Native Title Hot Spots

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Contents

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Recent Cases

The Miriuwung and Gajerrong High Court appeal

Western Australia v Ward [2002] HCA 28

per Gleeson CJ, Gaudron, Gummow, Hayne JJ (with Kirby J agreeing in a separate judgement), McHugh and Callinan JJ in dissent, 8 August 2002

Issues and background

For those not familiar with the history of this case or the issues raised, the background is available on the Tribunal's web site: Ward backgrounder. The following summary of some of the major points arising out of this decision is drawn from the joint judgement of Gleeson CJ, Gaudron, Gummow and Hayne JJ. The fifth member of the majority, Kirby J, concurred generally with their Honours' decision but went on to record some reservations about their findings in relation to the recognition of native title rights and interests and extinguishment. This summary does not include any reference to either Kirby J's comments or to the findings of McHugh and Callinan JJ, the minority judges. Further, owing to the length of the decision and the short time frame for publication, what follows is an indication of the outcome on some major points.

The outcome

By a 5:2 majority, the High Court:

- upheld all four appeals (one each by State of Western Australia, the Northern Territory Government, the Miriuwung and Gajerrong people from Western Australia and the Miriuwung groups in the Northern Territory); and
- set aside:
  – most of the orders made by the majority of the Full Court, including the order made on 3 March 2000 setting aside Justice Lee's determination at first instance;
  – the whole of the native title determination made by the majority of the Full Federal Court on 11 May 2000 — see [469].

The effect of the orders appears to be that Lee J's original determination is now on foot, subject to the matters finally determined by the majority of the High Court, until the remaining matters are finalised by the Full Bench of the Federal Court and a further approved determination of native title is settled — see ss. 13(3), (6) & (7), s. 68 and s. 225 of the NTA. The remittal proceedings are listed for hearing before Beaumont, von Doussa and North JJ on 10 February 2003.

Federal Court should have applied the law at the time of the appeal

The reason for upholding all of the appeals was that the Full Federal Court did not apply the new Act and the associated State and Territory legislation as required. In particular, Gleeson CJ, Gaudron, Gummow and Hayne JJ found that:

- the Full Federal Court, when hearing an appeal, must apply the law as it exists at the time of hearing i.e. the amended *Native Title Act 1993* (Cwlth) (NTA) and the relevant State and Territory native title legislation. The Full Court erred in concluding that it could not take into account changes to Western Australian and Northern Territory native title legislation that became effective prior to the hearing of the appeal — at [71] & [72].
- the High Court could not make a final decision about the operation of those laws on all the matters raised in the appeals because there had been no finding of certain relevant facts in the Court below. Where, as in this case, the intermediate appellate court has not fully dealt with the case, the High Court generally remits the

matter to that appellate court to complete the hearing and determine the appeal to it — at [72].

The matters remitted to the Full Bench of the Federal Court for further consideration include:

– the final determination of the effect of the grant of pastoral leases in Western Australia and the Northern Territory;
– the final determination of the effect of the grant of a mining lease under the *Mining Act 1978* (WA) on native title; and
– the effect of various historical dealings over parts of the Ord irrigation project buffer zone, an area that appears to be currently unallocated Crown land (UCL).

Bundle of rights and partial extinguishment

- It is a mistake to take the view that the term 'native title rights and interests' as used in the NTA refers to a single set of rights analogous to an estate in fee simple — at [82].
- The NTA, in allowing for either complete extinguishment or extinguishment only to the extent of any inconsistency with non-native title rights, treats native title as a bundle of rights and allows for it to be partially extinguished, e.g. s. 23G(1)(b)(i) — at [82].
- Native title rights and interests that are inconsistent with other, non-native title rights and interests will be permanently extinguished to the extent of the inconsistency. No question of suspension of native title arises unless the NTA otherwise provides — at [82].
- The non-extinguishment principle, as defined in s. 238, is an example of where the NTA 'otherwise provides'. For applications of this principle, see the provisions in relation to the effect of category C and D past acts in s.15(1)(d) and s.47, s.47A and s.47B. The last three sections of the NTA also provide that any prior extinguishment over the area concerned must be ignored for all purposes under the NTA.
- There are no degrees of inconsistency of rights required (e.g. total, fundamental or absolute inconsistency). Two rights are either inconsistent or they are not. This is an objective test and requires the identification of, and a comparison between, the two sets of rights (i.e. native title and non-native title) — at [78] & [82].
- The basic inquiry is about inconsistency of *rights*, not inconsistency of *use*. Evidence of use of the land may be relevant where it suggests or demonstrates that inconsistent rights have been created or asserted — at [78] & [215].

Definition of native title under the NTA

- Satisfying the definition of native title in s. 223(1) involves two inquiries:
  – one into the rights and interests possessed under traditional laws and customs under s. 223(1)(a); and
  – the other, for connection with land or waters by those laws and customs under s. 223(1)(b) — at [18].
- The requirement of s. 223(1)(a) gives rise to a question of fact, which is answered by identifying:
  – the laws and customs said to be traditional laws and customs;
  – the particular rights and interests in relation to land or waters that are possessed under those laws or customs — at [18]
- The evidence used to establish connection as required by s. 223(1)(b) may also be relevant for the purposes of paragraph (a) i.e. a connection with the land or waters 'by those laws and customs' — at [18].
- The statutory definition indicates that it is from the traditional laws and customs that native title rights and interests derive, not the common law — at [20].
- As required by s. 223(1)(c), the native title rights and interests must be capable of being recognised by the common law — see [21].

