Determination of native title – Hatches Creek

Alywawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory [2004] FCA 472

Mansfield J, 23 April 2004

Issue
Does native title exist over certain areas of land and waters south-east of Tennant Creek in the Northern Territory and, if so, who holds it? It was determined that native title did exist over much of the area covered by the claimant application considered. Note that the decision is subject to appeal (see below).

Background
This decision relates to a claimant application brought by the Alyawarr, Kaytetye, Warumungu, Wakay native title group (claim group). While the claim group was described by reference to these four language or tribal groupings, it also comprised seven landholding or estate groups (landholding groups), each associated with a particular part of the claim area—at [2] to [10].

The area covered by the application (the application area) was made up of:
- an area subject to a Crown Lease Perpetual granted to the Conservation Land Corporation in 1993 (the principal claim area); and
- an area of vacant crown land set apart for the proposed town site of Hatches Creek but never established as a township (Hatches Creek township)—at [18] to [20] and [38].

The whole of the application area was previously subject to grants of non-exclusive pastoral leases.

Evidence from land rights claims
The application area was situated near areas that had been the subject of four determined claims made previously under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth) (the land rights proceedings). Six of the seven landholding groups that made up the claim group in these proceedings had previously been found to be the 'traditional Aboriginal owners' in the land rights proceedings.

Justice Mansfield:
- received into evidence the reports and transcripts from the land rights proceedings under s. 86(a)(v) of the *Native Title Act 1993* (Cwlth) (NTA); and
- noted that it was necessary to have regard to such findings and evidence with some caution, given that there is no precise correspondence between the matters required to be proven in a claimant application made under s. 61(1) of the NTA and in land rights proceedings—at [41] to [49].

Aboriginal evidence generally
Substantial evidence was given by nearly 30 Aboriginal witnesses, largely on country. Apart from that given on country, the bulk of the evidence comprised expert reports, public records and witness statements tendered without formal proof. Four experts gave evidence on behalf of the applicant in relation to anthropological, historical, linguistic and archaeological issues—at [23] to [26] and [79] to [88].

The evidence of the Aboriginal witnesses was not disputed and Mansfield J was satisfied that it was coherent and credible.

His Honour noted that the claim area contained only a small proportion of the traditional country of the seven landholding groups and admitted relevant evidence relating to areas outside of, but close to, the claim area—at [69].

Relevance of anthropological evidence
While noting that the evidence of Aboriginal witnesses was central to the claim, his Honour also noted that:

- anthropological evidence may provide a framework for understanding the primary evidence of Aboriginal witnesses in respect of the acknowledgment and observance of traditional laws, customs and practices;
- it may observe and record matters relevant to informing the court of both the social organisation of a native title claim group and the nature and content of their traditional laws and traditional customs;
- by reference to other material, including historical literature and anthropological material, anthropologists may compare that social organisation with the nature and content of the traditional laws and traditional customs of the claimants' ancestors and interpret the similarities or differences; and
- there may also be circumstances in which an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear—at [89].

Inferences drawn
Mansfield J found that the evidence in this case permitted the drawing of reasonable inferences that:

- the claim group was descended from the original inhabitants of the area at the time sovereignty was asserted (which was 1788 in one part of the claim area and 1825 in the remainder) in that there was a 'substantial degree of ancestral connection' between them; and
- the original inhabitants of the area were, at sovereignty, both an identifiable community and an organised society under traditional law and custom—at [74] and [100] to [110].

His Honour noted that:

> [I]n practical terms I do not think that the different dates upon which sovereignty was established over the claim area are of significance in determining the native title claim. There was no European entry into the claim area or its environs until after 1825. There is

> nothing to indicate that the nature of indigenous use of the claim area, or areas around the claim area, altered in any way of significance to the present application between 1788 and 1825—at [63].

The evidence relied upon to draw these inferences included:

- archaeological evidence of pre-sovereignty occupation of the land; and
- historical records from the earliest European contact in 1860 that recorded 'many signs' of Aboriginal occupation in and around the claim area—at [102] to [103].

