Proposed determination of native title - *Wanjina-Wunggurr* community

Neowarra v Western Australia [2003] FCA 1402

Sundberg, J, 8 December 2003

Issue
This summary covers the court's findings on the extent of extinguishment of native title rights and interests in this case. For a summary of the findings in relation to s.223(1)(a) and (b) of the *Native Title Act 1993* (Cwlth) (NTA) see *Native Title Hot Spots* Issue 8.

Briefly, for the purposes of those provisions, the court found that the evidence supported the existence under traditional law and custom of a right amounting to the right to possession, occupation, use and enjoyment of the area covered by the application to the exclusion of all others that was held communally by the Wanjina-Wunggurr community. However, it was noted that it may be necessary to 'unbundle this comprehensive right into the component parts asserted by the applicants and to consider whether these components are in relation to land and waters'—at [382]. This is what the court went on to consider.

Non-native title rights and interests
The area covered by the applications in this case was in the Kimberley region of Western Australia. It included:

- a number of reserves, some for the use and benefit of Aboriginal people;
- some pastoral leases, some of which is held by the Indigenous Land Corporation;
- parts of the waters of Walcott Inlet and Prince Frederick Harbour; and
- several large areas of unallocated Crown land.

Extinguishment—general
Justice Sundberg set out NTA's scheme dealing with extinguishment and derived a number of propositions from the High Court in *Western Australia v Ward* (2002) 191 ALR 1; [2002] HCA 28 (*Ward*)—at [399] to [423] and see summary of that case in *Native Title Hot Spots* Issue No. 1.

Onus of proof
Sundberg J noted that:

- while native title claimants have the ultimate onus of proving that their native title has not been extinguished, the party asserting extinguishment carries an evidential onus of proving the nature and content of the executive act;
- absent proof of the executive act, the court has no basis for finding extinguishment;

- the discharge of the evidential onus may be assisted by the ordinary presumptions of regularity and continuance—at [431], citing the majority of the Full Court in *Western Australia v Ward* (2000) 99 FCR 316 at [117] and [120].

Validity of pastoral leases

The native title claimants contended that some of the historical pastoral leases had never, in fact, been granted. In the case of many of the earliest series of pastoral leases, no instruments of lease were produced. It was argued that the issue of an instrument of lease was an indispensable requirement for the disposal of any interest in land. The State of Western Australia relied upon tenure documents, such as public plans and a register of pastoral leases, collated by the state's Land Claims Mapping Unit (LCMU), the evidence of the acting manager of LCMU and the presumption of regularity: i.e. where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. The ordinary rule is that everything is presumed to be rightly and duly performed until the contrary is shown: *Broom's Legal Maxims* 10th ed (1939) at page 642.

In considering the authorities on point, Sundberg J noted (among other things) that:

- an act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect—traditionally, the courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power or authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority;
- the test for determining validity is to ask whether it was a purpose of the legislation that an act done in breach of the particular provision should be invalid;
- courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act;
- when the provisions being considered relate to the performance of a public duty, holding null and void acts done in neglect of that duty would work serious inconvenience or injustice to persons who have no control over those entrusted with the duty and, at the same time, would not promote the main object of the legislature. In these circumstances, the courts usually hold that breach of the duty, although punishable, does not affect the validity of the acts done;
- it is destructive of economic enterprise if the citizen cannot rely upon assurances of public authorities; this has long been recognized with respect to title to land—at [436] to [441].

His Honour found that the Land Regulations the claimants relied upon did not impose 'essential preliminaries' but rather conferred a power to dispose of waste lands of the Crown and described the manner in which the power was to be exercised:

> The [legislative] purpose behind [the] Regulations was doubtless to encourage the opening up of the Kimberley to profitable enterprise by the grant of interests in land. To

> hold null and void leases not granted [in accordance] with the formalities…would not advance this purpose. It would cause injustice to those who paid rent, and who went onto the land in reliance on the approval of their applications. They were "innocent" parties in the sense that the requirements in [the Regulations] were imposed on the Governor and not on them, and they had no control over whether the Governor discharged his duties—at [442].

Sundberg J held that the same reasoning applied to the grant of pastoral leases in similar circumstances under the Land Regulations 1882 and 1887; the *Land Act 1898* (WA); and the *Land Act 1933* (WA)—at [448], [452], [456] and [462] to [463].

His Honour was not prepared to find that a lease came into existence in relation to an application form that contained annotations suggesting the application for the lease never came to completion—at [457].

Validity of reserves

The applicant argued that many of the reserves purported to exist in the state's tenure information were never validly created because of a failure to fulfil legislative requirements, namely the gazettal of the reserve or, where gazetted, the absence of a full and complete description of the reserve.

The state relied on the presumption of regularity: i.e. where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution. The ordinary rule is that everything is presumed to be rightly and duly performed until the contrary is shown: *Broom's Legal Maxims* 10th ed (1939) at page 642.

In relation to the absence of a gazettal notice, Sundberg J saw no reason as to why the 'commonsense' observations about the presumption of validity should not apply to cases where no gazettal notice was in evidence. 'Not to apply the presumption would affect the security of apparently vested rights; applying will avoid uncertainty' and there was 'an element of probability' arising from the materials that were in evidence, such as minute papers and authenticated maps. Therefore, a failure to produce a gazettal did not give rise to any invalidity—at [562] to [567].

In cases where the gazettal was in evidence but there was no full and complete description, the presumption of regularity did not apply. However, his Honour applied the same reasoning to this issue as to the question of the validity of pastoral leases set out above and concluded that:

- the power to create reserves was not conditional on taking any steps—the reserve was first created by the Governor and gazettal was 'plainly' an act that followed, not a condition on the exercise of the power to create the reserve;
- the fact that publication was not an essential preliminary to the exercise of the power to create a reserve was a strong indication that breach of the gazettal requirement was not intended to invalidate an act done in breach of those provisions;

- public inconvenience would result if the creation of the reserves was found to be invalid e.g. reserves for watering places were 'essential' in terrain like the Kimberley—at [568] to [570].

If his Honour was wrong in his conclusion in cases where no gazettal was in evidence, then he would have applied this reasoning to those cases too—at [570].

