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Wik Peoples v. State of Queensland: A Restrained Expansion of Aboriginal Land Rights

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*Wik Peoples v. State of Queensland:* A Restrained Expansion of Aboriginal Land Rights

I. Introduction

In the past decade, Aborigines in Australia have gone from owning title to fourteen percent of the land in Australia to potentially being able to claim seventy-nine percent of it. These figures become even more staggering and meaningful given that the Aboriginal population constitutes only about two percent of Australia’s population. Prior to 1992, Australia recognized virtually no Aboriginal land rights. The Australian common law accepted the notion that no one owned the land prior to European colonization. However, in 1992, the High Court of Australia handed down *Mabo v. State of Queensland,* which overturned the doctrine of *terra nullius* and recognized that Aborigines had native title rights to Crown land that they and their predecessors had continuously occupied. *Mabo* was subsequently confirmed by the enactment of the Native Title Act.

Based on *Mabo,* Aboriginal groups filed numerous claims to native title. Among those Aboriginal groups were the Wik Peoples, who claimed to have native title over land that included pastoral leases. In *Wik,* the Australian High Court held that

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2 See infra notes 120-22 and accompanying text.
3 See infra notes 140-42 and accompanying text.
4 See infra notes 59-62 and accompanying text.
5 See infra notes 59-62 and accompanying text.
7 See infra notes 58-61 and accompanying text for a definition of terra nullius.
8 See infra notes 88-97 and accompanying text.
9 See Native Title Act, 1993, available in LEXIS, Codes Library, Ausact File; infra notes 100-07 and accompanying text.
10 See infra note 107 and accompanying text.
11 See Wik Peoples v. State of Queensland (1996) 141 A.L.R. 129, 166. Pastoral leases are leases that are granted by the Australian government. See Michael Warby,
native title can co-exist with a pastoral interest. By recognizing that native title could be asserted against pastoral land, Wik could potentially have far reaching consequences because of the large percentage of pastoral land in Australia. However, at the same time, judicially imposed limitations and proposed legislation could temper the extent of Wik.

In Part II, this Note summarizes the facts and procedural history of Wik and examines both the majority and dissenting opinions. Part III explores the background law leading to Wik. Part IV assesses the significance of Wik and discusses the subsequent legislation that has been initiated in response to the Wik decision. Finally, Part V concludes that Wik is not as threatening to the overall order of Australian land use and ownership as the public debate suggests. Various restraints are in place which will temper the impact of Wik, including the limited scope of native title rights, the required extinguishment of native title should it conflict with pastoral interests, and the proposed legislation currently before the Australian Senate that attempts to negate the significance of Wik.

II. Statement of the Case

A. The Facts and the Federal Court Ruling

The Wik Peoples, an Aboriginal group, filed an action in the

Outrage in the Outback, ASIAN WALL ST. J., Jan. 8, 1998, at 1, available in 1998 WL-WSJA 3467895. The leases are "granted for specific time periods permitting use of land for agricultural purposes, typically grazing." Id.

12 See Wik, 141 A.L.R. at 190.
13 See infra notes 120-22 and accompanying text.
14 See infra notes 136-94 and accompanying text.
15 See infra notes 20-55 and accompanying text.
16 See infra notes 59-114 and accompanying text.
17 See infra notes 115-94 and accompanying text.
19 See infra notes 136-94 and accompanying text.
Federal Court of Australia for a declaration that they possessed native title rights over an area of land in North Queensland. In the alternative, the Wik Peoples claimed damages and other relief if the court determined that their native title rights had been extinguished. The Thayorre People, another Aboriginal group, cross-claimed for a similar declaration with respect to land that partly overlaps the territory claimed by the Wik Peoples. The defendants included the State of Queensland, the Australian Commonwealth, nine cattle operators, and Comalco Aluminum Limited, a mining company.

The disputed property also included land under pastoral leases from the government. The Wik and Thayorre Peoples claimed that their native title rights survived the granting of the pastoral leases. In essence, these Aboriginal groups argued that native title can co-exist with the interests of the lessees. Conversely, the lessees maintained that the pastoral leases conferred exclusive possession on the lessee.

In addition to the pastoral leases, mineral leases also encumbered the land at the center of the dispute. However, the mineral leases were incorporated into the Comalco Act and the Aurukun Associates Agreement Act. The Wik Peoples argued that

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21 See id.
22 See id.
24 See Wik, 134 A.L.R. at 638.
25 See id. at 642.
26 See id.
27 See Wik, 141 A.L.R. at 170.
28 See Wik, 134 A.L.R. at 675.
29 See id. at 675, 705. The Commonwealth Aluminum Corporation Pty Limited Agreement Act (Comalco Act) was enacted in 1957. See id. at 690. The Comalco Act authorized an agreement between the State of Queensland and Comalco whereby Comalco would receive a mining lease over a bauxite field for an initial term of eighty-four years. See id. at 691. The Aurukun Associates Agreement Act (Aurukun Act) was enacted in 1975. See id. at 705. The Aurukun Act authorized the Aurukun Associates Agreement (also known as the Franchise Agreement) which also involved a bauxite mining lease. See id. Bauxite is a raw material that is used for aluminum. See
the decisions to enter into the Comalco Agreement and the Aurukun Associates Agreement were void because the Wik Peoples and their successors in title as the native title holders were denied the opportunity to voice their opposition to the making of those agreements. Furthermore, the plaintiffs argued that the State of Queensland owed a fiduciary duty to the plaintiffs and their predecessors in title and that the State had breached that duty in the way it entered into the disputed mining agreements.

The federal court ruled against the Wik Peoples on both the pastoral and mineral leases. The court held that the pastoral leases "conferred a right of exclusive possession of the land on the lessee and that by itself is sufficient to extinguish native title." With respect to the mining leases, the federal court stated that "[t]o do something specifically authorised by parliament cannot give rise to any claim either at law or in equity by persons adversely affected by the exercise of the statutory authority." In short, the court found that the right to exclusive possession under the pastoral leases had extinguished any native title and that the mineral leases had statutory authority which superseded the rights of parties that may have been adversely affected by the leases.

B. The High Court Decision

On appeal, the Australian High Court was presented with two major issues: (1) whether the pastoral leases conferred on the grantees rights to exclusive possession, and, if the lessees did have exclusive possession, whether the native title rights were extinguished, and (2) whether the special bauxite mining leases granted by Queensland were valid and, if invalid, whether the State of Queensland breached its fiduciary duty and failed to

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Newman, supra note 23, at 12.

