Native Title Hot Spots

No.9, April 2004

Contents

Disclaimer

Recent Cases

New cases — Tribunal alert service

The Tribunal's library provides a bi-weekly service that alerts subscribers by email to unreported judgments and some other information dealing with native title and related issues. Hyperlinks are included. Subscribers will also be notified if and when judgments are reported. If you wish to subscribe, please email libraryperth@nntt.gov.au.

Proposed determination of native title

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 *Hot Spots* Issue No. 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

His Honour 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—at [399] to [423] and see summary of that case in *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 *Western Australia v Ward* (2002) 191 ALR 1 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 *Western Australia v Ward* (2002) 191 ALR 1 at [51] and [89]. That is, 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 lease…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.

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 the *Western Australia v Ward* (2002) 191 ALR 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 [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—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 *Western Australia v Ward* (2002) 191 ALR was that the enclosure or improvement of pastoral lease land is not relevant to extinguishment—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 Western Australia v Ward* (2002) 191 ALR 1 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—see *Western Australia v Ward* (2002) 191 ALR 1 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 leases as are noted above i.e. the native title holders had 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 *Western Australia v Ward* (2002) 191 ALR 1 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.

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 (his Honour gave the extinguishment of a right to hunt 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 [586] to [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 W*estern Australia v Ward* (2002) 191 ALR 1 to hold that, whether vested before or after the RDA commenced on 31 October 1975, 'vesting 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 *Western Australia v Ward (2002)* 191 ALR 1 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 *Western Australia v Ward* (2002) 191 ALR 1. 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 leases—at [602] to [603].

Tenements under the *Mining Act 1978*

His Honour followed W*estern Australia v Ward* (2002) 191 ALR 1, finding that the grant of a mining or 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 because 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 *Western Australia v Ward* (2002) 191 ALR 1 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 by-laws 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 by-laws

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 *Western Australia v Ward* (2002) 191 ALR 1 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;

- 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 1950* (WA)—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 provided 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 *Hot Spots* Issue No. 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, that 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.

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 disregard of prior extinguishment —at [689] to [696].

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

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 and Western Australia v Ward (2002) 191 ALR 1, 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.

Determination of native title

The Lardil Peoples v State of Queensland [2004] FCA 298

24 March 2004, Cooper J

Issue

Does native title exist over seas adjacent to the Wellesley Islands and an area of coastline in the Gulf of Carpentaria and, if so, who holds it?

Background

This decision relates to a claimant application brought by the Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples seeking a determination of native title in respect of the land and waters below the high water mark in an area of sea adjacent to the Wellesley Islands and adjacent to the coast of Queensland between Massacre Inlet and the Leichhardt River, in the Gulf of Carpentaria (application area).

The original application made in 1996 sought a determination of exclusive ownership of the land and waters in the application area, with each of the four groups (claimant groups) claiming exclusive ownership of their respective traditional territory. The traditional territories were adjoining and, in certain locations, shared.

The evidence was prepared and tendered to support a claim to possession and occupation of the application area to the exclusion of all others. The High Court decisions in *Commonwealth v Yarmirr* (2001) 208 CLR 1, *Western Australia v Ward* (2002) 191 ALR 1 and *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 were handed down after the evidence concluded. The applicant subsequently amended the points of claim to seek a determination taking into account the impact of the High Court decisions (amended draft determination). There was no claim to possession and occupation of the application area to the exclusion of all others made in the amended draft determination

Law in relation to native title

At [44] to [51], Cooper J extracted the law as stated in the leading High Court decisions relating to the definition of native title in s. 223 of the NTA, the requirements for a determination of native title under s. 225 and proof of native title.

Existence of Indigenous inhabitants in claim area at sovereignty

On the evidence, Cooper J found:

- at sovereignty, each of the four claimant groups was an ethnographically and culturally separate group inhabiting the area claimed as their respective traditional territory;
- since sovereignty, there had continued to exist such an ethnographically and culturally separate group who were, and are, the direct descendants of the original group of Indigenous peoples; and
- the people named in the genealogy and identified as the members of each claim group are the direct descendants of the relevant original group—at [52].

Treatment of Indigenous witnesses' evidence

The existence of a right to control access to sea country, and the need to obtain permission to enter and engage in certain activities on it, was challenged by the respondents on the basis of:

- alleged inconsistencies in the evidence of Indigenous witnesses;

- concessions that permission had never been refused when sought; and
- general observations that people moved about in the seas abutting the islands and fished there without seeking express permission from anyone.

Cooper J stated that the evidence of Indigenous witnesses:

- must be carefully placed in context, as to take responses in isolation and out of context is too simplistic and want to mislead; and
- cannot be understood out of the context of their religious and spiritual beliefs—at [74], [80] and [85].

His Honour also noted:

- the systems which operated within each of the claimant groups were complex, involving an overlay of different, and differently sourced, rights;
- intervening circumstances during the mission period on Mornington Island and the greater degree of inter-marriage between members of the claimant groups made for a greater practical complexity than that which existed at sovereignty;
- protocols adopted had to be viewed against a patchwork of rights, with the possibility of a dulmada (a senior person within a clan group with the right to control activity within the group) creating an ad hoc right where none otherwise existed—at [75] to [84].

Challenge to evidence of Indigenous witnesses

The Commonwealth submitted that the weight to be given to the evidence of the Indigenous witnesses should be substantially discounted because their written statements:

- were prepared by the applicant's legal and anthropological representatives and the language used was not that of the deponent;
- were sometimes prepared in the presence of and with the 'assistance' of other members of the claimant groups;
- contained bare assertions of ownership inadmissible under the applicable rules of evidence.

It was also argued that Indigenous witnesses were present in court and heard the evidence of other members of their constituent groups—at [86].

Where matters in the written statements were challenged or overtaken by oral evidence, Cooper J relied upon, and gave greatest weight to, the oral evidence. His Honour found:

- while much of the language was not the witnesses' form of expression and the subjective understanding of the person preparing the statements may have intruded through the interpretation process, this was not intentional or intended to mislead the court, or to misstate or over emphasise aspects of the witnesses' evidence; and
- as the witnesses were examined and cross-examined, there was a substantial body of oral evidence which overcame the objections to form and admissibility—at [87].

The court rejected any suggestion that the presence of Indigenous witnesses in court was for the purpose of fabricating a consistent story or to attempt to ensure that all witnesses gave a consistent story—at [88].

Challenge to expert evidence

The respondents argued that the court should discount or reject the anthropologists' evidence as it was:

- not objective;
- inconsistent with their previous writing, or the writings of other anthropologists that were tendered into evidence but not examined; and

- concocted or over-emphasised in order to give the traditional laws and customs of the claimant group features or incidents with respect to the sea claim which in fact had never existed.

Cooper J largely accepted the anthropologists' evidence, noting that:

- sympathy to the applicant's claim was an almost inevitable consequence of the methodology by which substantial field work is carried out over time with living communities to obtain base research data;
- each of the assertions as to why the evidence ought to be discounted was put to each witness and answered;
- much of the work done by each of the anthropologists was derivative of earlier published work; and
- much of the reports were sourced in materials that pre-dated the High Court decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 or the major emergence of the land rights movement in the 1980s—at [89] to [91].