Rights conferred by pastoral leases

As was noted in *Ward* at [78], the question of whether rights of third parties, such as the holder of a pastoral lease, are inconsistent with claimed native title rights and interests 'is an objective inquiry which requires identification of and comparison between the two sets of rights' i.e. those claimed as native title and those held by non-native title parties.

Sundberg J compiled a list of rights conferred upon pastoralists under the various Land Regulations and Land Acts. According to his Honour, these included (either expressly or by implication) the right to:

- use the land for pastoral purposes;
- undertake pastoral activities on the land;
- graze sheep, cattle and horses on the land;
- construct and use buildings, fences, stockyards and any structures relevant to the conduct of pastoral activities on the land, including airstrips and quarters for employees, or drainage works;
- construct and use dams, tanks or wells;
- use sand, rocks, gravel and clay found on the land for construction purposes; fell, take and use timber for domestic or farm purposes, or for the construction of buildings, fences, stockyards or other improvements on the land;
- use the flora of the land to feed stock;
- exclude Aboriginal people from hunting fauna or gathering flora from enclosed and/or improved parts of the land (this is how his Honour characterised the effect of the reservation in favour of Aboriginal people that applied to pastoral leases, which is discussed below);
- exclude any person from enclosed or improved parts of the land;
- eradicate poison plants;
- receive compensation for improvements made to the land;
- travel across the whole of the land;
- live on the land and have a spouse, dependants, employees and agents living there;
- burn off or clear flora on the land;
- use water from ponds, pools, rivers or other water body on the land—at [465] to [470].

Comparison

Sundberg J then compared these rights with those claimed as native title rights and interests, with the primary purpose of determining whether there was any inconsistency between the two. Consideration was also given to whether the claimed

native title rights and interests could be the subject of a determination under s. 225 of the NTA and whether they were rights and interests 'in relation to land or waters' as required under s. 223(1), were issues that were of general application (i.e. not peculiar to pastoral leases).

Possess, occupy, use and enjoy the claim area to the exclusion of all others
As noted above, in considering s. 223(1)(a) and (b), Sundberg J found that the claimants had established the existence of a native title right to possess, occupy, use and enjoy the claim area to the exclusion of all others. However, such a right was 'plainly' inconsistent with the rights of a pastoral lessee and was, therefore, extinguished. As a result of this finding, the applicant was allowed to 'unbundle' that composite right into its component parts— at [472]. Each right in that bundle was then considered separately as follows.

The right to otherwise possess, occupy, use and enjoy the claim area
This 'wide and general claim' was rejected because:

- it ignored what was said in *Ward* at [51] and [89] i.e. because native title rights and interests could not amount to a right against the whole world to possession, occupation, use and enjoyment of land, it was inappropriate to express those rights by using the terms possession, occupation, use and enjoyment; and
- expressed with such generality, it was inconsistent with the grant of a pastoral lease: 'A general right of possession, occupation, use and enjoyment of the leased area would make impossible the leaseholder's enjoyment of its tenure'—at [473].

Assert valid proprietary claims over and speak authoritatively for, on behalf of, and about, the claim area
Even when modified to apply only as against other Aboriginal people, Sundberg J found that this claim of proprietary rights of this kind was inconsistent with those of the pastoral leaseholder—at [474].

The right to make decisions about the use and enjoyment of the claim area
His Honour found that, if exclusively claimed, this right was inconsistent with the rights of the pastoral leaseholder. Even when reformulated as a non-exclusive right 'to make such decisions by a person, other than a person holding a pastoral leas … and a person exercising a statutory right in relation to the use of the land and waters', Sundberg J was of the view that the right as amended confused the separate processes required by the legislation which were:

- firstly, a determination of each native title right and interest; and
- secondly, a comparison between that right and interest and other interests that exist in the claim area—at [475].

Further, the right or interest must be a native title right or interest. His Honour found that:

> No native title right approximating to the reformulation is established by the evidence ... . [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. Further, the amendment suffers from the vice identified in *Yarmirr* at [98] … . [T]he two sets of rights were fundamentally inconsistent and could not stand together "and it is not sufficient to attempt to reconcile them by providing that exercise of the native title rights and interests is to be subject to the other public and international rights". That applies to the attempt to reconcile the fundamentally inconsistent native title right to make decisions about the use and enjoyment of the land and waters and the rights granted by a pastoral lease—at [475]. See also [514].

Receive a portion of the benefit of any resources taken by others from the claim area

His Honour found that there was no evidence that this was a traditional right that existed at sovereignty—at [483].

Control the access of others to the claim area

It was held that this right was 'clearly' extinguished by the grant of a pastoral lease. An attempt to reformulate it as a non-exclusive right to refuse access to any person other than the pastoral leaseholder, or an employee, agent or invitee of the leaseholder exercising rights under and in accordance with the terms of the pastoral leases and others with a statutory right of entry was rejected as not being a traditional right existing at sovereignty.

Further it was an attempt to reconcile two fundamentally inconsistent rights, which was warned against in *Commonwealth v Yarmirr* (2001) 208 CLR 1—at [477].

Control the use and enjoyment of others of resources of the claim area

This right was held to be inconsistent with the rights conferred by a pastoral lease because it involved the assertion of an entitlement to control access to, and the use of, the land. An attempt to reformulate the right in a similar fashion to that set out in the paragraph above was rejected—at [479] and [480].

Have access to the claim area

His Honour considered this right in the light of the reservation in favour of Aboriginal people found in most pastoral leases granted in Western Australia. Prior to 1933, Aboriginal people had 'full right to…at all times to enter upon any unenclosed or enclosed but otherwise unimproved parts…[of land subject to a pastoral lease]…for the purpose of seeking their subsistence therefrom in their accustomed manner'—e.g. s. 106 of the *Land Act 1898*. From 20 January 1934, the reservation was in the following terms:

> The aboriginal natives may at all times enter upon any unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner—s. 106(2) of the *Land Act 1933* (WA).

