

IMPLICATIONS OF *WIK* FOR COMPANY DIRECTORS

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I. INTRODUCTION

The *Wik* decision did not fundamentally change the law, although it has fundamentally changed land management in Australia. The rules used to protect native title from pastoral leasehold grants are the same rules which protect the property rights of an individual (the Affected Individual) from actions of the Government. Those rules are:

- where there is room to construe the rights granted in a way which does not interfere with the Affected Individual's rights, the grant will be given that narrow construction;
- grantees cannot rely on the development of their rights over time by the practices they have employed on the land. They derive their rights only from the grant of rights to them;
- for a statute (and a grant made under it) to expressly provide for the extinguishment of the Affected Individual's rights, the expression must be distinct and clear;
- unless the statute (or the grant made under it) expressly provides for the extinguishment of the Affected Individual's rights, the burden will be borne on the grantee to establish that implied rights have been granted to extinguish the Affected Individual's rights; and
- for extinguishment to arise from the implication of rights (in the absence of a clear expression of extinguishment) the implied rights must be a *necessary* aspect of the rights expressly granted and must be such that the Affected Individual cannot continue to enjoy its rights with that implied right.

These rules are sometimes referred to as the presumption against derogation.¹ Corporate Australia must now assess the impact of the presumption against the derogation of the prior existing native title rights on the Crown grants they hold and hope to rely upon.

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¹ These principles emerge from *Stead v Carey* (1845) 135 ER 634.

II. INVALIDITY - THE *NATIVE TITLE ACT* PROTECTION

The NTA has cured the problems which might have been caused by the past invalidity of Crown grants. However, for the NTA's protection to apply (to 'past acts') the Crown grant protected must have been invalid, at least to some degree, due to the prior existence of native title. Many anomalies now exist between the protection available under the NTA for invalid past acts and the extinguishing effect of valid Crown grants under the common law applied by the High Court. The NTA is no guide to the common law effect of Crown grants on native title. Common law extinguishment (of native title) is less extensive in respect of many types of Crown grants than provided for under the NTA - in particular, pastoral leases, agricultural leases, activities over Crown reserves, and public works. When put into the practical context that few, if any, traditional Aboriginal owners would be likely to mount a case to argue that what was done in the past (most importantly, pre-1 January 1994) was invalid, much of the protection offered by the NTA becomes illusory, except as a deterrent to claims of invalidity.

III. VALIDITY - THE COMMON LAW PROTECTION

To the extent that the Crown had, prior to 1 January 1994, clearly and distinctly granted rights, *Wik* ensures that the rights granted will prevail over the native title rights which might have previously existed, and will do so validly. But the rights actually granted will only extend so far as those rights have been clearly and distinctly granted according to the presumption against derogation.

The underlying cause of the problems revealed in *Wik* is that, in many cases, the rights granted by Federal and State Governments are not sufficiently clear and distinct to cause the rights of native title holders to yield to those of Crown grant holders. The 'pastoral lease problem' is a classic example of this, as the High Court suggests that only 'grazing activities' or 'depasturing stock' (and those things necessarily incidental to grazing) is the extent of the authorised activities over some pastoral leasehold land.

Any attempt to pursue activities away from 'core' activities authorised in a Crown grant (given a 'narrow' interpretation) risks infringing native title. Authority must be found in the Crown grant if the 'non-core activity' is to avoid the risk of 'affecting' native title.

IV. THE *NATIVE TITLE* PROTECTION

The NTA is the sole mechanism by which native title may be dealt with 'inconsistently'. By invalidating acts which affect native title, the NTA provides strong protection for native title.

For corporate Australia, whether native title actually exists is less relevant in the short to medium term than whether native title has the *potential* to exist. This is because the 'native title problem' does not lie in the existence of native title, so much as the delay and cost caused under the processes of the NTA.

Subsequent to 1 January 1994, Crown grants which have not followed the 'future act' procedures under the NTA risk being held "invalid to the extent that the act affects native title" (s 22). To 'affect' native title, the act in question must purport to "extinguish native title or otherwise be wholly or partially inconsistent with the continued existence, enjoyment or exercise of native title rights".

If a Crown grant is invalid, then current case law suggests that the Crown (and the grantee) could become a trespasser. At the very least damages could arise. Reliance on 'invalid' rights is no defence.

A cautious approach pays full respect to s 22 of the NTA. Those things which have a likelihood of affecting native title require the compulsory acquisition of the native title concerned under a 'compulsory acquisition act' which complies with the requirements of the NTA. In turn, that will require notification to the potential native title holders under s 29 of the NTA. In such circumstances, the native title claimant may invoke the 'right to negotiate' procedures.