30 See id. at 689, 705.

31 See id. at 689.

32 See id. at 706-08.

33 Id. at 675. The question whether the Wik Peoples or the Thayorre Peoples are the holders of native title rights with respect to the leased lands was not decided since it did not arise given the court's holding.

34 Id. at 704-05.

35 See Wik, 141 A.L.R. at 167.
accord natural justice to the plaintiffs.\textsuperscript{36}

In a narrow four to three majority opinion, the Court ruled in favor of the plaintiffs on the issue of the pastoral leases.\textsuperscript{37} The majority held that the pastoral leases did not confer on the lessees rights "to exclusive possession, in particular possession exclusive of all rights and interests of the indigenous inhabitants whose occupation derived from their traditional title."\textsuperscript{38} The Court based its decision on the language of the statutes that authorized the leases.\textsuperscript{39} The Court acknowledged that the legislature might not have given conscious recognition to native title but noted that nothing in the statute or lease grant should be interpreted as providing "total exclusion of the indigenous people from the land, thereby . . . treating their presence as that of trespassers or at best as licensees whose licence could be revoked at any time."\textsuperscript{40}

Although the issue of extinguishment did not arise since the Court found that the lessees did not have exclusive possession, the Court nevertheless held that the pastoral leases did not extinguish the native title rights associated with the land.\textsuperscript{41} Extinguishment, the Court observed, can only be determined by comparing the rights and interests of the lessees, as provided in the pastoral leases, against particular rights and interests of the particular group claiming right to the land.\textsuperscript{42} If inconsistencies between the two claims are found to exist, the Court held that the native title rights would have to yield to the rights of the lessees.\textsuperscript{43} The Court concluded that when the rights of the lessees are not inconsistent with the rights of the Aborigines then native title and pastoral rights can exist concurrently.\textsuperscript{44}

On the issue of the mining leases, the Court ruled against the

\begin{footnotesize}
\textsuperscript{36} See id. at 295 (opinion of Kirby, J.).
\textsuperscript{37} See id. at 190.
\textsuperscript{38} Id. at 181.
\textsuperscript{39} See id. at 190.
\textsuperscript{40} Id. at 181.
\textsuperscript{41} See id. at 190.
\textsuperscript{42} See id.
\textsuperscript{43} See id.
\textsuperscript{44} See id.
\end{footnotesize}
The Court held that the mining leases granted by the State of Queensland in pursuance of State agreements and special State legislation were valid. The Comalco Act was passed with the purpose of providing legislative force to the Comalco Agreement. The Court noted that the legislation did not reflect "the usurpation of legislative power," but the "exercise of it." The Court further noted that "[t]he fact that other persons (such as the Wik) may thereby have lost rights previously belonging to them is simply the result of the operation of legislation, the constitutional validity of which is not impugned." The Court concluded that any perceived injustices arising from the Act should be addressed by the legislature and not the judiciary.

C. Dissent to the High Court Decision

Three dissenting justices, including the Chief Justice, found that the Wik and Thayorre Peoples' claim of native title should fail because it had been extinguished upon the issuance of the leases pursuant to the 1910 Act. The dissent found that the leases conferred exclusive possession on the grantees and that since the right of exclusive possession was granted to the lessees by the Crown, the lessees' right prevailed and the rights of the Aborigines to native title were extinguished. Accordingly, the dissent would

45 See id. at 292-93.
46 See id. at 292.
47 See id. at 289. In fact, the Court noted that the major purpose of conferring statutory status on the Comalco Agreement was to "avoid claims of invalidity of the Agreement of the kind which the Wik . . . wish to ventilate." Id. at 290. The Wik Peoples also challenged a second mining lease, the Aurukun Associates Agreement (a.k.a. "the Franchise Agreement"), which also received statutory force with the passage of the Aurukun Act. See id. at 292. The Court noted that the Aurukun Act "was in all material terms similar to the Comalco Act." Id. Consequently, for the reasons stated in the Comalco Act discussion, the Court noted that the Franchise Agreement should be treated "as if it were an enactment of the Queensland Parliament." Id. The Court thus held that the Franchise Agreement had statutory force. See id. at 293.
48 Id. at 290.
49 Id.
50 See id.
51 See id. at 160 (Brennan, C.J., dissenting). Justices McHugh and Dawson concurred with the Chief Justice's dissent. See id. at 164, 219.
52 See id. at 154 (Brennan, C.J., dissenting).
have held that the right of exclusive possession could not co-exist with the native title right and that native title was thus extinguished.\textsuperscript{53} Moreover, the dissent was of the opinion that the common law cannot recognize native title after the fact.\textsuperscript{54} The leases were granted under the 1910 Act when native title had not been recognized by the courts of Australia.\textsuperscript{55}

\textit{D. Back to Federal Court}

\textit{Wik} does not represent the end of litigation for the Wik People. The High Court’s decision only answered the question of whether the Wik Peoples have a claim to assert in federal court.\textsuperscript{56} The High Court decided that the Wik Peoples may claim a native title on land subject to pastoral leases.\textsuperscript{57} Accordingly, the Wik Peoples will have to return to Federal Court to prove that they have native title to the land.\textsuperscript{58}

\textbf{III. Background Law}

\textbf{A. Terra Nullius: The Law of the Land for Over 200 Years}

The concept of Aboriginal land rights is a novel one given Australia’s past. On August 22, 1770, Captain James Cook claimed Australia for England under the doctrine of \textit{terra nullius}.\textsuperscript{59}

