Proposed native title determination—Ngarluma and Yindjibarndi

Daniel v Western Australia [2003] FCA 666

RD Nicholson J, 3 July 2003

Issue
The question in this case was: Does native title exist over areas of the west Pilbara in Western Australia and adjacent offshore areas and, if so, who holds it?

Background
This decision provides the basis for a proposed determination of native title under s. 225 of the *Native Title Act 1993* (Cwlth) (NTA) in relation to claimant applications brought on behalf of a composite claim group, namely the Ngarluma and Yindjibarndi peoples. The decision also deals with the Yaburara Mardudhunera and the Wong-Goo-TT-OO claimant applications to the extent that they overlap the area covered by the Ngarluma and Yindjibarndi peoples' application. Both the Bunjima Niapaili Innawonga and the Kariyarra claimants were joined as respondents but did not take an active role in the proceedings. In relation to the overlapping applications, the Ngarluma and Yindjibarndi peoples asserted that their claim group included members of the Yaburara Mardudhunera and the Wong-Goo-TT-OO—at [40].

Claimed rights and interests not in application
The rights and interests sought to be recognised as native title rights and interests were asserted in submissions. They differed from, and were submitted to be in substitution of, the rights claimed in the application.Justice RD Nicholson was of the view that amendment of the application to include these rights was unnecessary. The court is required to make a determination of native title *in rem* in the terms set out in s. 225 of the NTA 'ultimately unconfined by the formulation of the claim'—at [69].

Summary of the outcome in relation to the majority of the application area
At [130] to [148], his Honour gives a succinct summary of his interpretation of the law as stated in the leading High Court cases relating to proof of native title and extinguishment. His Honour confirmed that the starting point for a determination of native title is s. 225 which (in turn) leads to the definition of native title in s. 223 of the NTA.

Nicholson J found that the claim area was inhabited at the time of the assertion of sovereignty by organised communities of Aboriginal peoples who, as members of organised society or societies, 'functioned under extensive traditions, procedures, laws and customs which connected them to the land'. Therefore, when sovereignty was asserted over the area covered by the application, those Aboriginal people possessed native title in respect of that land—at [405].

The court also concluded that:

- the area was occupied by the Ngarluma and Yindjibarndi groups; and
- the present applicants comprise members of those groups—at [370].

Further, his Honour was of the view that the Ngarluma and Yindjibarndi people have not lost their connection, through their traditional law and custom, to their respective claim areas—at [415] to [424].

This finding was made despite:

- the fact that European settlement had significantly impacted on those people, through the pearling, mining and pastoral industries and government policies;
- findings such as that there was no longer a Ngarluma speech community, that none of the Yindjibarndi people live on the claim area and that Ngarluma people now participate in the Yindjibarndi's law in relation to initiation—see [219], [421] and [423].

His Honour noted that:

> The reality and the sense of the [Ngarluma and Yindjibarndi peoples'] connection [to their country] appears from the evidence as enduring despite the influences which European settlement has brought to both peoples. In the case of each of them, it would appear to be that these impacts have brought them towards the cusp of the moment when their connection to each of their lands through their traditional law and custom could be washed away by the tide of history. From the evidence I do not consider that time has yet arrived—at [421].

Rights and interests

In relation to the claimed rights and interest presently observable in their exercise, his Honour found that they have been exercised continuously from sovereignty to the present day by the relevant groups and are exercised as norms of those groups—at [430] to [431].

In other words, the evidence showed that the rights and interests were normative both in the sense of being 'fundamental to their [the claimants] existence as a society' and that they were:

> [M]ore than social habits and [have] about them the quality of being a social rule in that some at least (and indeed a considerable number) of the [Ngarluma and Yindjibarndi] look upon the behaviour in question as a general standard to be followed by the group as a whole—at [304] and [436].

Some rights and interests were held to exist as a matter of fact (i.e. subject to extinguishment) over the entire area covered by the application. Others are severely limited to areas where they are exercised today—see [413] and [433] to [500].

This aspect of the decision is, with respect, somewhat surprising. His Honour acknowledged that the area over which rights are presently exercised does not necessarily limit the area over which the existence of rights and interests can be found. The court found that the rights and interests in the proposed determination meet the requirements of s. 223 of the NTA, including that the Ngarluma and

Yindjibarndi groups by their laws and customs, have a connection to the whole of their respective claim areas. Yet his Honour finds that some of those rights and interests exist only within a geographically restricted area within the areas subject to the application. The evidence does not appear to suggest that such limitations were culturally driven. It may be that the present exercise of those rights and interests merely reflects the fact that that is where the Ngarluma and Yindjibarndi people prefer to undertake particular activities within their claim area.