Comments on requirements for a determination that native title exists

There are a number of comments in the joint judgement that indicate that a higher degree of specificity than has been seen to date is required where anything less than the right to possession, occupation, use and enjoyment as against the whole world (exclusive possession) is recognised in a determination of native title. The relevant comments include the following:

- While acknowledging that it is difficult to express a relationship between a community or group of Indigenous Australians and their country in terms of rights and interests, the judges were of the view that this is what the NTA requires i.e. that the spiritual or religious is translated into the legal — at [14].
- Using general terms in a determination, such as recognising a non-exclusive right to use and enjoy the area, makes it more difficult to make specific findings in relation to extinguishment, particularly where native title may be partially extinguished — at [29].
- The expression 'possession, occupation, use and enjoyment to the exclusion of all others' is a composite expression. Breaking it into its constituent elements (e.g. use, occupation, possession as separate rights) is apt to mislead. The relevant task is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms — at [89] & [94].
- Without the right, as against the whole world, to possession of land, it is doubtful that there is any right to control access to land or make binding decisions about the use to which it is put — at [52].
- Where native title rights and interests do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of the determination area, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms — at [51].
- Where exclusive possession is not found, it is preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters e.g. hunting, fishing etc — at [52].
- The Court must identify the nature and location of the intersection of traditional laws and customs with the common law. This requires careful attention to the content of traditional law and custom and to the way in which rights and interests existing under that regime find reflection in the statutory and common law — at [86].
- Their Honours seem to indicate that, in relation to proving native title rights to natural resources (leaving aside the question of those covered by the mining and petroleum legislation), evidence was required to show traditional law and custom relating to, or traditional use of, those resources — at [382].

Both these comments and those made with respect to the definition of native title in s. 223 are likely to impact upon the application of various aspects of the registration test (e.g. s. 190B(5) — sufficient factual basis, s. 190B(6) — rights that can be registered) and on the form of a consent determination. These, and other potential impacts on the Tribunal's work, are under consideration.

Limits on recognition and protection of cultural knowledge under the NTA

- The judges took the view that what was asserted was something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law, a right that would extend beyond denial or control of access to land held under native title — at [59].
- After noting that the term 'cultural knowledge' had not been given any specific content at trial, the judges took the view that it appeared to involve, for example, the restraint of visual or auditory reproductions of what is found or takes place at various places in the claim area (e.g. photographs or video recordings of artwork or ceremonies). The judges found this to be a

'fatal' difficulty because the scope of the right claimed did not come within the scope of s. 223(1)(b), i.e. it 'went beyond denial or control of access to land held under native title' — at [58] to [60].

- The judges noted that aspects of the cultural knowledge of Indigenous Australians may be protected by other laws e.g. those relating to confidential information, copyright, fiduciary duty and moral rights — at [61].

Spiritual connection

- The definition of native title found in s. 223 of the NTA is not directed to how Aboriginal peoples use or occupy land or waters. What is required is consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a connection with the land or waters — at [64].
- There may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Indigenous Australians and the land or waters concerned. However, the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection — at [64].
- As a result of the way in which the question on this point was put to the High Court, it was not necessary for the judges to express any view on the nature of the connection that must be shown to exist. In particular, the Court expressed no view on whether a spiritual connection alone (i.e. any form of asserted connection without evidence of continuing use or physical presence) would suffice — at [64].

Confirmation and validation

Under the NTA, acts (such as the grant of a mining tenement) are either valid or validated. Where invalid acts fall within the definitions set out in past or intermediate period act provisions of the NTA and they are attributable to the Commonwealth, they are validated under the NTA. Generally speaking, invalid acts attributable to States and Territories that fall into those same categories are validated by relevant State and Territory native title legislation, in this case, the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (as it was by the time of the High Court hearing) and *Validation (Native Title) Act 1994* (NT). Affected native title holders may have a right to compensation, even where the act in question was always valid. This is, for the most part, dependent upon when the act in question was done and, in some cases, the effect of the application of certain provisions of the *Racial Discrimination Act 1975* (Cwlth) (RDA).

The 1998 amendments to the NTA introduced the confirmation provisions, which prescribe the effect of acts defined as either previous exclusive possession acts (PEPAs) or previous non-exclusive possession acts (PNEPAs). These acts have to be either valid or validated. This means they were either:

- valid at the time they were done, whether before or after the commencement of the RDA. An example of the latter is a valid future act. The findings in the joint judgement at [253] in relation to the effect of the vesting of a Crown reserve provide a further example. For the definition of ‘valid’, see s. 253; or
- invalid to some extent because of the existence of native title at the time but validated either under the NTA and equivalent State and Territory provisions (as past or intermediate period acts) or under a registered Indigenous Land Use Agreement. (For example, in relation to past acts, see s. 14, s. 19 and ss. 228 – 232 of the NTA.)

If an act is validated by the NTA provisions (and, in relation to acts attributable to a State or Territory, the relevant State or Territory legislation), then the affected native title holders have a compensation entitlement that arises under the NTA.

If the act in question was always valid, then no compensation entitlement arises under NTA. However, where the act was done after the RDA commenced on 31 October 1975, those affected may have an entitlement to compensation that arises because of the effect of the RDA — see, for example, the findings noted below in relation to the vesting of Crown reserves at [253]. Native title holders may also have a right to compensation that arises under State or Territory legislation — see, for example, the comments at [316] to [319] in relation to *Mining Act 1978* (WA).

The application of the RDA

After noting that, in accordance with earlier High Court authority, native title cannot be treated differently from other forms of title because native title has different characteristics from those other forms of title and derives from a different source, the judges went on to consider s. 9 and s. 10 of the RDA — see [122]ff.

Gleeson CJ, Gaudron, Gummow and Hayne JJ came to the conclusion that s. 9 did not apply to the matters before them (see [100] to [103]) and that:

> 'The appropriate provision is ... in s10(1)... [which is directed at]... the *enjoyment* of rights by some but not by others or to a more limited extent by others; [or where] there is an unequal enjoyment of rights that are or should be conferred irrespective of race, colour or national or ethnic origin' — at [103] & [105], emphasis in original.

Gleeson CJ, Gaudron, Gummow and Hayne JJ relied upon the decision of Mason J in *Gerhardy v Brown* (1985) 159 CLR 70 at 98-99 to find that s. 10(1) operates in two ways, depending on whether the State legislation under consideration:

- merely omits to make enjoyment of the right in question universal e.g. by failing to provide that persons of a particular race were entitled to compensation for the loss of their rights when people of another race were so entitled (scenario 1); or
- prohibits or forbids persons of a particular race from enjoying a human right or fundamental freedom that is enjoyed by persons of another race or deprives persons of a particular race of a right or freedom previously enjoyed by all regardless of race (scenario 2) — at [107] & [108].

