Chapter Twelve

The Wik Judgment

S E K Hulme, QC

Introductory

I suppose that at no time after 1788 was there greater goodwill towards Aborigines throughout the whole of Australia, than at the time of the constitutional amendment of 1967. The amendment did two things. It deleted from the Constitution s.127, providing that Aboriginal natives should be excluded from any reckoning of the numbers of the people of the Commonwealth or any part of it, and it gave to the Commonwealth power to pass laws with respect to Aborigines (by removing an exception which had taken "the aboriginal race" out of the s.51 (xxvi) power to make laws with respect to "The people of any race").

The amendment is one of only two amendments which the Australian people have ever approved, to give more power to the Commonwealth. (The other was the social services amendment of 1946). The proposal received the support of all major parties and almost all sections of the community. It was approved in all States, and by 90.77 per cent of the voters, a figure not approached before or since. It may be worth observing that the proposal was brought forward by a Liberal-Country Party government, led by Harold Holt.

Since that time many laws to do with Aborigines have been passed by the Commonwealth, and many billions of dollars have been spent by the Commonwealth. In recent years we have *Mabo* and the *Native Title Act* . The result has been that the overall health and happiness of the Aborigines is perhaps lower than at any time since 1967. No politician dares say so, and church and media would no doubt deny it; but I fancy that general community goodwill towards Aborigines is also at its lowest since 1967. If you doubt it, listen to the response when Pauline Hanson speaks on talk-back radio. There has been what is widely seen as a very expensive and almost total failure of perfectly good intentions. The tale continues.

The Comalco and Aurukun Matters

The decision in *Wik* [1] will be remembered famously for what it decided and said as to pastoral leases and native title. That must not be allowed to obscure the fact that the case raised other issues also. These arose in connection with what may be called the Comalco and Aurukun matters.

Within an area of native title claim, Comalco Aluminium Ltd. held several bauxite mining leases issued under an agreement called the Comalco Agreement. Entry into the Agreement by the State was authorised by the *Comalco Act* 1957 (Q'land), and that Act gave the Agreement itself statutory force. In paragraphs 40 to 95 of the Statement of Claim various attacks were made on the validity of the Act (these attacks were subsequently abandoned) and the Agreement and the leases.

It was said, broadly, that the Agreement and Special Bauxite Mining Lease ML 7024 were invalid, on the ground of procedural unfairness: the making by Queensland of the administrative decisions to enter into the leases would affect the holders of native title in the land concerned, and those holders had not been heard before the decisions were made; further, Queensland had an interest in the matter that Queensland was deciding (paras. 49 to 53). It was said that the Agreement and the leases were separately invalid, because Queensland owed fiduciary duties to

the Wik people, and duties as a trustee, and it had acted against their interest, in breach of those duties (paras. 54 to 58). It was said that Comalco knew of the breaches, and was liable to the Wik people, as a constructive trustee, for profit resulting to it as a result of those breaches (paras. 59 to 61); that Queensland and Comalco were both aware that the rights of the Wik people would be affected by the Comalco Agreement, and were liable in unjust enrichment (paras. 62 to 64); and that Comalco was liable for unlawful exploitation of the bauxite deposit (paras. 65 to 68).

A broadly similar attack was made in respect of an agreement called the Aurukun Associates Agreement, entered into under the *Aurukun Associates Agreement Act* 1975 (Q'land) (paras. 92 to 147). The substantial defendants to this attack were Queensland and Aluminium Pechiney Holdings Pty. Ltd.

Various issues had fallen by the wayside on the way to and before Drummond J., and in turn the High Court. There remained one broad question on the Comalco matter:

> "4. May any of the claims made in paras. 48A to 53, 54 to 58 (a), 59 to 61, 61A to 64 and 65 to 68 of the further amended statement of claim be maintained against the State of Queensland or Comalco Aluminium Ltd. notwithstanding the enactment of the *Comalco Act* , the making of the Comalco Agreement, the publication in the Queensland Government Gazette of 22 March, 1958 pursuant to s.5 of the *Comalco Act* of the proclamation that the agreement authorised by the *Comalco Act* was made on 16 December, 1957, and the grant of Special Bauxite Mining Lease No. 1 ?"

Question 5 asked a similar question as to Aurukun.

Drummond J. answered both questions, No. The High Court was unanimous in agreeing.

