Factsheet

The Wik Decision

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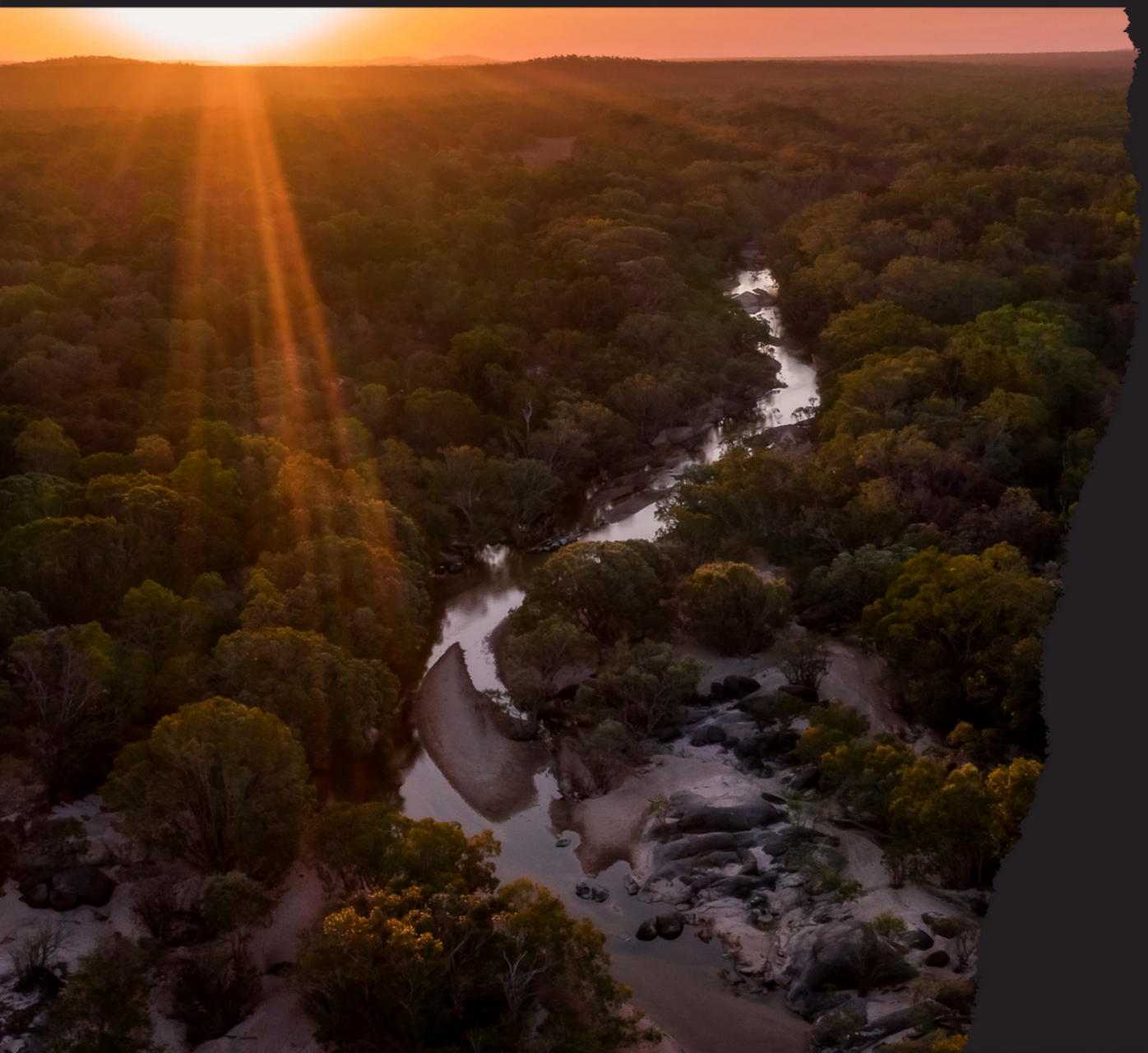

The Wik Decision

"We have got to learn to fight, not with our fists, but with our tongues."[1]

Stanley Ngakyunkwokka

"My name is Gladys. I'm the hot one. The fire. Bushfire is my totem. And I'm a proud woman of Cape York today. It is for me, here today, a historic moment as a Wik woman. I am not afraid of anything."[2]

Gladys Tybingoompa

These two quotes bookend the decision in *Wik Peoples v Queensland.*[3] In the first, community leader Stanley Ngakyunkwokka, who initiated the Wik peoples land claim, explains the approach they took to a meeting under a tent at Lockhart River in the Cape York Peninsula. In the second, Aunty Gladys Tybingoompa spoke to the waiting media pack outside the doors of the High Court of Australia, which had just ruled in her favour. Unfortunately, however, these two quotes do not tell the whole story. The Wik decision was the 'high point' of common law native title.[4] The subsequent political reaction demonstrates the vulnerability of Aboriginal and Torres Strait Islander peoples' rights in Australian law. The story of the Wik decision further emphasises the need for a constitutionally entrenched First Nations Voice.

