

# FOCUS

## NATIVE TITLE

### Inside:

We examine issues raised in four recent native title cases

### Your publication:

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

[www.aar.com.au](http://www.aar.com.au)

VISIT OUR WEB SITE  
TO READ ALL FOCUS EDITIONS



## Recent native title decisions

Senior Associate Robyn Glindemann and Lawyers Kate Barrett and Penny Creswell look at some of the issues raised in four recent decisions relating to native title.

### Four rulings on native title

- In the *Bardi Jawi* decision, the Federal Court determined that native title exists in the Dampier Peninsula area in Western Australia. Issues regarding the composition of the claimant group and the effect of pearly legislation on native title rights were considered.
- In *BHP v Karriyarra*, a Western Australian mining warden considered whether native title claimants are to be treated as private land holders for the purposes of granting entry permits to mark out tenements and whether conditions should be imposed to protect Aboriginal heritage.
- In *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group*, the Full Federal Court, on appeal, examined the possibility of 'partial' extinguishment of the right to control access and whether the proclamation of a town precludes claimants relying on section 47B of the *Native Title Act* (which allows extinguishment by prior interests to be disregarded).
- In *De Rose v South Australia (No 2)*, the Full Federal Court determined that the claimants held non-exclusive native title in relation to the De Rose station in far north-west South Australia, except where improvements had been made.

We examine these issues in further detail.

### Bardi Jawi native title claim in Western Australia

In the *Bardi Jawi* decision (*Sampi v State of Western Australia* [2003] FCA 777), handed down on 10 June 2005, Justice French found that the Bardi and Jawi claim group held native title to land and waters covering the Dampier Peninsula in north-west Western Australia.

The Bardi Jawi application began hearing in 2001, before the High Court's decision in *Yorta Yorta v State of Victoria* ((2002) 214 CLR 422), on the basis that the Bardi and Jawi people bringing the native title claim were 'two distinct yet closely related societies'. The hearing was adjourned pending the High Court's decision in *Western Australia v Ward* (2002) 213 CLR 1 and then the applicants sought leave to reopen the hearing to address the High Court's decision in both cases. At a second hearing in the matter post-*Yorta Yorta*, further evidence was presented that the Bardi and Jawi claim group today constituted substantially the same society as that which existed in the claim area at sovereignty.

***Justice French found that the contemporary Bardi and Jawi society held native title rights in that part of the claim area that was traditionally the territory of the Bardi people and that the contemporary Bardi and Jawi was substantially the same society that existed at sovereignty.***

On the basis of:

- the sustained pattern of inter-marriage between the Bardi and Jawi people, which gave rise to secondary or lesser rights in each other's territory;
- shared laws and customs between the two groups; and
- the existence of rules of membership in the Bardi society that allowed that society to adapt to the contemporary Bardi and Jawi society that was found to exist today,

Justice French found that the contemporary Bardi and Jawi society held native title rights in that part of the claim area that was traditionally the territory of the Bardi people and that the contemporary Bardi and Jawi was substantially the same society that existed at sovereignty. However, as the court found that Bardi society had no laws that would allow the incorporation of traditional Jawi territory, it was held that native title rights did not exist in those parts of the claim area (such as the islands to the immediate north of the Dampier Peninsula) that were the traditional territory of the Jawi only.

While the Federal Court accepted the claimants' contention that traditional Bardi society is, and was, organised into smaller estate areas along the coast, with exclusive rights applying to those areas among the claim group, the native title rights held to exist by the court, including the right to control access to the determination area, would be held by all claim group members. In making this finding, the court rejected the submission by certain respondents to the claim that the court must determine the rights and interests that exist at the estate group level. Justice French indicated that such a submission was at odds with the evidence and expressed the view that determining native title on an estate by estate basis 'involved a descent into factual detail that is the antithesis of the policy of the legislation and the process of recognition which it seeks to advance'.

***Justice French also dismissed an argument by one of the respondents that the enactment of pearling legislation applicable in Western Australia had wholly extinguished the native title rights to take and use a species of pearl and pearl shell.***

Despite finding the Bardi and Jawi people held exclusive native title rights to the land portion of the claim area, the court was not willing to determine those rights by reference to the right to 'use and enjoy' the claim area, on the basis that such a wide characterisation could include rights that were not contemplated by traditional laws and customs.