Brennan CJ. (Dawson and McHugh JJ. concurring), and Kirby J. (Toohey, Gaudron and Gummow JJ. concurring), gave broadly similar reasons. The plaintiffs did not attack the validity of the *Comalco Act* . That Act gave the Comalco Agreement statutory force. The Agreement entitled Comalco to require the issue of the lease. It followed that the granting of the lease could not lead to actionable claims. Question 5 was answered in like manner.

It will be seen that the decision was put on the basis that the *Comalco Act* authorised the granting of the specific lease. The judgments (I say it not in criticism, but simply as fact) said nothing as to the underlying allegations outlined above. But in the ordinary mining case, there will be no special legislation. Matters will rest solely on general *Mining Acts* , plus administrative action by the State. The result is to leave undetermined, save in special circumstances, the allegations concerning the State's allegedly unfair administrative procedures in determining and granting leases and its alleged position as a trustee, and breaches of that trust; and the consequent claims for damages.

There is need for very great caution in any area where attack on these grounds is available. The holder of the lease can find himself exposed to the claim that his lease is invalid, and that he must account for profits made and must pay on the basis of unjust benefit. The claims rest mainly on the views of Toohey J. as expressed in *Mabo No. 2* . Probably their best chance of acceptance has passed. But curious things can happen (see *Mabo Nos 1 and 2)* , and it is to be remembered that Toohey J. has been in the majority in *Mabo No. 2* and *Wik* .

What is the field in which these attacks are open? I see nothing to distinguish leases under the *Land Acts* from leases under the *Mining Acts* in this respect, and nothing to distinguish Queensland from the other pastoral States. Save where there has been special legislation (as with most very large mining projects), all mining and pastoral leases in the pastoral States seem to me exposed to the possibility of these claims.

A further field exists. Most grants in fee simple have been made by executive action under general *Land Acts* legislation. One would think the administrative procedure and trustee attacks would be *stronger* here, since we know that a (valid) grant in fee simple *does* , and *totally* , extinguish native title. Torrens title legislation may intervene to protect the holder, but this seems uncertain. I believe that a claim over land held in fee simple is already in the courts.

The Pastoral Lease Issue

(a) Introduction

This is the issue on which the fame or notoriety of *Wik* will chiefly depend. Question 1B asked, in relation to one lease:

"....

> (b) does the pastoral lease confer rights to exclusive possession on the grantee ?
>
> (c) does the creation of the pastoral lease that has...(this) characteristic confer on the grantee rights wholly inconsistent with the concurrent and continuing exercise of any rights or interests which might comprise such Aboriginal title or possessory title of the Wik Peoples and their predecessors in title which existed before the *New South Wales Constitution Act* 1855 (Imp) took effect in the Colony of New South Wales ?
>
> (d) did the grant of the pastoral lease necessarily extinguish all incidents of Aboriginal or possessory title of the Wik Peoples in respect of the land demised under the pastoral lease ?"

Question 1C asked similar questions as to other leases.

At first instance, Drummond J. held that he was bound by the decision of the Full Court of the Federal Court in *North Ganalanja Aboriginal Corporation v. Queensland* [2] to hold that the mere *grant* of a pastoral lease extinguishes native title, provided the lease is for a significant period, and subject to any inconsistent provision in the lease; and that nothing turns on whether the rights under the lease and the native title can both be enjoyed without interfering with each other.

Pastoral leases are directed predominantly to the back-country. They go a long way back in our history. They seek to reconcile the large-scale which successful pastoral activity must take in those often arid areas, and the security of tenure required for capital investment to that end, with the desire of government to retain ownership of the land in order to meet the demands of the unknown future.

In almost every State a statute called something like the *Land Act* authorises the granting of such leases, usually and perhaps invariably prescribing a grant to be made in formal legal language. The lease is frequently but not always expressed to be "for pastoral purposes only". The grant is usually made with reservation to the Crown of all minerals (as are all modern grants in fee simple). The lease frequently imposes obligations for the expenditure of money on such matters as fencing, bores, and these days airstrips. Almost invariably it reserves a right of entry to persons authorised by the Crown, for any reason, including inspection and survey. It is usually expressed to be subject to rights arising under mining legislation (as is most land held in fee simple). It may oblige the lessee to permit the passage and depasturing of cattle moving along recognised stock routes. In some States (but not Queensland) it is customary for the lease to include a clause requiring the lessee to permit Aboriginal natives to hunt, etc. in their traditional manner.