Claim to seas 'as far as the eye can see'

The applicant claimed native title rights and interests in the seas 'as far as the eye can see'. This area extended to the horizon and included the observable deep waters and any island or reef which could be seen between the land and the horizon. Cooper J rejected submissions that the claim was one of recent origin or invention, adopted by anthropologists for the purpose of the sea claim—at [90], [110] to [112] and [121].

To give the boundaries of the application area some geographical precision the applicant tendered a hydrographic report that plotted the:

- location of the horizon from various high points on land; and
- extreme ranges at sea from which those high points were visible from a boat.

His Honour found:

- generally, the evidence was that people observed the seas in front of their country from the frontal dunes or the beach, rather than from higher land locations;
- there was no evidence of persons at the time of sovereignty standing on the outlying uninhabited islands looking seaward and claiming the seas to the distant horizon; and
- the extreme ranges calculated from positions at sea did not relate to the evidence of Indigenous people of landward observations at sea—at [227] to [229].

Continuing existence of society

Cooper J found that European contact with each of the groups had, to a greater or lesser extent, brought about the physical dislocation of the claimant group from their traditional territories, as the majority of people did not live on country and did not live a traditional lifestyle 'anywhere approaching that which existed at the time of sovereignty'. His Honour was satisfied that, despite this, none of the groups had lost their identity or existence as a society—at [199] to [201].

Normative system and connection

Cooper J was satisfied on the evidence that each of the groups had maintained, through successive generations from their forebears at sovereignty, a normative system of traditional laws which are acknowledged and customs which are observed, by which persons are allocated to a country and rights are allocated to those persons in respect of that country—at [102] to [107], [116], [118], [120] to [125], [133] to [137] and [202].

His Honour found:

- all the Indigenous witnesses who gave oral evidence:
  - knew what country they belonged to and knew that it gave them the right to live, hunt and fish on the land and within the seas of that country;

- knew their genealogy and that genealogical relationships could create derivative rights in respect of country to which they did not belong;
- were aware of systems of *dulmada*-ship which carried rights;

- the continuity of that knowledge was recorded over time in the published anthropological material; and

- the fact that some had chosen to return and live on country showed acknowledgement by each of the communities that the right to return to country had never been lost or abandoned and had at all times remained an option to be exercised by those who have the right to do so—at [202].

As to the connection of each of the claimant groups required under s. 223(1)(b), his Honour found:

- the Lardil and Yangkaal peoples continued to have the closest physical connection to country because the siting of the mission in Gunana on Mornington Island kept those peoples in, or with access to, their traditional territories;

- the Kaiadilt peoples' physical connection with their traditional territory was severed when they were moved to Mornington Island in the mid-1940s;

- the Gangalidda peoples were physically isolated from their traditional territory by the granting of their traditional lands to pastoral interests and further as a result of the relocation of the mission from Old Doomadgee to new Doomadgee in 1936;

- the prohibition on travel by Indigenous peoples outside of the reserves managed by the missions also isolated the people from their countries;

- during the mission period, the majority of the members of the claimant group lost their native languages—at [199].

Claim by succession

The area claimed as the traditional lands of the Gangalidda peoples included an area once part of the country of the Mingginda peoples. The Mingginda peoples did not survive the impact of European contact and the Gangalidda peoples claimed their land by succession under traditional laws acknowledged and customs observed by the Gangalidda peoples at sovereignty. The Commonwealth submitted that the interest claimed by the Gangalidda peoples was an interest acquired post-sovereignty which was not recognised by s. 223(1) of the NTA.

Cooper J disagreed, finding that:

- succession to the Mingginda lands by the Gangalidda peoples occurred under traditional rules and customs which were acknowledged and observed at sovereignty by both peoples;

- the evidence showed a process of merger and absorption which occurred over time with the agreement of the Mingginda peoples under their traditional laws and customs; and

- rights and interests obtained by the Gangalidda people in the Mingginda lands under their traditional laws and customs were capable of recognition and protection under s. 223(1)—at [131] to [132], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.

Single joint claim to separate traditional territories

Cooper J found that:

- at sovereignty, there was no over-reaching communal system of traditional law acknowledged or custom observed with respect of the application area by the claim group as a whole, or by the groups separately, which gave any constituent group rights or interests in the traditional territories of the other constituent group;

- any cross-grouping rights were held at an individual level under the specific traditional laws and customs of the constituent group in whose territory the particular land and waters were located; and

- any agreement made post-sovereignty by the four claimant groups to treat the determination area as a single communal area held by them jointly with four internal areas which they each held separately, was not one recognised by the NTA—at [140].

Indigenous people's concept of 'ownership'

The applicant asserted that the claimant group owned the seas, the sea bed, the subsoil beneath the sea bed and the resources of the seas in their traditional territories. While finding significant differences in the responses of the Indigenous witnesses, Cooper J was satisfied that their concept of 'ownership' of these elements was not one based on common law concepts of property. Rather, it was a concept born out of the connection of the peoples to each of the elements through their spirituality—at [141] to [147].

As to the translation of the spiritual connection underpinning the claims to ownership to the legal form sufficient for the purposes of s. 223(1) and s. 225, his Honour found:

- the right to be asked was the touchstone of the applicant's concept of 'ownership'; and

- the identifiable right in the application area under traditional law and custom was that to control access and conduct—at [149] to [152].

No right at sovereignty to control access to outer sea area

Cooper J found that the sea claim did not translate into identifiable rights and interests in relation to the area beyond that within which the claimant groups habitually hunted, fished and foraged. Specifically, it did not translate into a right to control access to the outer areas. His Honour found:

- this was not unexpected as 'rights in respect of the outer margins of country were not matters of pressing concern at the time of sovereignty';

- the deep waters did not involve any activity which produced a consumable resource which could be shared among the people—at [113], [125] and [138].

Despite so finding, the court accepted that the deep waters were part of the traditional territory of the original Lardil and Gangalidda peoples and their connection with it was spiritual or religious—at [115] and [139].

Claim to control access to and activity in sea areas

Cooper J considered, upon analysis, that the underlying core claim to control access to and activity in the application area was maintained by the applicant in the amended draft determination—at [168].

His Honour, applying the law stated by the High Court in *Commonwealth v Yarmirr* (2001) 208 CLR 1 and *Western Australia v Ward* (2002) 191 ALR 1, found that control of access to the land and waters of the inter-tidal zone and the territorial seas with the right of exclusion, although a traditional right or custom acknowledged and observed at sovereignty, will not be recognised by the common law—at [164] to [167].

Right to non-exclusive possession, occupation, use and enjoyment

The applicant claimed the non-exclusive right of possession, occupation, use and enjoyment and, alternatively, the non-exclusive right to occupy, use and enjoy the waters and land (non-exclusive composite claim).

In view of the law stated in *Commonwealth v Yarmirr* (2001) 208 CLR 1 and *Western Australia v Ward* (2002) 191 ALR 1, Cooper J considered:

- any right expressed in non-exclusive composite terms gives rise to conceptual difficulties because the concepts of

possession and occupation at common law involve notions of control of access;

- the articulation of native title rights and interests which existed at sovereignty in these terms, or variants of them, is not a useful exercise. Nor is it useful to attempt to state native title rights as existing in a broad and expansive way, subject to the common law rights of fishing and navigation, or the recognised international right of free passage;

- a non-exclusive composite claim begs the question of what the residual rights and interests which do not involve elements of control of access to and use of the claim area might be—at [169] to [172].