[1] Susan Chenery, 'A tectonic shift in justice': how the Wik people fought the law and won, (2018), The Guardian, accessed online.
[2] SBS, NITV, 'Warrior Spirits: The Wik women who stood up for their land and communities', 2018
[3] Austlii, Wik Peoples vs Queensland, 1996.
[4] Maureen Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27 Melbourne University Law Review 523, 557.

Background

Aboriginal and Torres Strait Islander peoples have occupied the Australian continent for at least 60,000 years. Organised in distinct political communities, First Nations peoples were bound together by a system of customary law that governed their relationships to each other and to Country. When the British arrived and colonised the continent, they ignored the pre-existing systems of law that had directed these societies for tens of thousands of years. In what became known as *terra nullius* (land belonging to no one), the British simply ignored the rights and interests of First Nations peoples.

The supposed legal basis for this approach was the 1889 decision of *Cooper v Stuart*. In this case, the British Privy Council – then the highest Court for Australia – held that when the British arrived, the Australian continent was 'a tract of territory practically unoccupied, without settled inhabitants or settled law'.[5] This was factually incorrect, but it set in place a legal framework that continued until the 1990s. It was not until 1992, in the Mabo decision, that the High Court of Australia overruled *Cooper v Stuart*. The Court rejected the idea of terra nullius and said that Australian law could recognise native title. However, the Court also placed strict limits on native title. It held that Australian law can validly extinguish First Nations peoples land rights.

The *Mabo* decision was immediately recognised as momentous. Guugu Yimidhirr lawyer Noel Pearson remarked that the decision 'represents a turning point in the history of Australia since white "settlement", and 'compels the nation to confront fundamental issues concerning the Indigenous people of Australia, issues which have been largely avoidable to date'.[6] Prime Minister Paul Keating agreed. Keating believed that legislation was the best way 'to do justice to the Mabo decision in protecting native title and to ensure workable,

[5] (1889) 14 App Cas 286, 292.
[6] Noel Pearson, '204 Years of Invisible Title' in Margaret Stephenson and Suri Ratnapala (eds), Mabo: A Judicial Revolution: The Aboriginal Land Rights Decision and its Impact on Australian Law (University of Queensland Press, 1993) 75, 89.

certain, land management'.[7] After several months of difficult negotiation, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth).[8]

The Wik Case

During the negotiations for the *Native Title Act*, at least one First Nations community lodged a native title claim seeking recognition and protection of their rights and interests in land. In June 1993, the Wik peoples of the western Cape York Peninsula lodged a claim for native title over certain areas of land in Queensland subject to two leases. The Thayorre people subsequently joined the case. While all parties agreed that the granting of freehold title extinguishes native title, the question in the Wik case was whether the grant of a pastoral lease would do so too. In 1996 with a 4 to 3 split, the Court said no. Native title could co-exist with the grant of a pastoral lease.

The majority reached their decision by looking at the meaning of the word 'lease' and the purpose for which a lease is granted. They held that because pastoral leases do not automatically grant exclusive possession to the leaseholder, they do not necessarily extinguish native title. Rather, it is important to consider the rights conferred by a particular lease, and then consider the nature and content of the native title rights and interests.[9] Although confirming that native title can coexist with other legal interests in land, the Court held that where native title rights are in conflict or inconsistent with pastoral interests, the rights of pastoralists would prevail. The minority judges held that pastoral leases granted exclusive possession to the leaseholders. On this basis, they held that native title had been extinguished.

[7] Commonwealth, Parliamentary Debates, House of Representatives, 16 November 1993, 2878 (Paul Keating).
[8] Native Title Act 1993.
[9] Austlii, Wik Peoples vs Queensland, 1996.

