Extinguishment in *Daniel's* case—further interim decision

Daniel v Western Australia [2003] FCA 1425

RD Nicholson J, 5 December 2003

Issue

These are the supplementary reasons of Justice Nicholson addressing submissions on extinguishment made by the parties pursuant to the reasons for decision handed down on 3 July 2003 in *Daniel v Western Australia* [2003] FCA 666 (*Daniel 2003*, summarised in *Native Title Hot Spots* Issue 6.

Background

In *Daniel 2003*, his Honour gave the parties a limited opportunity to make submissions in relation to the preliminary views expressed by his Honour on inconsistency between extinguishing interests and the non-exclusive native title rights and interests found to exist as a matter of fact.

Right to access and to camp on pastoral leases

Submissions were made by the State of Western Australia, Telstra and pastoral interests.

The state submitted that the native title right (pursuant to the right to access) to 'remain' or (pursuant to the right to camp) to 'live' had been extinguished by the grant of the pastoral lease as such rights:

- are inconsistent with the rights of a pastoralist to run stock, maintain pasture and construct or establish improvements on any part of the lease area; and
- had an element of permanent residence or occupation (as distinct from transient access or camping) such that it would not be possible, in a practical sense, for a pastoralist's right to prevail over the exercise of those rights.

His Honour, noting the findings of the majority of the High Court in *Western Australia v Ward* [2002] HCA 28 (*Ward HC*, *Native Title Hot Spots* Issue 1) at [194] in relation to the possible extinguishing effect of pastoral leases beyond the issue of extinguishing control of access, considered that, where it is possible for the rights of a pastoral lessee to prevail over the exercise of the native title rights, those rights are not extinguished—at [11] to [13].

His Honour accepted the submission for the applicants that:

> [A] right is not to be considered as inconsistent or as extinguishing native title only because the tenure holder may want to exercise rights at the same location as a native title holder thus preventing the native title holder from exercising those rights at that location at that time. The true test is whether at that location at that time the exercise of the native title rights and interests would prevent the rights of the tenure holder prevailing—at [13].

Nicholson J also considered it appropriate, in considering issues of inconsistency, to have regard to the 'reasonable user' test to be useful—at [14], referring to the test propounded in *Western Australia v Ward* (2000) 99 FCR 316 at 403 and 478.

It was found that:

- it could not be said that the right to 'remain', pursuant to the right to access, would prevent the rights of the tenure holder prevailing because the right to remain cannot be exercised in such a way as would prevent the pastoral holder's rights prevailing; and
- whilst the right to live, read alone, conveys some sense of permanency, it was to be read in light of the 'right to camp, build shelters (including bough sheds, *mias* and humpies)...or to live on the area' as a whole;
- such a right was not a right giving or claimed as a right to live on an area independently of a right to camp and did not have about it the character intended to encompass permanent living;
- so understood, it could not prevail against the reasonable needs of the pastoral lease holder—at [15].

Telstra submitted:

- in respect of the right to access, that a right to remain on land where cabling is located is extinguished as it is inconsistent with Telstra's right to access the cabling for maintenance and given that Telstra's right to access and maintain the cabling cannot, in a practical sense, prevail over the right to remain. A similar submission was made in respect of its customer terminal sites and an optical fibre regeneration site;
- the right to camp, so far as it includes a right to live, is inconsistent with its right to access its cabling for maintenance so that the right to that extent is extinguished; and
- Telstra's right to occupy the land on which its facilities are installed free from interference and to access the facilities in order to maintain them is inconsistent with the right to camp and build shelters;
- therefore, the right to camp is extinguished in relation to land on which its customer terminal and regeneration sites are installed—at [7] and [9].

His Honour found that:

- it is not correct that the right to remain could not yield to Telstra's right to access and maintain its cabling;
- the right to 'remain' within the right to 'access (including to enter, to travel over and remain' is capable of yielding to the rights of Telstra to access and maintain its cabling and so is not inconsistent;
- the right to 'live', pursuant to the right to camp and understood in that context as a right to live temporarily is not inconsistent with Telstra's right to service its cabling. The nature of any shelter built pursuant to the right is conditioned by the character of the right so that the shelter must be one against which the rights of Telstra, reasonably exercised, can prevail; and

- in respect of the customer terminal and regeneration sites, the right to remain and camp was inconsistent with those of Telstra, such that the rights to remain and camp were extinguished in relation to those areas—at [15].