These 'right to negotiate' procedures require the State Government concerned, the interested parties (generally the grantee) and the native title claimant to negotiate in good faith for a period of up to six months to endeavour to reach an agreement by which the act affecting the native title may be permitted. If, after the six months has elapsed, no agreement is reached, any party may apply to the National Native Title Tribunal (NNTT) for a determination as to whether the act may be permitted and, if so, on what conditions. The NNTT has a further six months from the date of application in which to make its determination. If the Minister does not like the determination, the Minister can overrule it.

There is considerable doubt as to whether the NNTT has the power to make determinations owing to the principles laid down in *Brandy*.²

V. THE POLICY OF DISCLOSURE

The difficulties which the native title issue pose are, perhaps, best highlighted by the disclosure obligations for corporations raising investment funds under a prospectus. The same considerations are also relevant in considering whether management has discharged its general duties of care and diligence in managing the company's affairs.

The policy underlying the regulation of companies and managed trusts which seek investors' funds is that the managers of those entities stand in the best position to know and assess the risks and prospects an investor will face if the investor proceeds with the investment. Hence, corporate and fund managers are required to disclose as much about the securities they offer as they reasonably

2 *Brandy v Human Rights and Equal Opportunity Commission and Others* (1995) 183 CLR 245

ought to know and which is relevant to the investor's decision to invest. I shall refer to *corporate management* though the observations have equal application to managed trusts.

Whether a project planned by a company could be subject to native title considerations is a matter which falls within the ambit of the directors' responsibility. The risk of exposure to a native title claim can affect the viability of a given project. Where there is a native title risk and no investigation is made, and no plan is devised to deal with it, the board will risk liability under the *Corporations Law*, the *Trade Practices Act 1974* (Cth) and the common law tort of negligence. Subsequent to the publicity which the Century Zinc Mine negotiations and the *Wik* decision have attracted, it would be no defence for a director to argue that it was reasonable to be ignorant of the potential for a project to be subject to native title or its implications.

The *Corporations Law* policy requires a prospectus to convey information to potential investors and their professional advisers. The information required to be disclosed is that information which the investor and their professional advisers would reasonably require and reasonably expect to find in a prospectus for the purpose of making an informed assessment of:

- the financial position, profits and losses of the company;
- the rights attaching to the securities offered to the investor;
- the assets and liabilities of the company; and
- the prospects of the corporation.
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VI. NATIVE TITLE - WHERE IS IT?

From settlement, the Crown, whether in its Colonial, State or Federal form, has been allocating rights to Australian land; these are the 'Crown grants' to which we refer. Such grants range from freehold rights to rights to use the land or take resources from it. Other Crown land encompasses reservations, including not only State Parks, forests and riverfront reserves, but also things such as easements and 'unused roads' which pepper the continent. Since Federation, these grants have been issued under powers conferred on the Executive Government by statute.

All grants of less than freehold title which do not clearly grant rights of exclusive possession leave scope for native title to be claimed. Crown Land covers 70 per cent of the continental land mass of Australia; 42 per cent of the total is under pastoral lease.³ Recognition of native title by the NNTT is not necessary for it to attract the protection of the NTA.

3 Estimates given by the WA Government in their submissions in *Wik*.

VII. CONCLUSION

Native title has the potential to exist over all Crown land. Directors must, applying the *Wik* principles (stated above), review the grants of tenure over their land - the process is not unlike an 'old system' examination of title. These grants of tenure must be assessed to establish the extent of activity which the tenure permits and what the tenure might not permit. Once the scope of 'authorised activities' has been established, those activities must be assessed against the requirements which directors will have for its current and future operation.

Activity over Crown land for which authority was received following the commencement of protection under the NTA may well be "unauthorised", at least to the extent that native title or its enjoyment has been impaired under s 22 of the NTA. Directors must ascertain whether the 'future act procedures' were complied with in respect of that grant.

Directors must ascertain as best they can the activities which they might wish to undertake over the 'at risk land'. If the land tenure history doesn't accommodate that activity, then directors should:

- secure an upgrade in tenure to accommodate the activities concerned; and
- recognise that a potential conflict with native title claimants will exist.

Where upgraded tenure is desirable, the Crown should be required to:

- clear the upgrades through the NTA by lodging 'non-claimant applications'; and
- deliver the upgrades within stated time frames.

Directors should keep in mind that residual native title may be affected indirectly. The protection given to native title under the NTA is a special measure designed to protect Aboriginal rights and that protection will be given a very liberal application by the courts. The extent of the risk will depend on the nature of the claimed native title, the potential of its having survived extinguishment, and the directors' intended activity.