In relation to the Yaburara and Mardudhunera, it was held that no relevant connection had been shown in relation to any society present in the area at the time of sovereignty—at [501].

In relation to the Wong-Goo-TT-OO, their argument that they had native title to the area referred as the Burrup by virtue of a process of succession was rejected, with his Honour noting that, even if that argument was accepted, the evidence did not establish a continuing connection to that area from the late 1930s to the present—at [505].

Role of anthropology in defining the community or group

In relation to defining the group that claims to hold native title, his Honour was of the view that, when making a determination under the NTA, the court is *not* required:

> [T]o search for an anthropologically identified form of community or group. The NTA makes clear the Court is to examine the evidence to see who holds native title, if anyone, and so whether there are communal, group or individual rights and interests. Anthropological theory and research may inform that examination but cannot determine it—at [334].

What the court must do is make a determination of 'who the persons, or each group of persons' holding the 'common or group rights' comprising the native title: s. 225.

His Honour noted that a 'group' is defined relevantly to mean 'a number of people...regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose' (referring to the New Shorter Oxford English Dictionary (1993) p. 1151) and went on to hold that:

> In *Yorta Yorta* ... the word 'society' was utilised rather than the word 'community' in order to emphasise the close relationship between the identification of 'the group' and the identification of the laws and customs of that group.

In discussing genealogical issues, Nicholson J went on to refine this view of what constituted a group, namely, 'a number of people, regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose'—at [358].

The State of Western Australia submitted that the claimant group had to establish patrilineal descent through an estate group. The Ngarluma and Yindjibarndi argued that the claim group formed a composite community.

His Honour rejected both positions, stating that what was required was the identification of both the native title rights and interests that exist and the location of where they are held:

> [T]hat is the means by which the locus of the rights in a society, community or group is identified ... It will be the evidence concerning the locus of the rights and interests claimed, if made out, that will establish the nature of the group holding the rights... Neither the Act nor the reasoning of the High Court in *Yorta Yorta* is shaped in relation to anthropological considerations concerning estate groups or other similar entities ... [W]hat is required of a primary judge is to look to the evidence and particularly the lay [e.g. claimant's] evidence relevant to connection without the intervention of other [anthropological] constructs. The findings of connection are to follow from the evidence rather than such constructs—at [339] and [420].

The Burrup Peninsula

The Ngarluma and Yindjibarndi people effectively conceded that they had no claim to the Burrup Peninsula and the surrounding islands (referred to as the Burrup, an area that was subject to extensive development proposals) at [372] and [1480].

The Yaburara and Mardudhunera claimants asserted that the area was inhabited by the Yaburara people. His Honour held that:

- the Yaburara and Mardudhunera had not discharged the onus of proof in this respect;
- if that is not correct or the Burrup had been inhabited by another group, the evidence establishes that the group disappeared as an identifiable group early in the 20th century;
- the applicants who claimed to be Yaburara had not established that this was the case. The evidence supported the view that they rather had a claim as Mardudhunera people—at [352] and [373]. See also Appendix G to the reasons for decision.

Succession

The Wong-Goo-TT-OO claimed (among other things) that the last two members of a tribe that had lived in the area had transferred their rights to the Burrup to the father of a member of the Wong-Goo-TT-OO and, therefore, that they had acquired the laws and customs relating to the Burrup.

Nicholson J found no evidence to support a finding that the traditional laws and customs in issue included such a right of transmission. However, even if such evidence existed, his Honour was of the view that the third applicants could not establish 'their continuity from sovereignty under those laws and customs because to do so would involve them relying impermissibly on another society', contrary to principles set out in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (summarised in *Native Title Hot Spots* Issue 3) at [53] per Gleeson CJ, Gummow and Hayne JJ. Thus, his Honour was of the view that inter-society succession after sovereignty creates a situation when native title cannot be recognised as held by the successors—at [380] to [383].

Offshore and islands

In relation to offshore waters, Nicholson J found that the evidence:

- did not 'establish either present observable behaviour in terms of the rights claimed or any continuity from sovereignty of such claims'; and
- in so far as it related to fishing offshore by the Ngarluma and Yindjibarndi people, it showed that this behaviour was 'in the character of a social habit and not established as being normative'—at [526].

The same conclusion was drawn with respect to all islands within the determination area, save in relation to Depuch Island, where there was evidence of present visits by the Ngarluma and Yindjibarndi people. However, his Honour found that there was no evidence to establish the requisite continuity of connection with that island by any of the claimant groups—at [525].