(b) The Minority View as to Exclusive Possession

Because it represents traditional analysis of a known kind, and sets up the issues more clearly, it is convenient to begin with the judgment of Brennan CJ. (Dawson and McHugh JJ. concurring), holding that the grant of the lease *did* extinguish native title.

The judgment rather jumps into the issue without that prior explanation so useful to the non-lawyer members of this Society, and accordingly it might be helpful to make a few preliminary remarks as to the significance of "exclusive possession". The basal distinction between a person who has a mere personal licence to be on someone else's land (e.g. a visitor, or a spectator at a football match, or each of us here this morning), and a person who has an interest constituted by a lease of the land, revolves around this concept.

Exclusive possession is in a sense both the touchstone and the consequence of being a lessee. In general, if you have a right to exclusive possession, you are a lessee. If the instrument under which you hold is a lease, you are entitled to exclusive possession. Windeyer J. spelled it out in *Radaich v. Smith* :[3]

> "What then is the fundamental distinction which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise."

In determining whether or not the transaction is one of lease, the court of course looks at the language of the document concerned. Brennan CJ. went through the terminology of the Act and the technical language of lease which the Act used for itself and prescribed for the lease. He cited a passage from an earlier judgment of his own in *American Dairy Queen (Qld) Pty. Ltd. v. Blue Rio Pty. Ltd* :[4]

> "By adopting the terminology of leasehold interests, the Parliament must be taken to have intended that the interests of a lessee, transferee, mortgagee or sublessee are those of a lessee, transferee, mortgagee or sublessee at common law, modified by the relevant provisions of the Act. The incidents of those interests are the incidents of corresponding interests at common law modified by the relevant provisions of the Act."

His Honour called in aid the reasoning of the Privy Council in *AG v. Ettershank*,[5] where their Lordships said as to the *Land Act* 1862 (Vic.):

> "What the Act of 1862 authorises and prescribed in the case of a selector, is that he shall receive `a lease', and by s.22 such lease is to contain `the usual covenant for payment of rent', and a condition for re-entry on non-payment thereof. When, therefore, the statute authorises a lease with these usual and well understood provisions, it is reasonable to expect that the Legislature intended that it should operate as a contract of the like nature between private persons."

His Honour said that if the leasehold is regarded as a mere bundle of statutory rights, not as an estate held of the Crown, the same is equally true of a grant of land in fee simple.[6]

That was the main thrust of the argument. His Honour dealt with certain features alleged to turn things here the other way. The obligation to allow persons authorised by the Crown to enter for purposes of inspection, etc., his Honour regarded not as something inconsistent with a right of exclusive possession, but rather as showing that there *was* a basic right of exclusive possession.

So also with the express obligation to allow cattle to pass along the established stock routes. His Honour cited a passage from the judgment of the Privy Council in *Glenwood Lumber Co. Ltd. v. Phillips* :[7]

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

It is a good and a strong judgment. As previously I have made some criticism of his Honour's judgment in *Mabo No. 2* , it is proper that I should say so.

I might add that many instruments which no lawyer would have doubted were leases, contain quite severe restrictions and reservations of one kind and another. A lease of premises in a large shopping mall will normally specify the only purpose for which the land may be used (e.g., as a milkbar), will reserve a right of entry for persons authorised by the landlord, and will require the premises to be open for business during certain hours: i.e., will require that the lessee allow other persons to be on the leased premises for much of the day (and night). I have never heard it suggested that any of this was inconsistent with "exclusive possession", or prevented the transaction being one of lease. Questions as to the right of exclusive possession have been determined in a sensible way, in accordance with the kind of property the subject of the lease.

(c) The Majority Views on Exclusive Possession

Toohey J. notes the use of formal technical language, but points out that *these* leases are the creature of statute. [8] So of course they are. But if the statute prescribes the use of an instrument in a known form, why should one not take it that, subject to anything else the statute might say, the statute intends the instrument to carry the incidents which in all other circumstances accompany the use of that known form?