\begin{itemize}
  \item \textsuperscript{53} See id. at 162 (Brennan, C.J., dissenting).
  \item \textsuperscript{54} See id. at 160 (Brennan, C.J., dissenting).
  \item \textsuperscript{55} See id. (Brennan, C.J., dissenting). Native title was not recognized until the High Court’s \textit{Mabo} decision in 1992. See infra notes 89-99 and accompanying text.
  \item \textsuperscript{56} See \textit{Wik}, 141 A.L.R. at 166. The issues presented to the Federal Court were preliminary questions. See id. Leave was granted to the Wik Peoples to appeal the judgment of the Federal Court on the preliminary matters. See id.
  \item \textsuperscript{57} See id. at 190.
  \item \textsuperscript{58} See \textit{Court Supports Aboriginal Rights to Make Land-Ownership Claims}, ASIAN WALL ST. J., Dec. 24, 1996, at 1, available in 1996 WL-WSJA 12481153. To establish, native title, an Aboriginal group must show that their rights and interests to the land are “possessed under the traditional law . . . and the traditional customs . . . [of] the Aboriginal peoples or Torres Strait Islander” and that “by those laws and customs, have a connection with the land or waters.” Native Title Act, 1993, § 223(1).
This doctrine was normally applied by the colonial powers to land that was uninhabited. The decision to extend the theory of *terra nullius* to Australia, however, reflected the belief that "the Aborigines of Australia were not sufficiently advanced in Western terms to be considered an organized political unit with whom the Government of England would enter into treaty relations." Other justifications for the colonists' position "included bringing the benefits of Christianity and European civilization to 'backward peoples' and cultivating land that had not been cultivated by its original occupants." The doctrine of *terra nullius* remained unchallenged until *Milirrpum v. Nabalco Party Ltd.*, also known as the *Gove Case*. This case represented "the first effort to gain judicial recognition of indigenous land rights." *Milirrpum* was the leader of the Yirrkala Aborigines who lived in the Northern Territory's Gove Peninsula. The defendant, Nabalco Party Ltd., was a mining company that had been granted the right to extract bauxite from the Gove Peninsula by the Australian government. The Yirrkala Aborigines filed suit in the Supreme Court of the Northern Territory and requested recognition of their right to the land based on a communal native title to the Gove Peninsula. In addition, the Yirrkala sought an injunction against bauxite mining...
on their territory, as well as compensatory damages. The court ruled against the Yirrkala Aborigines and found that "the plaintiff's predecessors . . . [did not have] the same links to the same areas of land as those which the plaintiff now claim." The court further held that the Yirrkala's claim of communal native title "must fail for want of authority to support it" and that the plaintiffs have no proprietary interest over the claimed land. The case was not appealed and never reached the High Court.

B. Overhaul of Land Rights in Australia

Although the Gove Case did not recognize aboriginal land rights, the issue of aboriginal land ownership subsequently emerged in government discussions. After the Whitlam Labor Government was elected in December 1972, Mr. A. E. Woodward was appointed to review the issue of Aboriginal land rights. The Woodward Commission Report recommended that "control and ownership of tribal lands" be given to the Aborigines, but the Report nonetheless accepted the common law position that ownership of minerals remain with the government of Australia. In an attempt to implement the suggestions of the Woodward Commission, the Aboriginal Land Rights Bill was drafted in 1975. A "fierce debate" arose over the bill between the mining, pastoral, and fishing interests who opposed the bill and the Aborigines who supported it. Numerous amendments were made to the bill and in its final form, the Land Rights Act of 1976, the Aborigines were granted inalienable, statutory title if they could prove that they had traditionally owned the land. However, only land that was unalienated Crown land or that was owned by

70 See id. at 150; Manwaring, supra note 62, at 180.
71 Milirrpum, 17 F.L.R. at 198.
72 Id. at 262.
73 See id. at 273-74.
74 See Skinner, supra note 59, at 243.
75 Id.
76 See id.
77 Id.
79 See Bravo, supra note 59, at 552.
Aborigines located in the Northern Territory could be subject to a land claim under this Act.\textsuperscript{80} Furthermore, all claims had to be filed by June 5, 1997.\textsuperscript{81}

At the same time of the debate over the Land Rights Act of 1976, public hearings were being held concerning the effect of uranium mining on Aboriginal sacred sites.\textsuperscript{82} The hearings led to the publication of the Second Uranium Report of 1977 which suggested that mining activities be regulated in order to reduce their harmful effects on Aboriginal sacred sites and communities.\textsuperscript{83} The Report also salvaged land that was scheduled to be mined for uranium and granted titles of the land to seventy-three Aborigines.\textsuperscript{84}

In the courts, there continued to be a push towards recognition of Aboriginal land rights. In 1974, Paul Coe, an Aborigine, filed suit against the Australian and British governments on behalf of all Aborigines.\textsuperscript{85} He sought compensatory damages and injunctions against future interference with land used by Aborigines.\textsuperscript{86} He asserted that Aboriginal sovereignty, which had existed prior to colonization, rendered all non-Aboriginal claims of sovereignty void.\textsuperscript{87} The case was dismissed for procedural reasons, but the court indicated that it was not averse to the concept of Aboriginal title.\textsuperscript{88}

A successful verdict for the Aborigines finally materialized in the case of \textit{Mabo v. State of Queensland}.
\textsuperscript{89} The plaintiffs were members of the Meriam People, an Aboriginal group.\textsuperscript{90} The

\begin{itemize}
\item \textsuperscript{80} See id.
\item \textsuperscript{81} See id.
\item \textsuperscript{82} See Skinner, \textit{supra} note 59, at 244.
\item \textsuperscript{83} See id.
\item \textsuperscript{84} See id.
\item \textsuperscript{85} See Coe v. Commonwealth of Australia, (1979) 24 A.L.R. 118.
\item \textsuperscript{86} See id. at 123.
\item \textsuperscript{87} See id. at 121, 125, 128.
\item \textsuperscript{88} See id. at 130-31.
\item \textsuperscript{89} (1992) 107 A.L.R. 1. Eddie Mabo was the leader of the Meriam People. See \textit{Manwaring}, \textit{supra} note 62, at 191 n.70. He initiated the action, but did not live to hear the verdict of the High Court. See id. In January 1992, he died of cancer. See id.
\item \textsuperscript{90} See \textit{Mabo}, 107 A.L.R. at 8.
\end{itemize}
Meriam People inhabited the Murray Islands in the Torres Straits for generations prior to the first European contact. In 1879, the Murray Islands were annexed by Queensland. The Meriam People sought a declaration from the court that stated that the Meriam People were entitled to the Murray Islands as owners, possessors, occupiers, or as persons entitled to use and enjoy the Islands. The plaintiffs also sought a declaration from the Court that the Murray Islands were not “Crown Lands” within the meaning of Crown Land legislation and that the State of Queensland was not entitled to extinguish the title of the Meriam People. In a sweeping six to one opinion, the High Court declared: (1) the Murray Islands were not Crown Land; (2) that the Meriam People were entitled to possession, occupation, and use of the Murray Islands, excluding land that had been appropriated for administrative purposes and was inconsistent with native title; and (3) that the title of the Meriam People was subject to the powers of the State of Queensland provided that exercise of the Aborigines’ power is not inconsistent with the laws of the Commonwealth. In addition, a majority of the Court found that the common law of Australia does not embrace the doctrine of terra nullius. The majority also established the elements that would be required to claim native title: (1) the group must show that it has continued to observe the customs of the group, and (2) that the group has substantially maintained a traditional connection with the land. Furthermore, a plurality provided the Aborigines