The finding that, at the time of contact—and by inference the time of sovereignty—the Aboriginal occupants of the claim area were members of an organised society, was said to be 'confirmed' by ethnographic work undertaken in the claim area in 1901, which noted the following:

- the use of spears, shields, boomerangs, vessels for carrying water and food, stone knives, necklets made of animal fur, head rings and human hair string;
- the existence of customs related to both burial and mourning, including both tree burial and burial in the ground;
- the belief in various Dreamtime ancestors or totems who created the landscape and the performance of complex associated rituals;
- initiation and circumcision ceremonies;
- the existence of sacred objects or *Churinga* (*Atywerreng*);
- the existence of named moieties, the ceremonial role of persons of the opposite moiety, and the existence of gender-based restrictions in respect of information and places;
- the existence of what the ethnographer called a 'class system', the role of classificatory siblings, the existence of marriage rules, a rule for the descent of leadership, interrelationship of different groups, and the existence of territoriality—at [108].

Connection with claim area since sovereignty

His Honour found there was strong evidence that, since first contact (and by inference since sovereignty) to the present, the claim group's acknowledgement and observance of traditional laws and customs in relation to the claim area and its surrounds had continued in substantially uninterrupted fashion—at [111] to [128].

It was noted that:

> It is likely that Aboriginal presence upon, and occupation and use of, the claim area has not been uniform at or since first contact, and for the reasons given since sovereignty (whether 1788 or 1825), as it has been influenced no doubt by seasonal factors such as the availability of water and other resources, ceremonial obligations, and more recently the presence or absence of Europeans and other factors—at [107].

Claim group an identifiable native title community

Whether the evidence established that the claim group were the persons who, according to their traditional laws and customs, held the common or group rights comprising the native title was a primary point of contention at trial.

The applicant contended that the claim group was a recognisable composite, communal native title group, of which the estate groups were subgroups with particular more local affiliations—at [11] and [72].

The Northern Territory contended that the native title rights and interests were held at the level of each landholding group, rather than at the level of a more expansive community comprising the seven landholding groups or the four language or tribal groups in combination, arguing that the claim group was:

- a recently formed 'confederation caused by the fragmentation of remaining areas of traditional use and occupation due to European utilisation of the claim area'; and
- not connected to the application area in accordance with traditional laws and traditional customs of previous indigenous inhabitants—at [54] to [55], [75] and [112].

His Honour found:

- the claim group constituted an identifiable community;
- its members identified and recognised those persons within the description of the claim group as members of the broader community despite their different subgroups;
- its members lived under a common set of laws and customs;
- within the claim group, there were different subgroups or persons who have a particular responsibility for particular parts of the claim area or particular sites;
- there was a significant sharing of such responsibilities across particular persons from different landholding subgroups which arose under the broader communal laws and customs; and
- the claim group was not a new community different from that which existed at sovereignty. The claim group had its ancestral source in the community which occupied the claim area sovereignty—at [129] to [150].

Mansfield J referred to the finding of the majority of the Full Court of the Federal Court in *Western Australia v Ward* (2000) 99 FCR 316; [2000] FCA 191 (Full Court in *Ward*) at [204] that the evidence showed a communal title shared by a composite community of the Mirriuwung and Gajerrong estate groups under the traditionally-based laws and customs as 'currently acknowledged and observed by it'.

His Honour went on to state that:

> The particular issue was not directly raised before the High Court in Ward [*Ward v Western Australia* (2002) 213 CLR 1; [2002] HCA 28], but the majority reasons indicate that the existence of the communal group holding native title must exist both at the time of sovereignty as well as at contemporary time, and during the continuum. That is not to require that there be a mirror reflection of all features of the traditional laws and customs, or the manner of their exercise, at the two temporal bookends for the reasons already given. But the communal rights and interests cannot be transferred from one communal group existing at sovereignty to a different communal group formed sometime thereafter, so that the new communal group may assert under the NT Act native title rights and interests which it holds and which are recognised by the common law under s 223(1)(c) of the NT Act—at [131].

It was noted that:

- the existence of different individual rights in respect of different parts of the claim area does not mean that the claim group does not enjoy communal rights and interests over the claim area; and
- the claim group, by its members and through its traditional decision-making processes, could collectively assert against non-members the right to enforce its native title rights and interests—at [132] to [133].

Historical pastoral leases

The whole of the application area had previously been subject to a series of non-exclusive pastoral leases, with the majority having been granted prior to the commencement of the *Racial Discrimination Act 1975* (Cwth) (RDA) on 31 October 1975—at [232] to [244].