Sundberg J adopted what was said by the Full Court in *Western Australia v Ward* (2000) 99 FCR 316 at [319] i.e. that the effect of these reservations was to delineate, both in terms of purpose and geographical location, the extent of the native title

rights not adversely affected by the grant of the pastoral lease. As a result, his Honour found that the claimants had the right to access the area covered by a pastoral lease granted prior to 1933 but 'may seek their subsistence in their accustomed manner only from unenclosed or enclosed but unimproved areas'. In relation to leases granted after 20 January 1934, his Honour found that they 'may enter the land, but may seek their sustenance in their accustomed manner only from unenclosed and unimproved parts of the land'—at [476].

Comment

As noted above, Sundberg J's characterisation of the reservation is as a bestowing of a right on the lessee to exclude Aboriginal people from hunting fauna or gathering flora by enclosing and/or improving the leased land, from which he extrapolates that this right is inconsistent with native title rights to enter and use the area for those purposes. This finding appears to conflict with what was said in *Ward*, where, Gleeson CJ, Gaudron, Gummow and Hayne JJ (in considering the majority of the Full Court's findings) held that:

> [U]pon the happening of the contingency of enclosure or improvement contemplated by the reservation or provision, those who would enter *or* use the land as native title holders could continue to do so. Those who could no longer do so were those Aboriginal persons who, although within the terms of the reservation, were not native title holders—at [186], emphasis added. See also *Ward* at [182] to [185] and [417].

Later, their Honours noted that:

> The right to control access apart, many other native title rights to use the land the subject of the pastoral leases probably continued unaffected. For example, the native title right to *hunt or gather traditional food on the land would not be inconsistent with the rights of the pastoral leaseholder* although, as stated in par (a) of s. 12M(1), the rights of the pastoral leaseholder would "prevail over" the native title rights and interests in question—*Ward* at [192], emphasis added.

While their Honours could not make this finding in that matter because 'the relevant content of the native title rights and interests' had not been identified in the proceedings, the example they give seems to apply directly. See also *Daniel v Western Australia* [2003] FCA 666, where Nicholson J adopts the view that the decision in *Ward* was that the enclosure or improvement of pastoral lease land is not relevant to extinguishment—*Daniel* at [426], [596], [1109], [1110] and [1018].

Use and enjoy resources of the claim area

This 'generalised' claim was held to be inconsistent with the rights granted under the pastoral leases. It was more appropriate to deal with it in the context of the activities the applicant had identified (see below)—at [478].

Trade in resources of the claim area

His Honour was of the view that a right expressed in such a 'broad and general manner' was inconsistent with the rights conferred by a pastoral lease:

> The exercise of this right could involve taking from the land its timber, vegetation, fauna and flora and selling them. The removal of these items from the land is inconsistent with a pastoralist's right to use the land for pastoral purposes and to conduct pastoral

> activities on the land. In particular, the removal of feed is inconsistent with the right to graze sheep, cattle and horses over the whole of the land, and to use the flora of the land to feed stock. It is also inconsistent with the right to cut timber for domestic and farm purposes—at [481].

In any case, it was held that the evidence did not establish a general right to trade in resources:

> There is no evidence that the wurnan [traditional system of exchange] involved things such as feed, timber, vegetation or flora. There was some evidence that receipt of an item on the wurnan might be responded to by despatch of a kangaroo by the recipient. But that limited form of exchange falls far short of what could be done in pursuance of this asserted right—at [482].

Maintain and protect places of importance under traditional laws, customs and practices in the claim area

The evidence was that this involved low impact activities such as visiting, checking for damage, smoking, speaking to the Wanjina and repainting. His Honour found that:

> Activities of this type are not inconsistent with a pastoralist's right to graze stock. In the event of a clash of activities at or near a particular site, the pastoralist's right will prevail. Protection is directed to the prevention of damage to sites. This might involve Aboriginal presence when a busload of tourists visits a painting location, to ensure that the site is not damaged—at [484].

'Protect' was limited to protection from physical harm.

Use, maintain, protect and prevent the misuse of cultural knowledge of the Wanjina-Wunggurr community in relation to the claim area

As this form of claimed right was expressly rejected by the High Court in *Ward* at [59] and [60] as 'a new species of intellectual property right which could not be recognised for want of a connection with land', the applicant reformulated it as the right 'to prevent the disclosure otherwise than in accordance with traditional laws and customs [of] tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters'. However, the court found that the reformulation did not avoid the 'fatal difficulty' i.e. it would still involve the 'restraint of visual or auditory reproductions of what was found [on the land] or took place there' and so could not be recognised as a native title right and interest—at [485] to [487].

As between members of the Wanjina-Wunggurr community and as against other Aboriginal people who are subject to the laws and customs, uphold and enforce the traditional laws and customs of the Wanjina-Wunggurr community in relation to the land and waters of the claim area

His Honour characterised this as a right to uphold and enforce laws and customs, which he found was a right in relation to people and not in relation to land or waters as required by s. 223(1). However, even if it was such a right:

> On its face it involves the enforcement of traditional laws and customs in relation to the leased land. Traditional laws and customs are only capable of enforcement as between

> Aboriginal people. So the qualification adds nothing. The applicants have the onus of establishing that native title has not been extinguished … . For want of any adequate explanation of the ambit and effect of the right and the significance of the qualification, I am not satisfied that this right has not been extinguished by the pastoral leases—at [488]. See also [515].

Recognise or determine as between members of the Wanjina-Wunggurr community what is the form of connection or relationship of a particular member of the Wanjina-Wunggurr community to particular parts of the claim area and what are the particular rights and interests that arise from that particular form of connection or relationship

It was conceded that this was really an aspect of preceding right and, therefore, the court made the same findings here—at [489].

Resolve disputes concerning the claim area

His Honour found that there was no evidence to support this claim and, in any case, also characterised it as a right in relation to people and not in relation to land or waters—at [490].

As against the whole world, possession of painted images on rock surfaces within the claim area, in particular in relation to but not limited to painted images known as or referred to by the claimants as Wanjina images and Gwion images and images associated with those images

This was found to be inconsistent with the rights granted under pastoral leases and, therefore, extinguished by the grant. However, Sundberg J found the applicants were entitled to have access to the painted images 'to view them and freshen them up'—at [491].

As against the whole world, use the land or waters adjacent to such images for the purposes of or incidental to the preceding right

It was held that the use of the immediate area for the purpose of viewing and freshening up the images was not inconsistent with the lessee's rights but the pastoralist's rights would prevail—at [492].