91 See id.
92 See id. at 11. Prior to the annexation of the Murray Islands, Queen Victoria first extended the boundaries of Queensland. See id. However, before the territory of Queensland was extended, the governor of Queensland had to issue a proclamation that the Murray Islands were part of Queensland after the Queensland legislature passed a law annexing the islands. See id. Although these steps were taken, some question was later raised as to the legality of the first annexation, but any doubt was later resolved with the passage of an 1895 law ensuring the annexation. See id. at 14-15.
93 See id. at 55.
94 See id.
95 See id. at 56.
96 See id. at 41 (opinion of Brennan, J.); id. at 7 (opinion of Mason & McHugh, JJ.); id. at 82-83 (opinion of Deane & Gaudron, JJ.); id. at 142 (opinion of Toohey, J.).
97 See id. at 43 (opinion of Brennan, J.); id. at 83 (opinion of Deane & Gaudron,
with recourse to protect their native title with either legal or equitable remedies.98

Mabo was significant for two reasons. First, the decision rejected the common law doctrine of terra nullius, which had been the law for more than two hundred years.99 Second, the decision expanded to a national scale the return of Aboriginal land, which the Land Rights Act had begun to do in the Northern Territory.

The government of Australia responded to the Mabo decision with the passage of the Native Title Act of 1993.100 The Act became effective on January 1, 1994 and is applicable to all the states.101 The purpose of the Native Title Act is to regulate the native title that the High Court found existed at common law and to establish procedures for making and adjudicating land claims.102 The Act also provides for compensation in cases where native title has been extinguished.103 The language of the Act suggests that extinguishment has occurred where the government has granted freehold or leasehold estates.104 In cases where the native title has not been extinguished, the native title holders have a right to

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98 See id. at 44 (opinion of Brennan, J.).
99 In rejecting the doctrine of terra nullius, Justice Brennan acknowledged that “to state the common law in this way involves the overruling of cases which have held the contrary.” Id. at 41 (opinion of Brennan, J.). However, “[t]he common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius.” Id. (opinion of Brennan, J.). Critics of the Mabo decision, on the other hand, believed that the High Court overstepped its boundaries:

The judicial approach was that the determination of the existence and protection of native title was a judicial function. All of the political solutions that followed have had this somewhat absurd idea as the foundation of their approaches. The idea is absurd because while courts may be perfectly adequate to resolve a dispute between a few parties, they are hardly the vehicle for major political, social, and economic reforms.

100 See Native Title Act, 1993, pmbl.
101 See id. §§ 5, 6, 8.
102 See id. § 3.
103 See id. § 51.
104 See generally id. at pmbl.
negotiate compensation for future acts on the land.\textsuperscript{105} Thus, the native title holders may be entitled to payments tied to the profits made, income derived, or anything produced from the land.\textsuperscript{106} As a consequence of \textit{Mabo} and the Native Title Act of 1993, more than 300 native title claims were filed by December 1996.\textsuperscript{107}

Shortly after enactment, the Native Title Act was challenged in court. In 1994, the state of Western Australia went before the High Court to contest the validity of the Act.\textsuperscript{108} The Court ruled against the state of Western Australia and held that the 1993 Native Title Act was valid.\textsuperscript{109} The Native Title Act essentially superseded Western Australia’s own native title legislation, the Land (Titles and Traditional Usage) Act,\textsuperscript{110} because the latter was found to be inconsistent with both the Racial Discrimination Act of 1975\textsuperscript{111} and the Native Title Act itself.\textsuperscript{112}

Given the long entrenchment period of the doctrine of \textit{terra nullius}, the recognition of Aboriginal land rights unfolded with surprising speed. The rapid pace with which the concept of native title evolved can be directly traced to \textit{Mabo} and the legislative response to it. Before the government could enact the 1993 Native Title Act, however, Aboriginal groups filed their claims to land under \textit{Mabo}.\textsuperscript{113} One of those groups was the Wik Peoples.\textsuperscript{114} Their claim provided the High Court with the opportunity to clarify

\begin{itemize}
\item \textsuperscript{105} See id. § 33.
\item \textsuperscript{106} See id.
\item \textsuperscript{107} See Bravo, supra note 59, at 554. Facilitating the filing of the native title claims was the fact that the Native Title Act also provided for legal assistance to Aborigines who wanted to pursue a native title claim. \textit{See Native Title Act, 1993, pmbl., § 202.}
\item \textsuperscript{109} See Western Australia, 183 C.L.R. at 488-89; Hodgkinson, supra note 108, at 870.
\item \textsuperscript{110} Land (Titles and Traditional Usage) Act, 1993, (W. Austl. Stat.).
\item \textsuperscript{111} Racial Discrimination Act, 1975 (Austl.).
\item \textsuperscript{112} See Hodgkinson, supra note 108, at 870 n.75.
\item \textsuperscript{113} See Wik Peoples v. State of Queensland (1996) 141 A.L.R. 129, 165; McGinley, supra note 61, at 709 n.109 (listing 13 native title cases, including Wik, that were filed prior to the enactment of the Native Title Act of 1993).
\item \textsuperscript{114} See Wik, 141 A.L.R. at 165.
\end{itemize}
areas in the law that remained unclear after *Mabo* and the 1993 Native Title Act.

**IV. Significance of the Case**

*Mabo* specifically addressed the issue of a native title claim over government land. The facts in *Mabo* did not provide the High Court with the opportunity to decide the relationship between native title and pastoral leases. The Wik Peoples filed their claim after the *Mabo* decision but before the 1993 Native Title Act was enacted. Similar to *Mabo*, the Act did not specifically address whether a pastoral lease would extinguish native title. Amidst this legal vacuum, *Wik* surfaced and proceeded through the Australian courts. The High Court’s holding that pastoral leases do not extinguish native title and that the two can co-exist has had far reaching consequences. Although the effect of *Wik* is significant, it is tempered by various factors including a qualification made by the *Wik* Court and the subsequent legislation that has arisen to negate *Wik*.