All but two of the historic leases were granted subject to a reservation in favour of the Aboriginal inhabitants of the Northern Territory, giving them the right to:

- enter the leased land;
- access the springs and natural surface water;
- erect and make wurlies and other dwellings;
- take and use for food native birds and animals—at [232] to [246].

His Honour was satisfied that the various reservations that applied were all essentially the same in both meaning and effect, despite some changes in the wording of the reservation over time—at [265] and [268].

Other historical pastoral tenure

Parts of the claim area had also been subject to other pastoral interests, including pastoral permits and grazing licences. His Honour was of the view that the grant of these interests did not have any further extinguishing effect beyond that brought about by the pastoral leases—at [227], [237] and [260].

Extinguishing effect of non-exclusive pastoral leases

It was held that all of the pastoral leases granted over the claim area were previous non-exclusive possession acts (PNEPAs), being valid non-exclusive pastoral leases granted on or before 23 December 1996. A PNEPA that is not also a category A past act has the effect of extinguishing native title to the extent that it involves the creation of rights and interests that are inconsistent with the native title rights and interests in relation to the leased area: s. 9M of the Validation Act—at [217], [221] to [225], [249], [255] and [256].

Inconsistency of incidents test applied

Mansfield J applied the inconsistency of incidents test set out by the majority of the High Court in *Ward* at [78] to [79] and [82] i.e. the question of whether the rights of a pastoral leaseholder are inconsistent with native title rights and interests is determined by an objective inquiry which requires identification of and comparison between the two sets of rights. His Honour considered that, in order to determine the

legal incidents of a pastoral lease, it was necessary to examine both the relevant statutory provisions and the terms and conditions of the lease as a whole, including any reservation in favour of Aboriginal people—at [223] to [224] and [261] to [263].

The territory submitted that determining the extinguishing effect depended on the 'act of granting' a pastoral lease, which was said to demonstrate an assertion by the Crown of its entitlement to determine who would have the rights of occupation, possession, use and enjoyment of the claim area. His Honour rejected this submission:

> In my view, that contention does not correspond with the inconsistency of incidents test...[T]he exercise of the power [to grant the lease] extinguished native title only to the extent that the rights then granted were inconsistent with the pre-existing native title rights and interests—at [215].

Territory submissions on effect of grant of pastoral leases

As noted, the territory argued that any native title right to make decisions about the use and enjoyment of the land by others, and to control their access to the land, was extinguished by the grant of the pastoral leases. As to the effect of the reservation, the territory submitted that:

- it was clear from the terms that no bare 'right to make decisions' was preserved as a separate right—conceptually, such a right must be linked with a right to occupy, use and enjoy the land;
- the scope of any native title right to make decisions which is preserved upon the grant of a pastoral lease must be limited by the scope of the reservation, i.e. limited to the right to make decisions about the use and enjoyment of the land by the native title holders for the purposes which fall within the reservation; and
- no right to control access by others was preserved by the reservation—at [258] and [259].

Findings on effect of reservation in favour of Aboriginal inhabitants

His Honour was of the view that:

> [A] reservation in favour of Aboriginal people in the pastoral leases ... indicates clearly that native title rights described in the reservation were held back from the grant and could continue to be enjoyed by Aboriginal people. Moreover, the reservation indicated clearly that the pastoral leases did not extinguish all native title rights and interests or substitute for them statutory rights. The reservations firstly defined the scope of Aboriginal rights and interests which were preserved upon the grant of a pastoral lease. Native title rights, not in terms included in the reservation in the pastoral leases, were susceptible to extinguishment, and were extinguished 'to the extent of inconsistency of rights granted under the pastoral leases'—at [246], citing the Full Court in *Ward* at [340] and [342] (on this, see comment below).

His Honour concluded that, in preserving the express reserved rights to Aboriginal persons, including to enter and remain on the pastoral land and to continue certain activities on the land incidental to their presence, it was not intended that the leases would preclude Aboriginal persons from doing all other things not expressly provided for in the reservation—at [268].

Residual right to make decisions about access and use

Mansfield J recognised a non-exclusive native title right to control access to the application area by, and make decisions about its use in respect of, persons other than those having such rights under the pastoral lease or statutory rights of entry for particular 'explicit' purposes. However, his Honour went on to say that:

> I do not consider that it is inconsistent with such rights that the native title right to control access to the land should survive to exclude persons who might wish to enter the land to do things unrelated to the pastoral lease or without some other reserved or statutory rights—at [270].