In cases where scenario 1 applies, the relevant State law is unaffected but the RDA confers a complementary right to that created by the State law upon the persons deprived of it by that law — at [106]. For an example of the application of this scenario, see the findings at [253] in relation to the vesting of certain Crown reserves under the *Land Act 1933* (WA). The judges found that the act of vesting was valid, and the empowering legislation was fully operative but s. 10 of the RDA gave the affected native title holders a compensation entitlement equal to that available to non-native title holders. That entitlement, although arising under the RDA, must be dealt with under NTA — see s. 45 of the NTA.

If it is scenario 2, then s. 10 confers the right prohibited by the State law in question on the persons of that race so that they enjoy the human right or fundamental freedom on an equal footing with the persons of the other race. The second scenario 'necessarily results in an inconsistency between s.10 and the prohibition contained in the State law' and, by virtue of s. 109 of the Commonwealth Constitution, the State law is inoperative to the extent of that inconsistency — at [107] & [108]. In relation to the Northern Territory, after considering the Constitutional arrangements, the judges concluded that s.10 of the RDA continues to speak in respect of Territory laws — at [127] to [133].

Pastoral leases

- Valid or validated pastoral leases granted in Western Australia and the Northern Territory on or before 23 December 1996 are previous non-exclusive possession acts as defined under s. 23F of the NTA — [187] to [190] & [419] to [424] respectively.

- The grant of a pastoral lease is not necessarily inconsistent with the continued existence of all native title rights and interests — at [194] & [417].
- Any native title rights and interests that are inconsistent with the pastoral lessee's rights are extinguished by the grant under s. 23G(1)(b)(i) rather than suspended under s. 23G(1)(b)(ii) unless the NTA provides that the non-extinguishment principle applies i.e as in the case of a category D past act. Such extinguishment is confirmed under the provisions of the relevant State or Territory native title legislation, equivalent to s. 23G(1)(b)(i) of the NTA — see [192], [418], [422] and [423].
- It appears that the judges found that the grant of a pastoral lease was inconsistent with native title rights to control:
  – access to the land;
  – the use made of the land — at [192], [422] and [10] and [25] of the summary on p 183ff.
- The judges commented that a native title right to burn country might be inconsistent with the pastoralist's rights. If so, it will be extinguished. On the other hand, they were of the view that the native title right to hunt or gather traditional food on the land would not be inconsistent with the rights of the pastoral leaseholder although the rights of the pastoral leaseholder would prevail over them — at [194].
- Apart from the right to control access to and use of the land, 'many other native title rights to use the land the subject of the pastoral leases probably continued unaffected' — at [194].
- To the extent that the lessee's rights and interests are not inconsistent with native title rights and interests, they prevail over the native title rights and interests but do not extinguish them — at [425].
- The leases in question, with one exception, were all granted before the RDA commenced. Therefore, all were valid when granted and the past act provisions had no application. The lease granted after the RDA was not on foot on 1 January 1994, as required in order to be a category A past act. If it was invalid to any extent when granted, the judges noted that it had been validated as a category D past act — at [418] & [422].
- The Federal Court may, when it reconsiders this issue, find that other native title rights and interests are inconsistent with the lessee's rights. Therefore, the High Court's findings are not yet definitive of the effect of the grant of a pastoral lease in Western Australia or the Northern Territory on native title.

Effect of inclusion of a reservation in favour of Aboriginal people

- The reservations in favour of Aboriginal people to which the pastoral leases in question were subject did not define or confine the rights that native title holders could exercise in relation to the lease area. The grant of the lease does not give the pastoralist the right to exclude native title holders from the land. Such reservations are directed at giving rights of access for other Aboriginal people (although, of course, native title holders are also entitled to the benefit of the reservation) — see, for example, [184] to [187] and [417].
- The absence of a reservation in favour of Aboriginal people is not necessarily fatal to the survival of native title but the inclusion of such a reservation may be relevant in determining whether or not the lease in question confers a right of exclusive possession — at [186], [414] & [415].
- Enclosure (e.g. by fencing) or improvement of parts of a WA pastoral lease does not totally extinguish native title or limit native title rights and interests to those found in the reservation or prevent native title holders from entering those areas and exercising their native title rights over those areas — at [186].

Minerals and petroleum

- Even if the native title claimants had given evidence to establish rights to these

resources (which the judges said they had not), those rights would have been extinguished by provisions of the WA and NT legislative regimes that vested property in those resources in the Crown — at [383].

- The vesting of property in minerals and petroleum in the Crown under the legislative regime was not like the vesting of property in the fauna in the Crown under the legislation considered in *Yanner v Eaton* (1999) 201 CLR 351; (1999) 166 ALR 258:

  'The vesting of property in minerals [and petroleum] was no mere fiction expressing the importance of the power to preserve and exploit these resources [as was found in *Yanner*] ... Vesting of property and [sic] minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land' i.e. it vested full beneficial ownership of the minerals and petroleum in the Crown — at [384].

