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Native Title by Decision

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SUMMARY

Although some of the law relating to native title has been clarified by the Native Title Act 1993 (Cth), and by High Court decisions such as Mabo (No 2), Wik, Fejo, Yanner, Yarmirr, Ward and Wilson, numerous fundamental legal questions remain. Most of these questions are arising in cases being heard on their merits – that is to say where the respective parties have had to present their complete case, both factual and legal, and had it adjudicated upon by a court.

To date there have been decisions in seven such cases, namely Yarmirr, Ward, Yorta Yorta, Hayes, Wandarang, Rubibi and Ngalakan. Whilst Yarmirr and Ward have now been decided by the High Court, most of the others are at various stages of the appeal process. (Indeed many issues in Ward remain to be dealt with.) The High Court has also heard an appeal in Yorta Yorta, concerning the more fundamental question as to what must be shown in order to prove native title.

Several other native title applications are in the process of being heard, and decisions in some have been deferred pending further submissions which take into account the High Court's recent decisions in Yarmirr and Ward. One case presently being heard is the Wongatha matter, a claim over a large area of land in the Western Australian "Goldfields". The claim area has been subject of over 150 future act applications, many of which are landmark National Native Title Tribunal (NNTT) decisions (for example, Koara, Thomas and Strickland and Nudding). Once cases such as these have been decided many of the great uncertainties faced by mining companies presently running the right to negotiate gauntlet will be removed.

Other recent cases have arisen as a result of action taken by persons desiring to strike out native title claims on the basis of extinguishment (for example, Wilson v Anderson and Barkanji) or by bringing non-

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claimant applications asserting lack of relevant connection (for example, Kennedy).

Until the important issues raised by these cases have been resolved by the courts, the uncertainties and risks inherent in dealing with land potentially subject of native title, will remain.

RELEVANT BACKGROUND

On 3 June 1992 the High Court of Australia declared that "the Meriam People are entitled as against the whole world to possession, occupation, use and enjoyment of [most of] the lands of the Murray Islands".[1] Presumably "the lands" include the minerals, if any, within them.

Prior to that time it was generally assumed that the only recognisable rights held by indigenous "owners" (often referred to as "traditional owners" or "traditional Aboriginal owners") were those conferred by statute. For example, the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) (ALRA) expressly provided for the recognition of, and the granting of title to, people who could satisfy the particular requirements of that Act. Indeed the ALRA conferred significant rights, including rights of veto in certain circumstances, upon traditional Aboriginal owners in relation to mining and exploration activity upon Aboriginal land.[2]

In *Mabo (No 2)* it was held that some "indigenous owners" (now referred to as "native title holders") hold valuable and recognisable common law rights and interests (now described generally as "native title"). The holding of native title was dependent upon the claimants establishing certain connections with the relevant land and with those who held such native title rights and interests at the time when the Imperial Crown acquired sovereignty over that land. In many cases such native title, as did then exist, no longer exists. This is because the necessary connections with the land have been lost or abandoned, or because such rights have been extinguished by activities of the Crown.

Mabo (No 2) opened up the possibility of certain activities, such as grants of land or of a mining interest, particularly subsequent to the commencement of the *Racial Discrimination Act* 1975 (Cth) (the

[1] *Mabo & Ors v Queensland & Ors (No 2)* (1992) 175 CLR 1 (*Mabo (No 2)*) at 217.

[2] See Pt IV of ALRA. In 1985 the then Minister for Aboriginal Affairs attempted to create a National Land Rights Code but was unsuccessful in persuading the States to agree. The Commonwealth had been able to enact ALRA in relation to land (and waters) in the Northern Territory under the territories power in s 122 of the Commonwealth Constitution. See papers published in [1985] AMPLA Yearbook.

RDA), being invalid if such activities had detrimentally affected native title rights and interests without providing just terms.

Native Title Act

Hence, it was necessary to enact the *Native Title Act* 1993 (Cth) (NTA)[3] in order to:

(a) validate past grants, and in certain circumstances their renewal (the "past act" regime); and
(b) set up mechanisms for validly performing activities in the future where such activities might interfere with or extinguish native title (the "future act" regime).

Section 11(1) provides that native title "is not able to be extinguished contrary to this Act". In the *Native Title Act* case[4] the High Court said of s 11(1):

> "By that prima facie sterilisation, s 11(1) ensures that the exceptions prescribed by the other provisions of the Act which permit the extinguishment or impairment of native title constitute an exclusive code. Conformity with the code is essential to the effective extinguishment or impairment of native title. The Native Title Act thus governs the recognition, protection, extinguishment and impairment of native title."

The NTA set up procedures[5] for:

- native title holders to obtain a declaration of their rights – referred to in the NTA as a determination;[6] and
- claims for compensation by people whose native title rights have been extinguished.[7]

As at 25 July 2002 there were 619 active claimant applications (126 in WA, 175 in NT, 72 in NSW, 193 in Qld, 30 in SA, 21 in Vic and 1 in Tas). There were also 39 non-claimant applications and 23 active compensation claims.

[3] It was also necessary for the States and Territories to enact complementary legislation. References in this paper to provisions of the NTA should be read, where appropriate, as referring to the analogous State or Territory provision.
[4] *State of Western Australia v Commonwealth* (1995) 183 CLR 373 (the *Native Title Act* case).
[5] See ss 13 and 61 NTA.
[6] See s 225.
[7] See Pt 2, Div 5.

Relevant Case Law

Although some of the law relating to native title has been clarified by the NTA, and in cases such as *Mabo (No 2)*, *Wik,*[8] *Fejo,*[9] *Yarmirr,*[10] *Ward*[11] and *Wilson*[12] numerous fundamental legal questions remain.

Most of these questions are arising in cases being heard on their merits – that is to say where the respective parties have had to present their complete case, both factual and legal, and had it adjudicated upon.

To date there have been decisions in seven such cases, all initially heard by the Federal Court. Most are at various stages of the appeal process.

NATIVE TITLE DETERMINATIONS

The Croker Island sea claim[13] primarily concerned the question as to whether native title extends to the sea. The claim included claims in respect of the complete strata above and below the sea including air space and subterranean minerals. Olney J held that there could be native title in respect of the sea but that it did not include exclusive rights. These conclusions have now been upheld by the Full Federal Court[14] and by the High Court of Australia.[15]

The second decision was the *Ward* decision.[16] Lee J upheld most of the claim, in effect recognising a native title which included rights of exclusive possession. The case also dealt at some length with questions of extinguishment. The Full Federal Court[17] dismissed appeals by Western Australia regarding the native title findings but concluded that a considerable degree of extinguishment has occurred. Numerous grounds of appeal on a wide range of issues were heard by the High Court and many of them were upheld. The High Court set aside the relevant orders and the determination made

[8] *Wik Peoples v Queensland* (1996) 187 CLR 1 (*Wik*).
[9] *Fejo v Northern Territory of Australia* (1998) 195 CLR 96 (*Fejo*).
[10] *Commonwealth v Yarmirr* (2001) 75 ALJR 1582 (*Yarmirr HC*).
[11] *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory; Ward v Crosswalk Pty Ltd* [2002] HCA 28, 8 August 2002 (*Ward HC*).
[12] *Wilson v Anderson* [2002] HCA 29, 8 August 2002 (*Wilson*).
[13] *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370 (*Yarmirr*) – summarised at 3 NTN 146.
[14] *Commonwealth v Yarmirr* (1999) 101 FCR 171; 168 ALR 426 (*Yarmirr FC*). See article in 4 NTN 109.
[15] *Commonwealth v Yarmirr* (2001) 75 ALJR 1582 (*Yarmirr HC*).
[16] *Ward v Western Australia* (1998) 159 ALR 483 (*Ward*) summarised at 4 NTN 5.
[17] *Western Australia v Ward* (2000) 99 FCR 316; 170 ALR 159 (*Ward FC*). See articles at 4 NTN 142, 149 and 151.

by the Full Court and remitted the matter for further hearing, primarily to enable important factual findings to be made.[18]

The *Yorta Yorta* decision[19] concerned a claim over a large area of land and waters around and including part of the Murray River. The court dismissed the claim on its merits primarily holding that any traditional connection between those who would have held native title at the time of sovereignty and the relevant land and waters was lost in the 1880s at about the time when the Maloga Mission was established on the banks of the Murray near Echuca. Although the claim also included claims to water, minerals and other resources the court's finding based upon loss of connection rendered it unnecessary for consideration of such other claims, or of questions of extinguishment. A majority of the Full Federal Court dismissed an appeal against this decision,[20] and an appeal against this decision was heard by the High Court in May 2002.[21]

The fourth decision is the *Hayes* case.[22] It concerned a native title claim to a large number of parcels of land and water within the municipal boundary of the town of Alice Springs. Olney J found native title, but not of an exclusive kind, to exist in respect of the whole or part of about 113 of the areas claimed. This case, like *Ward*, involved numerous forms of tenure granted by the Crown, some of which extinguished native title. The applicant has appealed to the Full Federal Court and the Northern Territory has filed a cross-appeal.

The fifth decision is the *Wandarang* case.[23] Much of the claim area was subject of a perpetual lease held by the Northern Territory Land Corporation, which Olney J found to be a statutory authority within the meaning of the NTA. The claim also included parts of the Roper River and of other rivers and a stock route. The claim was brought on behalf of 12 groups of Aboriginals in respect of an area associated with the four named language groups. Olney J found that non-exclusive native title existed, the pastoral lease having extinguished exclusive rights. The applicants have appealed to the Full Federal Court.

The sixth decision is the *Rubibi* decision.[24] This was a claim over 300 acres of land near Broome, WA, which was vested in the

[18] *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory; Ward v Crosswalk Pty Ltd* [2002] HCA 28, 8 August 2002 (*Ward HC*)
[19] *Members of the Yorta Yorta Aboriginal Community Inc v Victoria* [1999] 4(1) AILR 91 (*Yorta Yorta*) - summarised at 4 NTN 2.
[20] See note at 4 NTN 59 and article at 5 NTN 2.
[21] See note at 5 NTN 120 and 154.
[22] *Hayes v Northern Territory* (1999) 97 FCR 32 (*Hayes*) - summarised at 4 NTN 84 and 88.
[23] *The Wandarang, Alawa, Marra, and Ngalakan Peoples v Northern Territory* (2000) 104 FCR 380; 177 ALR 512 (*Wandarang*).
[24] *Rubibi Community v Western Australia* (2001) 112 FCR 409 (*Rubibi*).

Aboriginal Lands Trust. The claim sought, and acceded to, was for exclusive possession for ceremonial purposes.

The seventh decision is the *Ngalakan* decision.[25] This claim concerned land gazetted as the Township of Urapunga, but which was never really used as such. The court upheld the claim for exclusive possession etc in respect of all of the land claimed, with the exception of gazetted roads which, according to the court, extinguished native title.

Yarmirr[26]

While *Mabo (No 2)* held that there could be native title to land, *Yarmirr* involved issues as to whether there can be native title over the sea and if so of what kind. The Federal Court's decision in this case was the first decision in relation to any application for a determination of native title under the NTA.

The area subject of claim was an area of the sea adjacent to Croker Island and between it and associated islands and the mainland. Croker Island is to the north-east of Cobourg Peninsula near Arnhem Land in the Northern Territory. Apart from a small area of sea near New Year Island the area subject of the claim is within three nautical miles of land. Croker Island itself, and the other islands in the region, are already Aboriginal land as a consequence of being listed in Sched 1 of ALRA. Indeed the land grant confers title (upon the relevant Land Trust) to the low water mark.

The claim was over the water, the subsoil below it and the airspace above it, together with all resources therein including marine species, minerals and other natural resources.

One of the major issues was whether the common law recognises native title in respect of the sea – in particular below the low water mark. Various arguments were advanced concerning this issue.

The main contention put by the respondents was that the common law has never extended beyond the low water mark and closing lines (across rivers, bays and gulfs) which defined the territorial boundaries of the Northern Territory (and the States). It was not until the 1980s (with the enactment of the Coastal Waters Acts by the Commonwealth and complementary offshore legislation by the Northern Territory)

[25] *The Ngalakan People v Northern Territory of Australia* (2001) 112 FCR 148; 186 ALR 124 (*Ngalakan*).