Toohey J. puts *Radaich v. Smith* to one side, as arising in a context of commercial agreements designed to avoid tenancy protection. Why that makes irrelevant what was said by Windeyer J. as to the distinction between lease and licence, Toohey J. does not say. He notes the dictum of Brennan J. in *American Dairy Queen* , but puts it aside because the case concerned the assignment of a sub-lease, in a commercial context. Again, his Honour gives no explanation of why that fact makes irrelevant what Brennan J. said as to the effect of using in a statute the formal language of lease. All cases arise in some kind of context. The approach Toohey J. takes here would let him distinguish as irrelevant almost any authority cited to him.

His Honour cites 19th Century despatches indicating governmental intention that land already used by natives for hunting should continue to be available to them for that use. The relevance of an 1839 despatch from Sir George Gipps to the Secretary of State, to the interpretation of the *Land Act* 1962 (Queensland) is neither obvious nor explained. Self government has not gone as far, it would seem, as I thought it had.

Gaudron J. turns to the *Land Act* 1910. [9] Her Honour notes the use of technical language and the adoption of the distinction between lease and licence. The force of this is said to be reduced by various factors. Since the pastoral lease is the creature of statute, one cannot take it that the pastoral lease has the usual accompaniments of a lease. One must look within the statute for indications as to whether the pastoral lease is to carry the right to exclusive possession.

Yes, one must. But do not the facts that the statute prescribes for the pastoral lease the normal language of the normal lease, and in its ordinary context that language carries that right, constitute the statutory sign that her Honour sought? Attention is drawn to the existence in the lease of various restrictions on the use of the leased land. Throw in the presumption that a

legislature will be presumed not to intend to interfere with property rights unless it evidences that intention clearly, and her Honour finds no exclusive possession here.

Gummow and Kirby JJ. give essentially similar reasons, and it seems unnecessary to pursue them individually. Accordingly, the claim to a right of exclusive possession failed.

(d) The Question of Extinguishment

There being then no automatic extinguishment of *all* native title rights by the grant of the pastoral lease, questions arose as to when extinguishment of some rights might occur.

Toohey J. says [10] that the essential test is the ability of each particular native title right to co-exist with the pastoral lease. This would require specific examination of the particular native title right claimed, and of the particular lease. Toohey J. does not say in express terms whether what is done by the pastoral lessee matters, but it would seem that his test is not what is done, but what the terms of the lease require (or perhaps permit) to be done.

Gaudron J. sees the argument that things such as the erection of a manager's residence support the case for exclusive possession. [11] That argument she has already rejected. She says that the question whether *performance* of the *conditions* attached to the lease has impaired or extinguished a particular native title right will depend on evidence led at the hearing. No reservation is made for performance of things permitted but not required by the terms of the lease.

Gummow J. says that it could be that "enjoyment" of native title rights would be "excluded" by actual construction of the airstrips and dams required by the lease. That would depend on the facts. How these alternative terms "enjoyment" and "excluded" fit with the concept of "extinguishment" his Honour does not tell us. What is clear is that the event which would bring about the change is the performance of conditions, and not the imposition of them, by the grant of a lease requiring them. [12]

Kirby J. takes a flatly contrary stand on that point. The answer must lie in the rights granted, not in the manner of their exercise. To allow native title to be affected by what the holder of the lease *does* would be tantamount to giving him a kind of unelected delegated power to alter rights. "This cannot be." [13]

The End Position

It is dismaying that none of the majority judgments so much as adverts to the fact that leases may *permit* things to be done, without *requiring* them to be done. A lessee may do much on a pastoral lease which is not *required* to be done, but is done in order to have a better property. Nor does any of the judgments advert to the fact that, where something is required or permitted to be built, the lease may very well not prescribe a particular site for it. Often the lease *could* not do so. The successful bore will be where water is found, not where a clerk has marked a place on a map. The Lands Department will not carry out a special survey and ground analysis to determine the precise site for the airstrip. The lease will express itself along lines of requiring that an airstrip be built "in the area north of Judges Creek", leaving its precise location to the future and the decision of the lessee.

Gaudron and Gummow JJ. both see the possibility of extinguishment (Gummow J., "exclusion"/ "enjoyment") flowing from performance of a condition. Neither makes provision for the case where the improvement is permitted, without being required. It appears that improvements made voluntarily will *not* extinguish (and therefore cannot be allowed to interfere with) native title rights.