Belong to or be from the claim area

This claim was not pressed, and in any case: 'Unassisted by an explanation of what the residual non-exclusive right to belong to country may involve', Sundberg J was not satisfied that it amounted to more than the right of access to the land, the derivation of traditional sustenance from it and the right to visit and look after important sites; in other words, it was subsumed within other rights—at [493].

Speak for the claim area

His Honour found that this involved a claim of ownership and noted that the existence of this right was one of the bases for his finding of a native title right to the possession, use and enjoyment of the land as against the whole world. However:

> The unbundling process is not assisted by singling out a right to speak for country, because that merely repeats, in the Aboriginal English used by some witnesses, the nature

> of the composite right … . I take this [the applicant's submission] to mean that the right is encompassed by rights earlier considered, and that it is not necessary to state it separately in a determination —at [494].

Represent the Wanjina

His Honour found no evidence to support the claim that to represent the Wanjina was to 'hold the law and the land in the fullest sense' as had been submitted. The court accepted that the claimants had a comprehensive native title as a result of evidence relating to speaking for country, exercising control over access to country, and owning or ruling it:

> If, as appears to be the contention, representing the Wanjina is just another way of expressing that title, it is inconsistent with pastoral lease rights to the same extent as the primary formulation. The unbundling process is not advanced by expressing that title in an alternative way that involves no greater specificity—at [496].

Look after the land and waters of the claim area

To the extent that this was a 'right' and not a duty or obligation arising from rights to the land, it was found to encompass the notion of control over people outside the claimant group.

Any such right was extinguished to the extent

that it was inconsistent with the rights conferred by pastoral leases—at [498].

Inherit the land and waters of the claim area

Reformulated as 'inherit the native title rights and interests in the land and waters of the claim area', this was found to be a right in relation to land and waters that was not inconsistent with rights under a pastoral lease—at [499].

Be acknowledged as the owners of the land and waters in accordance with traditional laws and customs

This was not pressed but Sundberg J noted that it would have no meaning beyond what would be expressed in the determination of the court that native title existed and was held by the claimants—at [500].

Comparison of rights conferred by leases with claimed activities

The applicants also claimed the right to engage in particular activities, as incidents of the rights claimed, but not comprising or defining the legal content of those rights. Where pastoral leases were involved, any native title right to exclusive possession had been extinguished. Therefore, his Honour was of the view that this was a circumstance where it was 'preferable to express rights by reference to activities that may be conducted as of right on or in relation to land and waters' and so went on to consider each activity—at [501], referring to *Ward* at [52].

Living in and building structures and establishing and maintaining communities

This was characterised as a claim to an entitlement to live, build structures and establish and maintain communities anywhere on a pastoral lease. His Honour held that this was inconsistent with the general right to conduct pastoral activities on the

whole of the land and with many of the particular rights under a pastoral lease listed above—at [502].

Moving freely about and having access to the claim area
As this activity was encompassed within the notion of a right to access to land for traditional purposes, his Honour qualified it as being subject to the same limitations regarding enclosed and/or improved areas of a pastoral lease as are noted above i.e. the native title holders have a native title right to access land subject to a pastoral lease but may seek sustenance in their accustomed manner only from unenclosed or unimproved parts of the land. In the event of any conflict, the pastoralist's rights prevail—at [503].

Camping
His Honour found that this activity was encompassed in the notion of access to land for traditional purposes:

> Setting up a temporary camp as opposed to permanent settlements is not inconsistent with the rights of the pastoralist, though in the event of a conflict of activities, the rights of the pastoralist will prevail—at [504].

It appears his Honour was of the view that setting up a permanent settlement was inconsistent with the pastoralist's rights—see [502].

Hunting
His Honour found that 'a traditional right to hunt for the purpose of satisfying the personal, domestic or non-commercial communal needs of native title holders including the purpose of observing traditional, cultural, ritual and spiritual laws and customs' was extinguished on areas of pastoral lease land that were enclosed or improved but not otherwise. In doing so, Sundberg J adopted what was said by the majority of the Full Court in *Western Australia v Ward* (2000) 99 FCR 316 at [325]:

> [F]or the purposes of making a determination of native title … an Aboriginal group claiming native title in respect of specified [pastoral] land holds a full right of entry in accordance with whichever of the reserved rights of entry is appropriate to the case, without entering upon the further task of defining geographically those portions of the land which are unenclosed, enclosed but unimproved, or unenclosed and unimproved. In the event of a dispute later arising as to the rights of the native title holders in relation to a particular area of land, any court of competent jurisdiction could determine whether that land came within the reservation.

Gathering and fishing
These were held to be traditional activities that were not inconsistent with a pastoral lessee's rights. Similar qualifications in relation to enclosed or improved areas noted above were found to apply—at [507].

Taking and using the resources of the area, including forest products, water, minerals and other resources from the land and waters
His Honour was of the view that this activity was 'too wide and general'. However, it was found that it would not be inconsistent with rights under a pastoral lease if expressed as 'using traditional resources of the area for the purpose of satisfying

personal, domestic or non-commercial needs'. It was noted that rights to take and use some resources were included already in activities such as hunting, gathering and fishing—at [508].

Manufacturing items from the resources of the land and waters
The court rejected a submission that this was not a right or activity 'in relation to land and waters' but rather a right in respect of chattels i.e. something that has been severed from the land or taken from the waters: 'As I have said, the words "in relation to" are of considerable amplitude'. The right was, however, limited to the manufacture of traditional items such as spears and boomerangs—at [509].

Disposing of the products of the land and waters or manufactured from the products of the land and waters by trade and exchange
While satisfied that this was a right in relation to land and waters, his Honour adopted a similar position to that which he took on the claimed right to trade in resources i.e. this claim was too broadly made and involved rights that were inconsistent with the rights conferred by a pastoral lease—at [510].

Managing, conserving and caring for the land and waters and controlling access to the land and waters
His Honour characterised this as a claim to exclusive possession and as such extinguished by the grant of a pastoral lease—at [511].

Conducting and taking part in ceremonies within the claim area
This was held to be not inconsistent with rights conferred by a pastoral lease—at [512].