[26] *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370 (*Yarmirr*). See "Native Title – A Catalyst for a Sea Change" by Ron Levy, Northern Land Council (1998) 3 NTN 120 and 140; "Native Title Offshore – At the Water's Edge or Beyond" by Raelene Webb, Barrister, Darwin [1998] AMPLA Yearbook; "Croker Island Sea Claim – Completion of Hearings" by Graham Hiley QC (1998) 3 NTN 125.

that the Northern Territory (and the States) acquired sovereignty and title over three nautical miles beyond the low water mark. It was contended that this was not sufficient to extend the common law beyond low water mark.

An alternative argument was that the offshore legislation had the effect of extending the common law beyond the low water mark. Questions then arose as to whether such a statutory extension is sufficient to enable common law recognition of native title to that extent (that is to the three nautical mile limit), and if so what native title there was to be recognised at that stage. By then (the 1980s) European contact had effected many changes both in terms of controls and grants brought about by legislation, and also in terms of usage of the waters by non-indigenous people. It was argued, for example, that fisheries legislation had certain effects upon the exercise of traditional laws and customs with the result that the only rights which were capable of being recognised by the common law as native title rights were those which had not been impaired or removed by such legislative regimes.

Another question in the case was whether "low water mark" means mean low tide, or astronomic low tide. The large tidal variations of the coast of the Northern Territory mean that in practical terms there is a significant difference between the two.

Another issue concerned ownership of the waters (and species within) and the airspace above the inter-tidal zone – that is the land between high water mark and low water mark. That land is already Aboriginal land. Although most grants of land in Australia stop at the high water mark, grants of land made under ALRA were made to the low water mark, thereby raising the question as to control of the sea (and its contents) when it is above the low water mark. This issue is particularly important to the commercial fishing industry in the Northern Territory because of the large amount of waters and resources within the inter-tidal zone and the significant amount of fishing activity carried out in those waters. This question has been subject of other litigation in the Federal Court.[27]

Another question concerned the territorial limits of the Northern Territory, and consequently whether much of the waters subject of the claim are an "offshore place" or "onshore place" as defined in s 253 of the NTA. The answer turns on what are the appropriate boundary lines to be drawn where the natural coastline is interrupted by bays and islands. The Commonwealth contended that the limits of

[27] *Arnhemland Aboriginal Land Trust & Anor v Director of Fisheries (NT) & Anor* (2000) 170 ALR 1 (Mansfield J) and on appeal *Director of Fisheries (Northern Territory) v Arnhemland Aboriginal Land Trust* (2001) 109 FCR 488; 185 ALR 649. See notes at 4 NTN 153, 176 and 198 and 5 NTN 49.

the Northern Territory are defined by the base lines drawn for the purposes of and at the time of the offshore legislation. On the other hand the Northern Territory contended that its territorial limits should be ascertained, inter alia, by closing lines across bays in the usual way rather than by resorting to particular lines drawn in the course of and for the purposes of the offshore legislation. In practical terms, the Northern Territory's position would have the effect of most of the claimed waters being an "offshore place" whereas the Commonwealth's position would have most of it as being an "onshore place". This point is relevant for operation of the future act provisions of the NTA. See for example Subdivs M and N of Div 3, Pt 2.

Another issue concerned whether, at common law, any person can have exclusive possession of the seas below the high water mark. The primary argument relied upon the well-established common law public right to fish and navigate across the open seas, said to have its source in the Magna Carta.

Historically, particular "estates" of land (and water) were held by particular groups whose membership was determined by patrilineal descent – commonly described as patrilineal descent groups. As has occurred elsewhere in Australia, various changes have occurred in the composition of such groups and in the daily relevance of individual estates and descent groups. Such changes have been brought about as a consequence, for example, of European interference, relocation of Aboriginal people, and death of male members of the descent group without leaving male heirs – giving rise to questions of adoption, succession, fusion and so on. A major question then was whether the common law accommodates such changes, and if so whether (and what) native title is held by the broader group or by several smaller groups whose rights are confined to and/or focused upon the areas held by their particular ancestors.

Detailed submissions were made regarding the effect of legislative and administrative regimes, particularly in relation to the management of fisheries, and as to whether these had an extinguishing effect or were simply regulatory. In this regard Brennan J's apparent acceptance in *Mabo (No 2)* of what was said by the Supreme Court of Canada in *R v Sparrow*[28] was subject of argument.

Decision at first instance[29]

In his judgment Olney J held that communal native title exists in relation to the sea and sea bed, at least to the 12 mile limit of the

[28] [1990] 1 SCR 1075.

[29] *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370 (*Yarmirr*). See "The Croker Island Case – A Landmark Decision in Native Title" by Neville Henwood (1998) 3 NTN 146; "Croker Island – Final Orders and Appeals" by Graham Hiley QC (1998) 3 NTN 177; and "Native Title and 'Sea-Country'" by John Basten QC (1998) 3 NTN 196.

territorial sea.[30] However, his Honour held that this was a consequence of the NTA[31] – leaving open the question as to whether native title was recognisable at common law prior to the commencement of the NTA.

His Honour also determined that:

- the territorial limits of the Northern Territory did not extend beyond the low water mark and river closing lines, apart from bays and gulfs, Mission Bay being the only one within the claimed area;[32]
- low water mark means mean low water;[33]
- "usufructuary" rights are capable of recognition and protection without the need to possess or occupy the land and waters to which those rights relate;[34]
- native title can only be understood as a combination of rights and interests;[35]
- although a system of permission operates as between the applicants and perhaps other Aboriginal people the evidence did not support a finding that the applicants enjoy exclusive possession, occupation, use and enjoyment of the waters;[36]
- there was no evidence to support any native title right of control over any of the resources of the sub-soil, and any right to control the resources of the sea would necessarily be co-extensive with the right to control access, which was not established;[37]
- the evidence did not support any native title rights to trade in the resources of the sea;[38]
- rights to protect places of importance and to safeguard cultural knowledge were established;[39]
- a right of exclusive possession would be inconsistent with the right of innocent passage recognised in international law, and with the public right of navigation and public right to fish recognised by the

[30] Paragraphs 30-32.
[31] Paragraphs 35-39 and 130.
[32] Paragraphs 40-51.
[33] Paragraphs 28-29.
[34] Paragraph 87.
[35] Paragraph 100.
[36] Paragraphs 101-115.
[37] Paragraphs 116-118.
[38] Paragraphs 119-122.
[39] Paragraphs 123-127.

common law, and therefore a right to exclusive possession could not be recognised by the common law;[40]

- the fisheries legislation and its associated administrative regime merely regulates and does not extinguish any non-exclusive, non-commercial native title fishing rights – rather, such native title rights are capable of co-existence with the regulatory regime;[41]
- there was no evidence to suggest any traditional law or custom in relation to minerals, and no native title to minerals could be recognised; in any event beneficial ownership of minerals has been vested in the Crown thereby precluding any survival of native title to minerals.[42]

Decision of the Full Court[43]

A majority of the Full Court (Beaumont and von Doussa JJ) upheld the various decisions of Olney J and dismissed both appeals. Merkel J agreed with most of the conclusions of Olney J but would have allowed the appeal and remitted it for further hearing. This was partly because his Honour considered that the trial judge should have considered various parts of the claim area (the sea) as at the date when each became subject of sovereignty, and partly because he thought that the applicants should have the opportunity of adducing evidence of and contending for an exclusive fishery which in his view would not be inconsistent with the public right to fish.

There was a significant difference of approach between the majority on the one hand and Merkel J on the other as to the meaning of "native title" as defined in s 223(1) of the NTA and consequently the proper approach to be taken at trial. Whilst these differences were not relevant to the ultimate outcome of the High Court appeal they are relevant to the High Court appeal in the *Yorta Yorta* matter.[44]

Decision of the High Court[45]

The decision of the Full Federal Court was subject of appeal by both the Commonwealth and by Yarmirr.

[40] Paragraphs 132-135.
[41] Paragraphs 137-156.
[42] Paragraph 158.
[43] *Commonwealth v Yarmirr* (1999) 101 FCR 171; 168 ALR 426 (*Yarmirr FC*). See article in 4 NTN 109.
[44] See later discussion about the *Yorta Yorta* appeal.
[45] *Commonwealth v Yarmirr* (2001) 75 ALJR 1582 (*Yarmirr HC)*. See too, article "*Native Title Offshore: Commonwealth v Yarmirr*; *Yarmirr v Northern Territory*" by Dr Lisa Strelein, Research Fellow, Manager, Native Title Research Unit, Australian Institute of Aboriginal & Torres Strait Islander Studies 5 NTN 78.

The main issues raised by the Commonwealth in its appeal related to the fundamental question as to whether native title is capable of recognition beyond the common law limits of the States and Territories, in general terms, the low water mark; alternatively, whether it is recognisable beyond the coastal waters of Australia, in general terms, the three mile limit. Another ground of appeal related to the level of proof and the kind of inferences that can be drawn in relation to the geographic areas to which the traditional connection is said to extend.

The main issue subject of the appeal by Yarmirr concerned the question of exclusive native title rights in the sea. Yarmirr challenged the decisions in the courts below to the effect that exclusive rights cannot be recognised primarily because they are inconsistent with the important well established common law public rights to fish and to navigate and with the international right of innocent passage. She contended that she and those who she represents have native title rights of exclusive use and enjoyment of the sea claimed. She also challenged the trial judge's conclusions that the various laws and customs that he found to exist do not apply to non-Aboriginal people and for that reason also do not confer exclusive rights.

The High Court dismissed both appeals, by majority. A fundamental starting point was the requirement in s 223(1)(c) of the NTA that the native title rights and interests which are claimed are "recognised by the common law of Australia". The majority held that the "question about continued recognition of native title rights requires consideration of whether and how the common law and the relevant native title rights and interests could co-exist", and that the common law will "recognise" such asserted native title rights "by giving effect to those rights and interests owing their origin to traditional laws and customs which can continue to co-exist with the common law the settlers brought".[46]

The majority rejected contentions to the effect that the common law could only recognise native title over areas to which the common law normally applies, and rejected the contention that "radical title" is a necessary prerequisite for native title to exist.[47]

However the majority held that the common law would not recognise exclusive rights and interests of the kind claimed because a fundamental inconsistency does exist between them and the common law public rights of fishing and navigation and the international right of innocent passage.[48] The court also declined to interfere with Olney J's findings of fact which were to the effect that

[46] Paragraph 42.
[47] See paras 44-51 and 76.
[48] See paras 61, 76, 94 and 98.

the evidence did not support the claimants' contentions that they were entitled under traditional law and custom to exclude anyone and everyone from the claim area.[49]

The court also dismissed the Commonwealth's challenge to Olney J's inferences as to the claimants' connection to a particular part of the claim area about which there was little if any evidence; again for the reason that this was a finding of fact with which an appellate court should not lightly interfere. The majority agreed with the majority of the Full Court[50] that "the primary judge was in a much better position to assess this evidence than an appellate court".[51]

The decision of the High Court in *Yarmirr HC* should enable the resolution of most, if not all, of the 130 or so other sea claims which have been lodged. These include two cases – *Daniels*[52] and *Lardil* [53] – which have already been heard by the Federal Court but where judgment had been reserved pending the High Court's decision in *Yarmirr HC*.[54]

Ward[55]

The Miriuwung Gajerrong people lodged their application for a determination of native title in April 1994. It was referred to the Federal Court following failure of mediation in January 1995. The claim area concerned a large area of land in the East Kimberley region of Western Australia and extending into the Northern Territory. The land included the township of Kununurra, surrounding pastoral stations, as well as the area the subject of the Ord River Irrigation Scheme. The claim area also included the land subject of an Aboriginal owned pastoral lease and the Keep River National Park in the Northern Territory.

Two further groups of applicants for native title were later joined – one being a group comprising the members of three Miriuwung "estate groups" located in the Keep River area in the Northern Territory; the other, the Balangarra people who claimed native title over Lacrosse Island in the Cambridge Gulf. The respondents included the Commonwealth, Western Australia and the Northern

[49] See paras 86-93.
[50] *Yarmirr FC* at paras 267 and 633-640.
[51] *Yarmirr HC* at para 79.
[52] *Daniels (Ngarluma) and Monadee (Yinjibarndi) & Others v Western Australia & Ors*: WAG 6017 of 1996, WAG 127 of 1997 and WAG 6256 of 1998 – Nicoholson J (*Daniels*). See references at 5 NTN 138.
[53] *Lardil Peoples v Queensland*: QG 207 1997 – Cooper J (*Lardil*). See references at 5 NTN 139.
[54] Both cases have now been further reserved at the request of relevant parties pending the outcome of *Ward HC*.
[55] *Ward v Western Australia* (1998) 159 ALR 483 (*Ward*). See "Brief Summary of Miriuwung Gajerrong Decision" by Greg McIntyre, Barrister, Perth (1998) 3 NTN 194; and "Miriuwung Gajerrong Native Title Decision" by Harriet Ketley, Perth (1999) 4 NTN 5.