Outcome before extinguishment is considered

The draft determination of native title Nicholson J proposed includes the following elements:

- no native title exists in respect of the Burrup or in respect of the sea below low water;
- no exclusive native title rights are held in relation to any of the determination area (see below);
- neither the Yaburara and Mardudhunera people nor the Karriyarra people hold native title rights in the proposed determination area;
- the Wong-Goo-TT-OO do not hold native title rights in the proposed determination area except where they may do so as Ngarluma or Yindjibarndi people;
- the rights held, as a matter of fact, by the Ngarluma and Yindjibarndi peoples are non-exclusive native title rights and interests to:
- access the determination area;
- conduct ritual and ceremony on that area;
- take and use water; and
- protect and care for sites and objects on and in that area.

Some rights, such as the right to camp and the right to cook and light fires were narrowly recognised as follows:

- in the case of the Yindjibarndi, limited to the Millstream-Fortescue area;
- in the case of the Ngarluma, limited to the proximity of river courses—at [1162].

Note, however, that these findings are subject to the resolution of extinguishment issues.

No exclusive native title

In order to establish, as a matter of fact (putting extinguishment to one side) the right to exclusive possession, it appears that the claimants must show that they currently have both the right to be asked permission to access the area and the right to speak for country under their current system of traditional law and traditional custom:

Western Australia v Ward [2002] HCA 28 (*Ward*, summarised in *Native Title Hot Spots* Issue 1) at [88] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

In relation to the finding that no exclusive native title rights are held in relation to any of the determination area, Nicholson J said that, while there was evidence of surviving practice to seek permission to enter what was considered to be Ngarluma and Yindjibarndi land, he got the impression that permission was sought as a matter of respect rather than in recognition of a right to be asked (i.e. a right to control access)—at [292].

Certain rights claimed found not to be native title rights and interests
In addition to rejecting rights to protect cultural knowledge that fell within the scope of the decision in *Ward* at [57], the following rights were not recognised as native title rights:

- a right to maintain, conserve and/or protect sites and objects of significance by preventing by all reasonable means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such place or object;
- a right to maintain, conserve and/or protect by all reasonable lawful means places and objects located within the area of social, ceremonial, ritual significance to the native title holders from use or activities which are unauthorised or inappropriate use or activities, in accordance with the traditional laws and customs of the native title holders—at [492].

This was because his Honour characterised them as duties incidental to the right to protect and care for sites and objects.

The following rights were also held not to be capable of recognition as native title rights and interests:

- the right of individual members of the native title holding group or groups to be identified and acknowledged, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area. This was because a determination of native title must include a determination of who holds the common or group rights. Therefore, this right 'cannot of itself be a native title right and interest'; and
- the right of the group or groups who hold common or group native title rights and interests to identify and acknowledge individual members of the native title holding group, in accordance with the traditional laws adhered to and traditional customs observed by the group or groups, as the holders of native title rights in relation to the land and waters of the area. The reason for rejecting this right was that it is not a right that 'gives rise to a connection to land and waters' and, in any case, was a matter to be determined by reference to the Native Title (Prescribed Body Corporate) Regulations 1999—at [302] to [303]. With respect, s. 223(1) requires that it is the traditional laws and traditional customs that give rise to the requisite connection, rather than the native title rights and interests.

Extinguishment issues
The parties have been given a limited opportunity to make submissions on whether or not and, if so, to what extent, non-native title rights and interests are inconsistent with the continued existence of the native title rights and interests found to exist as a matter of fact. It should, therefore, be noted that his Honour's comments in relation to extinguishment are, to a large extent, preliminary.

Discharging evidential onus for extinguishing acts
There were questions about the validity of some pastoral leases, chiefly on the basis that no suitable instruments to indicate the grant had been made were entered into evidence. However, where copies of the lease register (with relevant dates entered) and application forms were in evidence, these were found to comprise sufficient evidence that the interest in question had been granted. In some cases, only a register extract was available. If it had been suitably completed, it was found that it constituted sufficient evidence that the lease had been granted, i.e. 'on the balance of probabilities, having regard to the presumption of regularity, valid leases were made'—at [557] to [564] and [567].

It was found that no valid lease had issued in circumstances where:
- there was no date of the application for a pastoral lease where the application was required to be within a specific time, or no date of issue was recorded in the register or there was no reference to the signing or issuing of a pastoral lease;
- the land concerned was already leased;
- the application for a pastoral lease was marked 'no lease to issue';
- in any case, the lease was issued contrary to the relevant statutory requirements, i.e. there was no valid exercise of statutory power—at [565], [568], [570], [571], [574], [594] and [624].

In relation to leases for a lighthouse and a remote controlled electronic exchange site purportedly granted under s. 7(4) of the *Land Act 1933* (WA), there was no evidence as to the terms and conditions of the grant, which was not to be made in any prescribed form. In these circumstances, his Honour found that the party alleging extinguishment (in this case, the state) had not discharged the evidential onus of proof in relation to extinguishment—at [622].