His Honour stated:

> The Act requires that the relationship between a community or group of Aboriginal people and the land is to be expressed in terms of rights or interests in relation to that land. This means that a relationship which is essentially religious or spiritual, must be translated into law. 'This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them'—at [137], quoting *Western Australia v Ward* (2002) 191 ALR 1 at [14].
>
> [W]hen the unity of the relationship between Indigenous people and the land and waters is fragmented, and the rights to control access to, and use of and activities in the land and waters are excluded, little may remain which is capable of being translated into rights and interests in relation to that land and waters capable of recognition and protection under the NTA. What is left may amount to little more than non-exclusive rights to engage in specified activities in relation to the land and waters. Because the content of those rights or interests was fixed at sovereignty, no subsequent enlargement of these rights will be recognised under the Act—at [173] and [175], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at [43] to [44].

Alternative form of determination

Counsel for the applicant proposed an alternative form of determination to the non-exclusive composite claim in essentially the following terms:

- an interest in maintaining the land and waters free from intrusion, interference and affectation inconsistent with the spiritual connection and responsibility for the land and waters;

- a right to be acknowledged as the native title holders by Aboriginal people governed by the traditional laws and customs of the claimant groups, any person requiring consent to enter upon or use the land and waters and persons proposing to do a future act under Division 3, Part 2 of the NTA.

Cooper J found:

- the first of these was 'an emotional, as opposed to a practical, interest to exclude from the claim area anyone or anything which was inconsistent with the spiritual connection and responsibility for the land and waters'. There was no other interest separate or apart from the right to control access, use, or activities;

- the second did not relate to a right or interest under the traditional laws acknowledged and the traditional customs observed by the Indigenous inhabitants of the claim area in relation to the lands or waters claimed, as required by s. 223(1) of the NTA because it:
  - related to a right of acknowledgement of native title holder status but neither the content nor the extent of native title interests held was identified;
  - purported to be a right to present day acknowledgement, which was not a right or interest which existed at or survived sovereignty—at [178] and [179].

Right to speak for country

The Indigenous witnesses variously claimed a right to speak for country. Cooper J noted that the statement of right as 'a right to speak for country' lacks the precision required by the NTA. It is in fact the expression of a concept which embraces a 'bundle of rights' varying in number and kind, which may or may not be capable of full or accurate expression as rights to control what others may do with the land or waters—at [70] to [72], citing *Western Australia v Ward* (2002) 191 ALR 1.

Right to enjoy amenity of determination area

His Honour held that such right did not satisfy s. 223(1) as:

- it did not translate into a right in relation to land and waters at sovereignty; and
- any right the Indigenous inhabitants had at sovereignty to control the amenity of the land and waters in the application area was the right to control access and use by members and non-members of the claimant group. That right did not survive the assertion of sovereignty—at [179].

Right to maintain and protect sites

Cooper J found that, to the extent that the right to control access did not survive the assertion of sovereignty, the rights with respect to spiritual sites within the inter-tidal zone and the adjacent seas were diminished by the assertion of sovereignty—at [185].

Rights controlling access other than public rights of fishing, navigation and innocent passage

In their amended draft determination, the applicant claimed the right to grant or refuse:

- access to the waters or land;
- permission to use the land or waters;
- permission to take and use the resources of the waters or land to people other than those exercising the public right of fishing or navigation, the right of innocent passage, or a right lawfully conferred under statute.

The court found such formulations of rights involved an attempt to control access and use and were rejected by in *Commonwealth v Yarmirr* (2001) 208 CLR 1 and *Western Australia v Ward* (2002) 191 ALR 1 on the basis that the assertion of sovereignty was fundamentally inconsistent with any asserted native title rights to control who had access to the inter-tidal zone and adjacent seas—at [188] to [190].

Right to protect against unreasonable and impermissible user

In the amended draft determination, the applicant claimed the right:

> [T]o protect the resources of the waters and land by taking steps to prevent acts which are not consistent with the reasonable exercise of public or statutory rights and which may cause damage, spoliation or destruction of the habitat of fish, plants or animals in or on the waters or land.

Cooper J declined to recognise this right both for the same reasons as in respect of the claimed right to enjoy the amenity of the area (see above) and because:

- the claimed right to control the exercise of the public rights to fish and navigate and the international right of innocent free passage is inconsistent with the existence of those rights; and
- the existence of a native title right to prevent the exercise of rights on the ground of unreasonable and impermissible user is inconsistent with the assertion of sovereignty;
- the content and control of the exercise of rights given by the common law at the time of sovereignty are determined under common law;
- there is not, and never was, any native title right to control the exercise of such public rights imported with the common law at the time of sovereignty—at [191] to [193].

Rights and interests continuing

With two qualifications (relating to the right to hunt turtle and dugong and rights in relation to fish traps – see below), Cooper J was satisfied that each of the groups continued to possess the same rights and interests in respect of the land and waters under the traditional laws acknowledged and the customs observed by them, as were possessed by their forebears under the same traditional laws and customs at sovereignty—at [210].

Qualification on right to hunt turtle and dugong

His Honour, found that, although the native title right to hunt turtle and dugong is not inconsistent with the right of government to pass laws for the conservation and management of wildlife, it was capable of being regulated by those laws, subject to s. 211 of the NTA—at [211], citing Yanner v Eaton (1999) 201 CLR 351 at [37].

No native title right to rock fish traps

Cooper J held that the rights which existed at sovereignty as to the construction, maintenance and use of rock fish traps no longer existed, or were no longer acknowledged and observed, by contemporary members of the claimant groups—at [226].

His Honour also found that:

- following the introduction of the *Harbour Boards Act* 1892 (Qld), any right under traditional law and custom to build and maintain rock fish traps in the inter-tidal zone, while not necessarily extinguished, was subject to regulation by the crown in the manner recognised by the High Court in *Yanner v Eaton* (1999) 201 CLR 351; and

- in the absence of exclusive rights in respect of the fish traps, the balance of the evidence demonstrated that they had fallen into disuse and disrepair and any hunting and fishing in their vicinity was opportunistic and undertaken as a general right to fish and hunt in the area—at [212] to [226].

Sea areas where native title exists

Cooper J held that some native title rights and interests existed in all the land and waters, including reefs and sand bars within:

- five nautical miles of the high water mark of the inhabited islands and mainland coastline; and

- one-half of a nautical mile of the high water mark of the uninhabited islands lying outside of five nautical miles from the inhabited islands or mainland coast.

His Honour found:

- the five nautical mile limit reflected the area within which the court found Indigenous peoples engaged in activities of hunting, fishing and gathering, or in accessing sites for spiritual or religious ritual. It also recognised that some of that area was sea country with which the people had a spiritual connection because it was part of the total world in which they lived, although that did not translate into rights or interests in the land and waters recognised and protected by s. 223(1) of the NTA; and

- a half-mile limit reasonably represented the outer limits of areas adjacent to uninhabited islands which were in fact used by the original peoples—at [231] to [233].

Claim to waters, bed and banks of Albert River

The Gangalidda peoples claimed a right to control access to and conduct in the Albert river, a navigable tidal river. The area of the river claimed fell within the boundaries of a reserve for public purposes. Cooper J agreed with the submission by the state, relying on *Western Australia v Ward* (2002) 191 ALR 1, that the reservation for public purposes extinguished any exclusive rights and, therefore, any right to control use and access—at [160].