His Honour held that:

- native title rights to control access to the claim area and to make decisions about its use are not, of themselves, inconsistent with rights of a pastoral lessee to make decisions about the land for pastoral purposes;
- such rights are extinguished only to the extent that they are inconsistent with the rights of a pastoral lessee to make decisions concerning those matters—at [270] and [274] to [277].

Mansfield J's application of the inconsistency of incidents test was as follows:

> Let it be supposed that only one pastoral lease had been granted over the claim area and that lease had survived only one year. To the extent that it empowered the pastoral lessee and the lessee's invitees to enter upon the claim area, the grant of the lease would be inconsistent with the exclusive native title right to control the access of persons to the claim area ... . But the inconsistency arises because the pastoral lease authorised the entry of a definable group of persons under it. It did not authorise the entry of all or any persons under it. The lessee could exclude uninvited persons, subject to the reservation in favour of Aboriginal persons. That right would run in tandem with the right in the native title holders to control access: s 44H of the NT Act. Once the lease came to an end, the...native title holders would have whatever rights survived to control access to the claim area. Their right would have been extinguished to the extent that it was exclusive for the reason already given ... . But it does not follow ... that the right of a definable group of persons under the lease to access the claim area is inconsistent with (and so extinguishes) the non-exclusive native title right to control access to the claim area in respect of persons outside that definable group of persons—at [271].

Examples given by Mansfield J as to the exercise of these residual rights included:

- control of access e.g. persons seeking to enter the land to film a sacred site or commercially exploit a bush food resource; and
- decisions about use e.g. fishing or camping area restrictions—at [271] and [277].

His Honour found that:

- although the reservation referred generally to 'Aboriginal inhabitants', it was not intended to extend the range of Aboriginal persons who could exercise rights beyond those who, according to traditional laws and traditional customs, were entitled to do so, noting that this was consistent with the language used in the reservation, such as: 'in such manner as they would have been entitled to if this demise had not been made';

- Aboriginal people, other than those who constitute the claim group, had under native title laws and customs no right of entry to the claim area, and could be excluded from it, except upon permission being sought in an appropriate way from one or other of the members of the claim group; and
- it was consistent with the reservation that the native title holders, in accordance with their traditional practices, would continue to control entry to their country by other Aboriginal people to the extent that that right was not otherwise inconsistent with rights under the pastoral leases—at [272].

On this last point, compare *Daniel v Western Australia* [2003] FCA 666 at [586], where Justice R D Nicholson rejected a submission that the extinguishment of a right to control access was limited to controlling those entering pursuant to rights granted under a pastoral lease, as that was not what the High Court in Ward intended, i.e. that the native title right to control access was extinguished for all purposes, including controlling access by other Aboriginal people. It should be noted that the reservation considered in that case was the one found in Western Australian pastoral leases, which is differently worded.

Mansfield J relied upon the Full Court in *Ward* at [340] to [342]. However, the High Court in *Ward* specifically addressed and rejected the Full Court's findings, at least in relation to [340], stating that:

> [T]he reservations in favour of Aboriginal people did not define or confine the rights that native title holders could exercise in the manner suggested by the majority of the Full Court. However, the grants of the respective pastoral leases were inconsistent with the continued existence of the native title right to control access to and make decisions about the land. Those rights were inconsistent with the right of the pastoral lessee to use the land for pastoral purposes. The respective pastoral leases were not necessarily inconsistent with the continued existence of all native title rights and interests. ... [T]he pastoral leases ... did not confer upon the lessee the right to exclude native title holders from the land.'

However, Mansfield J addressed this by noting that it was 'significant' that:

> [T]he Full Court [his Honour appears to mean the High Court] in the passage immediately quoted above did not qualify its comment that the native title rights were inconsistent with the right of the pastoral lessee to use the land for pastoral purposes by the addition of the words 'by others'—at [276].

While the pastoral lessees' rights included excluding some people from the leased area, his Honour noted that:

> Such rights were, in no sense, absolute. The native title right holders have a right to make decisions about the use and enjoyment of the land for purposes that fall within the reservation, such reserved rights being rights held back from the grant. A more general right to make decisions about the use and enjoyment of the land, subject to the rights of pastoral lessees and to other persons who may use the land under statutory or other entitlements, is not of itself inconsistent with the rights of a lessee to make decisions about the land for pastoral purposes. Examples may be given, such as decisions that a type of bush food should not be exploited in certain areas at particular times of the year, or fishing area restrictions, or the location and timing of ceremonies and the like. They

might also include restrictions on members of the public as to where they might camp, if at all, in relation to significant sites—at [277].