Mining and general purposes leases in WA

- The grant of a mining lease or a general purpose lease under the *Mining Act 1978* (WA) is not necessarily inconsistent with the continued existence of all native title rights and interests — at [296], [308] & [340].
- The grant of a mining or general purpose lease will extinguish any native title rights and interests that are inconsistent with the lessee's rights unless the NTA provides otherwise — [341]
- The grant of a mining or general purpose lease under the Western Australian legislation is inconsistent with native title rights to control:

  – access to the land;

  – the use made of the land — at [309] and [341].
- If the lease was granted after the commencement of the RDA, the judges were of the view that the grant was not invalid to any extent because of the existence of native title. In their view, the affected native title holders either had a right to compensation under the WA Mining Act or the effect of the application of s. 10 of the RDA was in accordance with scenario 1 i.e. s. 10 applied to give the affected native title holders a compensation entitlement rather than to invalidate the grant of the lease — at [321] & [342].
- In either case, the grant of a mining or general purpose lease in Western Australia after the commencement of the RDA is not a category C past act and so the non-extinguishment principle does not apply. Therefore, inconsistent rights will be permanently extinguished rather than suspended for the duration of the lease as they would have been if the non-extinguishment principle applied — at [321] and [342].
- As the Court could not identify any further native title rights and interests that were inconsistent because of the lack of specificity of the determination by the Full Federal Court, the question of whether there were any other inconsistent rights was remitted to the Federal Court. The judges commented that the use of the land for mining purposes may prevent the exercise of some native title rights over parts or even the whole of the lease — at [308] & [341].
- As with pastoral leases, the Federal Court may, when it reconsiders this issue, find that other native title rights are inconsistent with the rights granted under the lease. Therefore, the High Court's findings are not yet definitive of the effect of the grant of a mining or general purpose lease in Western Australia on native title.

Argyle diamond mine lease

- The judges were unable to determine the precise extinguishing effect of the grant of the Argyle mining lease. The part of the lease included in the claim was an area where native title was found to be extinguished for other reasons i.e. because

it was a reserve vested under s. 33 of the *Land Act 1933* (WA) as discussed below — at [335].

- The judges appear to accept that any native title to a 'designated area' was extinguished. Areas gazetted as such are subject to strict control for security reasons. There is no indication of how much of the lease area has been gazetted as a 'designated area' but it appears that native title is wholly extinguished over any such area — at [328].

Perpetual leases over Keep River National Park and leases to the Conservation Land Corporation in the Northern Territory

- For various reasons, a special purpose and a conditional purchase lease granted after the RDA commenced were both found to be category D past acts to which the non-extinguishment principle applies — at [448].
- Neither grant was a previous exclusive possession act (PEPA) because s. 23B(9A) and the Territory equivalent expressly state that acts done for the purposes of preserving the natural environment are not PEPAs — at [453].

Fishing rights

- If the evidence otherwise established that the claimants had, under traditional law and custom, an exclusive right to fish in tidal waters, that exclusivity has been extinguished because it is fundamentally inconsistency with public rights of navigation over and fishing in those waters (referring to *Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1604; 184 ALR 113) — at [386].

Resumptions

In the 1960s and early 1970s, part of the area claimed in WA was resumed under s. 109 of the *Land Act 1933* (WA). In 1972 and 1975, additional lands were compulsorily acquired pursuant to the *Public Works Act 1902* (WA) and the *Rights in Water and Irrigation Act 1914* (WA).

- Whether or not the act of resuming land extinguishes native title will depend on the effect of the resumption as set out in the Act under which it takes place.
- A resumption under s. 18 of the Public Works Act or s. 3 of the Rights in Water and Irrigation Act results in the vesting of an estate in fee simple in the Crown, thereby wholly extinguishing native title — at [204].
- Resuming land under the Public Works Act after the commencement of the RDA was not an act that was invalid to any extent because of the existence of native title. This was because the judges took the view that native title and non-native title rights and interests were treated equally under the Public Works Act — at [278] & [280].
- The resumption under consideration was confirmed as extinguishing under the PEPA provisions. Those whose native title was extinguished may have a right to compensation under the RDA but it was noted in obiter comments that unregistered non-native title interest holders are not entitled to compensation under the *Public Works Act* — [278] to [280].
- A resumption under s. 109 of the *Land Act 1933* (WA) 'did not give the Crown any larger title than the radical title acquired at sovereignty' — at [208].

Creation of reserves

- The designation of land as a reserve for certain purposes under Western Australian legislation does not, without more, create any right in the public or any section of the public that extinguishes native title rights and interests — at [221].
- Reservation for a public purpose is inconsistent with any native title rights to decide how the land can be used and extinguishes that right but is not necessarily inconsistent with the native title holders continuing to use the land in whatever way they had, according to their law and custom, been entitled to use it before it was reserved — at [219].
- Where a reserve was created after the commencement of the RDA, it was a category D past act, to which the non-extinguishment principle applies — at [223].

Vesting of reserve land under s. 33 of the *Land Act 1933* (WA)

- The vesting of a reserve under s. 33 of the *Land Act 1933* (WA) (the Land Act) creates a public trust which vests the legal estate in fee simple in the person or body the land is vested in e.g. the Shire — at [235] to [241].
- Placing of a reserve under the control or management of a board of management under s. 34 of the Land Act does not have the same effect — at [239].
- In this case, several reserves, including Mirima National Park, were vested under s. 33 in the National Parks and Nature Conservation Authority (NPNCA). Others were vested in the Shire, various State Ministers and other agencies.
- If the reserve was vested under s. 33 before the commencement of the RDA, then all native title is extinguished unless the NTA provides otherwise, the act of vesting was always valid and no right to compensation arises — at [249].
- If a reserve was vested under s. 33 of the Land Act after the RDA commenced, the act of vesting:

  – was not invalid to any extent because of the existence of native title (i.e. it is not a past act) but the native title holders would have a right to compensation under the RDA — at [250] to [254].

  – in the case of the reserves vested in the NPNCA, these vestings were not previous exclusive possession acts because s. 23B(9A) expressly states that acts done for the purposes of preserving the natural environment, such as those under consideration, are not PEPAs.

  – in the case of a reserve vested in the Crown or a statutory authority (apparently including, in this case, the local Shire), the act of vesting was confirmed as extinguishing under the PEPA provisions.
- The Tribunal is currently making inquires to find out how many areas of reserved land in WA are vested under s. 33 of the *Land Act*. Note also that, although not considered by the Court in this matter, s. 47, s. 47A or 47B may, in some circumstances, apply to areas currently or formally vested under s. 33, in which case all prior extinguishment must be ignored for all purposes under the NTA and the non-extinguishment principle applies.