Justice French also dismissed an argument by one of the respondents that the enactment of pearling legislation applicable in Western Australia had wholly extinguished the native title rights to take and use a species of pearl and pearl shell. The court read the submissions made by the respondent and found that the relevant legislation did not provide for a prohibition in this regard. However, no further analysis of the legislation was provided. Rather, Justice French expressed the view that the outcome sought by the respondent was draconian in light of the evidence that the use of pearl shell was, and continues to be used, by the claim group, including in relation to male initiation and that section 211 of the *Native Title Act 1993* (Cth) would apply to preserve these rights.

## Should native title claimants be treated as private land holders for the purposes of granting entry permits to mark out tenements?

In *BHP Billiton Pty Ltd & Ors v Karriyarra Native Title Claimants & Ors* [2005] WAMW12, Warden Calder in the Perth Warden's Court considered whether native title claimants are to be treated as private land holders for the purposes of granting entry permits to mark out tenements and whether conditions should be imposed to protect Aboriginal heritage.

The Karriyarra and Palyku native title claim groups objected to miscellaneous licence applications made by BHP Billiton and others. The licences were sought in connection with the applicants' plans to expand their current iron ore production in the Pilbara.

One ground of objection was based on the argument that the objectors should be treated as private land holders under the *Native Title Act 1993* (Cth) and/or the *Racial Discrimination Act 1975* (Cth). Based on this view, the objectors argued that the applicants did not obtain an entry permit under the *Mining Act 1978* and the *Mining Regulations 1981* before marking out the tenement applications and therefore failed to provide the required notifications under the *Mining Act* and *Mining Regulations* to the objectors as would be necessary for private land owners. As the applicants did not comply with the *Mining Act*, the *Mining Regulations*, the *Native Title Act* or the *Racial Discrimination Act*, the objectors argued that the granting of the tenements would be contrary to public interest.

At the preliminary hearing in this matter (*BHP v Karriyarra* [2004] WAMW22 (BHP No.1)), the significant preliminary issue was whether the objectors were to be treated as private land holders under the *Mining Act* by virtue of either the *Native Title Act* or the *Racial Discrimination Act*. If they were to be treated as private land holders, the applicants were required to obtain an entry permit to mark out the tenements sought and obtain the objectors' consent under s29(2) of the *Mining Act*, which requires written consent of the owner and occupier of certain categories of private land before surface mining can occur. In *BHP No. 1*, the Warden concluded that, because of s24MD(6A) of the *Native Title Act*, for the purposes of the relevant provisions of the *Mining Act*, the objectors were to be

treated as if they held freehold (private) title to the land that is the subject of their native title claims.

*Warden Calder concluded that, because it was not necessary to enter private land or land that was the subject of the native title claim to mark out the tenements, an entry permit was not required.*

Although the applicants disagreed with the conclusions reached by the Warden in BHP No.1, they did not seek to reargue those matters in the substantive hearing of the objections. Accordingly, the Warden proceeded on the basis that his preliminary decision was correct and, to the extent the applicants were required to enter on to native title claim land to mark out tenements, a permit to enter was required. The Warden also stated that where native title claim land that was the subject of a tenement contained a bore, well, spring, burial ground or otherwise fell within any of the other categories of private land in s29(2) of the *Mining Act*, then the native title claimants' consent to conduct mining operations on that land would be required.

Warden Calder concluded that, because it was not necessary to enter private land or land that was the subject of the native title claim to mark out the tenements, an entry permit was not required. The evidence given by the person who conducted the marking out on behalf of the applicants was that he did not 'enter' in any way or by any means any of the ground applied for in any of the tenement applications. He entered and remained only upon certain locations in which native title had already been extinguished (including areas the subject of special leases held by the applicants for the construction and operation of its existing rail infrastructure). Accordingly, the Warden found that the marking out of the applications had been done in compliance with regulation 37 of the *Mining Regulations* and the *Native Title Act* requirements.

However, the Warden confirmed his view that, had the applicants entered the land that was the subject of the native title claims to mark out the licence applications, they would have required a permit to enter that land under the *Mining Act*.

The decision insofar as it relates to whether or not native title claimants are to be treated as private land holders under the *Mining Act* is limited to those

provisions requiring a permit to enter private land before marking out tenements under the Act. The application of this decision is further limited by Warden Calder's conclusion that it is the operation of s24MD of the *Native Title Act* that requires native title claimants to be afforded the rights of private land holders in respect to the grant of mining tenements. Section 24MD applies only to the grant of mining tenements for infrastructure purposes, such as miscellaneous licences.