**A. Apparent Far Reaching Consequences**

*Wik* significantly increased the amount of land that is available for native title claims. Fourteen percent of Australian land is under indigenous title, twenty-three percent is Crown land, twenty-one percent is composed of freehold estates, and forty-two percent consists of pastoral leases. *Mabo* made available an additional twenty-three percent of the land to native title claims. Recognizing that pastoral leases are also subject to native title claims, *Wik* effectively increased Australian land subject to a

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115 See id. The Native Title Act is not the subject of this appeal. See id.
116 See id. at 251.
117 See supra notes 35-44 and accompanying text.
118 Although the *Wik* Court held that the interests of pastoralists can co-exist with those of a native title holder, it also added that if the interests between a pastoralist and a native title holder are inconsistent, then the native title holder must yield to the interests of the pastoralist. See supra note 43 and accompanying text.
119 See infra notes 155-94 and accompanying text.
120 See Warby, supra note 11, at 1.
121 See id.
native title claim from thirty-seven percent to seventy-nine percent. In other words, potentially three-fourths of Australia is subject to a native title claim.

The pastoralists stand to lose a tremendous amount, on both a personal and economic level, from the High Court decision. In many cases, pastoralists have leased their land from the government for several generations. The lengthy passage of time has often meant that pastoralists have developed a personal attachment to the land. Over time, the occupants of the land also have made capital investments to the land and allowed themselves to develop expectations of continued, unfettered use of it. The High Court decision, however, raises questions as to what the pastoralists can do on the land and to what extent they will have to consult with the Aboriginal claimants or native title holders. Furthermore, recent experience has shown that overlapping claims for the same land often exist between different Aboriginal groups. The complexity of having to consult outside parties is exacerbated when the pastoralists must consult different Aboriginal groups who possess different interests and traditions. The pastoralists, therefore, sit in a state of uncertainty with respect to their land rights and their obligations to the native title holders.

Wik similarly affects the miners adversely because "[m]any potential mining projects are also situated on pastoral lease land." Recognition of native title with respect to pastoral

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122 Thirty seven percent is the sum of 14% indigenous land plus 23% Crown land. The 79% includes 14% indigenous land, 23% Crown land, and 42% pastoral land. See supra notes 120-21 and accompanying text.

123 In Australia, "farmers" are individuals who own their land freehold, whereas "pastoralists" occupy the land under pastoral leases. See Crichton, supra note 18, at 1.

124 See id.

125 In fact, the Native Title Act's preamble appeared to classify pastoral leases with freehold estates in reference to their immunity from native title claims. See Nikki Tait, Settling a Beef in the Outback: Australia's Government Seeks a Solution to Claims That Will Appease Both Cattle Farmers and Aboriginals, Fin. Post, Apr. 15, 1997, at 2, available in LEXIS, News Library, Non-USNews File.

126 See id.

127 See id.

128 See id.

129 Id.
leaseholds would mean that mining companies will also have to negotiate mining leases with traditional land owners.\textsuperscript{130} Under the 1993 Native Title Act, native title holders are entitled to compensation on just terms if their interests are extinguished.\textsuperscript{131} If their interests are impaired but not extinguished, the native title holder is also entitled to compensation.\textsuperscript{132} Furthermore, like the pastoralists, the mining companies may also have to negotiate with Aboriginal groups with overlapping claims.\textsuperscript{133} The mining companies, therefore, face both uncertainty as to their legal title over the land and additional costs in securing mining agreements.\textsuperscript{134} Accordingly, this uncertain and more costly environment may translate into a decrease in mining activity in Australia.\textsuperscript{135}

\section*{B. Restraining Factors}

Although Wik could potentially affect a significant portion of the Australian landscape, the decision’s bite may be less threatening than its bark. The potential effect of Wik is curtailed by the small population of Aborigines and the requirements needed to establish native title pursuant to the 1993 Native Title Act.\textsuperscript{136} Wik is further tempered by the Court’s decision to yield native title to a grantee’s rights under a pastoral lease if any inconsistencies should surface between the two.\textsuperscript{137} If native title

\textsuperscript{130} See id.; Native Title Act, 1993, § 26 (Austl.).
\textsuperscript{131} See McGinley, supra note 61, at 722; Native Title Act, 1993, § 17.
\textsuperscript{132} See McGinley, supra note 61, at 722; Native Title Act, 1993, §§ 17, 240.
\textsuperscript{133} See McGinley, supra note 61, at 697.
\textsuperscript{134} See id. at 695.
\textsuperscript{135} See id.
\textsuperscript{136} See supra notes 130-32 and accompanying text.
\textsuperscript{137} See Wik Peoples v. State of Queensland (1996) 141 A.L.R. 129, 190. The Court’s temperance in Wik appears consistent with Mabo. Although Mabo represented a significant turning point in the recognition of Aboriginal land rights when it overturned the doctrine of \textit{terra nullius}, the Court was also mindful of establishing boundaries. For instance, Justice Brennan noted in Mabo that claims of native title would not be recognized against land where the government was found to have expressly or impliedly extinguished such rights. See Mabo v. State of Queensland (1992), 107 A.L.R. 1, 51 (opinion of Brennan, J.). Accordingly, Justice Brennan observed that the native title rights had been extinguished with respect to leases the government had issued. See id. at 52-53 (opinion of Brennan, J.). The majority in Mabo agreed with Justice Brennan,
survives the hurdles posed, the rights conferred under native title are not the same as those of an owner of a freehold estate. Thus, the extension of native title claims to pastoral leasehold estates may not be as threatening to the overall order of land use and ownership as the public reaction may indicate.

As an initial matter, the vast amount of Australian land subject to native title claim is only available to a very small fraction of the Australian population. In the 1996 census, 372,000 Australians, or approximately two percent of the population, were identified as Aborigines. Pursuant to Mabo and the 1993 Native Title Act, claimants of native title must establish (1) that their rights and interests to the claimed land are consistent with their traditional laws and customs, and (2) that through the traditional laws and customs of their Aboriginal group, they have maintained a connection to the land. Many Aborigines, however, have relocated to urban centers or have been displaced from their traditional lands. Consequently, the number of potential native title claimants represents less than two percent of the Australian population.