Comment

With respect, his Honour's finding appears to be at odds with the approach taken by other judges at first instance subsequent to the High Court in *Ward*. For example, in *Neowarra v Western Australia* [2003] FCA 1402 at [473] to [480], his Honour Justice Sundberg refused to recognise residual native title rights to control use and access on a pastoral lease that were framed in substantially similar terms to the right considered by Mansfield J because (among other things) such rights were not traditional rights existing at sovereignty:

> [N]ative title rights and interests must reflect the normative system that was in existence at sovereignty. It is not surprising that the evidence does not establish the amended right. The subject-matter of the qualification (a pastoral leaseholder and a person exercising a statutory right) did not then exist—at [475].

That said, it is, of course, entirely proper for there to be such differences of opinion at first instance, particularly in cases where the language used in the legislation considered differs.

In any event, Mansfield J's findings on the native title rights that survive the grant of a non-exclusive pastoral lease in the territory may be somewhat limited because:

- the decision appears to turn on the statutory regime, in particular the wording of the reservation. Therefore, it may have limited or no application outside of the territory and, perhaps, South Australia, where a similarly worded reservation applies. Note that at [269], his Honour states that: 'The reservations contained no geographical limitation excluding enclosed or improved areas and, although not clear on the face of the reasons, this is a direct reference to the wording of the reservation applying to Western Australian pastoral leases;
- in practice, persons entering a pastoral lease for a particular purpose, other than as of right under the lease or some other statutory authority (except, possibly, other Aboriginal persons) are generally required to hold some form of permit or licence or to be acting under some other valid authority. For example, one of the objects of the *Pastoral Lands Act 1992* (NT) is to provide reasonable public access to 'waters and places of public interest' on pastoral lands, including the right to camp in certain areas for up to two weeks without any requirement for the lessee's consent: see ss. 4(d) and 78 to 81. Licences would have to be, and can be, obtained to commercially exploit bush food, one of the other examples given by his Honour: see s. 84. Note that an unlawful entry or use is not relevant to the making of a native title determination—see High Court in *Ward* at [78]; and
- the native title right recognised may, in practice, be somewhat empty of content, given that: (1) the determination recognises that non-native title rights and interests prevail over native title rights and interests; and (2) the future act regime in the NTA applies whether before or after a determination that native title exists and so the native title holders may only have the procedural rights available under the future act regime in any case.

Crown lease perpetual 1117

The area that was the subject of CLP 1117 (the perpetual lease), which incorporated the principal claim area, comprised a portion of a pastoral lease surrendered to the territory by the pastoral lessee in February 1993 pursuant to an agreement (the surrender agreement) between the Territory, the Conservation Commission of the Northern Territory (the commission) and the pastoral lessee—at [20], [243] and [244].

The perpetual lease was granted to a statutory authority in September 1993 for the purpose of a proposed national park in one area and for the establishment of a proposed tourist facility and camping ground in another.

Section 20(1) of the *Parks and Wildlife Commission Act* (NT) (the Commission Act) gave the commission the power to do all things necessary for the performance of its functions, including occupying, using, managing and controlling the principal claim area. However, this was subject to s. 122 of the *Territory Parks and Wildlife Conservation Act* (NT) (TPWC Act), which provided that Aboriginal people who had traditionally used the area could continue to do so in accordance with their traditions for hunting, food gathering (other than for sale purposes) and for ceremonial and religious purposes (the s. 122 reservation)—at [278] and [285].

The proposed national park had not been declared under the TPWC Act.

Effect of perpetual lease on native title

At [287], Mansfield J held that the perpetual lease had the same effect as a similar Crown lease perpetual considered by the High Court in *Ward*:

> [T]here was a conferral of exclusive possession [when the lease was granted] with the consequence that so much of native title rights and interests as had survived the loss of the right to be asked permission to use or have access to the land, consequent upon the preceding pastoral leases, was, subject to the operation of the RDA, extinguished—at [439], Gleeson CJ, Gummow, Gaudron and Hayne JJ.