Similar findings were made in relation to the lease of an area reserved for the purpose of a 'public utility' granted under s. 42 of the *Land Act 1898* (WA)—at [630].

Under s. 153 of the *Land Act 1898* (WA), the Governor of Western Australia could lease any town, suburban or village lands on such terms as the governor thought fit. Two such leases were found to be common law leases (i.e. to confer a right of exclusive possession) and, therefore, to completely extinguish native title. However, in several other instances where the lease document was not in evidence, Nicholson J declined to conclude that the leases alleged to have been granted had any extinguishing effect—at [626] to [628].

Freehold grants
Grants in fee simple made on or before 23 December 1996 are previous exclusive possession acts (PEPAs) and, unless the legislature provides otherwise (e.g. because the non-extinguishment principle found in s. 238 applies), such a grant completely extinguished native title, see: s. 23B of the NTA; ss. 12I(1)(a) and 12I(1A) of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (TVA)—at [539] to [540].

Grants of land in fee simple to the Commonwealth, state agencies or statutory authorities, the state itself (aka Crown to Crown grants) or to a local municipality made on or before 23 December 1996 are also PEPAs and, therefore, wholly extinguished native title—at [544].

Licences to occupy or purchase land
Pursuant to a licence to occupy issued under s. 52 of the *Land Act 1898* (WA), if the terms and conditions of the licence were met, then a Crown grant (essentially, the grant of an estate in fee simple) would issue. However, the licensee would forfeit the land and any moneys paid if certain of those conditions were not met.

In these circumstances, his Honour found that, when a licence was issued under s. 52, no clear or plain intention to extinguish native title was evinced. The intention to make a Crown grant only crystallised when the licence conditions had been satisfactorily fulfilled. The terms and conditions might never be met, in which case no Crown grant would issue. Similarly, because of the nature of a licence application to purchase a town or suburban lot under s. 45A of the *Land Act 1933* (WA), it was not, in his Honour's view, an interest of a kind that had the effect of extinguishing native title. Such a licence was liable to being (and, in this case, had been) absolutely forfeited, along with all fees and purchase money paid, as a result of a default in payment or a failure to fulfil certain conditions—at [551] and [553].

Pastoral leases
Following *Ward* at [192] and [422], Nicholson J found that the grant of a non-exclusive pastoral lease was a previous non-exclusive possession act that had the effect of extinguishing any native title right to control access to, or to control the use to be made of, the area covered by the grant—at [568].

In rejecting a submission that the extinguishment of the right to control access was limited to controlling access by those who entered the area pursuant to the pastoral lease, his Honour stated that:

> [T]his is not what the High Court intended. When extinguishment occurs ... it is inconsistent with so much of native title rights and interests as stipulated for control of access to the land the subject of the grants and denied to native title holders the continuation of a traditional right to say who could or who could not come onto the land in question ... The extinguishment of such rights and interests is for all purposes—at [586].

On this view, a right to control access to the area by other Indigenous persons was also extinguished—at [586], contra the *obiter* comments made by O'Loughlin J in *De Rose Hill v South Australia* (2002) 116 FCR 390 (summarised in *Native Title Hot Spots* Issue 3) at [558].

In any case, as noted above, his Honour found on the evidence that no exclusive native title right to control access existed as a matter of fact and so the question of extinguishment did not arise—see at [292] and [587].

The right to protect and care for sites is not found to involve exclusivity or control by the holders of that right. However, to the extent an aspect of exclusive control was implied in the right to protect and care for sites and objects or the duties associated with that right, it would be extinguished because such a right is inconsistent with the rights of the pastoral lessee—at [587].

Application of s. 47 to Mt Welcome pastoral and other leases
Three pastoral leases were held by Mt Welcome Pastoral Company Pty Ltd (the pastoral company). That company and the Ieramugadu Group Inc were created on behalf of the Aboriginal workers' community in Roebourne. The Ieramugadu Group Inc was incorporated to act as a shareholder of the pastoral company.

It was argued that these pastoral leases were held on trust by the pastoral company for the benefit of the Ieramugadu Group members, who were, in turn, Ngarluma people. The first applicant's argument was, eventually, that there was a constructive charitable trust (i.e. the pastoral company holds the leases on trust for Ngarluma persons) and so s. 47(1)(b)(ii) was satisfied. That provision requires that, at the time the claimant application was made, a pastoral lease was held over the area by a trustee on trust for any of the native title claim group.

The pastoral company's articles of incorporation indicated that the company was dedicated to making a profit for its shareholders as a commercial venture. This led to a finding that:

- the pastoral company is not a trustee;
- even if the Ieramugadu Group holds its assets as trustee, those assets are shares in the pastoral company, not the pastoral lease;
- in any case, the evidence did not indicate a charitable purpose and a charitable trust could be constructed—at [614].