The small percentage of the population that may be entitled to a native title is likely to be further diminished if their rights are found to be incompatible with those of the lessee. The High although the lease provided Aboriginal peoples access to the leased land. See id. at 53 (opinion of Brennan, J.).

138 As stated in Wik, “rights of [Aborigines] entitled to the benefit of a common law native title are personal only.” See id. at 83 (opinion of Deane & Gaudon, JJ.). Furthermore, native title can only be possessed by the indigenous inhabitants and their descendants. See id. at 42 (opinion of Brennan, J.). Thus, native title is not alienable. See id. at 83 (opinion of Deane & Gaudon, JJ.); see id. at 42 (opinion of Brennan, J.). Similarly, the 1993 Native Title Act defines native title to mean “the rights and interest that are possessed under the traditional laws and customs of the Aboriginal peoples and Torres Straits Islanders in land and waters that are recognized by the common law.” McGinley, supra note 61, at 719 (emphasis added).

139 See supra note 18 for a description of the extent of the reaction to Wik.

140 See Warby, supra note 11, at 1.

141 The total population of Australia is approximately 18 million. See Court Supports Aboriginal Rights to Make Land-Ownership Claims, supra note 58, at 1.

142 See Native Title Act, 1993, § 223(1).

143 See Warby, supra note 11, at 1. A National Aboriginal and Torres Strait Islander Land Fund was established for the purpose of assisting displaced Aboriginal People in the acquisition of land. See Native Title Act, 1993, § 201.
Court, in *Wik*, stated that in evaluating native title claims against pastoral leasehold estates, the rights of the Aborigines to the land would be balanced against the grantees' rights under the pastoral leases. If inconsistencies in the use of the land were found between the two, the native title rights would yield to the rights of the grantees. The Aborigines effectively have a qualified basis of support upon which to claim tribal ownership of land. *Wik*, therefore, is not the sweeping victory it may appear to be for the Aborigines.

Having satisfied the continuous connection and compatibility requirements, the successful Aborigine claimant would obtain native title which, by definition, implies a limited ownership interest. The native title holders are entitled to continue their traditional use of the land as prescribed by the customs and laws of their Aboriginal group. The rights and interests of a native title holder usually include hunting, gathering, and fishing. Furthermore, these rights are not transferable or alienable. Accordingly, the rights of a native title holder are significantly less than that of an owner of a freehold estate or a lessee of a leasehold.

In summary, the recognition of the co-existence of pastoral

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145 See *id.*
146 See *Court Supports Aboriginal Rights to Make Land-Ownership Claims*, supra note 58, at 1.
147 Moreover, the Court also found that lands subject to legally-incorporated mineral leases were outside the reach of native title claimants. See *Wik*, 141 A.L.R. at 292-93. The Court noted that the Comalco Agreement was given statutory force with the enactment of the Comalco Act. See *id.* at 289. Consequently, rights conferred under the Comalco Agreement were elevated to the same status as if the rights had been conferred by legislation. See *id.* at 290. The Court observed that if individuals or groups lost rights that they previously had, it was "the result of the operation of legislation . . ." *Id.* Under *Mabo*, native title could generally be extinguished by the state. See *Mabo v. State of Queensland* (1992) 107 A.L.R. 1, 55-56. The *Wik* Court, therefore, reinforced *Mabo*'s position on parliamentary action that extinguished native title rights and, thereby, reduced the amount of land that could have been subject to native title claims.
148 See supra note 138 and accompanying text.
149 See Native Title Act, 1993, § 223.
150 See *id.*
151 See *Mabo*, 107 A.L.R. at 42.
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interests with those of native title holders is restrained by several factors, including the limited scope of the rights afforded to native title holders and, once the rights are obtained, that they may be required to yield to the interests of pastoralists. The existence of a native title holder does not mean that the commercial operations on the land must cease. If the interests of the native title holder and the leaseholder are compatible, the two parties can continue to use the land as each has done in the past. Should the native title yield to the pastoralists and become extinguished, then the land would be solely vested in the pastoralists, subject to the lease terms dictated by the government. In effect, the Aboriginal groups have essentially received the right to be compensated for the termination of their interest in land. Aside from this right being extended to pastoral lands, Wik failed to provide the Aborigines with any additional relief or remedy.

C. Political Reaction to Wik

The effect of Wik and the potential for native title claims may be further curtailed with the proposed 10-Point Plan that Prime Minister John Howard introduced in 1997 in response to the Wik decision. The 10-Point Plan is intended to implement the High Court's decision and address the concerns of the mining and pastoral interests. The plan is summarized as follows:

(1) Actions by the government during the period beginning

152 See supra notes 144-46 and accompanying text. To establish native title, the claimant must show that the Aboriginal group had a continuous connection to the land. See McGinley, supra note 61, at 701; Native Title Act, 1993, § 223(1). Therefore, the two parties must have co-existed on the land prior to the filing of the native title claim.

153 See supra notes 144-45 and accompanying text.

154 The indigenous people of North America were similarly displaced from their native land. For instance, in Johnson v. M'Intosh, the United States Supreme Court recognized that "discovery gave [the United States] an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." 21 U.S. (8 Wheat.) 543, 587 (1823) (holding land grant by a Native American tribe to private individuals invalid). The Court noted that the right of discovery was "confined to countries 'then unknown to all Christian people.'" Id. at 576.


with the commencement of the Native Title Act on January 1, 1994 and the High Court's *Wik* decision on January 23, 1996 would be validated through legislation. For example, the grant of a lease or mineral exploration license would be validated even if they were entered into with the erroneous assumption that native title had been extinguished with prior pastoral leases. Accordingly, the government would be required to follow the procedures under the Native Title Act of 1993 which demands the payment of compensation.

(2) The permanent extinguishment of native title in "freehold, residential, commercial, and certain agricultural leases and public works" would be confirmed.

(3) The essential services provided by the government would be allowed to continue without extinguishing native title. The drafters wrote this point because they were concerned that the government would not be able to perform essential services without first getting the approval of native title holders, especially in some of the rural and remote areas. With the adoption of this point, the government would be able to provide essential services without having to obtain permission from the native title holders.