His Honour found that the same outcome was produced by the operation of:

- common law with respect to the crown prerogative in relation to the foreshore and the banks and beds of navigable rivers; and

- the *Harbour Boards Act 1892* (Qld) and the *Harbours Act 1955* (Qld). In particular, the effect of s. 77 of the *Harbours Act 1955* (Qld) was to extinguish any native title right (if not extinguished at sovereignty) that was inconsistent with the estate and interest of the crown in the inter-tidal zone, the land lying under the sea within Queensland waters and the land under any harbour, including any tidal river—at [161], [162] and [221] to [224].

His Honour also noted that:

- the claimed right was inconsistent with the statutory enactments which affirm the interests of the crown in the bed and banks and provide statutory provisions for the control of activities in the river;

- a navigable river is an area where the public retains the common law public right to fish and navigate. On the basis of *Commonwealth v Yarmirr* (2001) 208 CLR 1 and *Western Australia v Ward* (2002) 191 ALR 1, the continued existence of a right to control access or use within such an area post sovereignty was denied—at [162] and [163].

The court determined that the Gangalidda peoples have the right to access the river, in accordance with traditional law and custom, for:

- hunting, fishing and gathering for personal, domestic and non-commercial consumption; and

- religious and spiritual purposes.

Shared rights in certain areas

Cooper J found there were certain shared rights between the Yangkaal, Gangalidda and Kaiadilt peoples—at [117], [126] and [138].

Native title determined to exist in part of determination area only

Cooper J held that the area in respect of which native title rights were possessed at the time of sovereignty constituted part only of the determination area for the purposes of s. 225 of the NTA. Native title was determined otherwise not to exist—at [234] and [245].

Native title rights and interests determined to exist

The native title rights and interests included in the determination were the right to:

- access the land and waters seaward of the high water line in accordance with and for the purposes allowed by and under their traditional laws and customs;

- fish, hunt and gather living and plant resources, including the right to hunt and take turtle and dugong, in the inter-tidal zone and the waters above and adjacent thereto for personal, domestic or non-commercial communal consumption in accordance with and for the purposes allowed by and under their traditional laws and customs;

- take and consume fresh drinking water from fresh water springs in the inter-tidal zone in accordance with and for the purposes allowed by and under their traditional laws and customs;

- access the land and waters seaward of the high water line in accordance with and for the purposes allowed under their traditional laws and customs for religious or spiritual purposes and to access sites of spiritual or religious significance in the land and waters within their respective traditional territory for the purposes of ritual or ceremony.

In respect of the waters of the Albert River where native title was found to exist, the Gangalidda peoples were recognised as having the right to:

- access those waters for the purposes of hunting, fishing and gathering for living and

plant resources for personal, domestic and non-commercial consumption in accordance with and for the purposes allowed by and under their traditional laws and customs;

- fish, hunt and gather living and plant resources in the river for personal, domestic and non-commercial consumption in accordance with and for the purposes allowed by and under their traditional laws and customs;

- access the river in accordance with and for the purposes allowed under their traditional laws and customs for religious or spiritual purposes and to access sites of spiritual or religious significance in the river for purposes of ritual or ceremony.

Among other things, the native title rights and interests are subject to regulation, control, curtailment or restriction by valid laws of the Commonwealth and the state.

Interests other than native title interests

Cooper J found that the nature and extent of the interests required to be determined under s. 225(e) were:

- interests held by members of the public under common law, including the public right to fish, the public right to navigate and the international right of innocent passage;

- the rights and interests of holders of a licence or authority issued under the *Fisheries Act 1994* (Qld), the Fisheries Regulation 1995 (Qld) and the *Fisheries Management Act 1991* (Cwlth) or any other legislative scheme for the control, management and exploitation of the living resources within the determination area;

- the rights and interests of the holders of interests issued under the *Transport Operations (Marine Safety) Act 1994* (Qld) (TOMS Act) and the Transport Operations (Marine Safety) Regulation 1995 (Qld) (TOMS Regulation);

- the rights of Pasminco Century Mine Ltd under a permit granted to it under the TOMS Act and the TOMS Regulation to place and maintain in position a specified buoy mooring—at [235] to [240].

To the extent that any inconsistency exists between the native title rights and interests found to exist and these other, non-native title interests, the native title rights and interests must yield to the other rights and interests.

Confidentiality orders

The applicant sought permanent orders preventing access to genealogies and reports relating to sacred sites on the basis that:

- the genealogies contained private information as to family affiliations which was compiled for the purpose of the application only and otherwise would not be publicly available in that form; and

- to identify the location of sacred sites put them at risk of desecration.

The court declined to make the orders sought as:

- no supporting material was filed to support a finding that:
  - the genealogies and reports were so sensitive or culturally important that disclosure would be contrary to traditional laws or customs limiting access to the information to particular people or classes of people;
  - public access to the reports would give rise to a real risk of desecration of sites;

- the evidence contained in the genealogies and the reports was to a degree the subject of oral testimony. There was no indication from any of the Indigenous witnesses that there existed any cultural reason as to why:
  - access to the information should be denied; or
  - the location of sacred sites was culturally or spiritually sensitive. The Indigenous witnesses spoke freely of them;

- there was no suggestion in the evidence that sites were at risk of wilful destruction if the location of them was accessible to search of the court proceeding;

- proof of connection is an essential step in the proof of an entitlement to native title; and

- the public interest in the proper administration of justice requires that, unless there are special reasons to the contrary, the evidence given in public proceedings in court ought to be available to the general public—at [241] to [244].

Gale v Minister for Land & Water Conservation (NSW) [2004] FCA 374

Madgwick J, 31 March 2004

Issue

The issue before the Federal Court was whether or not the Darug people held native title to an area subject to a claimant application made on their behalf near Sydney on New South Wales.

Background

The background to these proceedings is somewhat unusual, which (with respect) limits the precedent value of this case.

A claimant application was made on behalf of the Darug people over ten hectares of land in the lower Portland area on the northern side of the Hawksbury River in NSW. The principal respondents to the application were the Minister for Land and Water Conservation for NSW (the Minister) and the Deerubbin Local Aboriginal Land Council (Deerubbin), a body constituted under the *Aboriginal Land Rights Act 1983* (NSW) (the Land Rights Act).

In 1999, Deerubbin made a claim to the land the subject of this application pursuant to the Land Rights Act, which the Minister approved in 2000. Both the Minister and Deerubbin contended (albeit for different reasons) that native title was wholly extinguished over the area concerned. In view of this, the applicant wanted to withdraw from the case without prejudice to the claimant group's interests in another claimant application filed on its behalf over other parcels of land (the other application).

An agreement was reached under which the applicant, on the undertaking of the principal respondents not to claim any issue estoppel in relation to the other application, elected to offer no evidence and withdrew from further participation in the proceedings. The understanding of all parties was that the respondents would seek a determination of the non-existence of native title in relation to the land and that the applicant was not further opposing that. It remained for the court to be satisfied on the evidence before it that this was a legally proper course.

Approach in the light of lack of evidence

As the applicant had withdrawn from the proceedings, the claimants declined to call witnesses. Therefore, in a technical sense, there was no evidence for the applicant before the court.