Territory, and over 100 other parties including mining, pastoral, local government, agricultural and business interests.

Numerous judicial review proceedings, directions hearings and associated litigation occurred before the substantive trial got under way. These included questions as to whether the extinguishing effect of certain pastoral leases should be dealt with as a preliminary legal issue;[56] gender restricted oral evidence;[57] and interlocutory applications brought by the native title claimants attempting to protect the subject matter of their application.[58]

Evidence was led from more than 50 claimants during the dry season in 1997 in a variety of places in the East Kimberley. On five occasions gender-restricted evidence was given. Historical evidence was provided, partly from diaries that later formed the basis of Mary Durack's works.[59] Anthropological, linguistic and archaeological evidence was also led. A substantial body of evidence was tendered showing the tenure history of the claim area as well as evidence of non-Aboriginal use of land and water within the claim area.

Decision at first instance

As well as extracting and applying common law principles from *Mabo (No 2)* the court (Lee J) also relied upon Canadian jurisprudence[60] in defining the elements of proof of native title.

Lee J held that native title will be proved if:

- at the time of sovereignty an indigenous community had an entitlement to use or occupy the land, arising from a locally recognised particular relationship, or connection, between that community and the land;[61]
- there is a currently identifiable group or community with ancestral connections to the community in occupation of the land at the time of sovereignty. It is not necessary to prove "biological descent" in the narrow sense – it is sufficient that the applicants show that a reasonable number of their ancestors probably occupied the land at the relevant time;[62]

[56] *Ward v Western Australia* (1995) 40 ALD 250.
[57] *Western Australia v Ward* (1997) 145 ALR 512.
[58] See, for example, *Ward v Minister for Land*, (unreported, 21 December 1995, Nicholson J).
[59] Namely, "Kings in Grass Castles" and "Sons in the Saddle".
[60] In particular the decisions of *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193 and *R v Van der Peet* [1996] 2 SCR 507.
[61] *Ward v Western Australia* (1998) 159 ALR 483 at 500-501.
[62] Ibid at 503 quoting and following McEachern CJ BC in *Delgamuukw v British Columbia* (1991) 79 DLR (4th) 185 at 282.

- the connection with the land has been substantially maintained by a community which acknowledges and observes, as far as practicable, laws and customs based on the traditional practices of the original ancestors – "an unbroken chain of continuity" did not have to be established.[63]

Lee J held that despite much interference as a result of European impact the necessary degree of connection with the claim area has been maintained by the applicants and their ancestors. Their continued adherence to the traditional laws and customs of their ancestors was demonstrated by many features of their society which included the skin system, ceremonial and ritual knowledge and practices, knowledge and transmission of dreaming stories and associated obligations to care for country, hunting, gathering of bush food and medicines, and the use of natural resources.[64]

The nature of the native title holding group was a major aspect of this case, as it formed the main basis of dispute between the three applicant groups. The first applicants contended that native title over the whole of the claim area was held by the Miriuwung and Gajerrong community, that is a "language-based" or "tribal grouping". The second applicants argued that the appropriate native title holding group was comprised of the narrower "estate groups". The third applicants' claim was on behalf of a "coenobium of common ancestors".

His Honour held in favour of the first applicants on the basis that traditional laws and customs come from the broader community, whose membership is defined by possession of language and, moreover, by self identification and community acceptance of such identification. How the occupying societies operated was not relevant.[65]

Lee J considered the question of extinguishment at length. Perhaps his most significant conclusion was that native title could not be partially extinguished. His Honour rejected the proposition that native title comprises a bundle of rights, some of which could be extinguished leaving others extant.[66]

He held that the onus of proof of extinguishment of native title rests upon the party propounding it.[67]

His Honour identified and applied three conditions which the British Columbia Court of Appeal in *Delgamuukw*[68] said had to be satisfied:

[63] *Ward* at 501-2.
[64] Ibid at 535-539.
[65] Ibid at 540.
[66] Ibid at 508-510.
[67] Ibid at 552-3.
[68] *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470 at 670-2.

- that there be a clear and plain expression of intention by parliament to bring about extinguishment;
- that there be an act authorised by the legislation which demonstrates the exercise of *permanent* adverse dominion as contemplated by the legislation;
- unless the legislation otherwise provides, *actual use* must be made of the land by the holder of the relevant tenure – use which is permanently inconsistent with the continued existence of Aboriginal native title, not merely a temporary suspension thereof.[69]

Needless to say the test applied by Lee J was stringent, and resulted in relatively few findings of extinguishment.

One example of the application of such a test is his Honour's finding that native title is not extinguished by the flooding of land for the creation of Lake Argyle, notwithstanding the consequent inability of anyone to exercise most of the rights that were exercised before the flooding.

His Honour held that the grant of a pastoral lease is not the creation of a permanent interest in respect of the land, and that it is unlikely that an act by a pastoral lessee will amount to actual use of land in a manner permanently inconsistent with the continued existence of native title.[70]

With respect to reserves, native title was only extinguished in those areas where the evidence established use involving a permanence or intensity of development such as the construction of town amenities and a telephone repeater station. Extinguishment was limited to that particular portion of the reserve in which the development has occurred.

His Honour held that the relevant legislation merely regulated the exercise of native title rights, it did not extinguish native title.

Decision of the Full Federal Court[71]

Both Western Australia and the Northern Territory filed comprehensive notices of appeal, Western Australia alleging some 92 appealable errors and the Northern Territory 45. They attempted to have a number of the issues remitted straight to the High Court but this application was refused. The second applicant also appealed

[69] Ward at 508.
[70] Ibid from 553 citing *Wik*, particularly per Gaudron J at 166 and Gummow J at 203.
[71] *Western Australia v Ward* (2000) 99 FCR 316; 170 ALR 159 (*Ward FC*). See articles at 4 NTN 142, 149 and 151. The determination is reproduced at 4 NTN 172.

against Lee J's rejection of their contentions that they held native title to the land in the Keep River National Park on an "estate group" basis. The Northern Territory supported the latter contention.

The Full Court of the Federal Court by majority (Beaumont and von Doussa JJ) by and large dismissed the appeals of the State and the Northern Territory in relation to native title, but upheld many of their appeals in relation to extinguishment. In relation to native title they made some important comments particularly in relation to the questions of descent, mutual recognition and continuing connection.[72]

The majority decision dealt with numerous issues relating to extinguishment of native title.[73] The judgment extracted relevant principles of extinguishment of native title from previous High Court decisions, mainly *Mabo*, *Wik* and *Fejo*. Their Honours referred to two main tests – the "inconsistency of incidents" test and the "operational inconsistency" test. The majority disagreed with the approach that had been taken by the trial judge, particularly his strong reliance upon Canadian authority. The majority also held that native title should be regarded as a "bundle of rights" and thus is susceptible of partial extinguishment.

The majority dealt with questions of extinguishment by pastoral leases, holding that in the case of a number of Western Australian pastoral leases which were "enclosed" or "improved", native title had been completely extinguished. The court also considered the extinguishing effect of the grants of permits to occupy, various reserves, the Ord Irrigation Project and acquisition and use of land for that project.

In relation to minerals, the majority held that both the Western Australian and Northern Territory mining legislation had the effect of vesting absolute property in minerals and petroleum in the Crown as a result of which native title in those resources was completely extinguished. The majority also held that a number of Western Australian mining leases completely extinguished native title.

The majority also dealt with ss 47, 47A and 47B of the NTA – sections which, in certain circumstances, undo the extinguishing effect of earlier tenures.

Appeals to the High Court

There were four appeals involved, one by each of Ward, Western Australia, Ningarmara and the Northern Territory. There was some

[72] See article by Brigita White "Western Australia v Ward – Proof of Native Title" at 4 NTN 149.
[73] See article by Kate Glancy "Summary of Full Court Decision *WA v Ward* – Extinguishment" at 4 NTN 142.

overlapping of grounds of appeal. Numerous issues were involved in the appeal, relating to both native title and extinguishment. Issues included the bundle of rights/partial extinguishment issues, various pastoral lease issues, the extinguishing effect of the vesting of minerals and of mineral leases themselves, the effect of the *Racial Discrimination Act* upon post-RDA grants and the operation of s 47B.

Special leave was not granted in respect of a number of grounds which were sought to be raised on appeal.[74] However many of these grounds may well be further agitated before and disposed of by the Full Court upon remitter to the High Court, because they relate to findings and conclusions dependent upon other findings which were subject of appeal.

A number of issues were not subject of appeal and can thus be taken as having been finally decided by the Full Court's decision. These include the following:

- onus of proof of extinguishment;[75]
- extinguishment by certain permits to occupy;[76]
- the presumed validity of certain pastoral leases notwithstanding the absence of evidence of proper application for them;[77]
- extinguishment of exclusive rights – by the dedication of a national park,[78] and by the imposition of conservation controls;[79]
- extinguishment of the native title right to take fauna in certain nature reserves;[80]
- extinguishment by the grants of a conditional purchase lease,[81] a particular special lease under s 152 of the *Land Act* 1898 (WA),[82] a lease for business and garden area[83] and a lease for a tourist facility.[84]
- extinguishment of exclusivity by the grants of various grazing leases;[85]
- the presumption that certain leases were validly issued.[86]

[74] See "High Court to Hear *Yarmirr* and *Ward* Appeals" by Graham Hiley QC 4 NTN 178.
[75] *Ward FC* para117.
[76] Paragraph 373. See too *Ward HC* paras 346-349.
[77] Paragraphs 455, 460, 463.
[78] Paragraph 446.
[79] Paragraphs 506-8.
[80] Paragraphs 504-5. See too *Ward HC* paras 265-268.
[81] Paragraph 608.
[82] Paragraph 614. See too *Ward HC* paras 351-357.
[83] Paragraph 634.
[84] Paragraph 647.
[85] Paragraphs 627, 641 and 654-5.
[86] Paragraph 611.

Decision of the High Court[87]

On 8 August 2002 the High Court delivered its reasons for decision. The court allowed each of the appeals, set aside the main orders originally made by the Full Court, and the whole of the orders and determination made by it on 11 May. The court remitted the matter to the Full Court for further hearing and determination.[88]

It will be necessary for the Full Court (or perhaps a single judge upon further remitter by the Full Court) to consider a large number of questions raised by the High Court and for that purpose to make further findings of fact. Indeed, the pleadings will probably have to be amended before many of the further questions can be dealt with. The court stressed the need for the particular traditional laws and customs and the particular kinds of native title rights and interests alleged to be identified in order that essential findings of fact can be made,[89] both for the purposes of satisfying the requirements of s 225(b) of the NTA and for the purposes of applying relevant extinguishment principles.[90] The court alluded to the possibility of parties tendering further evidence in the course of such further hearings.[91] The court concluded that there should be no order as to costs of the appeals in the High Court, and left it for the Full Court to determine questions of costs in the Federal Court.[92]

At the end of their joint judgment Gleeson CJ, Gaudron, Gummow and Hayne JJ set out a convenient summary of some of the main conclusions that they had reached.[93] The court stressed the need for primary regard to be had to the NTA and (in relation to validation and extinguishment) the relevant complementary State or Territory legislation.[94]

In relation to the definition of "*native title*" in s 223(1) of the NTA the court paid particular attention to paras (a) and (b), stressing the need for the particular traditional laws and customs alleged and the particular native title rights and interests said to be derived from those laws and customs, to be identified with precision.[95] The court agreed that native title is more in the nature of a "bundle of rights" and is not an "underlying title to land" as Lee J had held at first