Where a work is required, but its location is not fixed by the lease, it seems unlikely that it would be held that inconsistency at grant exists *everywhere* , because of what is later to happen

somewhere in the lease. Yet the practical choices must be everywhere or nowhere. The thought of identifying *all* areas that might be suitable for an airstrip, and finding inconsistency on all of them because all are at some kind of risk, would be bizarre. And if one did do that, Kirby J. at least would then maintain the inconsistency on *all* of the possible sites even after the airstrip had been built, since to do otherwise would mean that the lessee had altered legal rights, by building the airstrip at this site rather than on one of the others. "This cannot be."

It is impossible to feel sure, but the broad position seems to be:

(1) Work Required by Lease

A. *Site Located by Lease*

At Grant: Toohey and Kirby JJ: Inconsistency would arise.

Gaudron and Gummow JJ: No inconsistency can arise.

On Performance: Gaudron and Gummow JJ: Inconsistency can arise.

B. *Site Not Located By Lease*

At Grant : No inconsistency can arise, because one cannot identify the site affected.

On Performance: Gaudron and Gummow JJ: Inconsistency could arise.

Kirby J: No inconsistency can arise, as the lessee cannot have power to alter legal rights.

Toohey J: Not clear.

(2) Work Permitted But Not Required

A. *Site Located by Lease*

At Grant: Toohey and Kirby JJ : No inconsistency can arise, as you cannot say that native title cannot co-exist with a mere possibility of future voluntary action.

Gaudron and Gummow JJ: No inconsistency ever arises at grant; and in any event no inconsistency arises from making an improvement which is no more than permitted.

On Performance : Gaudron and Gummow JJ: Performance of a condition can lead to extinguishment, but not in the case of a voluntary action.

Kirby J: No extinguishment can arise from an action by a lessee, still less a voluntary action.

Toohey J: Semble no inconsistency.

B. *Site Not Located by Lease :* As for case (A), but more so.

I add two comments to this cheerless table:

(1) Quite apart from all of that, there will arise in the case of the decision to carry out any such works, all the claims underlying the Comalco and Aurukun matters. If performance of works can affect native title rights, is there a duty on the lessee to consult with the natives concerned, before determining where (in the case of required works not located by the lease) or whether and where (in the case of voluntary works) to do them? Where does the final decision rest? If the final decision rests with the lessee, has he been made a judge in his own cause? Is his decision invalid accordingly?

(2) When works are done, and extinguishment of one or another native title right has followed, there will arise the matter of compensation. The *Racial Discrimination Act* 1975 seems likely to ensure this. At the present time there exists no guidance whatever as to how these rights would be valued in such circumstances.

I do not see how one can avoid the conclusions:

(1) That following the decision in *Wik* there exists, in the interplay of all of Queensland's pastoral leases and many of its mining leases, on the one hand, and on the other hand rights of native title, profound uncertainty, quite incompatible with the properly planned conduct of business affairs.

(2) That there is no reason to doubt that this general position obtains equally in all the pastoral States.

(3) That, subject to political pragmatism, one set of these uncertainties applies equally to grants of land in fee simple.

I add that any time you say that this or that attack is not likely to succeed, *Mabo* bids us beware.

The High Court and the Art of Legislating

Sparked by *Mabo* , *Theophanous* , and other cases, criticism has been levelled at the High Court on the basis that it has begun to act as a legislature. Much has been said as to judicial creativity, judicial activism, etc. Do judges make law? Ought they to make law? Are there limits to how much law they can make?

The answers to those questions are Yes, Yes, and Yes. More accurately, Yes but, Yes but, and Yes. For there is much to add before the answers become meaningful.

Of course there is a very real sense in which judges make law. If judges do not make law, where did the common law come from?

"I need not remind my readers that Anglo-American common law is pre-eminently judge-made law." [14]

In one of his fairly frequent "rare public utterances", an address entitled *The Role of the Courts at the Turn of the Century* , given to the Australian Institute of Judicial Administration, the former Chief Justice, Sir Anthony Mason dealt scornfully with post- *Mabo* criticism that the High Court was assuming a legislative role.

"Implicit, if not explicit, in what I have been saying about the role of the judge, especially the appellate judge, is that it entails incidentally the making of law. I would have thought that there was nothing remarkable in that statement had it not been for some comments, made in the aftermath of recent High Court decisions, that the Court was undertaking a legislative role. Some comments seemed to imply that a court exceeds its function if it `makes law'. Only a person entirely ignorant of the history of the common law could make such a suggestion.....

