

JANUARY 2004

FOCUS

NATIVE TITLE

Inside:

Daniel v State of WA

Attorney-General of NT
v Ward

De Rose v State of SA

Your publication:

If you would prefer to receive
our publications in electronic
format, please email:
publications@aar.com.au

www.aar.com.au

VISIT OUR WEB SITE
TO READ ALL FOCUS EDITIONS

Allens Arthur Robinson



Latest developments in Western Australia and South Australia

The Federal Court was active in December 2003 handing down decisions in four native title cases. One of these decisions marked the end of one of the most important cases dealing with the extinguishment of native title. Senior Associate Robyn Glindemann reviews the four rulings.

Neowarra v State of Western Australia

This case began in November 1996 with the lodgement of a claim on behalf of the Wanjina/Ungurr (Wunggurr) people for 7,200 km² of land in Western Australia's Kimberley region. In June 1999, a second application was made for 60,000 km² of adjacent land. The breakdown of negotiations in 2001, saw the claims moved to the Federal Court. A third claim, concerning the application of sections 47 and 47A of the *Native Title Act 1993* (Cth) (dealing with land held by or for the benefit of Aboriginal people) to areas within the second claimed area, was lodged in December 2002 and was heard with the two earlier applications.¹

In handing down his decision, Justice Sundberg held that the members of the claimant groups in question were the descendants of the Aboriginal people present in the claim area in 1829 when sovereignty was asserted over Western Australia. He also found that the claimants' laws and customs, although modified and diluted to some extent by the passage of time, have had a continuous existence since sovereignty and were connected to the land and waters that were the subject of the applications. As a result, he found that s223(1)(b) of the *Native Title Act* had been satisfied.

His Honour also found that the claimants possessed the rights and interests claimed under the traditional laws and customs for the purposes of s223(1)(a) of the *Native Title Act*.

1. *Neowarra v State of Western Australia* [2003] FCA 1402 (8 December 2003).

Useful summary

In paragraphs 416 to 423 of his judgment, Justice Sundberg set out the 20 basic principles of extinguishment of native title by various land tenure types, as decided by the High Court in *Ward*. This is a useful summary of the criteria for the extinguishment of native title rights and interests (particularly the native title right to control access to land) in Western Australia. His Honour also looked at the various types of tenures that were identified with the boundaries of the claim area and, based on the *Ward* principles, determined whether native title rights and interests had been wholly or partly extinguished.

In relation to the interaction between pastoral leases and native title rights and interests, his Honour engaged in a detailed analysis of the rights conferred by the different types of pastoral leases within the claim areas and the rights and interests claimed by the native title claimants. At the end of that analysis, Justice Sundberg identified several rights and activities that were generally not extinguished by the terms of pastoral leases. These rights and activities also remained over land covered by gold mining leases issued under the *Mining Act 1904 (WA)*, quarrying areas and *Mining Act 1978 (WA)* mining leases, general purpose leases and miscellaneous licences. These activities were:

- having access to land for sustenance from unenclosed or unimproved land and hunting, gathering and fishing on such land to satisfy individual or communal needs (non-commercial);
- camping;
- having access to painting sites in order to freshen and repaint images and having the use of adjacent land for that purpose;
- using traditional resources for the purpose of satisfying personal or communal needs;
- conducting and taking part in ceremonies;
- visiting places of importance and protecting them from physical harm; and
- manufacturing traditional items (such as boomerangs) from resources of the land and waters for the purpose of satisfying personal or communal needs.

His Honour also considered extinguishment in connection with public infrastructure and works and by legislation, including the *Country Areas Water Supply Act 1947*, the *Parks and Reserves Act 1895*, the *Rights*

in Water and Irrigation Act 1914, and the *Wildlife Conservation Act 1950*.

Justice Sundberg's decision was only a draft determination and the parties have been given an opportunity to make further submissions on the court's findings. While the decision has little impact for areas outside Western Australia, it does permit a greater degree of certainty for those in the Kimberley region and allows the parties involved to develop a relationship aimed at ensuring the harmonious exercise of their (co-existent) rights.

Daniel v State of Western Australia

When Justice Nicholson handed down his decision in *Daniel v State of Western Australia* in early July 2003, he also made directions giving the parties an opportunity to make further submissions on relation to the preliminary views expressed on 'inconsistency between extinguishing interests and the non-exclusive native title rights and interests as found'.²

Justice Nicholson's decision on these submissions was delivered on 5 December 2003.³ The judge held, among other things:

- in relation to the rights given to pastoral lease holders, native title rights are not to be considered as inconsistent or extinguished only because the leaseholder may want to exercise rights at the same location as the native title holder. The 'true test' is whether at that location at that time, the exercise of native title rights and interests would prevent the leaseholder's rights from prevailing. The judge recognised that this analysis brought potential conflict, but said that it 'may be desirable in policy' to limit the occasions when it may be necessary to test the prevalence of the leaseholders' rights;
- the native title claimant's right to dig for ochre is extinguished to the extent it involves digging beneath the surface of land under which Telstra cabling is located; and
- in relation to extinguishment of native title rights to access and camping areas covered by mining tenements, and based on the evidence presented by the native title claimants, the State and mining companies, the judge did not agree that

2. *Daniel v State of Western Australia* [2003] FCA 666 (3 July 2003).