[87] *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory; Ward v Crosswalk Pty Ltd* [2002] HCA 28, 8 August 2002 (*Ward HC*)
[88] *Ward HC* para 469.
[89] *Ward HC* paras 18**,** 21, 29, 48-49, 51-52, 64, 86, 93-95, 570 and 575.
[90] *Ward HC* paras 22, 29, 94, 195 and 589.
[91] *Ward HC* para 470. This is a matter for the Full Court having regard to its powers under s 27 *Federal Court of Australia Act* 1976 (Cth).
[92] *Ward HC* para 471.
[93] See *Ward HC* para 468.
[94] *Ward HC* paras 2, 14-25 and 65-71.
[95] *Ward HC* paras 18**,** 21, 29, 48-49, 51-52, 64, 86, 93-95, 570 and 575.

instance.[96] The court expressed the view that it is not appropriate to use terminology such as "possession" or "occupation", as the Full Court had done in its determination, in circumstances where the native title is not "exclusive" (that is of a kind commonly alleged by use of the words "possession, occupation, use and enjoyment to the exclusion of all others" or "as against the whole world").[97] Nor, in such cases, is it appropriate to speak of controlling access to land or of making decisions about use of land.[98] Similarly, concepts such as rights to "speak for country" and rights to be able to confer or withhold permission to access or use the land, are only relevant to "exclusive" native title, not to native title rights of a lesser kind.[99]

The court observed that the native title rights and interests protected by the NTA are those which have a connection with land or waters.[100] Consequently, "insofar as claims to protection of cultural knowledge go beyond denial or control of access to land or waters, they are not rights protected by the NTA".[101]

In order to satisfy the connection requirement of s 223 (1)(b) it is not necessary that there be evidence of some recent use of the land or waters,[102] nor that a particular right has been exercised.[103] However the absence of recent use or of the exercise of rights may well be quite relevant. Conversely mere occupation of the land by the applicants or their predecessors does not in itself establish the existence or nature of traditional law or custom or of native title.[104]

As to the meaning and effect of s 223 (1)(c) the majority, consistently with their approach in *Yarmirr HC,* concluded that it encapsulates the concept of extinguishment.[105] Otherwise it would appear that their Honours have preferred to leave further discussion about this paragraph for their decision in *Yorta Yorta HC.*

As to *extinguishment* the court observed that the NTA provides that there can be partial extinguishment or suspension of native title rights.[106] Their Honours stressed that "questions of extinguishment first require identification of the native title rights and interests that are alleged to exist".[107]

96 *Ward HC* paras 82-95.
97 *Ward HC* paras 51 and 14.
98 *Ward HC* paras 53 and 49. See too para 2.
99 *Ward HC* paras 48-53 and 88-95. See too para 592.
100 *Ward HC* para 18.
101 *Ward HC* para 468 (7). See too paras 57-61. Cf Kirby J at para 580.
102 *Ward HC* para 468 (7) and paras 62-64. Cf paras 649-650.
103 *Ward HC* para 465.
104 *Ward HC* para 93.
105 *Ward HC* paras 20-21.
106 *Ward HC* para 468(3). See too paras 9, 26-29 and 76.
107 *Ward HC* para 468(4). See too paras 83-95.

The court reiterated that the relevant question regarding extinguishment is whether and to what extent the rights granted to third parties or asserted by the executive are inconsistent with the native title rights and interests alleged: "That is an objective enquiry which requires identification of and comparison between the two sets of rights."[108] The court endorsed the Full Court's reference to "the inconsistency of incidents test".[109] The use of the term "operational inconsistency" and reference to activities on the land is apt to mislead, except insofar as it focuses attention upon the particular right pursuant to which the land is used.[110]

The definition of "public work" and the effect of s 251D of the NTA was considered but referred back to the Full Court for findings of fact.[111]

Grants of pastoral leases in both Western Australia and the Northern Territory extinguished native title rights to control access to or the use to be made of land. But the grants did not confer rights of exclusive possession. The present findings of fact did not enable the High Court to determine what if any native title rights interests were not inconsistent with those conferred under the pastoral leases and thus were not extinguished.[112]

Vestings of land under s 33 of the *Land Act* 1933 (WA*)* in a body or person passed the legal estate in fee simple and thereby completely extinguished native title in that land. This was the case in respect of vestings both before and after the RDA.[113] Similarly, the vesting of "Works" under the *Rights in Water and Irrigation Act* (WA) extinguished all native title.[114] Resumptions and consequential vestings in the Crown under the *Public Works Act* (WA) were also held to completely extinguish native title.[115] This also applied to such vestings after the RDA.[116]

Minerals and petroleum in both Western Australia and the Northern Territory have been vested in the Crown, with the consequence that any native title right or interests in minerals or petroleum that might otherwise have existed was extinguished.[117] However the High Court set aside the Full Court's conclusions about the extinguishing effect of the grant of mining leases, holding that

[108] *Ward HC* para 78.
[109] *Ward HC* para 79 referring to *Ward FC* at para 81. See too *Ward HC* para 82.
[110] *Ward HC* para 468(5) and paras 78 and 149-151.
[111] *Ward HC* para 468 (9) and paras 153-156.
[112] *Ward HC* para 468 (10) and paras 157-170-177-192-194-195 re WA leases; para 468 (24) and paras 396-417 and 419-425 re NT leases.
[113] *Ward HC* para 468 (14). See too paras 229-241-244-249-256-261 and 274.
[114] *Ward HC* para 468 (15). See too paras 262-273.
[115] *Ward HC* para 468 (16). See too paras 199, 203-204-205, 829-832.
[116] *Ward HC* para 468 (16). See too paras 278-280 and 833.
[117] *Ward HC* paras 383-384 and 575.

whilst such grants would have extinguished certain rights such as rights to be asked permission to use or have access to land they did not necessarily extinguish all native title rights. As they held in relation to pastoral leases, the court held that it is necessary for further factual findings to be made before the extinguishing effect of mining and petroleum tenements can be determined.[118] The same conclusion was reached in regard to the Argyle mining lease and a general-purpose lease. [119] The court also considered the possible operation of s 23B (2)(c)(vii) and s 245(3), again pointing to the need for further factual findings.[120] The court also considered the possible effect of the RDA upon mining leases granted after its commencement and concluded that such mining leases would not have been invalid and thus would not be "past acts".[121]

The court held that native title was totally extinguished by the grant of a permit to occupy land under the *Land Act* 1898,[122] the grants of special leases under s 116 of the *Land Act* 1933,[123] and pre RDA grants of leases of reserved land under s 32 of the *Land Act* 1933 and post-RDA grants of such leases to persons other than the Crown or a "statutory authority".[124]

The court upheld the conclusions of the Full Court to the effect that prohibitions against hunting fauna and gathering plants imposed by by-laws made prior to the RDA extinguished all native title,[125] and that such by-laws made after the RDA were category D past acts.[126]

Certain other acts were held not to necessarily completely extinguished native title. These include the vesting of rights to use and to the flow and control of water,[127] the mere resumption of land under s 109 of the *Land Act*,[128] and the reserving of land.[129]

The court also considered certain leases granted to the Conservation Land Corporation (NT) subsequent to the RDA. The court concluded that those leases conferred exclusive possession[130]

[118] *Ward HC* para 468 (17). See too paras 296-310 and 341.
[119] *Ward HC* para 468 (18). See too paras 322-342.
[120] *Ward HC* para 334.
[121] *Ward HC* para 321.
[122] *Ward HC* para 468 (19) See too paras 346-349.
[123] *Ward HC* para 468 (20) See too paras 351-357.
[124] *Ward HC* para 468 (21). See too paras 358-375.
[125] *Ward HC* para 265.
[126] *Ward HC* para 268.
[127] *Ward HC* para 263.
[128] *Ward HC* para 468 (11). See too paras 201-208.
[129] *Ward HC* para 468 (12). Reservations pre RDA effected partial extinguishment (paras 209-221) and reservations post RDA merely suspended relevant native title rights for so long as the land remained reserved (para 222).
[130] *Ward HC* paras 433, 439.

but were invalidated by the RDA to the extent that they affected native title, as a consequence of which they were past acts.[131] The Conservation Land Corporation (NT) is a "statutory authority of the Crown".[132] Thus, the leases were category D past acts,[133] and are not previous exclusive possession acts because of the effect of the Northern Territory equivalent of s 23B(9A).[134] The vesting of the Keep River National Park in the Conservation Land Corporation (NT) did not vest any native title rights and interests and thus did not extinguish or otherwise affect them.[135] The subsequent adoption of a plan of management was held not to have effected any such extinguishment or impairment either.[136]

The court gave detailed consideration to the meaning and effect of the RDA, particularly in the context of s 10 rendering certain acts invalid on account of the existence of native title, and consequently the operation of the past acts regime.[137]

The court also referred to other relevant provisions in the NTA. These include the power to revoke or vary a determination (for example in circumstances where relevant connection has ceased),[138] the "other interests" provisions in s 225(c),[139] and the relationship requirements of s 225 (d).[140]

In summary, the main conclusions of the majority are to the effect that:

- particular traditional laws and customs and native title rights and interest must be identified;
- native title has been wholly extinguished in respect of land subject of freehold, public works or other previous exclusive possession acts, minerals and petroleum, and various other grants and vestings;
- native title has been partially extinguished (probably significantly) as a result of the granting of pastoral leases and mining leases, and (probably to a lesser extent) as a result of the creation of reserves.

[131] *Ward HC* para 441.
[132] *Ward HC* paras 442-447.
[133] *Ward HC* paras 442-448.
[134] *Ward HC* paras 450-453.
[135] *Ward HC* paras 458-460.
[136] *Ward HC* paras 455-456. See generally para 468 (25).
[137] *Ward HC* para 468 (6). See too paras 5, 98-106-107-108-133.
[138] *Ward HC* para 32.
[139] *Ward HC* paras 50 and 386-8 concerning the need to record the public right to fish.
[140] *Ward HC* paras 50, 193-194 and 308.

Yorta Yorta[141]

In February 1994 the Yorta Yorta Aboriginal community applied for a determination of native title in respect of public land and water, mainly State forests and reserves, in northern Victoria and southern New South Wales, including the Murray and Goulburn Rivers, and other waterways and lakes. The application was accepted by the Native Title Registrar in May 1994 and was subject of mediation from September 1994 until May 1995 when it was referred to the Federal Court.

The claim was originally, and continues to be, one including exclusive possession, occupation, use and enjoyment of the land, waters and natural resources therein. Needless to say it attracted over 500 respondents including the States of Victoria, New South Wales and South Australia, the Murray Darling Basin Commission, Murray Irrigation Limited, six shire councils, various recreational user groups, numerous licence holders and the New South Wales Aboriginal Land Council.

The hearing occupied some 114 sitting days during which time more than 200 witnesses gave evidence and hundreds of other documents, including witness statements, were tendered. The court conducted much of the hearing at various locations within or near the claim area.

Decision at first instance

The court (Olney J) found that by the late 19th century, the lives of those Aboriginal ancestors through whom the applicants sought to establish their native title had been so altered and disrupted by the effects of European settlement, that they were no longer in possession of the tribal lands and had ceased to observe relevant laws and customs which might otherwise have provided a basis for the claim.[142] The court applied the dictum of Brennan J in *Mabo (No 2)*[143] and found that the "tide of history" had washed away any real acknowledgment of traditional laws and any real observance of traditional customs, such that the foundation of native title had disappeared.[144] Although Olney J found that members of the applicant group had made genuine efforts to revive the lost culture of their ancestors, he held that native title rights and interests once lost are not capable of revival.[145]

[141] *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [1999] 4(1) AILR 91 (*Yorta Yorta*). See article, "The *Yorta Yorta* decision: A case of the 'tide of history'" by Vance Hughston (1999) 4 NTN 2.
[142] Paragraph 121 - see too paras 36, 63 and 118.
[143] Paragraph 60.
[144] Paragraph 129.
[145] Paragraph 121, again citing *Mabo (No 2)* per Brennan J at 60.

The court examined the various elements comprised in the definition of "native title" in s 223(1) of the NTA and identified in *Mabo (No 2)*.[146] These include the need for the claimants to prove descent from those who occupied the claim area prior to sovereignty, the acknowledgment and observance of traditional laws and customs, and substantial maintenance of traditional connection with the land by the descendants of those original occupants, including the present claimants.