Applying the RDA and NTA, it was then found that the grant of the lease was a category D past act to which the non-extinguishment principle found in s. 238 of the NTA applied. However, because of insufficient findings of fact, the High Court was not able to determine whether (in respect of the native title rights and interests that had survived the grant of pastoral leases) the subsequent grant of the perpetual lease was 'wholly or partly inconsistent with the continued existence, enjoyment and exercise of the native title rights and interests in question' for the purposes of the application the non-extinguishment principle—at [448], High Court in *Ward*, noted at [287] by Mansfield J.

It is somewhat difficult to reconcile the finding that the grant of the lease would, absent the intervention of the RDA and NTA, have wholly extinguished any remaining native title rights and interests on the basis of the inconsistency between that grant and those rights and interests, with a requirement to then go on to determine the extent of inconsistency.

However, this appears to be what the High Court said and so it fell to Mansfield J to consider whether the grant of the perpetual lease was an act that was wholly or partly inconsistent with the continued existence, enjoyment and exercise of the native title rights and interests. This was because:

> If wholly inconsistent, the effect of s 238(3) is that the native title continues to exist in its entirety but the rights and interests have no effect in relation to the grants. If there is partial inconsistency, there is the continued existence of native title in its entirety but, by force of s 238(4), the rights and interests have no effect in relation to the grants "to the extent of the inconsistency"—High Court in *Ward* at [448].

Mansfield J was of the view that the perpetual lease was wholly inconsistent with continued existence of a non-exclusive native title right to:

- control access of persons to the principal claim area; and
- make decisions about the principal claim area—at [289], having noted that those rights were not expressly within the terms of the s. 122 reservation.

This was primarily because the area came under the care, control and management of the commission:

> The powers in s 20(1) of the Commission Act to use and manage and control the principal claim area are so broad as to be inconsistent with the native title rights to which I have referred.

The effect of this finding is that such rights continue to exist but have no effect 'in relation to the act'—at [288], [289] and [292] and see s. 238(3) of the NTA.

In relation to the other native title rights and interests found to exist in respect of the principal claim area, Mansfield J found that:

- the perpetual lease created no greater inconsistency than that brought about by the grant of the various pastoral leases; and
- section 44H of the NTA applied, so that the exercise of rights under the perpetual lease would prevail over native title rights but would not extinguish them—at [292].

Note that the grant of the perpetual lease was not a previous exclusive possession act (PEPA) because s. 23B(9A) and the territory analogue expressly state that acts done for the purposes of preserving the natural environment are not PEPAs.

Public works — roads

As to the meaning of 'road', his Honour held that:

- certain access roads were 'roads' within the definition of 'public work' in s. 253(a)(ii) of the NTA because they were constructed for motor vehicle access and involved significant earthworks and the re-alignment from a pre-existing track; and
- a very rough four-wheel drive track, apparently following natural contours, was not a 'road' because s. 253 contemplates 'some permanent substantial and clearly identifiable physical features'—at [301] to [302].

His Honour found that:

- two access roads, the construction of which commenced on or before 23 December 1996, extinguished native title because they were public works validated as category A intermediate period acts, fell within the definition of a previous exclusive possession act (PEPA) and, therefore, also wholly extinguished native title; and
- applying s. 251D, native title also wholly extinguished over the land and waters adjacent to the two roads used for their construction, establishment or operation. This area included a corridor on either side as necessary to maintain them—at [308].

Note that, as areas subject to PEPAs were excluded from the application area (as they must be under s. 61A), those areas were also excluded from the determination under s. 225—see the Schedule to the determination at [328].

Public works — campsite infrastructure

The territory contended that certain campsite infrastructure within the principal claim area, including platform tables, timber bollards, barbeques and an interpretive shelter, were PEPAs, i.e. public works, the construction of which commenced on or before 23 December 1996 that were validated as either category A past or intermediate period acts.

Public works — fixtures

The definition of 'public work' relevantly includes 'a building or other structure that is a *fixture* that is constructed or established by or on behalf of a statutory authority of the Crown'—s. 253(a)(i), emphasis added.

The infrastructure in question was constructed by the commission. Having regard to the purpose of the lease and the powers of the commission in relation to the leased area, Mansfield J held that the works were valid, despite the fact that there had been no declaration of a proposed national park—at [300].

His Honour found that the campsite facilities, other than the interpretive shelter, were not 'fixtures' because:

- a fixture requires a degree of annexation to the land and the intention that it be permanent; and
- there is nothing in the NTA to indicate that the term 'fixture' is used other than in its normal common law sense—at [303] to [307].