Lease of a reserve under s. 32 of the *Land Act 1933* (WA)

- Section 32 of the *Land Act* authorised the grant of a lease of a reserve 'for any purpose, at such rent and subject to such conditions as [the Governor] may think fit'. No particular form of lease was prescribed by that Act. Further, these were not leases of Crown land because they could only be granted over reserves which, by definition, were not areas of Crown land — at [366].
- 'The lease... granted [pursuant to s. 32] was not a statutory interest in land. The features of the interest granted were not prescribed by the Act but were determined by the nature of the agreement reached and the grant made. The rights thus granted... were, therefore, rights as lessee of the land, as that term is understood in the general law... [and the lessee] was thus granted a right of exclusive possession of the land'. As a right of exclusive possession is wholly inconsistent with the continued existence of native title rights and interests, the latter were wholly extinguished when the lease was granted unless the NTA and the RDA otherwise provide — at [368] & [369].
- If granted after the RDA commenced and invalid to any extent because of the existence of native title at the time of the grant, then the leases in question had been validated as past acts — at [371].
- The judges do not specify the category of past act that would apply should any of the leases in question be invalid to any extent. This would, of course, depend on the matters set out in s. 229, s. 230 and s. 232 of the NTA, particularly whether or not the lease was in force on 1 January 1994 or not. However, if the grant of a lease under s. 32 after the RDA commenced was invalid to any extent but the lease was not in existence on 1 January 1994 (i.e. it had

expired or been forfeited), then it would appear to be a category D past act to which the non-extinguishment principle applies.

- Where such a lease was in force on 23 December 1996 (as is required under the State's validating legislation), it was a previous exclusive possession act and confirmed as extinguishing native title — at [371].
- Note also that, although not considered by the Court in this matter, s. 47, s. 47A or 47B may, in some circumstances, apply to areas currently or formally subject to a lease granted under s. 32, in which case all prior extinguishment must be ignored for all purposes under the NTA and the non-extinguishment principle applies.

By Laws under the *Rights in Water and Irrigation Act 1914* (WA)

- By-laws passed before the RDA commenced, which absolutely prohibited the taking of fauna or plants within half a mile of any reservoir within the Ord Irrigation District, extinguished native title rights to hunt and gather flora in those areas. As the prohibition was absolute, s. 211 has no operation — [265].
- Similar Shire by-laws were made after the RDA commenced covering public recreation areas:
  – vested in; or
  – under the control of the Shire.
- As the judges found that native title was wholly extinguished in relation to the first category by a vesting under s. 33 of the Land Act discussed above, the making of the by-laws could not have affected any native title to those areas — at [266] to [267].
- Over areas under the control of the Shire, the making of these by-laws was found to be a category D past act to which the non-extinguishment principle applies — at [268].

Buffer zone around the Ord Irrigation Project

- The project approach to extinguishment, taken by Beaumont and von Doussa JJ in relation to this area, was rejected — at [141]ff.
- The judges found that native title over some of the buffer zone was extinguished by the vesting of a reserve in the Minister under s. 33 of the Land Act discussed above — at [274].
- Over some other parts, native title was extinguished by a resumption under the Public Works Act, as discussed above.
- Determining the effect of the historical dealings over the remaining areas, including the effect of the application of the Rights in Water and Irrigation Act, was remitted to the Federal Court to be scrutinised again in accordance with the guidance provided by the majority of the High Court — at [269] to [277].
- The judges noted that s. 47B might apply to some of the UCL in the claim area but that was a matter for the Full Court on remitter — at [281].

Permit to occupy

- A permit to occupy granted under s. 16 of the Land Act, which provided for a Crown grant to issue if certain payments were made and other conditions were met, gave the grantee a right of exclusive possessionthat was intended to be perpetual. Therefore, the grant of the permit wholly extinguished native title. This is so even where the conditions were not fulfilled and no Crown grant issued — at [349].
- The issue of this permit was, in the judges' view, an instance where a clear and plain intention to extinguish native title could be discerned from the nature of the rights granted i.e the right to obtain a Crown estate in perpetuity if certain conditions were met. Whether or not those rights are fully exercised is, apparently, irrelevant.

Special leases under s. 116 of the *Land Act 1933* (WA)

- A lease for grazing purposes issued under s. 116 could be distinguished from the pastoral leases considered earlier because it was a less precarious interest and some of the purposes for which a lease under s. 116 may be granted (e.g. tanneries, factories, sawmills, warehouses) indicated

that the grant of a special lease gave the lessee a right to exclusive possession — at [355] to [357].

- As a result of these factors, the judges found that this was an exclusive pastoral lease and, having been granted before the RDA commenced, was valid when granted. According to the judges, its extinguishing effect was confirmed under the PEPA provisions (referring to s. 23B(2)(c)(iv)) — at [357]. Paragraph 12I(1)(b) of the State legislation relating to PEPAs requires that any such lease must be in force on 23 December 1996 in order to be confirmed as extinguishing under those provisions. It is not clear whether or not this lease was in force on that date.

Western Division Leases in NSW

Wilson v Anderson & Ors [2002] HCA 29

per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J in dissent, 8 August 2002

Issue

The central issue for resolution by the Court was, assuming that native title rights existed, whether they had been extinguished by the grant in 1955 of a lease in perpetuity pursuant to s. 23 of the *Western Lands Act 1901* (NSW).

Background

Mr Wilson, who holds a perpetual lease under the *Western Land Act 1901* (NSW), had previously sought, both in the Supreme Court of New South Wales and later in the Full Court of the Federal Court, an answer to the question of whether native title had been extinguished by the grant of the pastoral lease.

Mr Wilson argued that the existence of his lease provided 'a complete answer to the native title claim' made over it by Mr Anderson on behalf of the Nyoongah Ghurradong Murri (Granny Ethel) Euaylay-i People. He submitted that native title could not exist over the land in question because any accessorial native title rights and interests in relation to the land were extinguished by the Western Lands statutory regime in NSW and/or the grant of his lease.