"It is scarcely to be credited that anyone with any understanding of the judicial process now believes the fairy tale that the judges `discover' the law and then declare it, without actually making it, as though the judges resembled the Delphic oracle in revealing the intention of the pagan gods."

On a later date Sir Anthony said:

> "What I have just said may not be welcome news to those who believe that the courts do no more than apply precedents and look up dictionaries to ascertain what the words in a statute mean. No doubt to those who believe in fairy tales that is a comforting belief. But it is a belief that is contradicted by the long history of the common law."

There is a confusion here which would do no credit to a law student in his early years; a good deal of setting up a straw man, and boldly knocking him down. For there is a very real difference between merely "making law" and "legislating". There is a question of approach and degree, which makes a defence of, "We all make law" quite inadequate to a charge of "legislating".

In the ordinary trial court, the judge will rarely make law. He sits basically to apply laws as to which there is no dispute, to facts proved before him, perhaps after much dispute. Murder cases rarely have anything to do with elucidating the law of murder. Such a judge will declare the pre-existing law as he conceives it to be, and proceed to apply it. He would be both surprised and disturbed if he were told he had made some law today. This is the function one sees judges carrying out on television, and reads about in trial scenes in books. It is the community's normal picture of a judge. It is a function which is in general finely performed, to the community's unstated but considerable satisfaction. [15]

Sometimes, of course, there will be dispute before a trial judge as to the legal rule to be applied, or as to the precise content of that rule. To take an illustration from the most recent volume of law reports ready to hand, a bank claims to have suffered loss from a careless valuation. The bank sues the valuer for breach of contract. The valuer claims that s.26 of the *Wrongs Act* 1958 (Vic.) entitles him to raise a defence of contributory negligence. Question: Does s.26 apply where a plaintiff sues for breach of contract, or only when he sues in tort? Smith J. holds that it is available in both cases, and reduces by 25 per cent the damages otherwise payable. [16]

There indeed, you will say, is a judge making law. Before he gave his judgment there was not, and now there is, a rule on the matter. That is why this case, unlike other and much more dramatic cases heard in the Supreme Court, is given its gentle immortality in the law reports.

But that is not the whole story. Certain things will be noticed.

First, what the judge made was only a little bit of law. Judges make law, it has been said, but only in the interstices. "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." [17] This is the judge as oyster. Insert your little bit of grit, and the judge produces his little judicial pearl.

Second, in making his little bit of law the judge will have proceeded in a particular way. He will not have sat down under a palm tree and decided how he would run the world. He will have argued from known precedent, from reason, from analogy, from principle, from history, from morality, to explain how he has arrived at his answer, and to justify for his little bit of law its place as a thread in the law's wider fabric. This is what Sir Owen Dixon described as hard and lonely work. The judge has sought not just "his" answer, but the "correct" answer. The judge gives his reasons, not only so that the litigants know why he decided as he did, but because the system requires that the profession generally have those reasons. He justifies his answer not on the basis that he made it, but on the basis that it was the *proper* answer. Here lies a paradox. You can say, no doubt truly, if simplistically, that the judge is "making law". The way he makes it, is by a process of *looking* for it. And this is not a fairy tale.

Thirdly - and again there is paradox in this most difficult area of jurisprudence, where one is rather chasing one's own tail - once the judge has made his little bit of law - here, now, at judgment - *we apply it as if it always had been the law* . Indeed the judge does so instantly, in

applying his little bit of law, made today, we are assured, to events that occurred a year ago. As the good professor used to say, How can this be? The answer is that the law itself treats the judge as having *found* the legal rule, *not* as having made it; treats him as having declared what the law already was.

It is all a good deal more complex than Sir Anthony told us.

In the Full Court of the Supreme Courts of the States, or in the Courts of Appeal which in some States have replaced them, or in the Full Court of the Federal Court, this kind of thing occurs more often. For the reason that a case goes on appeal, is that it is one of the very small minority of cases (almost certainly less than 0.5 per cent of the cases heard in the courts) which turn on a disputable point of law. Again the judges will make law by seeking the law which is "correct", from principle and reason and analogy and the rest.