While the hard stand area on which the interpretive shelter was constructed was laid prior to 23 December 1996 (hard stand work), the shelter itself was not contracted for construction until June 1997. His Honour held that the hard stand work was a step prior to the construction of the public work—at [309].

However, the applicant accepted that the construction of the interpretive shelter was a valid future act under s. 24ID(1)(a) of the NTA to which the non-extinguishment

principle applied because it was to give effect to, or was because of, the surrender agreement—at [310].

Application of s. 47B to Hatches Creek town site
Mansfield J considered it common ground that s. 47B may apply to the Hatches Creek township area on the basis that, at the time the application was made, that area was not covered by a proclamation under which it was to be used for public purposes or for a particular purpose—at [228] and note that there was no consideration given to the other matters raised in s. 47B((1)(b)(ii).

There was no direct evidence before the court as to the requirement in s. 47B(1)(c) that, at the time the application was made, one or more members of the claim group occupied the area. The territory submitted this requirement was not met.

Mansfield J inferred from the evidence that members of the claim group occupied Hatches Creek township for the purpose of s. 47B(1)(c), noting that:

- claim group members resided nearby and hunted and traversed the surrounding land including, by inference, Hatches Creek township;
- the presence of Aboriginal persons on the application area, and their occupation of it, would be influenced by seasonal factors, ceremonial obligations and the presence of non-Aboriginal persons; and
- Hatches Creek township had no physical features of significance to suggest it was continually occupied, in the sense of having permanent residents, at the time of the making of the application—at [313], referring to Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32; [1999] FCA 1248 at [162].

Right to possess, occupy, use and enjoy
His Honour, referring to the High Court in *Ward*, found it was not necessary or appropriate to express the rights and interests in such terms—at [170] and [319].

Right to control disclosure of cultural knowledge
Mansfield J recognised the right to control the disclosure (otherwise than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the 'paraphernalia' associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of, or place on, the land or waters.

The territory argued that the claimed right did not meet the requirement of s. 223(1)(b). His Honour found that the 'critical question' under s. 223(1)(b) was whether the claim group, by the traditional laws and customs which give rise to the particular native title rights and interests, had a connection with the claim area:

> The expression of the claimed right is more refined, or more specifically directed to meeting the requirement of s. 223(1)(b), than those considered by the High Court in *Ward* ... . The evidence discloses that certain of the spiritual beliefs or practices of the claim group are 'site specific', and the activities conducted pursuant to them relate to particular locations in the claim area. As expressed, the proposed right firstly relates only to the spiritual beliefs which concern particular locations in the claim area. And secondly it seeks to 'control' the disclosure of those beliefs and the material objects and other

> 'paraphernalia' associated with them. It is not directed to controlling the use of some intellectual property, but to controlling its acquisition ... . As expressed, I do not consider the right is 'something approaching an incorporeal right akin to a new species of intellectual property'—at [324] and see High Court in *Ward* at [64], where it was said that what was required for s. 223(1)(b) was the identification of the content of traditional laws and customs and the characterisation of the effect of those laws and customs as constituting a connection of the people to the claim area.

Right to trade traditional resources

Mansfield J recognised a right to share, exchange or trade subsistence or other traditional resources obtained on or from the land and waters in respect of both the Hatches Creek township and principal claim area, i.e. on an exclusive and non-exclusive basis respectively. Note that in *Commonwealth v Yarmirr* (1999) 101 FCR 171; [1999] FCA 1668 at [250], the majority of the Full Court commented that it seemed logical to view the right to trade as an integral part of a right to exclusive possession. At first instance, in *Yarmirr v Northern Territory* (1998) 156 ALR 370; [1998] FCA 771 at [119], Olney J had commented that a right to trade consisting of a right to an exchange of goods was not a right or interest in relation to land or waters as required by s. 223(1). In *Neowarra* at [510], Sundberg J was satisfied that this was a right in relation to land and waters (although no such right was recognised in that case).

Right to maintain and protect areas of importance

The territory contended that a right to 'protect' may involve controlling access and making decisions in a manner that was inconsistent with rights granted under a pastoral lease and, therefore, that it was extinguished to that extent—at [176].