However, Warden Calder's decision remains significant because the conferral of 'private land' status on land subject to a native title claim and the requirement to obtain entry permits from native title claimants has the potential to confer veto rights on native title claimants and introduce substantial delays into the exploration and mineral development activity processes in Western Australia. This possibility arises despite the absence of any reference to 'native title land' in the definition of 'private land' under the *Mining Act*. The decision is contrary to at least two decisions of other Mining Wardens dealing with similar objections and is being appealed.

## **'Partial' extinguishment of the right-to-control access**

In *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135, the Full Federal Court, on appeal, examined the possibility of 'partial' extinguishment of the right-to-control access and whether the proclamation of a town precludes claimants relying on s47B of the *Native Title Act* (which allows extinguishment by prior interests to be disregarded).

*At trial, Justice Mansfield found that, although the pastoral leases had extinguished any native title rights to exclude persons with access rights under the pastoral lease (or other statutory right of entry), a qualified right to control access of others remained.*

On 29 July 2005, Justices Wilcox, French and Weinberg handed down their decision in the appeal over the determination of native title made by Justice Mansfield in the native title claim by the Alyawarr,

Kaytetye, Warumungu and Wakaya native title claim group.

Justice Mansfield determined on 23 April 2004 that the native title holders (comprised of the members of the seven landholding, or 'estate', groups) held non-exclusive native title rights and interests over the portion of land subject to a Crown lease in perpetuity to the Conservation Land Corporation and exclusive native title to the vacant Crown land contained within the proclaimed (but never built) Hatches Creek townsite. The entire claim area had been subject to pastoral leases in the past.

## **A non-exclusive right to control access?**

At trial, Justice Mansfield found that, although the pastoral leases had extinguished any native title rights to exclude persons with access rights under the pastoral lease (or other statutory right of entry), a qualified right to control access of others remained. He did not consider that a native title right to control access of persons wanting to do things unrelated to the pastoral lease was inconsistent with rights granted under the pastoral lease. On appeal, however, not surprisingly, and consistently with the dicta of the High Court majority in *Ward*, the court found that a right to control access to, or make decisions about, the use of land cannot be sustained where there is no right of exclusive possession 'as against the whole world'. The rationale underpinning this conclusion is that 'particular native title rights and interests cannot survive partial extinguishment in a qualified form different from the particular native title right or interest that existed at sovereignty'.

## **Does the proclamation of a town preclude the operation of s47B?**

Hatches Creek townsite was set aside in 1953 by a proclamation under the relevant Crown Lands Ordinance, but was never established. The only legal consequence of setting aside the town lands was to enliven the power to grant leases under the Ordinance. No leases were granted and the land remained vacant Crown land. Before the proclamation, the area had been a commonage reserve and subject to a pastoral lease and grazing licences. The pastoral lease extinguished at least any exclusive rights in relation to the area, including the right to control access.

Section 47B of the *Native Title Act* is a beneficial provision that, subject to some qualifications, enables the extinguishing effect of any prior interests to be



disregarded in relation to vacant Crown land where at least one native title 'occupied' the area when the native title claim was made. The qualifications relevantly include that, at the time the native title application is made, the relevant area cannot be covered by a proclamation under which part or all of the area 'is to be used for public purposes or a particular purpose'.

Justice Mansfield concluded that s47B could be relied on to disregard prior extinguishment, and native title to the Hatches Creek townsite was determined to be exclusive (subject to rights of access conferred by law). Although not raised at the trial, the Northern Territory argued on appeal that s47B could not be relied on, as the proclamation of the town precluded its application. The Full Court found that the mere proclamation of a town, which could comprise such a broad range of potential public and private uses, including the allocation of private property holdings, does not satisfy the requirement of public purposes or a particular purpose.

Reliance on s47B also requires proof of occupation of the area by a member of the native title group at the time the claim was made. The Full Court upheld Justice Mansfield's findings that relevant occupation existed, and that it could be based on inferences drawn from the evidence – direct evidence is not required. The Full Court adopted a broad view of occupancy: permanent physical presence or possession at law is not required, and where claimants used the relevant area 'as and when they wished', they may satisfy the requirement.

The court's decision in this case clarifies that claimants may rely on s47B within town boundaries.

