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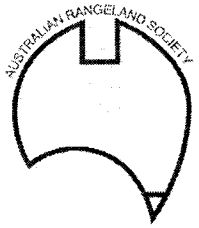

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PASTORAL LEASE TENURES AS POLICY INSTRUMENTS: FROM THE 1847 ORDER IN COUNCIL TO THE 1997 POST-WIK DRAFT LEGISLATION

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To approach the matter by reference to legislation is not to turn one's back on centuries of history nor is it to impugn basic principles of property law. Rather, it is to recognise historical development, the changes in law over centuries and the need for property law to accommodate the very different situation in this country.

(Toohey J in Wik Peoples and the Thayorre People v. Queensland (1996))

The High Court decision in the Wik case is consistent with the pragmatic institutional doctrine espoused by contemporary resource economists, by which property is recognised as a "bundle" of specified rights and duties, responsive to the policy context. This doctrine has underpinned the pastoral lease tenure system from its inception in the 1847 Order in Council. Through the unique challenges posed in guiding the allocation, reallocation, use and management of Australia's pastoral lands, a distinctive, policy-oriented doctrine of property rights has evolved, long before its wider contemporary acceptance. The foundation of this system is the lease tenure instrument.

A scrutiny of the history of lease tenure administration can yield insights into major policy issues, responses and outcomes. It can also highlight the pros and cons of flexibility in the award of property rights, tied at times too closely to policy imperatives.

Within the persistent unidirectional trend towards enhanced rights to the titleholder, six distinct policy phases can be identified, namely:

1. Managing the pastoral frontier (1847-1861);
2. Unlocking the land, through land selection (1861-1884)
3. "Progressive, planned" closer settlement (1884-1950s)
4. Policy vacuum and clientelism (1950s-1970s)
5. Sustainability and multiple use (1980s-1996)
6. Co-existence (1997-)

From 1847 until 1996, lease titles were two-party contracts, between the lessee as "tenant" and the state as "landlord", with the latter being responsible for protecting the public interest. The Wik judgment overturns this partnership, most strikingly by the recognition of prospective holders of co-existing native title, but also by awarding unprecedented roles to courts, tribunals and the federal government in the delineation of property rights on land held under pastoral lease. This delineation may be complex, prolonged and often acrimonious, most notably where it is perceived to impair the property rights of lessees. The process can be expedited if all parties acknowledge the marked regional variability in the relative balance between Aboriginal and pastoral interests.

Holmes, J.H. (2000) Pastoral lease tenures as policy instruments, 1847-1997. In 'Environmental History and Policy: Still Settling Australia', (Ed. S. Dovers) Oxford U.P., Melbourne.