Mansfield J recognised the right as claimed on the basis that the word protect:

> [C]ontemplates conduct in relation to those places in a way which may well fall short of controlling access to those places in a way which is inconsistent with previously granted rights, and the exercise of the right to be recognised is subject to the prevailing activities under the exercise of other rights: s. 44H NTA—at [322].

Right to determine and regulate membership of landholding group

Mansfield J determined that the native title holders had such a right, despite noting the applicant's acceptance that it was more appropriately recognised as part of their laws and customs rather than being a native title right or interest in relation to the claim area—at [173] and [325].

Right to bury

Mansfield J recognised a right to bury, formulated in the context of a right to engage in cultural activities in relation to both the primary claim area and Hatches Creek township i.e. on both an exclusive and non-exclusive basis. It appears the territory did not contest the recognition of such a right.

Determination that native title exists

Subject to excluding areas where it had been found native title was extinguished, his Honour determined that native title existed in relation to:

- the principal claim area, on a non-exclusive basis; and

- the area of Hatches Creek township, on an exclusive basis.

Native title holders

His Honour determined that the persons who hold the communal or group rights comprising the native title as the common law holders are the Aboriginal persons who are:

- members of one or more of the seven landholding groups because of specified descent based connections;
- those people recognised by the above persons as members of one or more of the seven landholding groups because of non-descent based connections, including adoption or birthplace affiliation; and
- spouses of persons referred to in the two categories above and who are recognised by the persons referred to in the first category as having native title rights and interests in the determination area.

Native title rights and interests determined to exist

Mansfield J determined the nature and extent of the native title rights and interests in relation to the determination area as required under s. 225(b) to be:

- the right to hunt and fish, to gather and use the resources of the land such as food and medicinal plants and trees, timber, charcoal, ochre, stone and wax and to have access to and use of water on or in the land;
- the right to live on the land, to camp, erect shelters and other structures, and to travel over and visit any part of the land and waters;
- the right to engage in cultural activities on the land, to conduct ceremonies and hold meetings, to teach the physical and spiritual attributes of places and areas of importance on or in the land and waters and to participate in cultural practices relating to birth and death, including burial rights;
- the right to have access to, maintain and protect places and areas of importance on or in the land and waters, including rock art, engraving sites and stone arrangements;
- the right to make decisions about access to the land and waters by people other than those exercising a right conferred by or arising under a law of the territory or the Commonwealth in relation to the use of the determination area;
- the right to make decisions about the use and enjoyment of the land and waters and the subsistence and other traditional resources of those land and waters, by people other than those exercising a right conferred by or arising under a law of the territory or the Commonwealth in relation to the use of the land and waters;
- the right to share, exchange or trade subsistence and other traditional resources obtained on or from the land and waters;
- the right to control the disclosure (otherwise than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters;
- the right to determine and regulate the membership of and recruitment to a landholding group.

Note that the native title rights and interests are held subject to, and are exercisable in accordance with, the traditional laws and customs of the common law holders.

Relationship between native title and other interests
His Honour determined the general relationship between the native title rights and interests and the non-native title interests as required under s. 225(d) to be they coexist but, to the extent of any inconsistency:

- the native title rights and interests do not prevent the doing of any activity by or under the non-native title interests; and
- the non-native title rights and interests, and the doing of any activity giving effect to those rights and interests, prevail over the native title rights and interests but do not extinguish them—at [328].

Mansfield J also specified the source of particular rights and interests conferred by, or arising under, the perpetual lease and, in relation to the principal claim area:

- determined the particular native title rights and interests that were not inconsistent with the non-native title interests determined in relation to the area; and
- noted that the right to make decisions about access by, or use and enjoyment of, the land by people other than those exercising a right under a law of the territory or the Commonwealth were inconsistent with the rights granted under the perpetual lease and, therefore, continue to exist but have no effect in relation to the grant—at [328] and see s. 238.

Prescribed body corporate
In orders 9 and 10, it was found that native title is not to be held on trust (i.e. it is held by the common law holders) and the applicant was ordered to nominate a prescribed body corporate within three months of the orders.

Appeal filed
The territory has raised more than 50 grounds in its appeal against aspects of this decision filed in the Federal Court shortly after judgment was delivered, including:

- the nature and composition of the native title holding group;
- the recognition of particular native title rights and interests, including the right to trade in resources and the residual right to control access to and use of a non-exclusive pastoral lease;
- the application of s. 47B to Hatches Creek township; and
- matters relating to the form of the determination.