Much of the case depended upon proof of historical facts extending back as far as 1788. The main source of evidence from which inferences could be drawn regarding the identity of the original occupiers and the content of their traditional laws and customs, was the work of Edward Curr, who had lived in part of the area for a decade or so in the 1830s. The court also relied heavily upon mission records and records of others who were present at the old Maloga Mission which was located near what is now Cummeragunja. It was during this time, in the 1880s that Aboriginal people were brought to the Mission from various areas and were discouraged from speaking their language and maintaining other traditional customs. It was largely this evidence that formed the basis of the court's conclusion that by that time the descendants of the original ancestors had lost whatever traditional association was necessary to maintain native title.

Olney J also examined what the claimants asserted were their present day laws and customs.[147] His Honour observed that much of the contemporary activity by members of the applicant group was concerned with the protection of Aboriginal archaeological heritage sites (such as scarred trees, oven mounds and middens, and areas containing Aboriginal remains), and protection and responsible management of the environment. The court found that none of those activities represented evidence of a continuation of the acknowledgment of traditional laws or observance of traditional customs of the original Aboriginal inhabitants of the area.

The court analysed a claim which is often advanced as supporting rights of exclusive possession – namely a need to obtain permission from the relevant Aboriginal people before entering upon, or using the resources of, the claim area. The court found that if there ever was such a custom it was no longer practised. Nor had there been in recent times observance of other traditional practices such as initiation or the performance of other ceremonial activities which, in

[146] Particularly the judgment of Brennan J with whose reasons Mason CJ and McHugh J agreed, and with whose reasons Dawson J (dissenting in *Mabo (No 2)*) subsequently adopted in *Western Australia v Commonwealth* (1995) 183 CLR 373 at 492.
[147] Paragraphs 122-128.

other Aboriginal societies, are indicative of spiritual attachment to the land.[148]

Although there was considerable evidence, particularly documentary, advanced in relation to extinguishment of native title, his Honour did not consider it necessary to deal with extinguishment because of his conclusion that native title did not exist, indeed had been "washed away" late last century. Nor was it necessary for the court to consider other questions such as whether there can be native title to flowing river water, or to underground minerals, and if so whether such native title could be of an exclusive kind.

Decision of the Full Federal Court[149]

The primary argument advanced by the claimants was that his Honour applied the wrong test and started at the wrong end – that is to say that rather than looking first to ascertain the identity of those who occupied the land at the time of sovereignty and examining their traditional laws and customs, his Honour should have commenced the exercise by examining the laws and customs asserted by the contemporary claimants and then working backwards to ascertain whether they are based on laws and customs acknowledged and observed at the time of sovereignty.

The arguments on appeal also involved consideration of the meaning, effect and application of s 223, the nature and extent of connection which must be established, and the weight which should be given to the various forms of evidence tendered. The latter included the writings of Edward Curr and a Petition sent in 1891 to the Governor on behalf of a number of Aboriginal people living at Maloga Mission, some of whom were ancestors of the applicants.

The appeal was dismissed by majority (Branson and Katz JJ; Black CJ dissenting).[150]

Much of the judgments were concerned with the statutory definition of native title in s 223 of the NTA and in particular the ambit of s 223(1)(c) and the meaning of the word "traditional".

The majority concluded that although s 223 defines native title, the effect of s 223(1)(c) is to incorporate the concept as informed by the common law, including questions of recognition and extinguishment.[151] All three judges agreed that native title must have

[148] Paragraph 127.
[149] *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [2001] FCA 45; 180 ALR 655 (*Yorta Yorta FC*).
[150] See "Note of *Yorta Yorta Aboriginal Community v Victoria*" by David Ritter (2001) 5 NTN 2.
[151] Paragraph 108; cf Beaumont & von Doussa JJ in *Yarmirr FC* at paras 58-61.

its basis in laws and customs which can be properly characterised as traditional, and that these laws and customs can change with time.[152]

The majority disagreed with the contention that the test was to be applied purely from the point of view of those currently claiming to be acknowledging laws or observing customs. Rather the test is principally an objective test having regard to whether the law or custom has in substance been handed down from generation to generation; that is whether it can be shown to have its roots in the tradition of the relevant community which possessed the rights and interests in the particular land at the time of the acquisition of sovereignty by the Crown.[153] The majority noted that the precise nature of the rights and interests that constitute a native title may change over time and that the present day content of a native title is to be ascertained by reference to the traditional laws and customs as currently acknowledged and observed. However because such laws and customs must be "traditional" it would be helpful to attempt to ascertain the nature of the traditional laws and customs acknowledged and observed at the time of sovereignty, although not fatal if this could not be achieved.[154]

The majority concluded that a communal native title can exist only where:

- the native title rights and interests are possessed under traditional laws currently acknowledged and traditional customs currently observed by the community;
- the indigenous claimants by those laws and customs have a current connection with the land or waters;
- the native title rights and interests are such that the common law will be prepared to recognise them;
- the native title claim has not been "extinguished":
  - (i) by the positive exercise of sovereign power – "extinguishment" as that term is usually used;
  - (ii) by the cessation of the acknowledgment and observance of the traditional laws and customs upon which the native title has been founded – sometimes referred to as "abandonment"; or
  - (iii) by a loss of connection with the land.[155]

The majority considered that there was more than adequate evidence to support the trial judge's conclusion to the effect that the relevant indigenous community had lost its character as a traditional

[152] Paragraphs 36-43 and 122.
[153] Paragraphs 126-128.
[154] Paragraphs 140 and 144-5.
[155] Paragraph 68.

community, and this finding was not one which should be disturbed on appeal.[156] They also noted that dispossession will not inevitably lead to a community ceasing to acknowledge its traditional laws or observe its customs and thereby losing its connection with land. Whether that has occurred in any particular case will be a question of fact.[157]

The dissenting judge, Black CJ, preferred to follow the approach advanced by the applicants and begin the process by considering the laws and customs presently acknowledged and observed and then considering whether they are traditionally based. His Honour considered that the trial judge adopted quite a different approach and made findings about the past before progressing forward. Black CJ was particularly critical of his Honour's use of historical material in the course of following this approach.[158] Further, assuming native title is to be seen as a bundle of rights, Black CJ considered that some rights, such as rights of exclusive possession, may well have ceased without removing all rights, such as a usufructuary right. His Honour considered that the trial judge applied a test that was too restrictive in its approach as to what is traditional and that he failed to deal with relevant aspects of the evidence. He disagreed with the majority's view that Olney J's finding was a finding of fact that should not be disturbed by an appellate court, and he would have remitted the matter to him for further hearing.[159]

Appeal to the High Court[160] (judgment reserved)

On 14 December 2001, the High Court granted the Yorta Yorta people special leave to appeal. Various members of the court expressed some concern about the prospect of being presented with large quantities of evidence and being asked to revisit factual findings. Accordingly the grant of special leave included an order that "the record in the Court and the written and oral submissions of the parties and inteveners be confined to the pleadings, the notices of appeal, the judgements and orders in the Federal Court at trial and in the Full Court on appeal, and that the record not be supplemented by evidentiary material without the leave of a Justice first obtained".[161]

The appeal was heard on 23 and 24 May 2001. The two main points raised in the appeal were:

156 Paragraphs 194 and 202-205.
157 Paragraph 196.
158 Paragraphs 54-55.
159 Paragraphs 86, 91-92.
160 (*Yorta Yorta HC*). See too 5 NTN 52, 73, 120 and 154.
161 See too 5 NTN 2 and 28.

- whether and to what extent s 223(1)(c) of the NTA incorporates the whole of the common law into the statutory definition of native title;
- assuming that s 223(1)(c) of the NTA does incorporate the common law, what are the requirements of the common law, particularly in respect of continuity of connection.

Underlying the first point is the fact that the two paragraphs immediately preceding s 223(1)(c) expressly require proof of some of the main elements identified by various members of the High Court in *Mabo (No 2)*, namely the possession of rights and interests under the relevant traditional laws acknowledged and traditional customs observed,[162] and connection with the relevant land or waters by those laws and customs.[163]

The second point raises questions as to just what it is that the common law requires. For example does the common law require that the claimants' traditional connection with the land has been "substantially maintained" since sovereignty?[164]

Needless to say the outcome of the appeal is likely to have significant ramifications, particularly in respect of native title applications brought by or on behalf of people whose ancestors did not have traditional connections with the relevant land at the time of sovereignty or where "the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs".[165] Should the appeal succeed it would appear likely that the matter be remitted to the trial judge for his further determination, applying whatever principles the High Court holds to be appropriate, but without hearing any further evidence.

Hayes[166]

This application was made to the National Native Title Tribunal (NNTT) in August 1994 and was referred to the Federal Court on 21 May 1996. It was brought by three Arrernte estate groups in respect of 166 parcels of land and water within the municipal boundary of the town of Alice Springs.

The claimants asserted that they held native title rights which entitled them to possession, occupation, use and enjoyment of the

[162] See s 223(1)(a), NTA.
[163] See s 223(1)(b), NTA.
[164] See eg, *Mabo (No 2)* per Brennan J at 58-61 and 69-70.
[165] *Mabo (No 2)* per Brennan J at 60.
[166] *Hayes v Northern Territory* (1999) 97 FCR 32 (*Hayes*). See articles – "Justice Olney hands down Reasons for Judgment in the Alice Springs Native Title Case" by Tom Anderson, Solicitor, Darwin (1999) 4 NTN 84; and "Alice Springs Native Title Claim and Section 47B of the Native Title Act (Occupation of Vacant Crown Land)" by Stephen Herne, Solicitor, Northern Territory Attorney-General's Department (1999) 4 NTN 88. The determination is reproduced at 4 NTN 173.

lands and waters to the exclusion of all others. The Northern Territory argued that native title within the claim area had been wholly extinguished by the grant of pastoral and other leases, reservations, public works, and the grant of other inconsistent interests affecting the claim area.

The Northern Territory conceded, at the outset of the hearing, that the claim area is part of the country recognised as the traditional land of the ancestors of the applicants at and prior to the settlement of the land by non-Aboriginal people.[167] Nor did the Territory dispute that, subject to extinguishment, a large number of the claimants, namely those who acquired rights through their father's father or mother's father were capable of being the holders of native title.

The main issues then, as far as the native title aspect was concerned, were the identity of the native title holding group, and the content of the native title – in particular whether it amounted to exclusive possession.

Like *Ward*, this case concerned a wide range of land tenures. One of the main extinguishment issues was the effect of Northern Territory pastoral leases. It was argued that these leases are different than those subject of *Wik* particularly because they contained reservations in favour of Aboriginal people. This question as to whether a lease with a reservation in favour of Aboriginal people constitutes a grant of exclusive possession with a re-grant in favour of Aboriginal people and therefore extinguishes native title, or whether the interest granted is less than a normal leasehold interest and therefore does not extinguish native title, has been subject of debate particularly since the *Wik* decision.[168]

As the 1998 amendments to the NTA came into effect before judgment had been delivered the new s 47B became relevant. This was because much of the land subject of claim may otherwise have been subject of tenures which extinguished native title.

Decision at first instance

The court (Olney J) rejected the claim of exclusive possession etc. but found that, subject to extinguishment, the applicants had native title. However, he concluded that native title had been extinguished, at least in part, in respect of much of the land claimed. He determined

[167] Paragraph 28.

[168] For the respective arguments see articles in *The Wik Case: Issues and Implications* (Butterworths, 1997) Graham Hiley QC (ed) – "How Wik Applies to Western Australia" by Greg McIntyre, Barrister, Perth at p 27, and "The Effect of Wik on Pastoral Leases with Provision for Access by Aboriginal People" by Raelene Webb, Barrister, Darwin and Kenneth Pettit, Barrister, Perth at p 30. The issue also arose in *Ward HC* in relation to "reservations" in WA pastoral leases.

that the applicants have native title in respect of the whole or part of about 113 of the 166 parcels claimed.

In determining who were the native title holders his Honour observed that there was a lack of uniformity among the members of the claimant groups as to how one derives rights to country. His Honour pointed out that the NTA recognises that some native title rights and interests may be purely usufructuary, and exercisable without the need for any proprietary interest in the land or waters over which they may be exercised.