The pastoral interests submitted that:
- an unqualified right of access is inconsistent with the rights of a pastoralist to use the pastoral property for pastoral purposes;
- the right of access should be limited to access for the particular purposes identified in the determination and relating the exercise of the right to access for the purposes of exercising the native title rights otherwise found; and
- a right to 'build shelters' is inconsistent with the pastoralist's right to conduct pastoral operations on any part of the lease area such that the right should be expressed as 'a right to camp temporarily on the area'—at [8].

Nicholson J found that:
- there was no basis on the evidence for redefining the native title right of access to be one limited to particular purposes to be identified in the determination; and
- understanding the right to camp in its proper context (refer above), there was no basis for finding that right to be inconsistent with the right of the pastoral leaseholder to conduct operations—at [15].

Right to take flora (including timber logs and grasses) on pastoral leases
The state submitted that the right to take grasses was inconsistent with the pastoralist's right to depasture stock and that it is not enough to say that the rights of the pastoralist to use the grass for depasturing stock will prevail, because it must be assumed that the pastoralist's interest is always to have as much pasture growing on the leases as possible. The pastoral interests also contended that the right to take timber logs should not be recognised in the determination because it was inconsistent with the pastoralists' rights to take timber logs for pastoral purposes, such as the construction of fences and yards—at [16] to [17].

Nicholson J found that:
- there was no basis for finding inconsistency resulting in extinguishment on these issues as the right to take grasses and logs must be understood in light of the reasonable user test;
- there was no evidence before the court of any exercise of the right to take grasses or logs in any way which would have negated or had any significant impact on the right of the pastoral lease tenure holder to use grasses and logs—at [19].

Right to take ochre on pastoral leases
Nicholson J accepted Telstra's submission that the right to take ochre was extinguished, on the basis of inconsistency, to the extent that it involved digging beneath the surface of the ground where this was reasonably likely to interfere with Telstra's rights to maintain its cabling free from interference—at [20].

Right to access and to camp on mining tenements

Submissions by the state and various mining, gas and petroleum interests were to the effect that any native title right to remain pursuant to a right of access, or to live pursuant to a right to camp, would be inconsistent with the rights of the tenement holder where the area is currently or historically the subject of a mining tenement.

The applicants submitted that mining activities do not extinguish the rights in question as mining activities may only occur over a small proportion of the entire tenement and when mining works need to be carried out, the rights of the miner can prevail, such that there is no necessary inconsistency and no extinguishment.

Nicholson J, referring to *Ward HC* at [308], considered the submissions for the applicants to accord with the evidence and to be correct in law. His Honour's view was that there would be no extinguishment so far as the exercise of the relevant native title rights do not interfere with the mining activities, that is, that they are exercised reasonably and there is no necessary inconsistency—at [25].

Right to engage in ceremony and ritual on mining tenements
Several respondents submitted that a 'right to engage in ritual and ceremony (including ... to carry out and participate in initiation practices)' was wholly extinguished in respect of mining tenements. The applicants submitted that the same principles as applied to the issues concerning the issue of inconsistency of a mining tenement to a right to remain or to live on an area should apply in the case of the right to perform ritual and ceremony. It was said this is particularly the case as the performance of ritual and ceremony might be quite intermittent and more confined in area and less frequent than access generally.

Nicholson J agreed with the applicant's submissions and found that they accorded with the evidence—at [26] to [28].

A right to cook and light fires on mining tenements
Several respondents submitted that the right to cook was wholly extinguished by the grant of a mining tenement. Nicholson J disagreed, finding that a right to cook and light fires should be viewed similarly to rights to remain and live on the land and, if exercised reasonably, was not inconsistent in any way with mining activity being carried out on the mining tenement—at [30] and [31].

Reserves for cemeteries
In *Daniel 2003* at [693], his Honour stated that certain cemetery reserves 'effect extinguishment of all rights found other than the right of access'. Various respondents submitted that this did not include the right to remain pursuant to a right of access. The applicants submitted that cemetery reserves should not be construed as extinguishing all rights other than the right of access. They argued that the other rights listed in the draft determination were not inconsistent with there being such a reserve. Also, with particular reference to the right to perform ritual and ceremony, and in the context of a burial, they submitted that the right is not only consistent but is expected to be carried out in a cemetery.

Nicholson J noted it was right to accept that the place for the burial of the dead is likely to be a place given respect by all peoples of any belief behaving reasonably and that a reserve for a cemetery may or may not contain the dead or it may contain some dead and some land reserved for the burial of the dead—at [34] to [35].