Visiting and protecting sites
His Honour referred to his findings in relation to the right to 'maintain and protect places of importance' i.e. this involved low impact activities that were not inconsistent rights conferred by a pastoral lease. However, 'protect' was limited to protection from physical harm—at [513].

Conclusion on pastoral leases
Essentially, Sundberg J reduced the native title holders' rights and interests that survived the grant of a pastoral lease to the right to:

- access the leased area but the native title may only seek sustenance in their accustomed manner on unenclosed or enclosed but otherwise unimproved areas (pre-1933), or (post- 1934) on unenclosed and unimproved areas;
- hunt on unenclosed or enclosed but otherwise unimproved areas (pre-1933), or (post-1934) on unenclosed and unimproved areas for the purpose of satisfying personal, domestic or non-commercial communal needs;
- gather and fish on unenclosed or unimproved areas or unimproved areas (pre-1933), or (post-1934) areas for the purpose of satisfying personal, domestic or non-commercial communal needs;
- use traditional resources for the purpose of satisfying personal, domestic or non-commercial communal needs;

- camp;
- access painting sites for the purpose of freshening or repainting images there and use land adjacent to those sites for that purpose;
- conduct and take part in ceremonies;
- access places of importance and protect them from physical harm;
- manufacture traditional items such as spears and boomerangs from resources of the land and waters for the purpose of satisfying personal, domestic or non-commercial communal needs; and
- pass on and inherit native title rights and interests—at [516] to [523].

His Honour dealt individually with all current pastoral leases within the claim area. In most if not all cases, there had been historic pastoral leases over all of the area covered by the current leases. Where current lease was granted prior to the commencement of the RDA on 31 October 1975, his Honour found it was a previous non-exclusive possession act inconsistent with native title rights to the extent consistent with the analysis above. Where the current lease was granted after the RDA commenced on 31 October 1975, his Honour found it was not a past act if the whole of the area had been the subject of earlier pastoral leases. The extent of the inconsistency was determined by those earlier leases that were previous non-exclusive possession acts. Note that this finding appears to conflict with Nicholson J's decision in *Daniel v Western Australia* [2003] FCA 666 at [919]. Although the prior history of dealings is not apparent on the face of the reasons for decision, see 'Case Note – *Daniel v Western Australia* [2003] FCA 666 ("Ngarluma Yinjibarndi")' by S Wright (2003–2004) 6 NTN 47 at 49. To the extent that any part of a present lease was not formerly covered by an earlier pastoral lease or some other form of tenure that extinguished native title to the same extent as a pastoral lease prior to the commencement of the RDA on 31 October 1975, it was held to be a category A past act completely extinguishing native title (although it appears that there were no such areas in this case)—at [523] to [554].

Effect of reserves on native title

His Honour applied the reasoning of the High Court in *Ward* to certain non-vested reserves and found that they extinguished rights of control of access to, or use of, the reserve. To the extent the reserves covered land previously covered by pastoral leases, native title rights and interests were already partially extinguished to the extent set out above in relation to pastoral leases.

Reserves created in 2000

The applicant contended that three reserves, one created for the purpose of a conservation park and two for national parks in 2000 were invalid because they were not created in accordance with the relevant provisions of the future act regime of the NTA. The whole area affected by these reserves had previously been subject to pastoral leases.

His Honour found that the creation of the national parks had no further effect on native title and so these were validly created. Implicit in the reasoning is that this

was not a future act, since s. 228 of the NTA defines such acts as ones that 'affect' native title—at [586].

To the extent that the creation of a conservation reserve (which may be subject to more stringent legislative regulation) may have had a greater extinguishing effect on native title rights than the earlier grant of a pastoral lease (with extinguishment of a right to hunt give as an example), it was held that:

> [T]he failure to follow the future act provisions does not invalidate the entire reservation, but affects it only to the extent that … [it] would otherwise have extinguished native title. Thus s 24OA of the Act provides that, unless otherwise provided, a future act is invalid "to the extent that it affects native title" … . The result is that … native title was unaffected by the creation of … [the conservation reserve] in relation to the part of the Reserve that had not been the subject of prior pastoral leases, and in relation to the balance of that Reserve and the whole of the others, native title was not affected to any greater extent than it had already been affected by the earlier pastoral leases—at [587].

Vested reserves

As to reserves vested under s. 33 of the *Land Act 1933* (WA), his Honour applied the findings of the High Court in *Ward* to hold that, whether vested before or after the RDA commenced on 31 October 1975:

> [V]esting passed the legal estate in the land … conferred a right of exclusive possession … extinguished native title, and in some but not all cases, was a previous exclusive possession act'—at [579].

Vested reserves for the use and benefit of Aboriginal people are dealt with below.

Special leases

In *Ward* at [351] to [357], the High Court held that the grant of a special lease under s. 116 of the *Land Act 1933* (WA) conferred on the lessee a right of exclusive possession and extinguished any native title rights and interests. Sundberg J applied this reasoning to a number of s. 116 leases in the claim area. The parties agreed that the special leases, with one exception, were previous exclusive possession acts—at [588].

Challenge to validity

The applicant appeared to raise a question as to the validity of several of the special leases on the grounds that they were not granted for a purpose that was within the scope of s. 116.

His Honour, having noted that the applicant had not discharged the onus of proof in this case, and that the presumption of regularity applied, held that the purposes listed in s. 116 of the Land Act, being public purposes, should be generously construed. For example, it was found that 'tourist facility' came within the listed special purpose of 'sites for hotels, stores, smithies, or similar buildings'—at [592] to [596]. Special leases to the Aboriginal Lands Trust are dealt with below in the discussion about s. 47A.

Minerals, petroleum and gas
Sundberg J held that any native title in respect of minerals as defined in the *Mining Act 1904* (WA) or *Mining Act 1978* (WA) was extinguished by those acts and any native title to petroleum and gas was extinguished by the *Petroleum Act 1967* (WA)—at [599] and [560].

As from 12 May 1920, the definition of 'minerals' included 'clays, ochres and feldspars for use in the manufacture of porcelain, fine pottery, or pigments'. Sundberg J found that: 'Since then ochres used for those purposes have been wholly owned by the Crown. They are excluded from the present claims'—at [599].