(4) The rights of the pastoralists would prevail if those rights were found to be inconsistent with the native title holders. This point would reinforce *Wik*, which held that the interests of the native title holders should yield to the interests of the pastoralists if the two are incompatible. This point also would provide the pastoralists with additional security to conduct "primary production" on pastoral leases without having to negotiate with

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157 See Amended *Wik* 10 Point Plan, supra note 155, at 1.
158 See *Wik*: The 10-Point Plan Explained, supra note 156, § H(1.1).
159 See id. § H(1.3).
160 See id. § H(2.2).
161 See id. § H(3.2).
162 See id. § H(3.1).
163 See id.
164 See id. § H(4.1).
165 See id.
166 Primary production includes "(a) the cultivation of land; (b) the maintenance of animals or poultry for the purpose of selling them or their bodily produce, . . .; (c)
the native title holders with respect to any such activities.\textsuperscript{167} Essentially, native title holders or claimants would not be allowed to interfere with the management of pastoral lands.\textsuperscript{168} Furthermore, where native title holders have a right to negotiate a price for the acquisition of their interest, each state would be allowed to remove that right provided the native title holders are afforded alternative procedural rights.\textsuperscript{169}

(5) Upon demonstrating existing Aboriginal access rights to pastoral leases, such rights will be preserved until their native title claim is adjudicated by a court.\textsuperscript{170} Once a claim is finalized, the court would be required to specify the native title rights that may co-exist with the pastoralists.\textsuperscript{171}

(6) The registration test for claimants in areas subject to mining would be "strengthened."\textsuperscript{172} This provision was included to appease the mining industry, which complained of the uncertainty it faced given that, after Wik, seventy-eight percent of Australian land was subject to native title and that its members would have to negotiate mining and exploration activity with the native title holders.\textsuperscript{173}

(7) The right to negotiate would be withdrawn with respect to acquisitions for private developments in towns and cities, although compensation would be paid if native title can be proven.\textsuperscript{174} Acquisitions for private development outside of towns and cities would be subject to the right to negotiate, but a "tougher registration test" would be imposed on native title claimants.\textsuperscript{175}

(8) Without extinguishing native title rights and incurring fishing operations; (d) forest operations; or (e) horticulture; and includes the manufacture of dairy produce by the person who produced the raw material used in that manufacture." Id. at Attachment (citing Income Tax Assessment Act, § 6 (1936) (Austl.)).

\textsuperscript{167}See id. § H(4.2).
\textsuperscript{168}See id. § H(4.4).
\textsuperscript{169}See id. § H(4.5).
\textsuperscript{170}See id. § H(5.1).
\textsuperscript{171}See id. § H(5.2).
\textsuperscript{172}See id. § H(6.1).
\textsuperscript{173}See id. §§ H(6.1), (6.2).
\textsuperscript{174}See id. § H(7.1).
\textsuperscript{175}See id. § H(7.2).
compensation liability, the government would maintain the ability “to regulate and manage surface and sub-surface water onshore and to manage offshore waters.”\textsuperscript{176} This provision was in response to the native title claims to water, fisheries, and offshore minerals that were made over onshore and offshore waters.\textsuperscript{177}

(9) New claims would be subject to a strengthened registration test\textsuperscript{178} and a sunset clause of six years would apply to all claims under the Native Title Act.\textsuperscript{179} In other words, parties claiming to have native title would have to file their claims within six years from the commencement of the amendment or lose their claim.\textsuperscript{180} This provision would provide closure to the native title episode and certainty to land tenure in Australia.

(10) Measures would be implemented to encourage “voluntary but binding agreements” as an alternative to the native title process available through the judiciary.\textsuperscript{181} The facilitation of voluntary agreements would help ease the overload of native title claims that have been filed in the courts.\textsuperscript{182} Also, it would help reduce the expensive legal fees associated with litigation.\textsuperscript{183} Although this provision appears to attempt to help the pastoralists with their potentially burdensome legal costs, the pastoralists may not be

\textsuperscript{176} Id. § H(8.1).
\textsuperscript{177} See id.
\textsuperscript{178} See id. § H(9.2).
\textsuperscript{179} See id. § H(9.4). In December 1997, the Senate amended the bill and eliminated the sunset clause. See Warby, \textit{supra} note 11, at 2; \textit{supra} notes 184-92 and accompanying text.
\textsuperscript{181} See id. § H(10.1).
\textsuperscript{182} Over 500 native title claims have been filed. See id. § H(9.1).
\textsuperscript{183} In recognizing the financial burden that legal fees would have on pastoralists, Prime Minister Howard announced that legal aid would be made available to pastoralists to respond to native title claims. See id. § J. Prime Minister Howard also announced a new general rule whereby “parties to claims will not have to bear the costs of other parties irrespective of the outcome.” See id. § K. In Australia, the loser in a case is required to pay the legal costs of the winner. See, e.g., Wik Peoples v. State of Queensland and Others, (1996) 141 A.L.R. 129, 189 (ordering the costs of appeal to be paid by the unsuccessful appellant); see generally GERARD B. CARTER, \textit{AUSTRALIAN LEGAL SYSTEM} 48-49 (1995) (stating that the costs of an action are usually paid by the loser).
willing to enter into agreements with Aboriginal groups until it is decided, after exhaustive introduction of evidence, that they are entitled to native title. In other words, the pastoralists may not be willing to surrender any rights to the Aboriginal groups unless they absolutely have to do so.

The future of the proposed 10-Point Plan remains uncertain. The 10-Point Plan passed the House of Representatives in October 1997.\textsuperscript{184} The Senate, however, amended the bill and eliminated the sunset clause, re-established a full right to negotiate, and subjected the Native Title Act to the Racial Discrimination Act.\textsuperscript{185} The Prime Minister rejected the Senate’s amendments because the 10-Point Plan, passed by the House, already reflected a compromise.\textsuperscript{186} The Prime Minister reintroduced the 10-Point Plan, also known as the \textit{Wik} Bill, to Parliament on March 9, 1998.\textsuperscript{187} In April 1998, the Senate rejected the 10-Point Plan again.\textsuperscript{188} The Senate’s rejection of the 10-Point Plan provided the Prime Minister with the authority to invoke the Constitution’s processes for resolving disagreements between Parliament.\textsuperscript{189} In other words, the Prime Minister was placed, and continues to be, in the position to dissolve both houses of Parliament, call for early elections to take place by October 29, 1998, and put the measure to Parliament once again.\textsuperscript{190} In June 1998, the Deputy Prime Minister gave the Senate a deadline of July 4, 1998 to pass the \textit{Wik} Bill or face dissolution.\textsuperscript{191} While the Senate negotiates the \textit{Wik} Bill for the third time,\textsuperscript{192} the 10-Point Plan remains a viable political