The Backlash

The Wik decision was not revolutionary. The Court confirmed that Australian law can extinguish native title. The majority of the Court simply said that it is necessary to closely examine the particular non-native title rights and interests granted to see whether it is inconsistent with the co-existence of native title. If it is, native title is extinguished. If it is not, native title can persist. The decision also only affected leasehold. It had no consequence for property held under freehold.

However, perhaps because significant areas of the country were subject to pastoral leases, the decision provoked significant political backlash. The backlash was inflamed by conservative politicians and members of the newly elected Howard government. In an interview on the 7.30 Report, Prime Minister John Howard held up a map of Australia supposedly demonstrating how much of Australia was at risk from native title claims.[10] Some state Premiers suggested that the suburban backyard was next.[11] Agricultural and mining interests were also outraged. National Farmers Federation President Donald McGauchie declared that 'the decision has just about ended Aboriginal reconciliation'.[12] These statements were legally baseless but politically effective.[13]

The Ten Point Plan

The Howard Government promised a legislative response to the decision. In September 1997, the Native Title Amendment Bill was introduced in Parliament. Known as the Ten Point Plan, the Bill proposed to broaden the power of governments to extinguish native title, remove the right to claim over urban

[10] Interview with Prime Minister John Howard (Kerry O'Brien, 7:30 Report, 1 December 1997).
[11] Ruth McCausland, 'Special Treatment—The Representation of Aboriginal and Torres Strait Islander People in the Media' (2004) 16 Journal of Indigenous Policy 84, 87.
[12] Ravi de Costa, 'Reconciliation as Abdication' (2002) 37(4) Australian Journal of Social Issues 397, 399.
[13] On the backlash see: Harry Hobbs, 'The New Right and Aboriginal Rights in the High Court of Australia' (2022) Federal Law Review (forthcoming).

areas and make the initiation of claims more burdensome. Howard explained his motivation:

"My aim has always been to strike a fair balance between respect for native title and security for pastoralists, farmers and miners. … The fact is that the Wik decision pushed the pendulum too far in the Aboriginal direction. The 10 point plan will return the pendulum to the centre."[14]

Deputy Prime Minister and leader of the National Party, Tim Fischer was blunter; the Plan was intended to deliver 'bucket loads of extinguishment'.[15]

The government argued it was seeking certainty. Others were not so sure. Professor Mick Dodson, the then Aboriginal and Torres Strait Islander Social Justice Commissioner explained that 'certainty' 'is code for removing native title'.[16] The Aboriginal and Torres Strait Islander Commission criticised the Bill and the fact that the Government did not meaningfully consult with them. The Commission lodged a complaint with the United Nations Committee on the Elimination of Racial Discrimination. The Committee found that the Bill was incompatible with Australia's international obligations, stating:

"The Committee recognised that within the broad range of discriminatory practices that had long been directed against Australia's Aboriginal and Torres Strait Islander peoples, the effects of Australia's racially

[14] John Howard's Amended Wik 10-Point Plan (Media Release, 8 May 1997).
[15] Interview with Deputy Prime Minister Tim Fischer (John Highfield, ABC Radio National, 4 September 1997).
[16] Michael Dodson, 'Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund: The Native Title Amendment Bill 1997' (3 October 1997).

discriminatory land practices had endured as an acute impairment of the rights of Australia's Indigenous communities."[17]

Many non-Indigenous Australians supported Aboriginal and Torres Strait Islander peoples, helping to build a national campaign calling on the Parliament to block the changes. It was around this time that ANTaR was formed, helping to coordinate the Sea of Hands protest on the lawns in front of Parliament House on 12 October 1997.

The campaign was ultimately not successful. The Senate made 217 amendments to the Bill and returned it to the House of Representatives. The House accepted about half of the changes before returning it again to the Senate. After the longest debate in the history of the Senate, the Bill was finally passed on 8 July 1998. Paul Keating described the amendments as a 'cut across the spirit' of the Native Title Act, 'the notion that the legislation was, first and foremost, of a beneficial kind – enacted to redress historic inequities, rather than to compound ones sanctioned by earlier acts'.[18]

[17] University of Minnesota, 'Procedural Decisions of the Committee on the Elimination of Discrimination', Australia, U.N. doc. A/54/18, para. 21(2), 1999.
[18] Paul Keating, 'The 10-Point Plan that Undid the Good Done on Native Title' Lowitja O'Donoghue Oration, University of Adelaide, 30 May 2011).

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With thanks:

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ANTAR is proud to acknowledge and pay our respects to First Nations Peoples as the traditional owners of the lands on which we work across the continent.

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