By implication, ochres used for any other purpose, including the exercise of a native title right, remained within the claim. A similar approach was taken by Nicholson J in *Daniel v Western Australia* [2003] FCA 666.

Gold mining leases and quarrying areas
His Honour could not distinguish gold mining leases granted, or quarrying areas created, under the *Mining Act 1904* (WA) from the mining lease granted under the *Mining Act 1978* (WA) considered in *Ward*. Therefore, it was found that these leases extinguished any native title right to control access to or the use of the land but were not inconsistent with the carrying out of the same activities or the exercise of the native title rights that survived the grant of a pastoral lease—at [602] to [603].

Tenements under the *Mining Act 1978*
His Honour followed *Ward* in finding that the grant of a mining or a general purpose lease or a miscellaneous licence under the *Mining Act 1978* (WA):

- extinguished any native title rights to control access to or the use of the land;
- was not inconsistent with the carrying out of the same activities or the exercise of the right referred to in relation to pastoral leases, set out above—at [613] to [616].

Roads and other works
Sundberg J found that:

> [R]oads [that had been 'reserved, dedicated or otherwise with some formality classed as a road'] and public works the construction or establishment of which commenced on or before 23 December 1996 are previous exclusive possession acts under s 23B(7) of the Act and s 12J(1) of the State Validation Act, and are excluded from the claim area. If adjacent land (s 251D) is not excluded from the claim area, native title is extinguished in relation to that land…If it is a "road" within the definition of "public work" in s 253 and is a category A past act, a category A intermediate period act or a previous exclusive possession act, native title is wholly extinguished—at [623] to [624].

The Waters and Rivers Commission, a statutory authority of the Crown with responsibility for the management of ground and surface water resources, had several surface water monitoring and meteorological sites, along with some groundwater well in the application area and also used access tracks to these sites. It

was held that there were public works that extinguished native title, with the access tracks adjacent to sites being found to be a 'public work' by application of s. 251D. It was found, on the evidence, that some roads, buildings and other infrastructure now within national and conservation parks were most likely constructed by a former pastoralist and, therefore, were not public works (since the pastoralist lessee would not be a 'statutory authority' as required in the definition of 'public work' found in s. 253)—at [629].

***Country Areas Water Supply Act* 1947 and by-laws**

By-laws made under this Act restrict or prohibit certain activities, including camping, bathing and collecting flora. They did not affect any part of the application area until after 1982.

Sundberg J applied *Ward* at [256] to [268] in relation to similar by-laws to find that the application of them to part of the application area was a category D past act:

> Thus native title rights to camp, take timber, and gather flora within the prescribed radius of a reservoir or bore, are not extinguished by the by-laws, but the rights have no effect so long as the by-laws exist. Should the bylaws be repealed, the rights will again have full effect. See s 238 of the Act—at [632].

His Honour considered that s. 211 of the NTA, which provides exemptions to native title holders from certain restrictions on doing particular activities under certain circumstances, did not apply either because the prohibition in the by-law was absolute or because 'cutting and destroying trees' was not 'gathering' i.e. it did not fall within the class of activities described in s. 211(3)(c), which are fishing, gathering and cultural or spiritual activity —at [632] to [633].

***Parks and Reserves Act 1895* and bylaws**

These by-laws came into force over a reserve within the claim area in 1974 i.e. before the RDA commenced. Those containing an absolute prohibition were held to extinguish native title rights to hunt, fish and collect flora. Section 211 of the NTA did not apply because the prohibitions were absolute.

By-laws relating to activities that could not be done without permission, such as cutting or removing trees, removing stone, gravel or earth, carrying or discharging a firearm, using fires except in authorised fire places, conducting picnics, holding concerts or engaging in public worship, preaching or public speaking and camping in areas other than authorised camp sites, were found to deal with activities that did not fall within the classes of activities described in s. 211(3) i.e. hunting, fishing, gathering and cultural or spiritual activity—at [636].

Water rights

Parts of the claim area were affected by three proclamations under Division 1B of Part III of the Rights in *Water and Irrigation Act 1914* (WA) (RIWIA), which applied to the watercourses and wetlands in those areas.

Sundberg J applied *Ward* at [263] to [264] to hold the proclamations extinguished native title rights to the extent they involve an unqualified right to possess and control the water. In those parts previously covered by the grant of a pastoral lease, the proclamations had no further extinguishing effect on native title rights to water than did the grant of the lease. In areas unaffected by a pastoral lease, the proclamations were held to have the same effect on native title rights to water as a pastoral lease—at [641].

His Honour had earlier noted that:

- the vesting in the Crown under the RIWIA of the right to the use and flow and to the control of the water in natural waters was inconsistent with any native title right to possess those waters to the exclusion of all others—at [609].

Further, the common law:

- did not recognise private ownership of flowing water or subterranean water running in undefined or unknown channels and, therefore, could recognise native title amounting to ownership of such water; and
- was capable of recognising some other native title rights to water such as a non-exclusive right to take water for the purposes of satisfying communal, personal and domestic needs—at [609].

Wildlife Conservation Act 1950

His Honour followed the reasoning of the Full Court in *Western Australia v Ward* (2000) 99 FCR 316, not disturbed by the High Court on appeal, in finding that land reserved under the *Wildlife Conservation Act 1950* (WA) for 'conservation of flora and fauna' was a 'nature reserve' within which native title rights to take fauna were 'clearly and plainly extinguished' by the prohibition found in s. 23 of the *Wildlife Conservation Act*—at [645].

Telstra facilities

As a result of s. 26 of *Australian and Overseas Telecommunications Act 1991* (Cwlth), which provided that Telstra was to be taken not to have been incorporated or established for a public purpose or for a purpose of the Commonwealth, and not to be a public authority or instrumentality or agency of the Crown, it was held that Telstra was not a 'statutory authority' for the purposes of s. 253 of the NTA but that its predecessors were—at [647].

Facilities constructed or established by Telstra's predecessors on Crown land not yet subject to a reservation were found to be public works as defined in s. 253:

> Each is a building or structure constructed by or on behalf of a statutory authority, and is a fixture. The construction was valid or has been validated, and it took place before 23 December 1996 … . Accordingly, the construction was a previous exclusive possession act attributable to the Commonwealth, which extinguished native title in relation to the land on which the facilities are situated—at [653].