Thus s. 47(1)(b)(ii) did not apply. Further, none of the other provisions of s. 47 had any application. Therefore, any extinguishment brought about by the creation of any prior interest must be taken into account.

Special leases
Where a special lease was granted under s. 116 of the *Land Act 1933* (WA) before the *Racial Discrimination Act 1975* (Cwlth) (RDA) commenced on 31 October 1975, but the lease was not in force on 23 December 1996, the grant wholly extinguished native title at common law. Special leases in force on 23 December 1996 are PEPAs (s. 12I of

the TVA and s. 23B of the NTA)—at [618] and [619]. Note that these provisions of the TVA differ significantly in some aspects from the provisions of s. 23B of the NTA.

Special leases granted after the commencement of the RDA but not on foot 23 December 1996 are category A past acts because they are agricultural and commercial leases and, as such, wholly extinguish native title (s. 12I of the TVA). The remaining special leases in this category were held to be category D past acts—at [620] to [621].

Leases of reserves
A lease of a reserve to a jockey club under the Land Regulations 1882 was found to be in the nature of a common law lease that conferred a right of exclusive possession. Therefore, it wholly extinguished native title—at [629].

When considering the effect of a grant of a lease over a reserve under s. 32 of the *Land Act 1933* (WA), his Honour pointed out that, while it was said in *Ward* that a lease granted under this section wholly extinguished native title, this conclusion was reached only after careful consideration of the lease documents in each case to determine if the lease granted exclusive possession and, therefore, had the effect of completely extinguishing native title. In the matter before his Honour, while the evidence allowed the court to draw the inference that two leases that were not in evidence were issued, it was not possible, absent those documents, to infer that the leases in question conferred a right of exclusive possession. Having considered the lease documents in three other instances, his Honour was satisfied that the leases in question did confer a right of exclusive possession and, therefore, completely extinguished native title—at [631] to [633].

In relation to leases of reserves granted pursuant to s. 33 of the *Land Act 1933* (WA), his Honour chose not to equate the exercise of the power to lease in s. 33(3) with the effect of the vesting of a reserve under s. 33(2). The effect of the former will depend upon the nature of the agreement reached and the grant made. The fact that there is a right of public entry onto the lease does not negate an inference of exclusive possession. Some of the leases were in force on 23 December 1996 and were therefore PEPAs. Some were granted after the commencement of the RDA and were, therefore, category A or D past acts at [637].

In relation to leases of reserves granted pursuant to s. 32 of the *Public Works Act 1902* (WA), his Honour found that there is nothing in that section to distinguish its effect from that of s. 32 of the *Land Act 1933* (WA). Consequently, the leases considered that were issued under that provision wholly extinguished native title at common law—at [639].

Roads
Where the Crown is permitted by legislative authority to constitute a public road, the question whether lands have been so constituted as a public road depends entirely on whether the statutory procedure has been followed. Legislative constitution of a road creates in third parties (e.g. members of the public) the enforceable right of free

passage over the lands and denies to all persons the right to use the land for any other purpose than free passage or a purpose incidental thereto. This would, save in an exceptional case, be wholly inconsistent with any continuing right to enjoy native title in those lands and would, absent legislative intervention, extinguish native title—at [640].

Evidence of usage is relevant only in the case of a road that was not constituted as a result of the exercise of legislative authority or executive or administrative action under legislative authority—at [641].

In the case of roads dedicated after the commencement of the RDA, these were validated by the application of TVA as public works that are category A past or intermediate period acts and, therefore, wholly extinguished native title—at [642] to [646].

Resumptions

His Honour found that:

- without more, resumption of a pastoral lease under s. 109 of the *Land Act 1933* (WA) does not extinguish native title
- it is necessary to determine whether the resumption gives rise to an estate in fee simple e.g. where the notice of resumption makes it clear that the resumption creates a fee simple vested in the Crown then, subject to the RDA, native title is extinguished;
- a resumption under s. 18 of the *Public Works Act 1902* made the Crown the absolute owner of the area concerned and completely extinguished native title. The RDA is not relevant because the *Public Works Act* did not treat native title any differently to other rights and interests in land;
- so far as the provisions of s. 18 of the *Public Works Act* are incorporated by reference into other legislation (e.g. *Country Areas Water Supply Act 1947, Iron Ore (Cleveland Cliffs) Agreement Act 1964* and *Local Government Act*), the above comments apply—at [647] to [649], referring to *Ward* at [204] to [208].