His Honour found as follows in relation to each of the applicable listed rights:

- access—a right to enter and travel over such a reserve is not inconsistent with the purpose of the reserve and a right to remain is not necessarily inconsistent, given that it must be reasonably exercised and must yield to actual usage, in that the purposes of the reserve would prevail;
- ritual and ceremony—a right to engage in ritual and ceremony for the dead is not inconsistent with the purpose of a cemetery reserve. Otherwise such right is inconsistent so that extinguishment of the right occurs, save to the extent that it relates to ritual and ceremony for the dead;
- camping—the exercise of this right would be inconsistent with the purpose of the reserve;
- hunt and forage; collect and gather bush medicine and tucker; take fauna; take flora; take and use water—on the basis that these rights are exercised reasonably and yield to the right to provide for burial for the dead, the creation of the cemetery reserves in itself did not result in extinguishment of these rights;
- take ochre; cook and light fires—these rights are wholly inconsistent with the purpose of the reserve and are extinguished in relation to them if they exist within the geographic limitations of the right;
- protect and care for sites and objects— inapplicable in respect of cemetery reserves—at [36].

Country Areas Water Supply Act By-Laws— rights to access including right to remain; rights to camp; collect and forage for bush medicine and food; right to take flora

In *Daniel 2003* at [858], his Honour concluded that native title is extinguished by the Country Areas Water Supply Act By-Laws 36 and 40.

By-law 36(1) provides that:

> No person, body corporate or association or group of persons shall at any time camp or picnic within 300 yards of the high water mark or of any well or bore or any reservoir or feeder thereto.

By-law 40 provides that:

> The removal, plucking, or damaging of any wild flower, shrub, bush, tree, or other plant, growing on any land or reserve vested in the Minister, within half a mile of any reservoir or bore is prohibited.

The state submitted that by-law 36(1) extinguished any right to remain pursuant to a right to access and that the right to camp was extinguished. The state also contended that by-law 40 extinguished the right to collect and forage for bush medicine or food as well as the right to take flora within the area covered by the by-law. The applicants submitted that, given the decision in *Daniel 2003* that native title is

partially extinguished by the by-laws within their terms, any extinguishment must be strictly limited to the term of the prohibition—at [40] to [43].

Nicholson J, noting that the by-laws in question extinguished native title within their terms, held that:

- by-law 36(1) extinguished the right to remain pursuant to the right to access and the right to camp; and
- by-law 40 extinguished the rights to collect and forage for bush medicine and tucker and to take flora—at [44].

Nature reserves and wildlife sanctuaries—rights to hunt and forage; fish and take fauna from waters; take fauna

In *Daniel* 2003 at [879], his Honour concluded that native title rights to take fauna were extinguished in nature reserves and wildlife sanctuaries created under the *Wildlife Conservation Act 1950* (WA) prior to the commencement of the *Racial Discrimination Act 1975* (Cwlth).

The state submitted that the native title rights to hunt and forage, fish and take fauna from the waters and collect and forage for bush medicine for food were all extinguished. The applicants submitted that:

- any rights that are extinguished should be restricted to the right to take fauna; or
- in the alternative, if the general right to hunt and forage is extinguished, then there should still be a right to take flora and the right to collect and forage for bush medicine and bush food—at [45] to [46].

On the basis of the conclusion in *Daniel* 2003, Nicholson J found that:

- any right to hunt and forage was extinguished so far as it affects fauna;
- any right to fish was extinguished so far as it relates to fauna; and
- any right to take fauna is extinguished where inconsistent—at [47].

Jetty licences—right of access to remain; right to camp and build shelters

In *Daniel* 2003 at [901], Nicholson J concluded that inconsistent native title rights were extinguished by the grant of a jetty licence except where the rights under the jetty licence were in the form of regulation. The state submitted that any native title right to remain or to camp would be extinguished by the grant of a jetty licence as they were inconsistent with the right of a licence holder to construct and operate a jetty—at [48].

Nicholson J agreed with the applicant's submission that none of the native title rights listed in the draft determination was necessarily inconsistent with the rights under jetty licences. This was because if the jetty licence area is not being used, then native title holders exercising their rights, including the right to camp or remain on the area, would not give rise to any inconsistency. If the area was being used, then the rights under the jetty licence would prevail while those activities are being carried out—at [50].

Decision

The court's findings on the various points raised are noted above. Further submissions are to be made concerning the form of the determination.