In April 2000, the Federal Court found that it could not be said that native title rights were extinguished by the grant of the lease in question on the information before it. To determine that, it would be necessary to show that the rights granted under the lease were inconsistent with all native title rights that may be held in relation to the land. Having no evidence of the native title rights before it, the Court could not decide the matter. Mr Wilson applied for special leave from the High Court to appeal against the decision of the Federal Court. This application was heard by all the members of the High Court on the basis that it was necessary to hear all the arguments in relation to the matter before the leave application could be determined.

Decision

The outcome of the application was a decision by the majority of the High Court (6:1) that special leave to appeal be granted and that the appeal be deemed to have been instituted and heard.

The lease in question conferred upon the lessee a right of exclusive possession over the land covered by the lease. Therefore, the lease was a previous exclusive possession act, as the term is used in s. 23B of the NTA, and native title had been extinguished in relation to the lease area.

Gleeson CJ

The approach to be taken by the Court requires consideration of the confirmation of extinguishment provisions of the NTA and the mirror provisions of the *Native Title (New South Wales) Act 1994* (NT(NSW) Act). If the lease grants exclusive possession, then the grant of the lease is a previous exclusive

possession act as set out in s. 23B(2)(c)(viii) of the NTA and native title has been extinguished by the combined operation of the NTA and s. 20 of the NT(NSW) Act.

Gleeson CJ states that:

> 'when regard is had to the genesis of the interest in land referred to in the Western Lands Act as a lease in perpetuity, its affinity with freehold title, the inference that it was the intention of the legislation that the Minister should be empowered to grant leases which conferred upon lessees a right of exclusive possession is compelling' — at [21]

His Honour also doubted that a different result would arise in relation to a term lease (a non-perpetual lease) granted under the same section or whether the land was set apart for grazing, agriculture, or mixed farming — at [20].

Gaudron, Gummow and Hayne JJ

In analysing the NTA provisions, the joint judgment sets out a useful analysis of the relevant provisions of the NTA — see [52] to [56]. To be a previous exclusive possession act, the lease could either be:

- an exclusive pastoral lease — see s. 242 (lease), s. 248 (pastoral lease), s. 248A (exclusive pastoral lease) and s. 23B(2)(c)(iv); or
- a lease (other than a mining lease) that confers a right of exclusive possession over the land or waters (s. 23B(2)(c)(viii)).

An exclusive pastoral lease is, among other things, a pastoral lease that confers a right of exclusive possession over the land or waters concerned. Thus the test is the same: does the lease confer a right of exclusive possession over the land or waters concerned? — at [60].

The joint judgment surveys the history of this type of lease and the steps taken to strengthen them so that they become more attractive to lenders as security for loans. The judgment then reviews the classificatory controversy concerning the nature of an estate in fee simple and leases in perpetuity. The question of whether such a lease is the grant of a freehold estate is not pursued and the inquiry is then focussed upon the legislative genesis of the term 'lease in perpetuity' From a review of the literature and Parliamentary speeches, their Honours draw the implication that a perpetual lease was intended to 'contain all the advantages and essences of a freehold' grant without the Crown relinquishing its capacity to put conditions upon the grant such as requirements for development and personal residence and the like — see at [93], [102], [107] & [116].

Their Honours conclude that the conditions and restrictions upon the perpetual lease did not detract from the conclusion that the grant was, in substance, freehold (this is not to say that the lease was a 'freehold estate' — that point was unnecessary to determine). Thus the grant of a perpetual lease gave rise to a right to exclusive possession and therefore the grant of the lease was a previous exclusive possession act and native title had been extinguished — at [109] to [119].

Callinan J (McHugh J agreeing)

Callinan J distinguished the Wik decision on the basis that the pursuit of pastoral purposes, '... properly understood, is incompatible with the pursuit of any other activity involving unrestricted access to or physical presence upon the land'. His Honour went on to say that much weight should be given to the use of the word 'lease' and that even very extensive reservations are compatible with ordinary leasehold and, for that matter, freehold. Thus his Honour was of the view that the lease gave rise to a right to exclusive possession and is therefore a PEPA — at [194], [203] & [205].

Kirby J (in dissent)

His Honour, having recognised the complexities of interpreting the NTA, states that the meaning of the term 'exclusive possession' should be consonant with the majority decision in *Wik*. The NTA, he says,

proceeds on the basis that 'leases' may or may not grant exclusive possession and thus the reference to the grant being a lease is insufficient to determine the issue. Of importance to his Honour were the facts that the lease was not a Scheduled interest (see s. 249 C) and that the legislation did not, in words, afford a right of exclusive possession. The consent requirements for the transfer of the land, the regulation of the use of the land, the exceptions and reservations that applied and the power reserved to resume parcels of the land were, in Kirby J's view, evidence that its likeness to the statutory regime in the Wik case was 'overpowering'. Thus, he was of the view that the lease did not give a right to exclusive possession and was not a PEPA — at [126], [127], [153] & [163]

Ramifications of the decision

Native title is wholly extinguished over much of the Western Land Division of NSW. Native title applications would need to exclude these areas for registration test purposes. This decision may also have implications for perpetual pastoral leases in other areas of Australia.

Change of solicitor and discontinuance

Ankamuthi People v Queensland [2002] FCA 897

per Drummond J, 17 July 2002

Issue

The Cape York Land Council (CYLC), the representative body for the area covered by this application, filed a notice of change of solicitor in relation to this claimant application and then filed a notice of discontinuance. The question was whether or not these were effective, given that the CYLC did not have instructions from the applicant to file these documents.

Background

The evidence indicated that:

- none of the five persons named as the applicant in the proceedings gave instructions to change their solicitors and none of those persons gave instructions to discontinue the claim;
- a large majority of the native title claim group were unhappy with the way the claim was being conducted by the applicants and their legal representative.

Decision

Whilst his Honour Justice Drummond was satisfied that CYLC was acting on the instructions of a large majority of the Ankamuthi People, he held that there is a procedure laid down in s. 66B the Native Title Act to deal with the dissension that has developed within the Ankamuthi People. If the applicants no longer have the authority of the Ankamuthi People to run this action on their behalf, they can be replaced by new applicants. However, his Honour noted that this can only be done by the Court on notice to all the parties.