However, at the request of the applicant, the intended evidence of members of the claimant group and of witnesses (including an expert in pre-history) as exhibits had been marked up and the court had made inspections of the subject land and other areas, the record of which might also have become evidence. Along with the application itself, his Honour Justice Madgwick had regard to this other material:

> [F]or the purpose of considering whether it seems proper to uphold the contention of the Minister and Deerubbin that native title rights and interests had ceased to exist in any person before any question arose of extinguishment by virtue of the NSW Act [the Land Rights Act]…The weight to be given to the applicants' material must however suffer by reason of its not, in the main, having been tested by cross-examination, when the respondents wished to do so—at [11].

The Minister tendered a report by Professor Ward, an historian, and Professor Maddock, an anthropologist. Deerubbin tendered expert reports by Ms Waters, an historian, and a joint report from anthropologists Mr Wood and Dr Williams. This evidence was not tested either.

Main questions

The main questions for the court were:

- Whatever were the intrinsic merits of what the court called 'the overarching Darug land polity theory', would any such polity extend north of the Hawkesbury, at least so as to include the claimed land? That is, was there a Darug-speaking society of which its members had native title rights and interests in the land?

- Has any such society or polity continued to exist as a body united by its acknowledgement of traditional laws and its observance of traditional customs?

- Have those traditional laws and customs been continued to be acknowledged and observed substantially uninterrupted since sovereignty, including until now, by members of the claimant group?

Put shortly:

- Was the claimed land ever within a Darug domain?

- What was the nature of the relevant pre-sovereignty land-owning and using society or societies relied on as the progression of the asserted Darug people?

- Has there been the requisite continuity of such a society and acknowledgement of traditional laws and observance of traditional customs?—at [36] and [37].

History of the application area

His Honour summarised the history of the area by the reports that were available as evidence in the following way:

- As the claimants' statements and evidence acknowledged, the remnants of the clans in occupation at the time of sovereignty who survived initial epidemics and dispossession came together in new assemblages, with names like 'South Creek Tribe', 'Kissing Point Tribe'. Until the 1830s, these were led by 'full-blood men' who still practiced traditional rituals, fought in traditional ways and kept the 'half-castes' subordinate;

- By the 1840s, however, with the further impact of disease, even these 'tribes' ceased to be viable, and new communities formed, dominated by the 'mixed-race';

- Among these were the Locks and their associates at Black Town and the Barbers and others on the Sackville Reserve;

- Somewhere between this period and when they were first published in 1897, the language names such as Darug and Darkinjung came to be identified and applied to wide groupings – though rather loosely and unclear in areas where the various clan clusters intersected;

- The language names began to be used in reference to social groupings, but there was no indication that these groupings functioned as what the applicant's expert Professor Ward called 'social entities'.

  The nearest one gets to that is a tendency for kinship to affect marriage and residence patterns: the Lock families showed a marked tendency (though by no means an exclusive one) to find marriage partners from among their own lineages or with close connections, and to cluster together on or near the Black Town land. So did the Barbers and their Darkinjung connection at Sackville—at [104].

Madgwick J held that, although the evidence before the court was both limited and to some extent contradictory, there was little to suggest that, in fact, a 'Darug' social order functioned across the whole of the Sydney basin, wherever the descendants of 'Darug' language

speakers lived. This was largely because there was simply not enough land left in Aboriginal *de facto* ownership and control to foster such a social order—at [106].

His Honour concluded that:

> The surviving Aboriginal or part-Aboriginal people may well, of course, combine in new voluntary associations such as Darug Link. Such groupings can draw identity and legitimate pride from the historical evidence about their forebears. But that evidence does not easily lend itself to definition of the Darug as a corporate group with corporate property rights derived from the on-going rights of the smaller traditional groups, including the land which is the subject of this claim. Nor, I would add, does the oral history reported by the claimants' intended witnesses adequately support such a thesis—at [107].

Connection with the land claimed

The court, in considering whether there was a present connection with the area covered by the application as required by s. 223(1)(b), held that:

> There is scant evidence of any considerable, actual link possessed by any member of the claimant group to the claimed land or the land surrounding it that might have significance for a claim to native title rights and interests. No one, apparently, had been on the land before the claim made in respect of it by the institution of these proceedings. There used to be an Aboriginal Reserve at Sackville Reach, not far from the claimed land, but Mr Colin Gale, the main spokesman for the claimant group and a man in his sixties, was unfamiliar with the history of that land and had not visited it until 20 years ago—at [109].

Language

Madgwick J also considered that it might 'more likely' be that the area in question 'was primarily the domain of people who spoke a different language – Darkinjung' but that Darug people may have had traditional rights and interests of some non-exclusive kind in relation to the claimed land. However, his Honour found that there was neither an oral tradition of this nor any reason to form a positive conclusion about it. While members of the claimant group did have traditional links with the Sackville Reach area, there was nothing to link any such visiting person or clan to any identifiable member of the claimant group nor even to any undifferentiable party of the group nor to the group as a whole—at [110].

Madgwick J held that while:

- there was some oral tradition of some Aboriginal words among some of the claimant group, there was no evidence that anyone now alive speaks the Darug language;

- a living society may with time change its language the inference in this case was of immense change that caused virtually a complete loss of a language and this confirmed every other indicator that the changes since sovereignty have amounted to a complete rupture with traditional ways, not their live maintenance through adaptation—at [111].

Knowledge of bush foods and medicines

The court acknowledged that:

- some members of the claimant group may have knowledge of bush foods and may still use them as a minor supplement to an otherwise conventional modern diet; and

- this kind of knowledge was likely to have been handed down from generation to generation of people of at least partial Aboriginal descent—at [112].

However, Madgwick J concluded that:

> There was, however, no suggestion that the present knowledge is accompanied by an actual sense of any *right, privilege, liberty or immunity* in relation to entering or being upon any particular land for the purpose of putting the knowledge to use, nor did I get

any impression of a live sense of actual and immediate deprivation arising out of exclusion from any particular land, except that in the Plumpton area, which was long ago alienated from the Crown.

There was, in any case, nothing to set that knowledge in a wider framework of related knowledge so as to amount even to a remnant *system* of thought which might be expected in a living society bound by traditional laws and practising traditional customs which any claimant could access—at [112] to [113].

Traditional mythic beliefs

The court found that there were some oral traditions handed down from before 1788 but it appeared that, for the most part, they were scarce and many were remnants without any detail of the belief lost—at [114].

Artefacts and places of special significance

The court found that few artefacts survive in the hands of applicants and, likewise, evidence as to places of special significance, particularly of great spiritual significance, was 'very sparse'—at [115].

Way of life

Madgwick J stated that evidence in this regard did not rise higher than the way of life lived by Mr Gale. His Honour found as follows:

> That Mr Gale is living a suburban way of life largely indistinguishable from that of many non-Aboriginal Australians could, of itself, hardly be decisive. Mr Gale has, for many years, set out to learn and to teach, whenever he can, and so much as he deems appropriate, what he knows of the culture of his forebears. He appears, at least by modern standards, to be a considerable bushman. He knows and believes some things from family sources that would likely not be available to a non-Aboriginal person. Mr Gale is conscious of historical loss and injustice, of both material and non-material kinds, to Aboriginal people, including his own extended family and other people whose understanding is that they are descendants of Darug people. He has spent many years trying to recover some of so much that has been lost. He essentially seeks for the claimant group and himself recognition that they are the authentic descendants of people who, before the coming of the British, lived in some part or parts of the Sydney basin and that, accordingly, they have a moral right to be consulted as to use of unalienated Crown lands in that region and as to issues of local aboriginal heritage. But the overall impression is firmly not of a man actually acknowledging traditional laws or observing traditional customs (including in relation to land rights and interests). Inescapably, what is essential for a native title claim appears to have been irretrievably lost.
>
> Further, should what has been lost now or in the future somehow be substantially recovered, according to *Yorta Yorta* the severance with the past could not be thereby undone—at [116] and [117].