3. *Daniel v State of Western Australia* [2003] FCA 1425 (5 December 2003).

extinguishment had occurred. So far as the exercise of the native title rights did not interfere with mining activities, there was no necessary inconsistency.

Attorney-General of the Northern Territory v Ward

On 9 December 2003, the Full Court of the Federal Court closed the book on Australia's most prominent case on the extinguishment of native title.⁴

When the High Court delivered its decision in *Western Australia v Ward* in August 2002, some important issues were left unresolved because the court felt that additional findings of fact needed to be made. When the Full Court of the Federal Court reconvened to hear the case in 2003, it became apparent that a negotiated settlement might be possible. Registrar John Efthim was asked to conduct a series of mediation conferences.

The Ward case is important as it delineates the criteria for the extinguishment of native title.

The mediation conferences eventually led to agreement on all outstanding issues concerning land located in Western Australia. Some aspects of the proposed agreement on land in the Northern Territory were disputed, so a hearing was convened in October 2003 to determine those matters. The court's decision on these issues was reserved until after the Western Australian issues had been settled.

With the Full Court signing the Minute of Proposed Consent Determination for Western Australian Land and Waters and making orders for the Northern Territory claim, thus effecting the formal determination of native title, the Ward case is now finally at an end.

De Rose v State of South Australia

On 16 December, Justices Wilcox, Sackville and Merkel delivered an important milestone in South Australia's native title debate.⁵ It resulted from an

appeal against Justice O'Loughlin's decision in November 2002 dismissing the native title claimants' application on the grounds that the claimants had failed to prove a continuing connection to the claim area, as required by s223(i)(b) of the *Native Title Act 1993* (Cth).

Having analysed the primary judge's findings, the Full Court held that s223(i)(b) of the Act required the judge to identify the content of the traditional laws acknowledged, and customs observed, of the Western Desert people and to inquire whether the effect of those laws and customs constituted a 'connection' between the claimants and the claim area. However, the primary judge had approached s223(i)(b) in terms of whether the claimants had abandoned their connection with the claim area by not visiting the area and not carrying out traditional rituals and activities. In doing so, the Full Court said that the primary judge had 'accorded undue weight to the [claimants] failure (as his Honour saw matters) to discharge their responsibilities as [the 'owners' of the land] regardless of the view taken by the traditional laws and customs of the Western Desert Bloc of that failure'. In other words, the primary judge had considered whether a connection existed through a 'Western' perspective, rather than through the eyes of the Western Desert people.

While the Full Court was inclined to set aside the orders of the lower court, the court stated that it could not make its own determination on connection because it did not have sufficient evidence before it. Similarly, the case could not be referred back to the lower court without great expense to all parties since the primary judge had retired from the court. In these circumstances, the court felt that the best course of action was to direct the parties to consider what issues remained in dispute and then submit detailed submissions to the court for consideration.

A case management conference will be held before February 2004 to set out the timing of the submissions and any further hearings that may be required.



4. *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 (9 December 2003).

5. *De Rose v State of South Australia* [2003] FCAFC 286 (16 December 2003).

Get the latest legal news online

Allens Arthur Robinson's publications are available online. When a new publication is issued, we'll keep you up-to-date by emailing you a short summary of the legal issue we are focusing on, together with the link. If it's relevant to your business, you can click on the link to read online, or print a version from our website.

If you prefer to receive publications electronically, please send your email address to:
publications@aar.com.au

Tell us your name, title and company, and indicate your areas of interest:

- | | |
|----------------------------|---------------------------------|
| Banking & Finance | Media & Technology |
| Biotech & Health | Mergers & Acquisitions |
| Capital Markets | Privacy |
| Commercial Litigation | Product Liability |
| Construction | Property |
| Energy & Resources | Tax |
| Environment | Telecommunications |
| Funds Management | Trade Practices/Competition Law |
| Insurance | Workplace Relations |
| Insolvency & Restructuring | Any other areas |
| Intellectual Property | |

You can view our full range of publications at: www.aar.com.au/pubs/

Allens Arthur Robinson 
Clear Thinking

For further information, please contact:

Tony Wassaf

Partner, Sydney
Ph: +61 2 9230 4783
Tony.Wassaf@aar.com.au

Bill Manning

Partner, Melbourne
Ph: +61 3 9613 8611
Bill.Manning@aar.com.au

Andrew Buchanan

Partner, Brisbane
Ph: +61 7 3334 3244
Andrew.Buchanan@aar.com.au

David Martino

Partner, Perth
Ph: +61 8 9488 3808
David.Martino@aar.com.au

Have your details changed?

If your details have changed or you would like to subscribe or unsubscribe to this publication or others, please go to www.aar.com.au/general/subscribe.htm or contact Barbara Leis on +61 7 3334 3371 or email Barbara.Leis@aar.com.au

www.aar.com.au