Indeed, we *know* that there is this external standard of correctness. If leave is sought to appeal to the High Court, the applicant's submission must specify "the *error(s)* complained of in the court from which the proceedings are brought". [18] To speak of "error" in the law as *made* in the court below, is to acknowledge that there are measuring sticks by which the rightness or wrongness of the law as made by the judge can and is to be judged. Something is *not* automatically law, because a judge has made it.

The High Court is of course a court of ultimate appeal. In a particular sense what an ultimate court of appeal says to be the law *is* indeed the law, simply because that court has said so. Even that does not mean that the profession will regard every one of that court's decisions as "right". Even the decisions and judgments of an ultimate court of appeal are properly to be brought to account against the basic touchstones mentioned above. Chief Justice Coke famously told King James I that the monarch himself was *sub deo et lege* : under God and the law. Even a court of ultimate appeal will not claim for itself a position and power which the law denies to the monarch. So even here, the correctness of the decision is still an issue. "The law has no *mandamus* to the logical faculty", said Justice Oliver Wendell Holmes. Posterity too will judge. Indeed, on a later occasion an ultimate court itself may say that its own earlier decision was wrong: the law it "makes" today will say that the "law" it "made" last time, *never was the law* .

For all appeal courts, but especially for courts of ultimate appeal, questions inevitably arise as to the extent to which the court may properly interfere with established common law structure. This is where there arises the issue relevant to *Mabo* . It is an issue which Sir Anthony Mason passed by unmentioned, when attacking the "fairy tale" approach as to "making laws".

Certain legal principles, judge-made though they originally were, can become so established as part of the law of the land that the only proper way they can be altered is by legislation. Thus I doubt if even the boldest spirit on the High Court would say that that Court could properly decide, today, that the standard of proof in an ordinary criminal matter was other than "Beyond reasonable doubt". A recent judicial statement on the matter is that of Brennan J. in *Mabo No. 2* itself. [19] There Brennan J. accepted that the Court is not free to adopt a new rule if the adoption "would damage the skeleton of principle which gives the body of our law its shape and internal consistency." It is ironic that that was said in a case which overturned rules which, in the words of Deane and Gaudron JJ., had been accepted "as a basis of the real property law of this country for more than a hundred and fifty years": [20] but the principle remains correct.

In *State Government Insurance Commission v. Triawell* [21] the High Court was invited to alter for Australia the common law rule as to liability for damage resulting from farm animals straying onto the highway, as laid down by the House of Lords in *Searle v. Wallbank* . [22] The invitation was based on the proposition that the spread of the motor car had made the existing rule

inappropriate in Australia. The principal statement of the reasons for not accepting that invitation was as follows:

> "If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise. The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adapted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or inquiries with a view to ascertaining whether particular common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals who may be vitally interested in the making of changes to the law.
>
> "In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature. These considerations must deter a court from departing too readily from a settled rule of the common law and from replacing it with a new rule. Certainly, in this case they lead to the conclusion that the desirability of departing from the rule in *Searle v. Wallbank* is a matter which should be left to Parliament.
>
> "It is beyond question that the conditions which brought the rule into existence have changed markedly. But it seems to me that in the division between the legislative and the judicial functions, it is appropriately the responsibility of Parliament to decide whether the rule should be replaced and, if so, by what it should be replaced. The determination of that issue requires an assessment and an adjustment of the competing interests of motorists and landowners; it might even result in one rule for urban areas and another for rural areas. It is a complicated task, not one which the court is equipped to undertake." [23]

That all seems very sensible, and likely to appeal to you. All that may surprise you is the name of its author: Sir Anthony Mason.

In *Mirehouse v. Rennell* [24] in 1833, the great Baron Parke dealt with the question in a manner still relevant:

> "Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."

In his *Law in the Making* , Professor Sir Carleton Allen KC cited that passage and continued:

"No judge at the present time would need any reminder to keep this principle `steadily in view'." [25]

It follows that the criticism that the Court has behaved like a legislature is in no way met by saying that judges cannot help making law. There is at one end of the spectrum the undoubtedly proper steady interstitial development of the common law, seeking to develop the law by reference to existing law and established principles. At the other end lie changes which unarguably belong to the legislature. In between there is a band into which judges venture at some risk. Judges will differ among themselves as to how far they should venture into this tricky area. Judicial activists will call for the court to press ahead. Exponents of judicial restraint will point out that we live in a democracy, and will argue that significant changes in the laws should come from the elected legislature and nowhere else. What is being said, is that the High Court has got it wrong in this area.