Drummond J found that a claimant application is a representative proceeding and that, pursuant to s. 61(2) and s. 62A of the Act, only the named applicant has control of the litigation. The other members of the native title claim group have no authority to take any step in the proceedings. His Honour noted that, as these were representative proceedings, they could not be discontinued without the leave of the Court pursuant to O 22 r 2(2) the Federal Court Rules.

Party Status

Rubibi v The State of Western Australia [2002] FCA 876

per Merkel J, 11 July 2002

Issue

The main issue was whether persons who are acknowledged as part of the claim group but claim different native title rights and interests to those claimed by the applicants should be joined as respondents. The case also

considers the Court's jurisdiction to make a determination of native title in favour of a party who has not made a claimant application under s. 61 of the Act.

Background

A group referred to as the Walman Yawuru claimants claimed to be persons whose 'interests may be affected by a determination in the proceedings' and applied under s.84(5) to be joined as respondents. The first and second applicants (referred to as the Rubibi and Leregon claimants respectively) opposed the joinder. The Walman Yawuru claimants are persons on whose behalf native title rights and interests were being claimed by the Rubibi and the Leregon claimants in accordance with s.61(1).

As there was evidence that the native title rights and interests they were claiming differed from those claimed by the Rubibi and Leregon claimants, his Honour was satisfied that the Walman Yawuru claimants were claiming 'a competing communal native title claim in respect of part of the claim area.' They also proposed to adduce evidence to dispute the nature and extent of the native title rights and interests claimed by the Rubibi and Leregon claimants.

Merkel J distinguished the decision in *Yarmirr v Northern Territory* (unreported, Federal Court of Australia, Olney J, 4 April 1997), where Olney J refused an application by a person claiming native title to be joined as a respondent on the basis that the Court lacked jurisdiction because that person had not made a claimant application.

Jurisdiction v discretion

His Honour rejected the Rubibi applicant's submission that the proper course of action for the Walman Yawuru was either make an application under s.61 of the NTA or to apply to replace the existing claimants under s.66B. Merkel J found that the absence of any such application was a consideration that went to discretion rather than jurisdiction. His Honour was satisfied that the Court has jurisdiction to resolve the dispute between the members of the claimant communities as to the existence, nature and extent of the native title rights and interests that are being claimed. Merkel J considered it unnecessary to finally determine whether, as part of its resolution of that dispute the Court has jurisdiction or power to make a determination of native title in favour of the respondents — at [17] and [18].

Note that his Honour was of the view that if a member of the claimant community sought joinder for the purpose of 'merely disputing the manner in which a claim is being contested or some incidental aspect of it, rather than to oppose the claim on substantive grounds', then the discretionary issues raised by the Rubibi claimants, including that the proper course is to apply for a replacement of the applicants under s. 66B, may have some force. However, Merkel J was of the view that this was not such a case — at [22] & [23].

Decision

Merkel J found that the Walman Yawuru claimants were persons whose interests may be affected by the determinations sought by the Rubibi and Leregon claimants and ordered that they be joined as respondents to the proceedings.

*Walker v Western Australi*a [2002] FCA 869

per French J , 10 July 2002

Issue

The main issue was whether a mining company that had applications for mining tenements pending had a sufficient interest to support a joinder application.

Background

AngloGold Australia Ltd (the company) sought to become a respondent to a claimant application filed on behalf of Ngalia Kutjungkatja People on the basis that the 15 exploration licence applications and four prospecting licence applications it had

pending over the claim area provided sufficient grounds to support a joinder application. Seven of the exploration licence applications had been recommended for approval as at the date of the hearing. French J accepted that the company had a genuine and substantial interest in exploring for gold in the area the subject of the claim, with expenditure of approximately $100,000 to $150,000 budgeted for exploration should the tenements be granted. The native title applicants did not oppose the company's application.

His Honour noted that, pursuant to s. 84(3)(b), a person who has an interest that may be affected by a determination in the proceedings who notifies the Court, in writing, that they want to be a party within the period specified in s. 66 is entitled to become a party. After surveying the relevant case law, French J turned to the decision *Members of the Yorta Yorta Aboriginal Community v State of Victoria* at 9 — 10 (unreported, Federal Court, 7 June 1996). In that case, Olney J found that a single application for an exploration licence was not a sufficient interest for purposes of a joinder application. French J distinguished that case on the basis that, in the matter before the Court presently, the company had a number of well advanced applications directed at furthering its already substantial economic interest the area. Accordingly, his Honour made orders that the company be joined as a party. However, in a note of caution, his Honour commented that:

> '... if a party's interests were used as a platform to pursue some collateral ideological or other agenda or if a party were to act grossly unreasonably in relation to a proposed consensual settlement, there is a discretion on the part of the Court to dismiss the party from the action — *Bissett v Minister for Land and Water Conservation (NSW)* at [24].' At [22].

Right to Negotiate Determinations

The determinations summarised below raise interesting points or develop the law relating to right to negotiate applications made under s. 75 of the NTA i.e. objections to the application of the expedited procedure and future act applications. For further information about right to negotiate proceedings, see the 'Guide to Future Act decisions' on the Tribunal's home page. Please note that all were made prior to 30 June 2002 i.e. before the two High Court decisions referred to above. Whether or not these cases give rise to any issues in relation to future act proceedings is currently under consideration.

Objection to the application of the expedited procedure

Bruce Monadee & Ors on behalf of the Ngaluma Injibandi/Western Australia/Auriferous Mining Pty Ltd & Anor

NNTT WO01/164, Hon EM Franklyn QC, 26 June 2002

The objectors' contentions asserted that there were sites of significance but this was not supported by the affidavit evidence or by the information available on the WA Register of Aboriginal Sites — at [16] to [17].