Although non-Aboriginal occupation of the land had restricted the ability of the claimants and their ancestors to exercise many of their traditional rights, his Honour found that the applicants and their ancestors had continued to use the land in accordance with their traditional laws and customs. In many cases they have continued to live on or near the land of their respective groups, and have hunted wildlife and gathered food found thereon and made use of the surface water resources.[169]

However, as was the case in *Yarmirr*, the question as to whether or not other people, Aboriginal or otherwise, had been excluded from entering or remaining on the claimed land and whether such people had to seek permission, played a large part in his Honour's conclusion that the claimant groups do not:

> "in practice enjoy, nor indeed … claim the right to, the exclusive possession, occupation, use and enjoyment of their country. The traditional laws currently acknowledged and the traditional customs currently observed by the claimant groups do not extend to the exclusive entitlement which has been advocated in this proceeding. The claimants' own evidence does not support the rights which have been asserted by others on their behalf."[170]

Likewise, his Honour found that although the applicants have a traditional right to enjoy the food and water resources found on their estates, there was no evidence that the applicants enjoyed exclusive rights to those resources by their traditional laws and customs.[171]

His Honour also found that the applicants have a traditional right to make decisions about the use of the land and water claimed, the right to protect places and areas of importance in or on the claimed area, and the right to manage the spiritual forces and safeguard the cultural knowledge associated with the claimed land and waters. Each

[169] Paragraph 47.
[170] Paragraph 48.
[171] Paragraph 49.

of these rights "would be a normal adjunct from the recognition of native title rights and interests in land but the exercise of such rights would of necessity be subject to any valid, executive or legislative act affecting those rights."[172]

As to extinguishment his Honour held that none of the 15 pastoral leases were exclusive pastoral leases – they were not relevantly different to those in *Wik* despite the existence of the reservations.[173]

Various other leasehold tenures[174] did extinguish native title. So too did numerous public works,[175] and the reservation and use of some areas.[176]

His Honour found that various other tenures or events did not extinguish native title. These included approximately 290 grazing, occupation and miscellaneous licences,[177] a pipeline licence,[178] mining tenures,[179] sand and gravel permits,[180] various other reservations of land for public purposes[181] and the statutory vesting in the Conservation Land Corporation of "all right, title and interest, both legal and beneficial" of parts of the claimed land.

His Honour held that the applicants had established native title rights to hunt and gather food resources for their own sustenance and to use water within the claim area. They did not prove ownership of water resources, minerals, or of flora and fauna. His Honour held that the legislative regimes in the Northern Territory regulating the taking of water, flora and fauna did not extinguish the proven native title rights. His Honour distinguished the decision of the Queensland Court of Appeal in *Eaton v Yanner*.[182]

His Honour considered other legislation and concluded that its effect was merely to regulate certain conduct, not to extinguish native title.

In respect of 20 of the areas where native title had been extinguished, his Honour was able to apply s 47B of the NTA with the result that such extinguishment had to be disregarded.[183]

[172] Paragraph 51.
[173] Paragraphs 66-88.
[174] Paragraphs 89-94.
[175] Paragraphs 97-98.
[176] Paragraph 117.
[177] Paragraphs 99-110.
[178] Paragraphs 111-114.
[179] Paragraph 115.
[180] Paragraph 116.
[181] Reserves for Aboriginal purposes, cemetery and garbage reserves, police, pound and commonage reserves, reserves for conservation and municipal purposes, public parks, historical and recreational purposes, and national parks.
[182] [1999] 4(2) AILR 38 (Qld CA) – now reversed on appeal by the High Court – *Yanner v Eaton* (1999) 201 CLR 351.
[183] For a comprehensive note about this part of his Honour's decision see article by Stephen Herne op cit n 166.

Appeals to the Full Federal Court

By notice of appeal on 13 June 2000 the applicant, Myra Hayes, challenged the conclusions of Olney J that the native title in relation to the parts of the claim area which were unalienated Crown land did not include a right to possession, occupation, use and enjoyment as against the whole world, and also his conclusion that all native title was extinguished in relation to claim areas 8, 27, 81, 82 and 93, so much of claim areas 1 and 2 as did not include the Roe Creek borefield and the quarantine paddock, and so much of claim area 106 as is a sacred site.

The grounds of appeal regarding exclusivity relied inter alia upon evidence and findings that the traditional laws and customs of the native title holders: (a) required people to get permission to come onto the Mparntwe Estate; (b) conferred upon particular native title holders the right to speak for Mparntwe country; (c) entitled particular people to own the land; (d) conferred the right to welcome people to Alice Springs, a right respected by the rest of the Aboriginal community; and (e) conferred the right to be on Mparntwe country, including a right to make decisions as to whether other people may come upon Mparntwe country, being a right still exercised. Another ground related to his Honour's finding to the effect that no other people, Aboriginal or otherwise, had sought or been refused permission to enter upon the claimed land or to establish a permanent residence there.

The extinguishment grounds related to: (a) the nature and extent of certain works; (b) the extinguishing effect over a nature reserve caused by the erection of a fence designed to regulate the hours of entry of the public to the reserve; and (c) the extinguishing effect of the setting aside of certain land for the purpose of flood retardation dams. Hayes also challenged the conclusion that the lease to the Mbantarinya Aboriginal Corporation is not a lease within the meaning of s 47A of the NTA. She also contended that Olney J erred in failing to find that the construction of a fire station on the land was invalid, and in deciding that the court need not determine the validity of a particular pastoral lease. His Honour is also said to have erred in holding that native title had been extinguished over the whole of claim area 93 in circumstances where there was a sacred site on the claim area and native title holders had a statutory right of access to the site and across other land in accordance with Aboriginal tradition.

The Northern Territory responded to the appeal by filing a notice of cross-appeal on 10 July. The Northern Territory challenged Olney J's failure to find that perpetual leases granted to the Conservation Land Corporation, alternatively the vesting of land in

the Conservation Land Corporation upon declaration of the land as a park, extinguished any native title rights to make decisions about the use and enjoyment of the land. The Territory also contended that his Honour erred in finding that s 47B of the NTA was applicable to any of the lands claimed, in finding that a certain Crown lease term was not a scheduled interest, and in finding that certain miscellaneous leases did not extinguish native title. The Territory also contended that the court erred in its expression of the relationship between native title rights and interests and other interests in accordance with s 225(d) of the NTA.

Wandarang[184]

The claimants sought a determination of native title in respect of a large area of land and waters in the Northern Territory, much of which comprised the old St Vidgeons Station and in more recent years has been subject of a Crown Lease Perpetual held by the Northern Territory Land Corporation. The claim area also included part of the Roper River and parts of the Cox and Limmen Bight Rivers. It also included a stock route. The main participants were the applicants, the Northern Territory, the Northern Territory Land Corporation (NTLC) and the Northern Territory Seafood Council Inc (NTSC).

Immediately adjacent to the claim area are three other areas which have been subject of traditional Aboriginal land claims under ALRA. As findings of traditional Aboriginal ownership have been made in each of those land claims the court, pursuant to s 86 of the NTA, received into evidence relevant portions of the transcript of the evidence given in those inquiries, and was also asked to adopt relevant findings of the respective Aboriginal Land Commissioners. Some of the evidence tendered in another native title claim then being heard by the court, the *Ngalakan* native title claim,[185] was also admitted into evidence in this proceeding.

By and large the traditional evidence was uncontroversial. The primary contentions of the respondents were that all native title has been extinguished, alternatively any exclusive rights have been extinguished over most of the claim area because of past and existing leasehold interests, and that the common law does not recognise the existence of exclusive native title in relation to the rivers.

There was an inconsistency between the description of the claim area expressed in the original application and the boundary of the

[184] *The Wandarang, Alawa, Marra and Ngalakan Peoples v Northern Territory* (2000) 104 FCR 380; 177 ALR 512 (*Wandarang*). The determination is reproduced at 4 NTN 235.
[185] This is the claim now subject of the *Ngalakan* decision, *The Ngalakan People v Northern Territory of Australia* [2001] FCA 654, 5 June 2001, O'Loughlin J.

claim area shown on the map accompanying it. Olney J applied the reasoning of the Full Court of the Federal Court in *Attorney-General (NT) v Maurice & Ors*[186] and looked at the intention of the applicants to be gathered from a consideration of the application read as a whole. He concluded that the applicants' intention was to include both the stock route and the river adjacent to the area of land and waters covered by the application.[187]

The application was made on behalf of 12 groups of Aboriginals in respect of land and waters associated with the four named language groups, the Wandarang, Marra, Alawa and Ngalakan, and was presented on the basis that the claim area encompasses the whole or part of the traditional country of the several groups. Each group was referred to as a local descent group, a term borrowed from ALRA.[188] People acquired rights primarily by descent but also by adoption, succession, and conception affiliation.

At a relatively early stage of the trial, counsel for the Northern Territory tendered a statement which included a large number of concessions regarding the native title aspect. The statement was subsequently adopted by the other two main respondents.[189] The respondents maintained, however, their claims of extinguishment, non-recognition and non-exclusivity.

Olney J considered the nature and extent of the native title rights and interests that existed at the time of sovereignty and concluded that prior to then they were probably exclusive rights. However, the subsequent advent of European settlement coupled with the application of statute law and executive acts caused this to change.[190]

The applicants challenged the validity of the Crown Lease Perpetual held by the NTLC, CLP346, on the basis that at the time when it was issued, a previous pastoral lease, PL700 (also held by the NTLC), had not been surrendered, although the NTLC had agreed to surrender it in exchange for the perpetual lease. Olney J rejected this contention and noted further that as the lease was subsequently registered, the title of the registered proprietor was absolute and indefeasible.[191]

The next question was to determine whether CLP346 was a previous exclusive possession act and thus extinguished native title pursuant to s 23C of the NTA. This required the court to consider whether the NTLC is a statutory authority within the contemplation of

[186] (1987) 73 ALR 326.
[187] Paragraphs 38-42.
[188] Paragraph 43.
[189] See paragraph 60.
[190] Paragraphs 72-76.
[191] Paragraph 90.

s 23B(9C). The court noted that the NTLC has been held by the High Court not to be an emanation of the Crown (see *R v Kearney; Ex parte Japanangka*,[192] and the refusal of the High Court to grant special leave in *Lansen v Olney* for the purpose of the reviewing *Japanangka*). However, his Honour concluded that the NTLC was a statutory authority within the definition of that term in s 253 of the NTA and also within the ordinary meaning of statutory authority.[193]

The court concluded that the lease was not a previous exclusive possession act[194] and as it was granted subsequent to the passing of the RDA, it was a past act. Further, because of the conclusion that the NTLC is a statutory authority, CLP346 is a category D past act, to which the non-extinguishment principle applies.[195]

The court then reviewed the earlier tenure history which commenced with pastoral leases issued between 1881 and 1883. All of these contained reservations in favour of the Aboriginal inhabitants.[196] His Honour concluded that the mere reservation of certain limited rights in favour of the Aboriginal inhabitants does not evidence an intention to extinguish all other existing native title rights and interests. However, consistent with the reasoning of the majority in *Wik*, the granting of the pastoral leases would have the effect of extinguishing any exclusive rights of occupation use and enjoyment that may otherwise have been an incident of the native title rights. Similarly, any traditional right to control access to the land would have been extinguished to the extent that the exercise of such rights would be inconsistent with corresponding rights enjoyed by the lessee "or indeed by other Aboriginals exercising a reserved right".[197]

His Honour observed that three pastoral permits and 26 grazing licences had been issued over parts of the claim area prior to the grant of PL700. He held that to the extent that those licences and permits authorised the respective grantees to occupy, use and enjoy the land, any inconsistent exclusive native title rights and interests would have been extinguished. There was also a miscellaneous licence granted for a period of three months authorising the Church Missionary Society to go upon an area of land within the claim area to take salt from it. His Honour held that "the licence which expressly provided that the licensee did not have an exclusive right to the area was clearly not intended to extinguish all existing native title but would

[192] (1984) 158 CLR 395.
[193] Paragraphs 103-5.
[194] Paragraph 106.
[195] Paragraph 108-9.
[196] Paragraphs 110-1.
[197] Paragraph 112.

have extinguished any prior exclusive native title right to take salt from it".[198]

The court then considered the rivers and concluded that as much of them had previously been subject of pastoral lease, any exclusive native title in relation to the beds and banks had been extinguished. His Honour found that the Roper River and Limmen Bight Rivers and part of the Cox River within the claim area are all tidally affected.[199]

His Honour considered the legislative regimes regarding fishing and wildlife and concluded that the legislation was essentially regulatory in nature but was nevertheless inconsistent with the continued existence of an exclusive native title right to engage in the activities of hunting, gathering and fishing.[200]

His Honour held that the common law does not recognise a claim to ownership of flowing water and noted that relevant legislation had established a regime in relation to water rights which is inconsistent with the continued existence of exclusive native title rights to the ownership and use of water.[201]

His Honour then considered the question of roads. Many roads were expressly excluded from claim. His Honour concluded that the width of such road corridors as were excluded from the leased area (and thus from the claimed area) would be about 100m.[202] He also concluded that a number of roads were public works and that native title to those areas was extinguished by force of ss 23B(7) and 23C(2) of the NTA. His Honour also referred to a number of tracks, one of which was not shown to have been a public work as defined in the NTA.[203]

His Honour concluded that the stock route was a public work and thus its declaration would extinguish native title.[204] A number of public boat ramps were constructed along the Roper River in 1999. The court held that because they were constructed subsequent to 23 December 1996 their construction did not affect any existing native title rights.[205] Olney J held that various gravel pits were not "major earthworks" for the purposes of the definition of "public work" in the NTA.[206]

[198] Paragraph 117.
[199] Paragraphs 118-123.
[200] Paragraph 125.
[201] Paragraph 126.
[202] Paragraph 127.
[203] Paragraphs 131-3.
[204] Paragraph 134.
[205] Paragraph 135
[206] Paragraph 137.