Is there a 'society'?

His Honour noted that, in order to establish a native title claim, it must be shown that:

- a society existed that has continued to exist since before sovereignty, which was and is united by its acknowledgement of traditional laws and observance of traditional customs; and
- the governing laws and identifying customs have had a 'continuous existence and vitality' since sovereignty.

Madgwick J held that:

- on the limited available evidence, the claimant group did not constitute a society that, in any presently relevant sense, acknowledges traditional laws or observes traditional customs;
- there was a modern association of Aboriginal people who wished to have

recognition of their claims to be, and who have a sense of themselves as, direct descendants of Aboriginal people who lived in the Sydney basin before the coming of the British;

- however, by reason of the devastating and thoroughly pervasive effects of the coming of the British and of subsequent Australian history, they do not constitute a society sufficiently organised to create or sustain rights and duties;

- even if they did so, this would not be a continuation by tradition but, at best, an attempted re-creation of a society—at [118] to [119].

Identification of nature of pre- and post-sovereignty rights and interests in land

The court held that there was no acceptable evidence of:

- what rights or interests actually existed before sovereignty in relation to the application area;

- the actual traditional laws or customs, in relation to land use custodianship of any group, that embodied the norms that supported any such right or interest;

- the existence of anything like a body of traditional laws and customs having a normative content in relation to rights or interests in land, which any member of the claimant group now acknowledges or observes—at [120] and [121].

Madgwick J was prepared to infer that, before sovereignty, there may have been periodic necessities, following disasters inflicted by nature or human beings or from other causes, for regrouping by the original Aboriginal inhabitants of what is now the greater Sydney area and its north-western environs. However, in this case, the available evidence did not permit any inference as to how these processes occurred.

His Honour was not prepared to infer that the rise of any felt primary identity as Darug people in the nineteenth and twentieth centuries among the claimants and their forebears was of a kind with traditional pre-sovereignty regroupings, and considered that the scale and intensity of the post-sovereignty re-arrangements seemed to have been quite unprecedented in pre-sovereignty time—at [124].

Therefore, the court was of the view that:

- any re-arrangements were of a kind quite different from what occurred before sovereignty, so as to indicate not the survival of traditional kinds of laws and customs concerning periodic necessities for clan adaptations, but a break with anything previously known;

- any present agreement among the claimants that 'all Darug people' are now the owners of custodians of 'all Darug land' was not shown to have come about by any traditional kind of process;

- there was no reasonable evidence of which classes of people in which kind of grouping traditionally made any such decisions or a traditional continuity of such a position, even making very large allowances for probable adaptation;

- the evidence was lacking as to the content of the pre-sovereignty norms as to relations to, and in connection with, land inherent in traditional laws and customs. Knowledge of those norms had apparently been irretrievably lost—at [124], [125] and [126].

Effect of colonisation

Madgwick J concluded that:

> [T]he coming of the British and their colonisation of New South Wales meant in time the destruction of all traditional Aboriginal societies, in the sense of peoples, in those parts of New South Wales relevant to this claim, though fortunately not of people of degrees of Aboriginal descent. The evidence suggests that this had largely

occurred by the middle of the 19th century. That may overstate the matter: as late as the 1950s there may have been one or more Darug-speakers still living; as between different families and individuals, change in ideation and ways of living is hardly likely to have been uniform. Nonetheless, there is now no real doubt that for a long time there has been no acknowledgement or observance by any known person, including members of the claimant group of anything like the body of traditional laws and customs that regulated pre-1788 Aboriginal life, including people's relations to and in respect of land. A few beliefs, stories, values and family traditions, which it is fair to call vestigial, and some surviving practical bush knowledge in relation to gleaning food and medicine from the land and any still unpolluted streams, do not begin to amount to such a body—at [127].

Misunderstanding of Mabo

His Honour was of the view that the claimants misunderstood the effect of the decision in *Mabo v Queensland* (No. 2) (1992) 175 CLR 1, noting that:

- it appeared that they viewed their claimed authentic descent from Aboriginal people who were identified in viewing written records very soon after British colonisation, together with the survival of vestigial elements of traditional culture, as 'more or less' sufficient to show both the survival of a people, rather than of descendants of one or more peoples, and, in large part, continued connection for the purposes of establishing legal recognition of their claimed native title in respect of the claimed and associated lands;

- what those things may well show, along with the facts of uncompensated historical dispossession, is a claim telling in fact and morality for due recognition as the historical descendants of the original owners and occupiers, in a generic sense, of the lands that have become greater Sydney, and for reparation for the effects of that dispossession;

- however, the fact of Aboriginal descent, either alone or taken with the survival of some remnants of Aboriginal people's pre-1788 culture, falls both wide and short of showing the survival of a people with live traditional laws and customs stemming from any such original people—at [129]

His Honour went on to say that:

> The decision in *Mabo* was regarded in various quarters as heralding a new dawn for at least a modest degree of reparation to Aboriginal people generally, by way of according them an ability to reclaim unalienated Crown lands. The decision in *Yorta Yorta* has confirmed that such was not the effect of *Mabo*. The ability to obtain a declaration of native title under the Native Title Act is, at least after *Yorta Yorta,* strictly limited.
>
> The reality seems to be that the present idea of a Darug *land-owning polity* is an aspiration which arose, after *Mabo*, out of the process, more generally, of the Darug Link group's earlier efforts, in rather less of a 'land rights' context, to recover some of their lost history and to have public recognition of and respect for their ethnic and cultural roots and their historic losses and injustices—at [130] to [131], emphasis in original.

Decision

As, 'despite the usual, requisite and exhaustive processes undertaken [under s. 66] to attract to the proceedings anyone who might have an interest' in the application area, nobody but the claimant group had come forward to assert native title, the court saw no adequate reason why it should not make a determination that native title did not exist in relation to the subject land. The first and second respondents were ordered to file minutes of a proposed formal order to reflect the court's findings.

Applications to vacate trial and for mediation program

***Bennell v Western Australia* [2004] FCA 228**

French J, 12 March 2004

Issues

This decision deals with applications:

- to vacate trial dates in relation to part of the area covered by a claimant application known as the Single Noongar Claim (Area 1); and
- for orders that a mediation protocol be formulated and adopted in a related claimant application known as Single Noongar Claim (Area 2).

Background

On 5 March 2004, at a directions hearing held to review the progress, through mediation, of claimant applications in the South West of Western Australia, it was noted that a mediation protocol had been agreed between the native title representative body for the region, the South West Aboriginal Land and Sea Council (SWALSC) and the State of Western Australia for progressing negotiations in relation to those applications. The object of the protocol was to achieve some form of overall agreement including a resolution of native title issues.