\textsuperscript{184} See Warby, supra note 11, at 2.
\textsuperscript{185} See id.
\textsuperscript{186} See id.
\textsuperscript{188} See Christopher Zinn, Australian PM Set to Call Poll Over Land Rights, GUARDIAN, Apr. 10, 1998 at 1, available in 1998 WL 3088281.
\textsuperscript{189} See Contractor, supra note 187, at 1.
\textsuperscript{191} See Christopher Zinn, Hanson Eager to Face Early Poll, GUARDIAN, June 17, 1998, at 1, available in 1998 WL 3095789.
\textsuperscript{192} See Lenore Taylor, Election in Balance as Wik Talks Continue, AUSTL. FIN. REV., at 1, available in 1998 WL 12567637.
If the 10-Point Plan is passed and enacted into legislation even with the Senate amendments, the legislation would significantly negate the scope of *Mabo* and *Wik*. The heightened standards that would be required to establish native title would reduce the number of potential claimants.\(^{193}\) Also, the expanded rights of the pastoralists would significantly reduce the rights of the Aborigines with respect to the land.\(^{194}\) These changes would certainly benefit the pastoral and mining industries and significantly reduce land rights that Aborigines recently acquired pursuant to *Mabo* and *Wik*.

### V. Conclusion

The impact of *Wik* has been overestimated. The recognition of native title over pastoral land does impact a significant area of land in Australia.\(^{195}\) The *Wik* Court, however, held that in the event that native title is inconsistent with pastoral interests, then pastoral interests should prevail.\(^{196}\) This is a significant qualification to the seemingly broad extension of Aboriginal land rights.\(^{197}\) The qualified support that Aboriginal land rights received in *Wik* effectively maintains the relationship between the two interests at a near status quo. The Aborigines who are able to assert a successful native title claim over pastoral land have occupied and maintained a relationship to the land for generations, during which time the pastoralists have also occupied the same land.\(^{198}\) The two groups have, therefore, existed on the same land for generations and gone about their own business. The *Wik* decision simply acknowledges that the Aborigines, as occupiers of the same land, also have a limited ownership interest in the land. If their interest should interfere with those of the pastoralists, however, their

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\(^{193}\) See Court Supports Aboriginal Rights to Make Land-Ownership Claims, supra note 58, at 1.

\(^{194}\) See supra notes 164-69 and accompanying text.

\(^{195}\) See supra note 122 and accompanying text.


\(^{197}\) See Court Supports Aboriginal Rights to Make Land-Ownership Claims, supra note 58, at 1.

\(^{198}\) See supra note 152 and accompanying text.
native title is extinguished and the pastoralists are able to go on about their business. Essentially, the pastoralists continue to have primary control over the land, as it has been assumed for generations.

The real fear of Wik is the litigation that it could possibly generate. Extending native title claims to pastoral lands increases the number of potential claimants because pastoral leases comprise just over forty percent of land tenure in Australia. Also, where interests are thought to be inconsistent, litigation may be required to extinguish native title. Litigation may also be required when native title may be impaired and just compensation is due, or where the holder of native title may be entitled to negotiate compensation for future acts. Facilitating, and possibly encouraging, litigation is a fund that was established under the 1993 Native Title Act to help Aborigines file their native title claims. The 10-Point Plan of Prime Minister John Howard addresses these concerns by promising to assist pastoralists with litigation costs and to strengthen the requirements for establishing a native title claim. The measures proposed by the Prime Minister may not only level the playing field by providing the pastoralists with comparable legal assistance, but by strengthening the requirements needed to prove native title, may also help to tilt it in favor of the pastoralists and mining companies that are situated on pastoral lands.

The legislative response to Wik, however, should not go too far and effectively render Mabo and the 1993 Native Title Act void. The legislature needs to amend the 1993 Native Title Act to incorporate the decision of the Wik Court. In attempting to address Wik legislatively, the Prime Minister has proposed legislation that negates Wik and appears to thwart the progress achieved by Mabo and the 1993 Native Title Act. The increased

199 See Wik, 141 A.L.R. at 190.
200 The last “point” of the 10-Point Plan dealt exclusively with the reduction of litigation and associated costs. See supra notes 181-83 and accompanying text for a discussion of this last part of the 10-Point Plan.
201 See supra note 120 and accompanying text.
202 See Native Title Act, 1993, § 203.
203 See supra notes 178, 181 and accompanying text.
requirements for establishing a native title claim may significantly affect the number of claimants that could assert a claim. Also where native title exists, the 10-Point Plan would disallow the opportunity to negotiate under certain circumstances. These measures would negate the recognition of Aboriginal land rights that the 1993 Native Title Act acknowledged were long overdue.

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204 See supra notes 161-63, 166-69, 174 and accompanying text.

205 See Native Title Act, 1993, pmbl. The Native Title Act of 1993 was enacted under the government of Prime Minister Paul Keating. See Crichton, supra note 18, at 1. The Act noted that the people of Australia “intended to rectify the consequences of past injustices.” Native Title Act, 1993, pmbl.

The move toward reconciliation between the Australian government and indigenous people, however, appears to have slowed down under Prime Minister John Howard’s government. See Mark Beeson, Mr. Howard and the ‘Stolen Children,’ ASIAN WALL ST. J., June 5, 1997, at 1-2, available in 1997 WL-WSJA 11008753. Before his election, Mr. Howard assured voters “that his main goal was to make them ‘relaxed and comfortable’ and . . . that he would govern ‘for all of us.’” Id.

Prime Minister Howard described Wik as “very disappointing” and acknowledged that Wik “pushed the pendulum too far in the aboriginal direction.” Crichton, supra note 18, at 1-2. He observed that “[t]he 10-Point Plan will return the pendulum to the centre.” Id. at 2. He described the 10-Point Plan as containing “bucketfuls of extinguishment.” Id. at 2 (referring to extinguishment of Wik).

The 10-Point Plan has been extensively criticized. See Warby, supra note 11, at 2. Criticism of the 10-Point Plan has had racial undertones. See id. The Prime Minister has “been called ‘racist scum’ by one prominent Aboriginal leader and claims have been made that Australia is a ‘new South Africa.’” Id.