His Honour then considered the operation of s 47B of the NTA. This section could only possibly apply to that part of the claim area as was not covered by CLP346 at the time when the native title application was made, namely certain road corridors excluded from CLP346 and the stock route area. His Honour concluded that these areas are covered by s 47B(1)(b)(ii). Further, his Honour added that there was no evidence to suggest that those areas were, at the time the application was made, occupied by one or more members of the native title claim group.[207] His Honour noted that had the applicants succeeded in their argument that CLP346 was invalid then s 47B may have required that the extinguishing effect of prior leases would have to be disregarded.

His Honour added that to the extent that the rivers within the claim area are tidal the common law does not recognise exclusive native title rights. This is a case of non-recognition of such rights, not a case of prior rights being extinguished. Accordingly, s 47B would have no application in relation to tidal rivers. To the extent that part of the Cox River within the claim area is not affected by the tide, s 47B would not apply in any event, there being no evidence of the occupation of that area by any member of the native title claim group when the application was made.[208]

In his summary, his Honour concluded that CLP346 is valid and was in force when the application was made and that native title does not exist in relation to certain roads, the stock route area, minerals and petroleum or water affected by the tide. He held that non-exclusive native title exists in relation to the balance of the claim area.

Appeal to the Full Federal Court

The claimants have appealed against the determination of Olney J on several grounds. It is contended that his Honour erred:

(a) in holding that the prior grant of certain pastoral leases, pastoral permits or grazing licences had extinguished any exclusive rights that may otherwise have been an incident of the native title;
(b) in holding that the prior grant of a miscellaneous licence to take salt for a period of three months had extinguished any prior exclusive native title right to take salt;
(c) in holding that the *Control of Waters Ordinance* 1938 had established a regime in relation to water rights which is inconsistent with exclusive native title rights to the ownership and use of water;

[207] Paragraph 139.
[208] Paragraph 139.

(d) in holding that native title does not exist in relation to the water of the segments of various rivers affected by the tide;
(e) in holding that the declaration of a stock route extinguished native title and that such extinguishment ought not be disregarded pursuant to s 47B(2) of the NTA;
(f) in holding that native title does not exist in relation to certain lands and waters delineated as roads;
(g) in holding that traditional rights (qualified by the need for permission from the relevant local group) held by Aboriginal persons who were not members of one of the 12 local groups found to hold communal title were not rights "in relation to land and waters" for the purpose of the statutory definition of "native title" and thus were not native title rights;
(h) in failing to hold that the native title included a right to maintain, protect and prevent the use of cultural knowledge;
    (i) in holding that the native title does not include minerals or petroleum;
    (ii) in holding that CLP346 had been validly granted;
(i) in otherwise failing to hold that s 47B(2) of the NTA was applicable to the area claimed;
(j) in failing to make an order for costs in favour of the native title applicants.

Rubibi[209]

This was a native title claim brought in respect of approximately 300 acres of land near Broome, WA, presently subject of Reserve 30906 currently vested by statute in the Aboriginal Lands Trust which holds the land for the "use and benefit of Aborigines". The Rubibi Community brought the claim primarily on the basis that the land was a traditional Aboriginal law ground of the Yawuru people, namely a ceremonial site of spiritual and cultural significance. They sought a determination that native title exists in relation to the land conferring upon them "occupation, use, possession and enjoyment, as against the whole world, of the claim area for 'ceremonial purposes'". A competing application was brought on behalf of the Leregon (Langanjun) clan of the Yawuru tribe, not by way of an independent claim of native title as such but more for the purpose of protecting certain housing on and associated rights of access to the claim area. Both the Rubibi applicants and the Leregon applicants are members of the Yawuru people.

[209] *Rubibi Community v Western Australia* (2001) 112 FCR 409 (*Rubibi*). See too article, "A Commentary on the Rubibi determination" by Paul Burke, Native Title Consultant at 5 NTN 58 and notes at 5 NTN 52.

The hearing and submissions took approximately 14 days, the major participants being the two applicant groups and the State of Western Australia. Evidence was taken "on country" and included gender restricted evidence.

The court (Merkel J) found the necessary elements of the claim to have been established and indicated that it would make a determination of the kind requested by the applicants, namely "as against the whole world, for 'ceremonial purposes'". His Honour also indicated that the determination would also declare that the native title includes rights of access and other "rights and interests of importance" including to possess, occupy, use and enjoy the area, make decisions about the use and enjoyment of the area, conduct ceremonies, control access, use and enjoyment of others, hunt and gather and to maintain, protect and prevent the misuse of cultural knowledge.

The State had also contended that the reservations of the Reserve, and the making of by-laws with respect to the Reserve, extinguished any exclusive native title rights to possess, occupy, use and enjoy the land. The court found it unnecessary to resolve this question however because s 47A of the NTA operated to remove the effect of any such extinguishment as may have occurred.

As between the applicant groups the question arose as to the right of the Rubibi group to remove structures erected on the land by Leregon people and to prevent further unauthorised residential use and occupation of the claim area. This issue raised the question as to the court's role in determining a dispute between members of a claimant community in the context of a native title determination. The court invited and received supplementary submissions on this aspect, and also in relation to the form of the determination that should be made.

On 7 November 2001 the court delivered a supplementary judgment on these issues.[210] The court held that the Leregon people had not established any legal right or interest that entitled them to use or reside in the structures or to resist their removal from the claimed area. The court did not order their removal, but made a declaration that the structures are unauthorised structures within the meaning of s 270(1) of the *Land Administration Act* 1997 (WA). The court added that the government could use the machinery set out in that Act if it wished to have those structures removed.

The court also clarified the nature of the rights held by the successful claimant group (the Yawuru people) in relation to activities

[210] *Rubibi Community v Western Australia* [2001] FCA 1553. See too article entitled, "The Final Disposition of the Rubibi claim" by Paul Burke, Native Title Consultant at 5 NTN 98.

on the land inconsistent with ceremonial purposes. It also included in the Determination[211] provisions intended to specify the relationship between the co-existing native title rights and interests on the one hand and other interests on the other, including the interests of the Aboriginal Lands Trust in regard to the control and management of the Determination Area.[212]

Ngalakan[213]

This matter concerned land approximately 320km south east of Katherine, NT, which is within the gazetted boundaries of the Township of Urapunga. The claim area is on the southern bank of the Roper River and is bordered on the east, west and south by land held in trust for the Ngalakan traditional owners as a result of recommendations made by the Aboriginal Land Commissioner under ALRA.[214] It would seem the only reason that the claim area was not included within that land claim and grant was that land in a town could not be claimed under ALRA. The claim area is also upstream from the land subject of the *Wandarang* native title determination.

The Township of Urapunga was surveyed in 1886 and proclaimed and declared in 1887, as a consequence of which the claim area thereby became reserved and dedicated town land. The survey provided for 276 allotments together with provision for roads and a square to be known as "Salisbury Square". With the exception of a number of allotments which were consolidated and ultimately became subject of a grant of fee simple and on which a caravan park presently exists, little other development occurred.

The application for determination of native title excluded the freehold land and was subsequently amended to also exclude all roads over which the public has a right of way. A dispute arose as to the extent of such roads and the court (O'Loughlin J) ruled that the excluded areas should be taken to include "cleared and otherwise altered land forming the carriageway and incidental to its use".[215] His Honour has given the parties the opportunity to lead further evidence on this point if necessary.

The court also considered the status of a number of gazetted roads in the subdivision and concluded that they must all be regarded as public roads and that "the unrestricted right of the

[211] Relevant extracts from the Determination are reproduced at 5 NTN 106-7.
[212] Compare s 225 (c) & (d), NTA.
[213] *The Ngalakan People v Northern Territory of Australia* (2001) 112 FCR 148; 186 ALR 124 (*Ngalakan*). See too note at 5 NTN 61.
[214] *Yutpundji-Djindiwirritj (Roper Bar) Land Claim*, AGPS 1982, Toohey J.
[215] Paragraph 28.

public to use and enjoy these public roads is so incompatible with native title as to extinguish it".[216] Whilst referring to *Fourmile's* case, his Honour noted that that case dealt with the particular statutory regime that was then in place in Queensland, and was not concerned with the common law principles that applied to the dedication of land for a highway.[217]

O'Loughlin J observed that in order to establish native title the applicants had to establish that, at the time of sovereignty there was an identifiable community or organised society of Aboriginals who possessed, occupied, used and enjoyed the claim area according to their traditional laws and customs, and that any claim to native title will depend upon the community's presence on, and connection with, the land of which the claim area forms part. He added that presence on the land is not to be equated with possession in the conventional sense; there can still be a presence notwithstanding the existence of a nomadic lifestyle.[218]

The only respondent was the Northern Territory. It conceded that there was evidence of a relevant physical connection between the Aboriginal people and the claim area, and that the applicants are descended from the original inhabitants of the country in the sense that there is a "substantial degree of ancestral connection" between them and the original inhabitants.[219]

Individual claimants belonged to one or other of four semi-moieties and had, as is frequently the case, different classifications in relation to different countries, through their father's father, father's mother and so on. Toohey J had regarded as traditional owners only those who were Mingirringgi, namely those whose relationship to the country was through their father's father.[220] However the Territory conceded, and the court concluded, that the native title holding group could include persons having any of the four classifications, notwithstanding that an Aboriginal person could potentially therefore join in claims for native title in respect of four different areas of land.[221]

Some of the claimants were said to have been adopted by a member of the applicant group, and others were said to have been "incorporated" in the sense of having come to be regarded as a member of the group, for example as a result of ceremonial

[216] Paragraphs 32-47.
[217] Paragraph 2.
[218] Paragraph 8.
[219] Paragraph 14.
[220] In later land claim reports Toohey J, and subsequent Aboriginal Land Commissioners, expanded the class of persons whom they regarded as traditional Aboriginal owners thus allowing for the possibility of one person being the traditional owner of up to four different estates.
[221] Paragraphs 23-25.

involvements or residence or skin affiliation. Whilst the Northern Territory did not dispute the ability of an adopted person to be part of the native title holding group, it did express reservations about incorporation. It asserted that the evidence did not support a conclusion that incorporation is a long established tradition; rather it is a relevantly recent mechanism whereby males are "recruited" through ceremony in order to make viable otherwise rapidly diminishing groups. The court rejected this contention and held that even if incorporation was a relatively recent practice it is nevertheless part of the system of traditional laws and customs, which may evolve over time.[222]

As to the identity of the native title holding group, his Honour observed that although it is not necessary for the court to name each individual member of the group "it is necessary for the Court, if the evidence permits, to identify the claimants as a group or as a community". His Honour concluded it sufficient to identify the claimants, and hence the native title holders, as "those Aboriginal persons who are either Mingirringgi, Junggayi or Darlnyin for that area of land in the Roper River region which includes the claim area".[223]

In relation to the claim of exclusive rights, the court agreed with the contention that while the word "own" and its derivatives as used by Aboriginal witnesses should not be understood in the strict legal sense, the words are indicative of assertions of control. His Honour concluded that the evidence justified recognition of exclusivity.