What the Court cannot I hope but be aware of, is the truly horrifying fall in that respect which in the past ordinary members of the community felt and expressed for the High Court. I well remember being assured in earlier years by my Oxford law tutor, the great Dr J.H.C. Morris, that the High Court of Australia was far and away the greatest appellate court in the English-speaking world. It is a good while since people have said so.

In recent years the Court has given decisions which have, in the perception of many, taken it beyond its proper function. Members of the Court have given considered explanations of the approach they see as proper for the Court to take today. These explanations have added fuel to the fires of concern. In recent days the Press has revealed to us the sight, the very sad sight to the many who have so respected the Court, of the Chief Justice of the High Court of Australia writing to the Deputy Prime Minister of Australia, requesting him to temper his criticisms of the Court, since it is important that the community think well of the Court.

So it is, and the Chief Justice's letter encouragingly shows that the Court is indeed, and properly, concerned as to the community's perception of it. But I do not think that the community takes its views on this matter from Mr Fischer or anyone else. Much more than clever people give it credit for, the Australian community is apt to make up its own mind about things. (In the days of apartheid, after fifteen years of joint effort by all political parties, all churches, and all media, polls continued to show Australian opinion firmly in favour of sporting links with South Africa.) Recognition of this independence of thought on the part of the Australian community was one of the main reasons that Sir Robert Menzies was able to hold office as Prime Minister for seventeen years, and retire when he chose. My old grandmother, the wife of an engine-driver, with no sources other than the daily newspaper (when Grandpa had finished with it), decided that Hitler was an utterly evil man long before that realisation dawned on the clever people who knew about these things. If sections of the public have a very critical perception of the Court, the fault is not Mr. Fischer's.

It is not by what politicians or media or commentators say, that the community will judge the Court. Like all of us, the Court will be judged by what it does. The remedy is in the Court's own hands, and really in no one else's.

Endnotes :

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1 . *The Wik Peoples v. The State of Queensland and ors.,* Action QG 104 of 1993 in the Federal Court of Australia. After various interlocutory steps, there came before Drummond J. the determination of certain questions of law prior to any ascertainment of the facts. Some of those questions concerned pastoral leases, and others the Comalco and Aurukun matters. Drummond

J. answered all the questions against the Wik People: (1996) 63 FCR 450. Appeal to the Full Court of the Federal Court having been lodged, the High Court ordered that the appeal be removed into the High Court pursuant to s.40 of the *Judiciary Act* . That Court's decision is reported at (1997) 141 ALR 129.

2 . (1995) 61 FCR 1.

3 . (1959) 101 CLR 209 at p.222.

4 . (1981) 147 CLR 677 at p.686.

5 . (1875) LR 6 PC 354 at p.370.

6 . (1977) 141 ALR at p.155.

7 . (1904) AC 405 at p.408.

8 . 141 ALR at p.176ff.

9 . 141 ALR at p.205.

10 . 141 ALR at p.184.

11 . 141 ALR at p.218.

12 . 141 ALR at p.247.

13 . 141 ALR at p.275.

14 . Vinogradoff, *Common Sense in Law* (2nd Ed., 1946), p.122.

15 . There seem only two areas where any significant amount of criticism arises. One is apt to arise whenever a judge hearing a rape case says anything about the behaviour of women generally. That judge soon learns that some people do criticise particular judges, by reference to particular cases; and that they do so vociferously. The other area of criticism concerns sentencing, as to leniency and as to inconsistency. Outside these areas criticism of the actual judge seems almost nonÄexistent. Let me say that if my affairs caused me to be brought to court in other than my business capacity, I would sooner be brought to an Australian court than almost any other court in the world.

16 . *Challenge Bank v. Cooper* (1996) 1 VR 220 at pp.235Ä243.

17 . Sir Henry Maine, *Early Law and Custom* , p.389.

18 . See Practice Direction No. 4 of 1996 of the High Court of Australia, para. 6(c)(i).

19 . (1992) 175 CLR 1 at p.29.

20 . 175 CLR at p.120.

21 18. (1980) 142 CLR 617.

22 . (1947) AC 341.

23 . 142 CLR at pp.633Ä634.

[24] . (1833) 1 Cl. & F. 527 at p.546.

. Professor Sir Carleton Allen, KC, Law in the Making (4th Edn, 1946), p.223.