Nonetheless, the Tribunal found four sites of particular significance within the meaning of s. 237(b), only one of which was precisely located. As the grantee party had not provided any evidence as to its intentions in relation to the conduct of exploration and the Tribunal recognised that it may be some time before the sites were specifically located and identified, it was impossible for the Tribunal to conclude that the grant was not likely to interfere with sites of particular significance. Therefore, the expedited procedure was not attracted and the right to negotiation provisions apply to the proposed grant.

May Rosas/BHP Billiton Minerals Pty Ltd/Northern Territory

NNTT DO01/98, Mr J. Sosso, 25 June 2002

The government party queried whether the deponents were authorised to speak on behalf of the native title claim group or sub-group, relying on *Little v Western Australia* [2002] FCA 1706. The Tribunal found the deponents did not explicitly deal with their qualifications to speak for the native title claim group with respect to various sites. *The Stokes Range Land Claim Report* (No 36) and the *Nguliwurru/Nungali Land Claim Report* provided the Tribunal with helpful findings identifying the deponents and the areas for which they had authority to speak— at [16] to [24] & [78] to [79].

In relation to s. 237(b), the Tribunal noted that:

> 'When a native title holder says he/she is speaking for country or for particular areas or sites, then they should specify in their witness statement or affidavit whether they are a member of the relevant native title claim group, on what basis they can speak for the country or site, the significance of the country or site, and such other information which allows the Tribunal to ascertain that what is deposed to, is a proper reflection of the traditions of the claim group' — at [28].

The Tribunal considered the regulatory regime in the *Mining Act* (NT) and in particular the conditions mandated by s. 24A (the Second Schedule conditions) — at [69] & [70]. The Tribunal noted the lynchpin of the regulatory scheme is the requirement found in clause 18 for licensees to give notice and convene a meeting with registered native title claimants or holders to explain the exploration activities. Clause 20 provides for government action following a written complaint that exploration is adversely affecting native title rights and

interests. The Tribunal found on the facts of this matter that there was likely to be intersection between the exploration activity and the community and social activities of the objectors but that there was no real chance of any significant interference. Therefore, the Tribunal found that there was not likely to be interference with a site of particular significance — at [68], [71] & [80].

In relation to s. 237(c), the Tribunal confirmed the starting point and pre-condition is evidence of proposed physical disturbance of land and waters. However, in assessing whether the impact will be 'major,' physical impact on customs and traditions may be considered. The Tribunal found the regulatory regime is a key element in ascertaining the real risk of a major disturbance. After considering the regulatory regime in the *Mining Act* (NT) and the *Mining Amendment Act 2001* (NT) the Tribunal was satisfied the objectors' cultural concerns could be accommodated without any real risk of a major disturbance — at [84], [88] to [92].

In respect of the native title party's concerns about exploration in Gregory National Park, the Tribunal accepted the relevance to a s. 237(c) inquiry of the fact that the proposed tenement included national park land. The Tribunal noted the Territory Parks and Wildlife Conservation Act seemed to allow a policy permitting multiple use of parks and reserves. The fact that land is in a national park does not, of itself, raise a presumption that the area in question exhibits special circumstances such that it is more likely that a major disturbance would occur. The Mining Act s. 176A has special provisions for appropriate consideration and review of mining in national parks. No evidence was presented indicating that the previous exploration activity had resulted in disturbances. It was determined that the expedited procedure was attracted — at [95] & [98].

Tribunal Practice and Procedure

An interim set of registration test procedures, addressing the High Court's decisions in *Western Australia v Ward* and *Wilson v Anderson*, are being developed. When finalised, they will be posted on the Tribunal's website. Shortly afterwards, the changes flagged in the interim procedures will be integrated into the full suite of registration test procedures presently available on the website. The amended parts of the procedures will initially appear in red text. These, and other matters relevant to the impact of the High Court's decisions are being considered.

Please note that the procedures and guidelines on the Tribunal's website are continuously updated. Reference should always be made to the procedures as they appear on the web. They are consolidated on a three-monthly basis and reflect all changes made to that date. Changes appear in red text within the document, along with the date on which the changes were made.

Federal Court Liaison Report

The relationship between the Tribunal and the Federal Court is important in terms of the efficient and effective management of native title matters. Communication strategies between the two agencies include:

- The President of the Tribunal contributing to the Court's Native Title Coordination Committee;
- Mediation reports provided by members of the Tribunal to judges allocated to specific native title matters;
- Communications between the Native Title Registrar and the Federal Court Registrars in relation to particular issues and in the context of the Attorney-General's Native Title Coordination Committee;
- Communications about administrative matters at the regional and national level, including in relation to strategic and operational matters; and
- Tribunal staff appearances at directions hearings as *amicus curiae* (or 'friend of the Court').

The Tribunal and the Court have well established and effective administrative relationships, including an administrative protocol that establishes a consistent approach to the transfer of documents and provision of information. The Court and the Tribunal endeavour to:

- share that information and reach agreement on administrative practices to reduce the likelihood of our processes producing incompatible outcomes; and
- ensure that a co-ordinated approach is taken in relation to Court case management conferences and Tribunal mediation.

Pre-mediation case management conference

The Tribunal recently worked closely with the Federal Court in relation to a pre-mediation case management conference and information session for the Gounditch-Mara native title application in Victoria. The case management conference was held in Portland on 7 and 8 August 2002. In consultation with the parties and the Tribunal, the Federal Court has developed timeframes to progress the mediation of the claim.

FC Native Title User Group meetings

The Tribunal regularly participates in Federal Court Native Title User Group meetings. The Tribunal attended the First National User Group meeting in Adelaide last year and attends regional User Group meetings in Western and South Australia, Victoria, New South Wales and the Northern Territory. Anyone involved in the native title process is encouraged to attend, including representative bodies, industry groups, government and individual parties. The meetings are a catalyst for open discussion and informed debate. They facilitate consultation and strategic planning of the management of the native title caseload. Key outcomes of User Group meetings are, where this is necessary, addressed through liaison networks between the Tribunal and the Court.

For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.
A wide range of information is also available online at www.nntt.gov.au

Native Title Hot Spots is prepared by the Legal Services unit of the National Native Title Tribunal.