Application of extended definition of 'public work'

The applicants submitted that the access roads to some of the Telstra facilities were not public works under s. 251D on (among other) grounds that it:

- only applied to areas both adjacent to and necessary for, or incidental to, the construction, establishment or operation of the work. Some of the access routes considered were many kilometres in length so that not all of the area of the route lay near the facility;
- only picked up roads constructed or established 'by or on behalf of the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities', referring to the definition of 'public work' in s. 253, whereas the tracks here were private station tracks.

Section 251D provides that:

> [A] reference to land or waters on which a public work is constructed, established or situated includes a reference to any adjacent land or waters the use of which is or was necessary for, or incidental to, the construction, establishment or operation of the work.

His Honour held that each track was adjacent land the use of which is or was necessary for, or incidental to the construction, establishment or operation of the facility for the purposes of s. 251D, finding that:

- the word 'adjacent' includes 'adjoining', 'contiguous' and 'bordering' and the tracks considered adjoined, bordered and were contiguous to the site;
- access roads are adjacent to a site if they lead to it;
- section 251D
  - should be given a purposive construction;
  - merely extends the area of the land over which the extinguishing effect of the construction of a 'public work' as defined in s. 253 operates. Whether a road is 'constructed or established' by any 'relevant body' is irrelevant;
  - should not be denied its 'beneficial function of ensuring that a public work has the benefit of adjacent land that is necessary for or incidental to the operation of the work, especially in relation to access to landlocked works' on these grounds—at [659] to [660].

Public works on land to which s. 47A applied

Two other repeater station towers constructed on pastoral lease land, together with access tracks, were also held by his Honour to be public works and previous exclusive possession acts. One of these stations was built on a lease held by the Indigenous Land Corporation (ILC). Sundberg J found that, even if s. 47A (discussed below) applied to the lease, extinguishment brought about by the construction of the repeater station could not be disregarded because it was not 'any other prior interest' for the purposes of s. 47A(2)(b)—at [665] and [666], following *Erubam Le v Queensland* [2003] FCAFC 227, summarised in *Native Title Hot Spots* Issue 7.

Facility that was not a public work

One facility was constructed on pastoral leasehold land by Telstra. Accordingly, it was not a 'public work' as defined in s. 253, since Telstra was not a statutory authority—see above. It was done with the consent of both the Crown and the

pastoralist under statutory powers contained in the *Telecommunications Act 1991* (Cwlth). The validity of the exercise of those powers was disputed by the applicants.

His Honour found (among other things) that:

> The *Telecommunications Act 1991* authorised Telstra to construct and operate the facility. That statutory right extinguished native title over the site because it was inconsistent with any continued enjoyment of native title rights—at [668].

Cabling

It was common ground among the parties that Telstra's rights in relation to underground cabling did not extinguish any native title rights and interests, although Telstra's rights would prevail over any native title rights in the event of any inconsistency between the two—at [670] and [671].

Section 47

Section 47 of the NTA provides (among other things) that, with respect to certain pastoral leases, any extinguishment of native title rights and interests brought about by the grant of the lease itself or the creation of 'any other interest itself in relation to the area' must be disregarded for all purposes under the NTA 'in relation to the application'. At the time the claimant application is made, the lease must be held by or on trust for native title claimants or by a corporation with only claimants as shareholders. It was argued that three such pastoral leases were claimed: two held by the Indigenous Land Corporation (ILC); and a third by the Commonwealth, with an indication that it was prepared to transfer the lease to the ILC.

The ILC is a body corporate established under s. 191A of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cwlth) to assist Aboriginal people to acquire and manage land. Its powers include acting as trustee of property.

Sundberg J held there was insufficient evidence to indicate that any of these leases were held in trust, and even if they were so held, there was no evidence that any of the leases were held in trust for 'any of the persons who made the application claiming to hold the native title or any other persons with whom they claimed to hold the title' as required by the relevant provision of s. 47(1)—at [674] to [677].

Meaning of 'the area' in ss. 47A and 47B

These provisions, which require that extinguishment must be disregarded in certain circumstances (discussed below) are both said to apply to 'an area'. The applicant argued that this meant the area subject to the application, presumably because both sections require that 'the area' must be 'occupied' to attract these provisions and so occupation of any part of the application area would then be sufficient.

His Honour rejected this submission:

> When the legislature means to refer to the claim area it uses one of the descriptions "the area covered by the application" and "land and waters covered by the application"… . In s 47A(1)(c) "an area" is not used in that sense. Rather it contemplates a particular area. That is made clear by par (b)(i) which refers to a freehold estate existing over the area, or

> a lease existing over the area, or an area being vested in a person. …[W]here … it is sought to apply s 47A to particular reserves and pastoral leases, it is the area of the particular reserve or lease that must be assessed for occupancy—at [686].

In relation to s. 47B, his Honour also made the following comments:

> [T]here is an indication peculiar to s 47B that shows that "the area" … means the particular area in relation to which it has been concluded that, but for the section, native title rights would be extinguished. Sub-section (1) refers to the "area" not being "covered by" various forms of land tenure. Where, as in the present case, the claim area includes unallocated Crown land … the applicants' construction of "the area" would lead to the application of s 47B to all of the claim area, including the land subject to the various tenures.
>
> The applicants' meaning of "area" could have absurd results. Take the case…of a large claim area with Aboriginal occupation of a community in the extreme north east, but with no evidence of any occupation of the remainder of the area. The applicants [sic] interpretation would have s 47B applying to a small area of unoccupied Crown land in the opposite, south west corner of the claim area, regardless of the evidence relating to occupation there—at [721] and [722].

Section 47A

His Honour found that the vesting of a reserve in the Aboriginal Lands Trust for the purpose of either 'use and benefit of Aborigines' or 'use and benefit of Aboriginal inhabitants' was an act falling within s. 23B(9)(b) of the NTA i.e. it was not a previous exclusive possession act. However, it was still effective to extinguish any native title rights and interests at common law—at [582].

