Leave to reopen, public works – Ngarluma & Yindjibarndi

Daniel v Western Australia [2005] FCA 178

RD Nicholson J, 4 March 2005

Issue
There were a number of issues before the Federal Court in respect of a minute of proposed determination of native title. While there were a number of matters agreed between the parties for inclusion, this summary deals with the main issues of contention before the court. These relate to the inclusion of a pastoral lease omitted from a previous judgment in this matter and a notice of motion by the State of Western Australia (the state) to add to the definition of extinguished areas within the minute of proposed determination.

Background
This decision is another from the court addressing the settlement of a determination of native title, a draft of which was handed down in *Daniel v Western Australia* [2003] FCA 666, summarised in *Native Title Hot Spots* Issue 6. See also *Daniel v Western Australia* [2003] FCA 1425, summarised in *Native Title Hot Spots* Issue 8 and *Daniel v Western Australi*a (2004) 208 ALR 51; [2004] FCA 849, summarised in *Native Title Hot Spots* Issue 11.

Pastoral Lease 398/824
The state submitted that pastoral lease 398/824 should be included within the First Schedule definition of 'Ngarluma Total Extinguishment Area' and the definition of 'Yindjibarndi Total Extinguishment Area' because, while it was previously omitted through oversight, it was indistinguishable from the other pastoral leases in those definitions.

The first applicants sought to contest the legal basis for the presence of any pastoral lease in the above definitions and argued that if leave were granted to argue the inclusion then the legal basis for that inclusion should also be re-argued.

His Honour Justice Nicholson had previously declined to re-hear argument on the issue of whether pastoral leases wholly extinguished native title. He stated that the first applicants should not now be allowed:

> [T]o make submissions in relation to the extinguishing effect of this pastoral lease separately from the decisions made in relation to other pastoral leases which have been held to extinguish native title—at [6].

His Honour found that the lease was relevantly indistinguishable from pastoral leases found to have wholly extinguished native title and accepted the submission from the state that the omission of this lease from previous judgments was an

oversight brought about by its omission from the relevant submissions to the court. Pastoral lease 398/824 was included in the total extinguishment area in the draft determination—at [7] to [8].

Motion for Leave to Reopen
Nicholson J held that despite the need to bring the process of reopening to an end and the fact that the evidence sought to be adduced could have been previously discovered, that the evidence presented by the state was so material that the interests of justice required that leave be granted to reopen.

Further, his Honour said that, the following support leave being granted:
- the evidence would most certainly affect the result to the extent of the interests concerned;
- there was no demonstrated prejudice to the first applicants in that the issues raised were the subject of submissions by them;
- there is a public interest in properly finalising the 'once up' opportunity for a determination of native title;
- the merits of the contentions on the matters the subject of the reopening—at [11] and [12].

Nicholson J then considered the matters raised by the state for inclusion.

Wickham High School
No contention was raised that Wickham High School should not be included as reserve 46193 in the First Schedule, definition of 'Ngarluma Total Extinguishment Area'—at [15].

Church
On 12 December 1975 the Under Secretary for Lands granted to the Bishop of Geraldton a right of entry to enable work to commence on the church. On that basis, Nicholson J found that it was more probable than not that the church was constructed prior to 1980. This was relevant because, prior to 1980, s. 164 of the *Land Act 1933* (WA) (the Land Act), which dealt with the construction of a building on Crown land prohibited 'unauthorised' use of Crown land. After that year the provision was differently worded—at [16] and [17].

The state contended that the act of construction was valid and was a previous exclusive possession act under s. 23B(7)(b) of the *Native Title Act* 1993 (Cwlth) (NTA) and s. 12J of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA)(the TVA). The first applicants contended that the words in the definition of public work in s. 253 of the NTA 'with the authority of the Crown' meant more than just with the approval or permit of the Crown i.e. it referred to a concept of agency and acting for or on behalf of the Crown—at [20].

The state's submissions were that:
- the Macquarie Dictionary defined 'authority' to include 'a warrant for action; justification' which is the correct meaning in this context;

- paragraph (a) of the definition of public work in s. 253 of the NTA refers expressly to things constructed 'by or on behalf of the Crown';
- the change to 'with the authority of the Crown' in paragraph (b) signals a different meaning
- to interpret the phrase in terms of a concept of agency was to read paragraph (b) as a mere restatement of paragraph (a)(i) which could not have been the legislative intent; and
- to read paragraph (b) of the definition as confined to buildings that relate to the ultimate benefit of the crown, rather than simply works done by a private person, is to add to the definition a criterion not expressed.