Resumptions under the *Public Works Act* were held to be valid, despite the fact that public works were constructed on the area prior to the resumption, because s. 28 of that Act expressly authorised the resumption after the execution of any public work—at [652] to [654].

Resumptions under the *Country Areas Water Supply Act and Public Works Act 1947* (WA) were all found to have been resumed in a way that extinguished native title—at [658] to [660].

Vested reserves

His Honour rejected an argument that the mere vesting of a reserve under s. 33 of the *Land Act 1933* (WA) did not wholly extinguish native title—at [665], referring to *Ward* at [240] to [256].

His Honour also found that a vesting under the following legislation had the same effect on native title:

- regulation 33 of the Land Regulations 1882;
- regulation 36 of the Land Regulations 1887;
- section 42 of the *Land Act 1898*—at [666].

Thus, his Honour finds that all vested reserves considered in this matter completely extinguished native title upon vesting—at [667].

Unvested reserves

The court noted that the creation of a reserve necessarily extinguished the right to control the usage of the land subject of the reserve but that, in order to determine whether there is any further extinguishment, it was necessary to determine whether the rights in the reserves are inconsistent with the rights in native title—at [668] to [669].

Where there was no evidence of the assertion of the rights created by the reservation of the area concerned, then no further extinguishment was found. However, even where it appeared that a reserve for a stock route had been used for that purpose, it was held that there was no further extinguishment—at [670] to [682].

Where there was evidence that the creation of a reserve established that rights were both created and asserted that were wholly inconsistent with the continued existence of native title, native title was found to be wholly extinguished. Reserves in this category included reserves for a rifle or pistol range. A cemetery reserve that was used for its purpose was found to extinguish all but the native title right to access the area—at [689] and [693].

Where public works (e.g. the digging of gravel pits or construction of bores on water reserves where the work is done by or on behalf of the Crown in any capacity) have been established on the area reserved, native title was wholly extinguished over the 'public work' as defined in s. 251D. Examples in this category were reserves for government purposes used for an electric substation, government housing, a lighthouse, slaughter yards, a Main Roads depot and reserves used for parking, drainage, hospitals, a quarantine station, a post office, a ration depot, a police station and a courthouse—at [684] to [699].

Query whether, by operation of the extended definition of public work found in s. 251D, native title is extinguished on the whole of the reserve on which the public work is situated. In one instance, the applicants did not bring evidence to rebut the state's case that was so in relation to water bore constructed on a 640-acre water reserve. Absent evidence to the contrary, his Honour accepted the state's submission—see [685].

Easements

Common law easements do not confer exclusive possession to land. However, in this case, the easements were granted either under s. 16 of the *Petroleum Pipelines Act 1969*

(WA) or ss. 134B to 134N of the *Land Act 1933* (WA). It was thus necessary to construe the terms of a statutory easement to determine what non-native title rights and interests had been granted. Having considered the statutory scheme, his Honour concluded that the easements in question did not confer exclusive title to the grantees—at [701] to [708].

Infrastructure on easements that fell within the definition of a public work done on or before 23 December 1996 completely extinguished native title. The onus rests on the applicants to rebut the presumption that native title is extinguished on the whole of the easement under the extended definition of public work found in s. 251D. Where the improvement is not a public work, consistent native title rights and interests will continue to coexist with non-native title rights—at [709] to [710].

Licences

While it was not necessary for his Honour to finally resolve the matter, he considered that the preferred position with respect to licences granted under s. 101 of the *Conservation and Land Management Act 1984* (WA) was that their grant 'extinguished the exclusivity of any native title rights to possess, occupy, use and enjoy the land the subject of the licence *during the existence of the licence'* (emphasis added)—at [725] to [726].

It is not clear why his Honour included the emphasised phrase, since extinguishment is permanent, unless the legislature has intervened to provide otherwise. That said, his Honour found that the use of the licensed area by the licence holder (presumably for the licensed purpose) prevailed over inconsistent rights of the native title holder.

Minerals and petroleum

His Honour relied upon the majority decision in *Ward* at [377] to [385] to find that native title in minerals, petroleum and gas has been extinguished—at [728].

The state submitted that ochre is a mineral. His Honour referred to a proclamation under Pt VI of the *Mining Act 1904* (WA), pursuant to which the state asserted that red ochre was a mineral within the terms of the Mining Act.

It was held that ochre is not included in the definition of a mineral under that Act if the ochre is to be used for the purpose of the exercise of a native title right and not for 'use in the manufacture of porcelain, fine pottery, or pigments', as was required by the proclamation—at [732].

Mining tenements—general

It was said that:

- mining tenements granted after the commencement of the RDA are not past acts;
- inconsistent native title rights are extinguished by the grant of the mining tenement and the rights of the tenement holder prevail over the native title rights.