Subsection 47A(1) provides that, in certain circumstances, extinguishment must be disregarded for all purposes under the NTA, namely in circumstances where, when a claimant application is made in relation to an area:

- a freehold estate exists, or a lease is in force, over the area or the area is vested in any person, if the grant of the freehold estate or lease or the vesting took place under legislation that makes provision for the grant or vesting of such things only to, in or for the benefit of, Aboriginal peoples or Torres Strait Islanders; or
- the area is held expressly for the benefit of, or is held on trust, or reserved, expressly for the benefit of, Aboriginal peoples or Torres Strait Islanders; and
- one or more members of the native title claim group occupy the area.

Pastoral leases and 47A

Sundberg J found that s. 47 was not intended to be an exhaustive statement of the circumstances in which extinguishment in relation to pastoral leases must be disregarded and that s. 47A may also apply to pastoral leases—at [699] to [703].

The applicant submitted s. 47A applied to six pastoral leases wholly or partly within the claim area. Sundberg J held that s. 47A(1)(b)(ii) applied to:

- a lease held by an Aboriginal Corporation incorporated under the Aboriginal *Councils and Associations Act 1976* (Cwlth);

- three leases held by the ILC;
- a lease held by the Commonwealth, purchased with the intention to secure a lease for the purpose of providing land for communities or groups of Aboriginal people, to be subsequently transferred to the ILC; and
- a lease held at the time of application by the Aboriginal and Torres Strait Islander Commission (ATSIC) and subsequently transferred to an Aboriginal Corporation.

His Honour found that the requirement of occupation in s. 47A(1)(c) was met in relation to five of the leases and, therefore, found that extinguishment brought about by the interests covered by s. 47A(2) must be disregarded in relation to the areas subject to those leases—at [704] to [716].

Effect of proclamation
Two reserves and one of the pastoral leases found to be areas to which s. 47A applied were affected by the Fitzroy River Proclamation, one of three in the claim area made under the *Rights in Water and Irrigation Act 1914* (WA), which vests in the Crown: 'The right to the use and flow and to the control of the water at any time in any water-course'.

Sundberg J held this to be a 'right ... over ... waters' and hence a 'prior interest' within s. 47A(2)(b). Therefore, it was held that any extinguishment resulting from 'creation' of the Crown's interest must be disregarded. The validity of the proclamation was not affected and the non-extinguishment principle applied to the vesting effected by it—at [719] and see s. 47A(3).

Meaning of occupy
Sundberg J considered the case law, where it has been found (among other things) that:

- a 'broad view' should be taken of the word 'occupy' in the requirement in s. 47A(1)(c);
- the requirement is met notwithstanding the area is also occupied by others who are not claimants and the 'occupying' claimant is rarely present upon the land, so long as the claimant makes use of the land as and when the claimant wishes—at [682].

In relation to a number of reserves, Sundberg J considered that the evidence of occupation for the purposes of s. 47A(1)(c) was insufficient to warrant the disregarding of prior extinguishment —at [689] to [696].

Comment
With respect, it appears that his Honour has taken a narrower approach to what claimants must show to prove occupation for the purposes of s. 47A or 47B (discussed below) than was envisaged by Beaumont and von Doussa JJ in *Western Australia v Ward* (2000) 99 FCR 316 e.g. it was found that 'consideration of some unidentified place in that [named part of] country as a possible location for [a traditional] burial does not establish occupation of the reserve' in the sense required.

Similarly: 'It is not sufficient to prove occupation of some other, even nearby area'— at [689] and [744] respectively.

Section 47B
Section 47B provides that extinguishment brought about by the creation of any prior interest in relation to the area must be disregarded for all purposes under the NTA in respect of an area if, at the time of application, the area was not:

- covered by a freehold estate or a lease;
- covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or
- subject to a resumption process—see ss. 47B(1)(b) and (2).

Occupation for s. 47B
Sundberg J found that s. 47B(1)(c) was satisfied, at least in part, in six of the fourteen areas of unallocated Crown land considered. Indicators of occupation of an area for the purposes of the Act were:

- presence of an Aboriginal community;
- witnesses' evidence of visits to parts of the area 'as and when they wish to do so';
- being enclosed and surrounded by land held to be so occupied—at [725], [742], [743], [749], [750], [753] and [757].

Generally, if an area lay near or next to an occupied area, it was not sufficient to satisfy s. 47B(1)(c). However, Sundberg J did infer from the size and location of a small area in the corner of a station occupied by an Aboriginal community, that the community treated the area as part of the station and 'in that sense is occupied for the purposes of s. 47B(1)(c)'— at [686], [687], [744] and [756].

Rights to waters
The Western Australian Fishing Industry Council made submissions related to the waters forming part of Walcott Inlet at the mouth of the Calder River, seaward of the high water mark, and the waters forming part of Prince Frederick Harbour at the mouth of the Roe River, seaward of the high water mark, both of which were included in the area covered by the application. These submissions were dealt with separately.

His Honour was satisfied, for reasons given earlier in relation to the claim generally, that:

- the laws and customs that existed at sovereignty in the region in which the waters were located were still in existence, though modified and in some cases diluted as a result of European settlement;
- for the purposes of s. 223(1)(b), the evidence established a connection, by traditional laws and customs, with the two bodies of water—at [323] to [346], and [764], [766] and [770].

Sundberg J disregarded claimed rights and interests that were not:

- supported by any evidence;
- 'in relation to land or waters';
- pursued or said by the applicants to be unnecessary;
- applicable to an area of water
- able to be recognised in a non-exclusive form—at [771]. his Honour followed the High Court in *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 and *Ward*, where it was held that only non-exclusive rights may exist seaward of the low water mark and in tidal areas — at [773].

This apparently left the right to:

- access and move freely about these areas;
- take, use and enjoy resources of the areas but limited to the satisfaction of personal, domestic or non-commercial needs;
- inherit native title rights and interests in these areas;
- hunt turtles etc;
- gather and fish, but only for the purpose of satisfying personal, domestic or non-commercial needs;
- manufacture items from the resources of the waters, but limited to traditional items;
- conduct and take part in ceremonies within the claim area—at [783].

Settlement of the determination

His Honour did not provide a draft determination in his reasons for decision and the matter is yet to be settled.