicial decisions. Some of the considerations that applied there operate even more powerfully in the case of *Wik*.¹⁷⁴

It is, with respect, hard to regard these comments as a compelling reason to leave *Wik* undisturbed. Both Gleeson CJ and Kirby J were concerned with

169 *Anderson v Wilson* (2000) 97 FCR 453, 474 [101], 477 [114].

170 (2002) 190 ALR 313, 367 [204].

171 As Callinan J remarked in *Ward*, the language of s 23G(1)(b) also demonstrates that the legislators and their legal advisers could not determine what the effect of *Wik* was with any certainty: (2002) 191 ALR 1, 281 [969].

172 See also *Barns v Barns* (2003) 77 ALJR 734, 753 [104] (Gummow and Hayne JJ): 'In the end, the justification for not following an earlier decision construing a statute must be that the view taken of the statute in the earlier decision was wrong in a significant respect.'

173 (2002) 191 ALR 1, 166 [595].

174 (2002) 190 ALR 313, 318 [15].

upsetting the reasonable reliance of the legislature on *Wik*. However, they did not recognise that while *Wik* undoubtedly provided the impetus for many complex amendments of the NTA, its demise need not significantly affect the operation of the Act. The NTA currently divides pastoral leases into 'exclusive pastoral leases', some of which confer a right of exclusive possession over the land or waters,¹⁷⁵ and 'non-exclusive pastoral leases', which do not.¹⁷⁶ A finding, contrary to *Wik*, that Queensland pastoral leases fell into the former category would hardly shake the foundations of the Act; indeed, it would be consistent with the intended operation of Part 2, Div 2B.¹⁷⁷ Nor would such a finding undermine the intermediate period act regime in Part 2, Div 2A. That regime applies to acts that took place between 1 January 1994 and 23 December 1996 on land over which pastoral leases or other interests had not extinguished native title. Although some of the areas covered by pastoral leases in *Ward* fall within that description, the NTA does not mandate that there must be any such land in Queensland or elsewhere, meaning that a decision to overturn *Wik* would still accord with the structure and provisions of the Act.

But, one might cavil, what about the status of *Ward*? Would not overruling *Wik* cast a shadow over its correctness? Not necessarily. The majority findings in *Ward* on Northern Territory pastoral leases, at least, depended on the existence of broad reservations in favour of Aboriginal people.¹⁷⁸ No equivalent reservations were found in the Queensland pastoral leases in *Wik*. It may thus be possible to distinguish between the two cases, although, for the distinction to be convincing, the Court would need to explain that 'a right to exclusive possession' in the context of the NTA refers to the capacity of a lessee to exclude a native title holder.¹⁷⁹ It would also need to address why the NTA contemplates that previous exclusive possession acts, including exclusive pastoral leases, can nonetheless contain beneficial provisions such as access rights for Aborigines.¹⁸⁰ Even if drawing the distinction ultimately proves impossible, however, that does not mean that *Ward* should prevent a re-examination of *Wik*. None of the parties in *Ward* or

175 NTA s 248A(a). An exclusive pastoral lease also includes a pastoral lease that is a Scheduled interest. There is no need to discuss such pastoral leases further.

176 NTA s 248B.

177 An exclusive pastoral lease would be a previous exclusive possession act: see NTA s 23B(2)(c)(iv).

178 (2002) 191 ALR 1, 120 [415].

179 If the reservations preclude native title holders being excluded, then the scope of the reservations becomes important: they would define the extent of any surviving native title on the leases. On this basis, the result on Western Australian pastoral leases would be that native title survived over areas that were not enclosed or improved, but only on those areas. That was the approach adopted by the Full Court of the Federal Court.

180 NTA s 23D. See also *Native Title Amendment Bill 1997: Explanatory Memorandum*, 62. The joint judgment did not consider the issue in *Ward*, although it suggested that the reservation for Aborigines in Northern Territory pastoral leases meant that a right of exclusive possession was not conferred.

Wilson called for *Wik* to be reopened, and that alone should give the Court greater freedom to depart from *Wik* and its progeny if it regards that course as desirable.

It is, moreover, worth noting that *Wik*'s demise would entail far less disruption to the legal system than that done by other recent decisions of the Court. *Brodie v Singleton Shire Council* is an example.¹⁸¹ It abolished the immunity of highway authorities for non-feasance, a long-standing immunity which had been specifically extended to particular public authorities by legislation.¹⁸² It created a new common law rule that subjected councils to previously unknown liabilities.¹⁸³ It also raised the spectre of intrusion by the courts into political decisions about road maintenance and the allocation of resources.¹⁸⁴ Formally overruling *Wik*, by contrast, would be a far more modest step. It would fit comfortably within the framework of the amended NTA, but it would provide greater certainty and logic to an area of law that badly needs them. The argument from legislative reliance – the one factor that may be used to support *Wik* – therefore does not have much bite. The case for overruling *Wik* remains strong.

Conclusion

This article has argued that the Court's recent and past jurisprudence on pastoral leases and native title has been deeply flawed. The Court's decision in *Ward* that pastoral leases in Western Australia and the Northern Territory did not confer a right of exclusive possession stemmed from characterising pastoral leases as statutory interests that were precarious and limited. That characterisation, however, is difficult to defend as a matter of logic and is inconsistent with the historical approach of the joint judgment in *Wilson*. What is more, the authority underpinning that characterisation is *Wik*, a judgment which is now of little precedential value and which, with respect, should be overturned. The majority judges in *Wik* made historical claims that are suspect; they inferred an absence of exclusive possession from provisions that, upon closer examination,

181 (2001) 206 CLR 512. Other examples where the Court has reformulated the law despite legislative changes that were made on the assumption that previous understandings of that law were correct include *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 and *Lipohar v The Queen* (1999) 200 CLR 485.

182 (2001) 206 CLR 512, 534 [36]-[37], 536 [42] (Gleeson CJ), 647 [374]-[375] (Callinan J).

183 Heydon, '*Judicial Activism and the Death of the Rule of Law*' 47(1) *Quadrant* 9, 20.

184 (2001) 206 CLR 512, 528-529 [16] (Gleeson CJ).

do not support their claims; they relied on other factors, such as the known presence of Aborigines on the land, that no longer seem to be legitimate after *Ward* and *Wilson*. They also did not consider that later pastoral leases in Queensland were not limited to pastoral purposes. Given the flaws in the *Wik* judgment, and the thinness of the arguments for adhering to it, the Court should overrule it and ensure that the jurisprudence of pastoral leases and native title proceeds on a firmer basis. In this area which has raised so much controversy, reason should finally be allowed to regain her seat.