The court proposed standard directions to progress mediation be made in each case i.e. the applicants, SWALC and the state were to comply with the mediation protocol, which was to be varied to include the applicants as parties to it and to specify their role in it. The revised protocol was to be filed by 5 April 2004. The directions hearing was adjourned to 30 August 2004, with the Tribunal being requested to provide a mediation report on or before 23 August 2004. Orders in these terms were made on 12 March 2004. There was also a motion in two parts before the court that is dealt with in this decision.

Single Noongar Claim (Area 1)

The motion in relation to this application was for orders vacating trial dates in relation to part of the area covered by that application.

Seven applications in the Perth area, known as the Combined Metropolitan Claim, had been part-heard by His Honour Justice Beaumont. When his Honour became ill, they were set down for trial before His Honour Justice Wilcox. Only one of these applications (No 142/98) remained on foot on 9 October 2003, when Wilcox J ordered that it should be amended to combine it with an application known as the Single Noongar Claim (Area 1). Hearings for the area originally covered by No. 142/98 (known as the Perth Section) were to recommence early in October 2004.

The applicants in the Single Noongar Claim (Area 1) sought to vacate these trial dates to allow the Perth Section to be dealt with in the mediation of the Single Nyoongar Claim (Area 1). Resource limitations and the late engagement of an expert anthropologist were cited in support of the application to vacate. The state opposed the motion.

Decision

His Honour Justice French was of the view that:

> [T]he Perth Section of the claim having already been part heard by one trial judge and now under the control of another with directions made for the resumption of the hearing, it is not appropriate that I make any order varying the orders made by Wilcox J. While there may be compromises necessary in order that the expert reports required by his Honour be filed within the time that he has prescribed, I do not consider that there is evidence that the applicants in the Perth Section claim will suffer any irremediable prejudice by being required to produce evidence relevant to their area of their section of the claim. Dr Palmer [the expert anthropologist] has been engaged relatively late in the piece and I do not consider that that fact should be given

great weight as a reason for vacating the trial date and the directions made by Wilcox J…

This result does not mean that mediation cannot continue in respect of the Perth Section of the Single Noongar Claim (Area 1). Indeed, it might be that the ongoing litigation in respect of this section could have a bearing on producing some outcomes relevant to the larger claim—at [16] to [17].

Single Noongar Claim (Area 2)

The Single Noongar Claim (Area 2) overlapped (in whole or in part) two other claimant applications. Orders for the preparation of a mediation protocol and program to be filed by 31 March 2004 were sought by the applicant in Single Noongar Claim (Area 2). The state, which opposed the motion on the ground that the dispute with the overlapping claimants was 'fairly intractable' and that it was very difficult to seriously entertain any meaningful mediation in relation to that matter, sought orders programming the matter for trial. Counsel for the state noted that the timetable it proposed was 'fairly gentle' and not inconsistent with further negotiations taking place.

Decision

French J allowed the applicant's motion because:

- SWALSC seemed 'to be doing its best to pursue a reasonably focussed strategy for the resolution of intra-Indigenous disputes affecting the application'; and
- the Single Noongar Claim (Area 2) had neither been notified nor its party list settled—at [22].

The state was given liberty to apply for directions following notification.

Northern Territory of Australia v Doepel (No. 2) [2004] FCA 46

Mansfield J, 3 February 2004

Issue

This decision deals with whether an unsuccessful applicant to an application (the review application) made under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth)(AD(JR) Act) should pay the costs of a respondent to that application.

Background

On 28 November 2003, the Federal Court dismissed an application made under the AD(JR) Act by the Northern Territory of Australia for an order setting aside the decision of the Native Title Registrar to accept a claimant application for inclusion on the Register of Native Title Claims—see *Northern Territory of Australia v Doepel* (2003) 203 ALR 385, summarised in *Native Title Hotspots* Issue 8. The second respondent, the Northern Land Council (NLC), on behalf of the native title claimant group, sought costs in relation to the review application.

Contentions of the territory

As was noted, the court has a discretion to award costs that is absolute and unfettered. It must, however, be exercised judicially, and it cannot be exercised on grounds unconnected with the litigation—at [4].

Within that general discretion, it is accepted that:

- ordinarily the rule is that costs follow the event and a successful litigant receives costs in the absence of special circumstances justifying some other order;
- where a litigant has succeeded only upon a portion of the claim, the circumstances may make it reasonable that the litigant bear the expense of litigating that portion upon which he or she has failed;

- a successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other parties' costs of them. In this sense 'issue' does not mean a precise issue in the technical pleading sense but any disputed question of fact or law—*Ruddock v Vardalis* (No 2) (2001) 115 FCR 229 at [11], Black CJ and French J.

The territory contended that there were special circumstances justifying the departure from the ordinary rule because:

- the review application raised novel questions of general importance under the NTA;
- it was in the public interest that the law be clarified by the court determining those questions;
- the territory's approach to the application had been a reasonable one, in that it sought to explain to the NLC the reasons for the review application (i.e. the novelty and general importance of the questions raised) and sought to conduct the application expeditiously and co-operatively; and
- the application concerned the construction of provisions under the NTA which are of general significance and, so, that the 'spirit' of s. 85A of the NTA should be applied. That section provides that, unless a party has acted unreasonably, and unless the court otherwise orders, each party to a proceeding under the Act should bear that party's own costs;
- the public benefit of the application was illustrated by the funding of the second respondents by the NLC (an Aboriginal/Torres Strait Representative Body as defined in the NTA funded by ATSIS) and hence, ultimately, by the Commonwealth government; and
- the payment of costs would, in reality, be a payment of the costs from the territory to a body funded by the Commonwealth rather than to an individual person or company.

His Honour Justice Mansfield made a number of findings as to the benefits of a review application, including that:

- the application required careful consideration of the provisions of the NTA, particularly those concerning the functions of the Registrar when considering, under ss. 190A to 190C, whether to accept a claimant application for registration;
- consideration of the proper construction of those sections in the review proceedings gave rise to many issues that had not previously been the subject of judicial consideration;
- there were a number of contentions raised by the territory that did not lend themselves to ready resolution by analogy with decisions under other provisions of the NTA or under comparable legislative provisions;
- judicial consideration was of benefit to both the Registrar in determining whether to accept a claimant application for registration and to those confronted with the issue of whether the Registrar will accept their application for registration;
- recent High Court decisions in *Western Australia v Ward* (2002) 191 ALR 1 and in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 provided a further reason to revisit the registration test provisions—at [9].

Notwithstanding these findings, his Honour concluded that the particular features of the review application were not such as to lead to the conclusion that there should be no costs order. The application by the territory did raise the construction of ss. 190A to 190C and the other provisions. However, resolution of the various issues did not turn exclusively, or indeed largely, simply upon the territory's construction—at [12].

His Honour then outlined the extent to which he considered that the resolution of the various issues did not turn exclusively, or indeed

largely, simply upon the territory's construction—at [13] to [18].

Conclusions

The court found that:

> …the [review] application involved consideration not simply of the proper construction of…[certain provisions of the NTA] but to a significant degree also turned upon its own particular facts and circumstances. In the latter respect, it was of no particular importance other than to the parties. Each application for the determination of native title which the Registrar has to address to determine whether to enter it on the Register of Native Title Claims will similarly have to be addressed in its own context and in its own particular circumstances. Moreover, whilst certain aspects concerning the proper construction of sections of the Act which arose in the review application are of general importance, that cannot be said of all the issues of construction which arose. There were several contentions of the applicant concerning features of the primary application which could not readily be described as giving rise to issues which are likely to arise in considering the registrability of all or many other applications for the determination of native title. The consequence is that the particular provisions of the Act to which those contentions directed attention are not ones which are of high public importance or which give rise to commonly raised issues. The construction of a provision of legislation does not, in every instance, attract the description as being of significant public importance—at [14].