Nicholson J held that the reference to authority should be read as referrable to its normally understood meaning of providing justification by the grant of approval or permit—at [22].

The grant of a right of entry in December 1975 was expressly made to enable works to commence. Thus, his Honour held that the grant established that the church was a building 'constructed with the authority of the Crown'—at [23].

Validity of church construction under state law
His Honour held that the authority to construct the church was sufficient in law for the purposes of s. 164 of the Land Act, even though at all relevant times the Land Act contained no provision for formality in granting authority to use or build on Crown land—at [24] and [25].

Validity of church construction by reason of native title
Nicholson J went on to consider whether the act was invalid by reason of native title. Section 12J of the TVA provided for confirmation of extinguishment in relation to public works where they were previous exclusive possession acts under s. 23B(7) of the NTA where those are attributable to the state. He therefore considered whether, pursuant to s. 239(c) of the NTA, the construction of the church was attributable to the Commonwealth, a state or territory.

Nicholson J held that:
- under s. 239 the reference to 'any person under a law of' the Commonwealth, the state or the territory meant a person given authority of the 'state' to do that act;
- it was not addressing a person who has obtained the authority of the state under a provision in a law of the state but someone whose act is attributable to the state because the state, by a law, has authorised that person to do the act, not merely authorised all persons to apply for an authority by some process;
- the construction did not satisfy the requirement of s. 12J(1)(a) of the TVA that the act be a previous exclusive possession act which was 'attributable' to the state;
- the same requirement in s. 5 of the TVA, which validated every past act attributable to the state, was similarly not met—at [31].

Creation of the church reserve

The state submitted that:

- if native title were not extinguished by the construction of the church, then the creation of the reserve in 2002 would be a 'past act' under s. 228(3)(b)(ii) of the NTA;
- this was on the basis that it was an act that took place on or after 1 January 1994 and gave effect to, or was otherwise done because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there was written evidence created at or about the time of the offer, commitment, arrangement or undertaking was made;
- the affidavit evidence established that there was a commitment, arrangement or undertaking given in the 1970s to the Roman Catholic Church that the area in question would be reserved for the church.

Nicholson J accepted this submission and held that the creation of the reserve was a category D past act to which the non-extinguishment principle applied and reserve 46888 should be included in the Second Schedule as an 'other interest'—at [33] and [34].

Comment

While it will not apparently change the outcome, the analysis in this matter seems, with respect, incomplete. It does not consider whether the grant of a right to entry was a past act or not. Nor does his Honour come to any express conclusion as to the validity of the construction of the church.

Roads

Submissions were heard in relation to sections of the Point Samson-Roebourne Road and the Spinifex Drive and Tamarind Place and Hakea Roads. These submissions related to the dedication of sections of these roads under s. 28 of the *Land Administration Act 1997* (WA). These dedications were wider than the areas of road constructed in 1982 and 1984 respectively. It was accepted that, where construction had occurred, it was valid and, as a previous exclusive possession act under s. 23B(7) of the NTA and s. 12J of the TVA, had wholly extinguished native title over the constructed roads and the area necessary or incidental to the construction of the roads—at [35].

The state submitted that the whole of the dedicated area was necessary or incidental to the construction and maintenance of the road and was therefore part of the public work under s. 251D of the NTA, referring to *Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory* (2000) 104 FCR 380; [2000] FCA 923 (*Wandarang*) at [127]. In that case, Olney J held that, having regard to the physical environment in the remote areas of the Northern Territory, where weather conditions may necessitate temporary diversions, it was not unreasonable to treat the area of the road as the whole of the area set aside to be used for the road.

In the alternative, the state submitted that, to the extent some of the areas dedicated as roads in 2002 were not the subject of earlier public works which had wholly

extinguished native title, the dedications were valid under s. 24KA(3) of the NTA and the non-extinguishment principle applied—at [38].

The first applicants submitted that specific evidence should be tendered to establish that the areas are necessary or incidental and that *Wandarang* should be distinguished on the basis that the roads in question here were close to towns and built-up areas rather than remote areas—at [39].

Nicholson J followed *Wandarang*, finding that it was appropriate to treat each of the road areas as having been set aside to be used for roads and, therefore, as having extinguished native title over the whole of the dedicated areas—at [40].