It was noted that use of the tenement area may prevent the exercise of any remaining native title rights and interests on parts of the tenement but does not extinguish any of those rights and interests—at [733].

Mining and related leases

His Honour was of the view that the following rights were extinguished over areas affected by the grant of gold mining leases under the *Goldfields Act 1886* (WA) and *Goldfields Act 1886* (WA):

- the right to control access;
- the right to access the area, in terms of remaining (although it is not clear what is meant by 'remaining');
- any right to perform ritual and ceremony;
- the right to camp, in terms of living on the land;
- rights to cook and light fires.

It was held that the grant of such a lease did not extinguish native title rights to:

- access, in terms of entering and travelling;
- hunt and forage;
- camp, but not where this involves living on the land (but, as noted above, without the right to cook or light a fire);
- collect bush medicine and tucker;
- take fauna;
- take flora;
- take ochre;
- take and use water; and
- protect and care for sites and objects—at [741], [746], [751], [763], [782], [786], [763] and [786] to [795], [803], [814] to [816], [822], [826], [830].

In relation to protecting and caring for sites, it may be that this is somewhat hampered by his Honour's finding that there is no native title right to perform ceremony and ritual on these areas.

The same preliminary findings were made in relation to the extinguishing effect of:

- gold mining leases under *Mining on Private Property Act 1898* (WA) and the *Mining Act 1904* (WA);
- mining leases granted pursuant to the Land Regulations 1887;
- dredging claims, machinery, quarry, tailings and market garden areas as authorised holdings and mineral claims, mineral leases and miner's homestead leases under the *Mining Act 1904* (WA);
- mining and general purpose leases and miscellaneous licences under the *Mining Act 1978* (WA).

His Honour found that the grant of the mining or general purpose lease under the *Mining Act 197*8 (WA) extinguished all rights to be asked permission to use or access the lease area had they existed i.e. these native title rights are extinguished in respect of all persons, not just the grant holder—at [586] and [822].

In relation to machinery, tailing and market garden areas as authorised holdings under the *Mining Act 1904* (WA), his Honour concluded that these types of interest confer a right of exclusive possession but did not go on to find complete extinguishment. It is not clear why not—see at [775], [782], [814] and [816].

In relation to mining leases granted pursuant to the *Land Regulations 1887* (WA), having concluded that these were 'indistinguishable' from pastoral leases, his Honour goes on to find that they had the same effect on native title rights as did the grant of gold mining leases etc. noted above, i.e. they brought about more extinguishment than did a pastoral lease—at [746]. It is not clear why his Honour took that view.

Prospecting areas for holders of miner's rights under the Mining Act 1904
In his Honour's view, the rights given under a prospecting area were inconsistent with any native title right to control access to the area—at [797]. It is not clear why his Honour did not also discuss the impact of the licence on the right to control use of the area.

Tramway leases under the Mining Act 1904
His Honour was of the view that the grant was wholly inconsistent with the continued existence of native title and so completely extinguished it—at [817].

Business and residential area tenements under the *Mining Act 1904*
His Honour holds that the registration of each business area conferred on the holder a right 'akin to a right of exclusive possession'. Thus, on this view, native title is wholly extinguished on those areas—at [758] and [805].

Water rights under the *Mining Act 1904*
The relevant grant conferred on the holder a right to take and sell water and extinguished any exclusive native title rights to water on the area subject of the grant—at [820].

Prospecting and exploration licences under the *Mining Act 1978*
His Honour was of the view that there is no inconsistency between native title rights established and the rights given to the holder of a prospecting or exploration licence under this Act. Presumably his Honour is referring to the rights as he determines to exist in this case i.e. non-exclusive native title rights—at [838] and [844].

State Agreement Act mineral lease
The lease in question was granted to Dampier Salt Limited under s. 48 of the *Mining Act 1904* as modified by the *Dampier Solar Salt Agreement Act* (WA). This was a case, his Honour said, where the understanding of the rights is properly informed by the evidence of usage. The lease covers the whole of the salt production area. Nicholson J was of the view that exclusive possession must have been intended, given the nature of solar salt production. Thus, the grant of the lease wholly extinguished native title—at [847].

Licences to prospect for mineral oil under the *Mining Act 1904*
The licence gave the licensee the right to occupy the land for a period not exceeding 10 years and an exclusive right to bore and search for mineral oil in the area. His Honour found that such an interest would have extinguished any exclusivity of native title rights had they been found to exist—at [851].