Section 85A

Mansfield J held that the court should have regard to the 'spirit' of s. 85A but that there was no such general rule: each case should be considered on its merit. In this case, s. 85A was relevant because the review application concerned the validity of a function undertaken by the Registrar under the NTA and involved consideration of the particular sections directing how that function was to be considered—at [17].

Decision

Mansfield J accepted the public importance of some of the issues that arose and the novelty of those issues and also took into account what was put as to the reasonableness of the territory's conduct. However, overall, notwithstanding both the public interest in the judicial resolution of certain issues and the relevance of s. 85A, his Honour considered that the territory should be ordered to pay the NLC's costs of the review application. The nature and the range of the issues addressed, both legal and factual, led his Honour to the view that, on balance, the ordinary rules as to costs should apply—at [18].

Review of decision to refuse financial assistance

Tucker v Aboriginal & Torres Strait Islander Commission [2004] FCA 134

French J, 24 February 2004

Issue

This decision relates to an application for review under the *Administrative Decisions (Judicial Review) Act 1977* (Cwlth) of a decision by ATSIC under s. 203FB of the NTA affirming the decision of a representative body to refuse financial assistance to a claimant group. Findings were made in relation to the nature of the ATSIC's review function under s. 203FB.

Background

Those seeking review constituted the applicant in a claimant application on behalf of the Narnoobinya family group (Narnoobinya application). The Narnoobinya application was overlapped by a larger application made in behalf of the Ngadju People. The Goldfields Land and Sea Council (GSLC) provided the Narnoobinya claimants with some initial limited assistance under s. 203BB of the NTA but declined to provide further assistance on the basis that the Narnoobinya claimants were

recognised as being part of the Ngadju claim group and could be included in the Ngadju application—at [10].

The Narnoobinya applicant sought internal review of the decision to refuse assistance. The GLSC review panel recommended that the Narnoobinya claimants be treated as 'persons who may hold native title' for the purposes of s. 203BB and that an independent facilitator be appointed to conduct discussions between the Narnoobinya and Ngadju claimants with the objective that the Narnoobinya claimants be recognised as part of the Ngadju claim group. The GLSC adopted the panel's recommendation (referred to as the implied decision to refuse assistance)—at [13] to [15].

The Narnoobinya applicant then sought review of GSLC's decision under s. 203FB. The reviewer appointed by ATSIC conducted a merits review and concluded that the implied GLSC decision should be affirmed. The reviewer had regard to:

- a draft anthropological report; and
- the policies and procedures of GLSC—at [28] to [37].

In May 2003, ATSIC advised the Narnoobinya applicant that it affirmed the implied decision of GLSC to refuse financial assistance. The statement of reasons provided by ATSIC made it clear that ATSIC accepted the findings and conclusions made by the reviewer and affirmed the decision on that basis—at [18] and [39] to [42].

The review application was made primarily on the ground that the ATSIC decision was an improper exercise of power—at [20].

Nature of external review by ATSIC under s. 203FB

His Honour Justice French found that the process under s. 203FB is a review on the merits and noted that:

- the process involves substantive judgments by a relevantly skilled or knowledgeable person about whether a grant should be made or the refusal of assistance affirmed;
- the factual basis for an assistance decision does not require certainty as to the status of a person seeking assistance as a native title holder or the success of the relevant claimant application – judgments made in decisions about assistance will necessarily be based upon material which is provisional or incomplete;
- the statutory objectives set out in s. 203BC(3) must be observed by representative bodies in making assistance decisions, namely:
  - such decisions must be made in a way that promotes an orderly, efficient and cost effective process for native title applications; and
  - the representative body must make all reasonable efforts to minimise overlapping applications;
- while not bound to do so, it was appropriate for ATSIC and its reviewer, in exercising their functions under s. 203FB, to adopt the perspective of the representative body and have regard to its relevant policies and procedures—at [46] to [49].

Improper exercise of power

The bases for review on this ground were:

- ATSIC had failed to turn its own mind to the question it had to decide under s. 203FB(7); and
- it was inappropriate for the reviewer or ATSIC to have regard to GLSC's priority criteria as these were within the special province of the relevant representative body—at [50] and [51].

French J held that:

- it would be wrong for ATSIC, in the exercise of its review function, simply to 'mindlessly' adopt the reviewer's report – it must consider the report and be satisfied that the report and its recommendations are appropriate;

- however, it is open to ATSIC to accept the report and make a decision in accordance with its recommendations and it can adopt the reasons set out in the report; and

- it is appropriate for both the reviewer and ATSIC to put themselves notionally in the position of the representative body, or at least to have regard to the considerations the representative body would need to bear in mind in allocating resources. There is no legal error in such approach, provided regard is had to the particular circumstances of the case—at [53].

Decision

It was held that none of the grounds of review were made out and, therefore, the application was dismissed with costs.

Evidence — order sought that rules not to apply

***Harrington-Smith v Western Australia (No 8)* [2004] FCA 338**

Lindgren J, 26 March 2004

Issue

Essentially, the issue here was whether the court make an order dispensing with the application of rules of evidence under s. 82(1) of the NTA or otherwise allow challenged evidence to be admitted.

Background

This case concerned the admissibility of evidence. The documents at issue were primarily those where the author or the source of asserted facts was deceased. The applicant sought either to have the documents admitted into evidence under exceptions to the hearsay rule or for a direction to be made under s. 82 that the rules of evidence did not apply to the documents.

The Evidence Act

His Honour Justice Lindgren reviewed the hearsay rules in s. 63 (first-hand hearsay) and s. 69 (business records) of the *Evidence Act 1995* (Cwlth) (the Evidence Act). The documents in dispute included, among other things, records of Mt Margaret Mission prepared by Mrs Schenk, diaries of her husband Reverend Schenk, genealogies prepared by Margaret Morgan (the Schenks daughter), letters and a consultant's report. The mission records were found to be business records and were admitted, subject to certain limitations, under that exception—at [29] to [48].

The application of s. 63(2) to the affidavit of a deceased person, applying the test of whether the asserted facts which are the subject of the representations in the affidavit were within the personal knowledge of the late deponent, is also of interest—at [105] to [109].

Section 82

In relation to s. 82 of the NTA, his Honour found that:

- there must be some factor present calling for the making of such an order, referring to *Daniel v Western Australia* (2000) 121 FCR 82 at [4];

- there was no set procedure for applying for a s. 82 direction;

- it was not a sufficient reason that the rules of evidence render certain evidence inadmissible—at [81] to [82].

Decision

It was held that no order under s. 82 NTA would be made and the application was declined. Therefore, rulings were made on the admissibility or inadmissibility of the various documents under the Evidence Act.

For more information about native title and Tribunal services, contact the National Native Title Tribunal, GPO Box 9973 in your capital city or on freecall 1800 640 501.
A wide range of information is also available online at www.nntt.gov.au

Native Title Hot Spots is prepared by the Legal Services unit of the National Native Title Tribunal.