## Native title over the De Rose station

In *De Rose v State of South Australia (No 2)* [2005] FCAFC 110, the Full Federal Court determined that the claimants, a group of Yankunytatjara and Pitjantjatjara people, held non-exclusive native title over the De Rose station in far north-west South Australia, except those areas where improvements had been made.

The case was first heard by Justice O'Loughlin who, in November 2002, determined that the claimants did not hold native title primarily because they had been unable to establish a continuing physical or spiritual connection with the claim area. The claimants appealed and, in December 2003, Justices Wilcox,

Sackville and Merkel upheld the appeal, finding the trial judge's decision was affected by certain errors of law (*De Rose (No 1)*). In particular, the trial judge had attributed too much weight to a lack of evidence that the claimant group was a community and had applied the wrong test in relation to 'connection'. (See AAR's *Focus: Native Title*, January 2004, which examines the appeal decision). As the matter could not be remitted to Justice O'Loughlin (who had retired), the Full Court asked the parties to identify remaining issues in dispute and it would further hear those issues. *De Rose (No 2)* is the outcome of that further hearing.

***This decision reiterates the High Court's comments in Ward that connection is not directed at how Aboriginal people use the land; rather, the question is whether they have a connection by the traditional laws acknowledged and customs observed.***

### Connection

The Full Court found that the traditional laws and customs of the claimants conferred rights and responsibilities on the claimant, Peter De Rose, linking him 'inextricably' with his country in a variety of ways, despite the fact that he had 'failed' to discharge certain responsibilities in relation to sacred sites for a number of years. This decision reiterates the High Court's comments in *Ward* that connection is not directed at how Aboriginal people use the land; rather, the question is whether they have a connection by the traditional laws acknowledged and customs observed. A continuous physical connection to land is not necessarily required.

### Extinguishment by improvements constructed on the pastoral leases

The Full Court in *De Rose (No 2)* also considered the extinguishing effect of the right to make improvements granted by the pastoral leases.

It was not disputed that the pastoral leases had extinguished exclusive native title rights to control access or make decisions about the claim area. The question of what further extinguishing effect (if any) the right to make improvements had was considered in detail. Under the leases, the lessees had the right to



make improvements (such as houses, sheds, airstrips and dams), which had the potential to extinguish native title rights but, until such improvements were made, it was impossible to apply the High Court's 'inconsistency of rights' test set out in *Ward*. In accordance with the joint judgment in *Ward*, in relation to extinguishment, the key issue is whether the rights granted under the lease are inconsistent with the native title rights found to exist. Actual use of the land is only relevant in as far as it highlights the right under which the land is used.

***The Full Court found that native title was wholly extinguished in relation to the area of the improvements and the appropriate 'buffer zone' around each improvement.***

The Full Court found that the right (to make improvements) granted under the leases does result in extinguishment, but only once the right is exercised.

That is, once the improvement is built and the area affected by it can be ascertained, the 'condition precedent' is met, and the extinguishing effect of the grant of the right occurs. The High Court had acknowledged in *Ward* that 'the operation of a grant of rights might be subjected to conditions precedent or subsequent [and] may be incapable of identification in law without the performance of a further act or taking of some further step'.

The Full Court found that native title was wholly extinguished in relation to the area of the improvements and the appropriate 'buffer zone' around each improvement. The 'buffer zone' was determined to be 'any adjacent area the use of which is reasonably necessary for or incidental to the operation or enjoyment of the improvements', on the basis of the High Court's finding in *Ward* that the grant of a right carries with it rights necessary for the meaningful exercise of the right.

If you have any questions about this, or any other native title issue, please feel free to contact us.



**For further information, please contact:**

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

**Scott Langford**  
Partner, Melbourne  
Ph: +61 3 9613 8926  
Scott.Langford@aar.com.au

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

**Robyn Glindemann**  
Senior Associate, Perth  
Ph: +61 8 9488 3712  
Robyn.Glindemann@aar.com.au

**Ben Zillmann**  
Senior Associate, Brisbane  
Ph: +61 7 3334 3538  
Ben.Zillmann@aar.com.au

Sydney  
Melbourne  
Brisbane  
Perth  
Bangkok  
Beijing  
Hong Kong  
Jakarta  
Phnom Penh  
Port Moresby  
Shanghai  
Singapore

***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](http://www.aar.com.au/general/subscribe.htm) or email [Publications@aar.com.au](mailto:Publications@aar.com.au).*