By-laws
Several water reserves had been constituted under *Country Areas Water Supply Act 1947* (WA) over fairly substantial parts of the application area. By-laws made under that Act absolutely prohibit camping or picnicking within 300 metres of the high water mark or of any bore, reservoir or feeder thereto and absolutely prohibit removing, plucking or damaging flora growing on any land or reserve vested in the Minister, within half a mile of any bore or reservoir. Where they came into effect before the RDA commenced, these by-laws were found to extinguish native title 'within their terms'. If these by-laws came into effect in relation to a particular area after the commencement of the RDA, then the act of making the by-laws would be a category D past act to which the non-extinguishment principle applies—at [857] to [858].

The same reasoning was applied to similar by-laws made under *Parks and Reserves Act 1895* (WA)—at [860] and [861].

National Parks Authority Act 1976
Regulations made under this Act were found to be category D past acts. In any case, only two of the regulations, which dealt with the erection of permanent or semi-permanent structures, could have arguably had any extinguishing effect—at [866].

Rights in Water and Irrigation Act 1914
His Honour followed *Ward*, i.e. the vesting of water in the Crown is inconsistent with exclusive native title rights to water. Where by-laws made prior to the commencement of the RDA absolutely prohibited the rights to hunt fauna or gather plants, native title was extinguished to that extent—at [868].

Wildlife Conservation Act 1950 (Fauna Protection Act)
Nicholson J was of the view that, within a declared 'nature reserve' or 'wildlife sanctuary', the native title right to take fauna has been extinguished pursuant to s. 23 of the Fauna Protection Act. However, the creation of such places after the commencement of the RDA was held to be discriminatory and, consequently, the act of creating those places was found to be a category D past act—at [879].

***Transfer of Land Act 1893 (WA)* (TLA)**
Registration of a grant under the TLA does not further extinguish native title over and above that caused by the grant of the interest itself—at [884].

Cossack–Roebourne Tramway Act 1886
It was not argued that this was a public work. However, given the nature of the lease issued, his Honour was of the view that native title was wholly extinguished over the area—at [885].

Marine and Harbours Act 1981
Vesting of land under s. 9 of this Act vested in the Minister beneficial ownership of the land. The vesting of the seabed of the ports in the Minister extinguished any native title rights to the seabed and the space above it in so far as those rights relate to the intertidal zone (no rights at all were found to exist below the intertidal zone)—at [892].

Subsection 12(2) of the above Act provided for the grant by the Minister of leases in respect of the land vested under the Act. The lease in question here used the language of a common law lease and hence granted a right of exclusive possession of the leased area which, consequently, completely extinguished native title—at [896].

Pastoral leases that were Category A past acts or PEPAs (if in force on 23 December 1996)
One pastoral lease was found to be a Category A past act that completely extinguished native title. At [919], his Honour found that three other pastoral leases that were in force on 23 December 1996 were PEPAs. However, with respect, it is not possible for non-exclusive pastoral leases to be PEPAs. They are PNEPAs, although s. 6 of the TVA will still apply to them pursuant to s. 12M(2) of that Act. See also s. 23G(2) of the NTA.

Intermediate period acts (IPAs)
A range of freehold grants were found to be IPAs and also PEPAs—at [922]. Resumptions of land under the *Local Government Act 1960* (WA) and the *Public Works Act 1902* (WA) within the relevant period were found to be IPAs and PEPAs. Some leases were IPAs and scheduled interests and, thus, PEPAs. His Honour seems to draw some significance from the issue of whether IPAs cease to be IPAs when they are also PEPAs—at [926].

With respect, this seems a fruitless analysis. IPAs, like past acts, do not cease to be those types of acts merely because they are also PEPAs. The NTA merely resolves which provision applies in relation to the effect of validation of those acts, i.e. s. 23C applies rather than ss. 15 and 22B.

Section 47A
With respect to the meaning of 'occupy' for the purposes of s. 47A, his Honour accepted and followed the view of the majority of the Full Court in *Western Australia v Ward* (2000) 99 FCR 316, finding that occupation was established for the purposes of s. 47A(1)(c) wherever he found connection—at [938].

His Honour applied s. 47A to a variety of circumstances, each of which turns on its own facts. For example, in relation to reserves of a particular kind, he held that s.

47A(1)(b)(i) applied to a reserve, the purpose of which was expressed to be for a 'Native Mission School'. On the other hand, in relation to reserves in respect of 'Preservation of Native Art' and 'Archaeological site', s. 47A does not apply because 'they are not expressly for the benefit of [Aboriginal] people alone'—at [955].

Section 47B

His Honour determined that temporary reserves are reservations within the meaning of sub-paragraph 47B(1)(b)(ii) of the NTA. In his Honour's view, it was evident that the legislative intent was to apply this excluding provision as widely as possible. In relation to the meaning of occupy in s. 47B, his Honour took the same approach as he did in respect of s. 47A—at [967] to [968] and [973].