His Honour also concluded that exclusive rights to flora and fauna were not extinguished, but were merely regulated, by the legislative regime in place for the protection and control of plants and animals in the Northern Territory.

The court distributed a proposed determination, and noted its agreement with the proposition in *Ward FC* to the effect that where exclusive native title rights were determined there was no particular need to spell out specific rights and interests. The court made its determination accordingly on 7 February 2002.[224]

Consent Determinations

By the end of July 2002, the Federal Court had made approximately 43 determinations of native title under s 225 of the NTA. Seven of

[222] Paragraphs 48-51.
[223] Paragraphs 52-54. Cf the description of the native title holders in the *Wandarang* determination – 4 NTN 235.
[224] Relevant extracts from the Determination are reproduced at 5 NTN 135.

those, namely those discussed above, were made by the court after full hearings of the claims on their merits.

Twenty-four determinations have been made by consent pursuant to s 87 of the NTA.[225] Thirteen of these have been made in respect of islands in the Torres Strait,[226] four in respect of other land in North Queensland, namely *Deeral*,[227] *Western Yalanji*, [228] *Wik (Part A)*[229] and *Congoo*,[230] two in New South Wales, namely *Buck* [231] and *Kelly* [232] and five in Western Australia namely *Smith*,[233] *Anderson*,[234] *Ngalpil*,[235] *Brown* [236] and *Karajarri*.[237] Two of the Western Australian consent determinations, namely *Smith* and *Karajarri*, were negotiated and made during the trial, after a substantial amount of the claimants' evidence had been heard.

In many of these cases the consent determinations were made in respect of land which had already been the subject of a form of tenure or reservation in favour of Aboriginals, and did not involve interests of large stakeholders apart from the claimants and the State.

A useful article concerning the role of the Federal Court in respect of s 87 determinations has been written by Stephen Beesley.[238] Questions remain as to the kind of matters to which the court must have regard in deciding whether or not "it is appropriate" to make a consent determination. For example, some consent determinations have been made in the past without any connection evidence being tendered.

[225] For references to these determinations and relevant extracts from them see note at 5 NTN 148

[226] One of them, *Dauan*, is reproduced and another four referred to at 4 NTN 190; another five were made on 23 May 2001 in favour of the *Kaurareg People* and another was made on 14 June 2001 in favour of the *Meriam People* in respect of the two islands in the Murray Island group that had been excluded from the High Court's decision in *Mabo(No 2)*.

[227] *Deeral (Gamaay Peoples) v Charlie* (1998) 3 AILR 28. See too article at 3 NTN 100.

[228] *Western Yalanji v Pedersen* – 28 September 1998. See article at 3 NTN 178.

[229] *Wik Peoples v Queensland* [2000] FCA 1443, 3 October 2000. Extracts are reproduced at 4 NTN 212.

[230] *Congoo & Wason on behalf of the Bar-Barrum People v State of Queensland* [2001] FCA 868, 28 June 2001.

[231] *Buck v New South Wales* – 7 April 1997. See Native Title Service, pp 60,018-960,018-9 para [130,005].

[232] *Kelly on behalf of Byron Bay Bundjalung People v New South Wales Aboriginal Land Council* [2001] FCA 1479 – Branson J.

[233] *Smith on behalf of Nharnuwangga, Wajarri and Ngarla People v State of Western Australia* (2000) 104 FCR 494. Extracts are reproduced at 4 NTN 211.

[234] *Mark Anderson on behalf of the Spinifex People v State of Western Australia* [2000] FCA 1717, 28 November 2000. Extracts are reproduced at 4 NTN 234.

[235] *Ngalpil v Western Australia* [2001] FCA 1140. Extracts are reproduced at 5 NTN 92.

[236] *Brown v Western Australia* [2001] FCA 1462, 19 October 2001. Extracts are reproduced at 5 NTN 105. See too note at 5 NTN 108.

[237] *Mangkiriny on behalf of the Karajarri People v Western Australia* [2002] FCA 660, 12 February 2002. Extracts are reproduced at 5 NTN 149.

[238] See "The Role of the Federal Court when Parties Reach Agreement: s 87 of the *Native Title Act 1993*" by Stephen Beesley, NNTT in 5 NTN 5.

These questions were considered by Emmett J in the *Gunggari* matter.[239]

A number of determinations have also been made under s 86G of the NTA, to the effect that native title does not exist. The most recent of these was that made in the *Kennedy* matter.[240] Whilst determinations pursuant to s 86G are not by consent, the main criteria identified in s 86G are identical to those in s 87. These were considered in further detail by Sackville J, in his reasons for decision in *Kennedy*. All of these matters were commenced by way of non-claimant applications, and were "unopposed".[241]

EXTINGUISHMENT

As outlined above, the High Court has addressed questions of extinguishment in *Ward HC* (in numerous respects).

The amendments to the NTA have now rendered it unnecessary for common law extinguishment to be considered in many instances, at least in respect of scheduled interests[242] and the other tenures and events defined to be previous exclusive possession acts.[243] Where there has been such a tenure or event then complete extinguishment is confirmed, by the NTA (and its State or Territory equivalents).[244]

However there have been various acts, for example Crown to Crown grants and vestings, which may only be previous exclusive possession acts if they would have extinguished native title at common law.[245] Further, acts which are not previous exclusive possession acts may still have extinguished native title, in whole or in part, at common law. Further, in cases of partial extinguishment it will be necessary to go back to relevant common law principles in order to ascertain the extent of the partial extinguishment.[246]

[239] *Munn for and on behalf of the Gunggari People v Queensland* [2001] FCA 1229, 23 August 2001. See too article entitled "s 87 of the Native Title Act and the Gunggari Native Title Claim" by Mark Boge, Brisbane at 5 NTN 81.

[240] *Kennedy v State of Queensland* [2002] FCA 747, 13 June 2002. See article "Native Title on Pastoral Leases – Not in every case? The decision in *Kennedy v Queensland"* by David Finch, Solicitor, Brisbane in 5 NTN 142.

[241] See definition of "unopposed" in s 86G(2), NTA.

[242] See s 249C, NTA and Sched 1, NTA.

[243] See s 23B, NTA.

[244] See eg article entitled "The SA Native Title (Validation and Confirmation) Amendment Act" by George McKenzie, Adelaide, at 5 NTN 84 and "Extinguishment of Native Title; the Relationship between Common Law and Statutory Extinguishment, and the Relationship between the various Statutory Categories of Extinguishing Acts" by Peter Wittkuhn, Claremont, WA, at 5 NTN 126.

[245] See for example s 23B(9C), NTA, and its consideration in *Wandarang*.

[246] See too s 23G, NTA..

Whilst (common law) extinguishment was subject of some discussion by the High Court in *Mabo (No 2)*, the court did not have to consider and articulate the relevant principles until *Wik*. Even then its primary attention was directed at the particular Queensland pastoral leases involved in that matter. In *Yanner v Eaton*[247] the High Court provided further guidance in relation to vestings of fauna.

With one exception[248]it was not really until *Ward FC* that a Full Court had to apply common law extinguishment principles to other forms of tenure and to other events, such as resumptions and legislative acts, which could have had the effect of impairing or extinguishing native title.

There have however been various decisions at first instance on common law extinguishment.[249]

Crown to Crown grants of freehold have been held to extinguish native title.[250] Although the High Court had earlier held in *Fejo* that ordinary grants of freehold extinguished native title some doubt had remained about the effect of Crown to Crown grants.

The application of the *Wik* decision to pastoral leases in Western Australia and the Northern Territory has now been considered by the High Court in *Ward HC*. The High Court has also now ruled on the extinguishing effect of a New South Wales Western Lands lease in *Wilson v Anderson*.[251]

In *Anderson v Wilson*[252] the Full Federal Court declined to answer questions as to whether Mr Wilson's Western Lands grazing lease involved exclusive possession of the lease area by the lessee, or whether any native title rights, the exercise of which involved the native title holders' presence on the lease area, would have been extinguished or suspended by the grant of the lease. The court held that native title claims on Western Lands grazing leases must be assessed on a case by case basis. As no factual findings had been made as to the nature and extent of the native title rights it could not be concluded that all native title rights had been extinguished at common law. The Full Court held that such findings must be made before one can ascertain whether and

[247] Discussed below.
[248] The extinguishing effect of the dedication of certain roads in Queensland was considered in *Fourmile v Selpam Pty Ltd* (1997) 80 FCR 151.
[249] See for example *Wandarang*, and *Ngalakan*.
[250] *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178; 180 ALR 91. See too note at 4 NTN 236 and article, "Casenote on *Bodney v Westralia Airports Corporation Pty Ltd*" by Jane Fricke 4 NTN 232. The vesting of Lake Victoria (NSW) in the State of South Australia has also been subject of argument in *Lawson (Barkandji People) v Minister for Land and Water Conservation (NSW)* and judgment has been reserved.
[251] *Wilson v Anderson* [2002] HCA 29 (Wilson).
[252] *Anderson v Wilson* (2000) 97 FCR 453;171 ALR 705. See too "Casenote on *Anderson v Wilson*" by Chris Searle 4 NTN 164.

to what extent the rights conferred upon the lessee are inconsistent with any or all of the rights which make up the native title existing in the land at the date of the grant. This view is consistent with that expressed by Toohey J in *Wik,* by the Supreme Court of Queensland in *Savage Togara* [253]and now by the High Court in *Ward HC,* about the need to ascertain the content of the native title before considering extinguishment (at common law).[254]

The High Court held that the Full Court had erred in applying a common law test of extinguishment and not applying the provisions of the NTA, in particular s 23B (2)(c)(viii). Six justices of the court distinguished Mr Wilson's perpetual pastoral lease from those under consideration in *Wik* and in *Ward HC,* and held that Mr Wilson's lease did confer a right of exclusive possession. Thus the lease was a previous exclusive possession act as envisaged by s 23B(2)(c)(viii) of the NTA with the consequence that native title was completely extinguished by force of the New South Wales equivalent of s 23C(1) of the NTA.

Yanner v Eaton[255]

This case, sometimes known as the "crocodile case" started as a prosecution of *Yanner* for the taking and killing of two estuarine crocodiles. He was charged with contravening s 54(1)(a) of the *Fauna Conservation Act* 1974 (Qld) (the Fauna Act) which, in effect, provided that a person shall not take, keep or attempt to take or keep fauna without being the holder of a particular licence granted under the Fauna Act. Yanner's defence was that he was exercising a native title right and that the requirement of the Fauna Act that he hold a licence did not apply to him, because of the operation of s 211 of the NTA. The magistrate upheld his defence.

The State of Queensland appealed to the Court of Appeal, which upheld the appeal.[256] The majority held that any relevant native title right that may once have existed had been extinguished by s 7(1) of the Fauna Act which provided as follows:

> "All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority."

[253] *Re Savage Togara Coal Pty Ltd* [1999] 2 Qd R 307.
[254] It is not readily apparent why the pastoralist relied so heavily upon common law extinguishment, nor why he initially only contended for extinguishment of native title rights which involved presence on the lease area. Cf s 23B(2)(c)(viii), NTA.
[255] *Yanner v Eaton* (1999) 201 CLR 351. See article at 4 NTN 106.
[256] *Eaton v Yanner* [1998] 4(2) AILR 38 per McPherson JA and Moynihan J, Fitzgerald P diss. See case notes at 3 NTN 112 and 113.

Yanner's appeal against that decision was upheld by the High Court. The decision ultimately turned upon the meaning of the word "property" as it appeared in s 7(1). The majority[257] held that the word "property" can have different meanings.

The majority concluded that the "property" conferred on the Crown by s 7(1) of the Fauna Act is not accurately described as "full beneficial, or absolute, ownership".[258] They held that the property which the Fauna Act vested in the Crown was no more than "the aggregate of the various rights of control by the Executive that the legislation created".[259] Gummow J referred to it as an "aggregate of legal relations between the 'Crown' and 'fauna'."[260]

On the other hand the dissenting justices considered that the word should bear the ordinary meaning of property, tantamount to absolute ownership.[261] Accordingly, their view was that the vesting of the property in fauna in the Crown was inconsistent with the native title right asserted by Yanner.

The judgments contain useful dicta as to the meaning and content of native title, and as to who might hold various native title rights.[262] Relevant principles of extinguishment were identified.[263] The majority also revisited the distinction between regulation of native title rights and interests on the one hand and extinguishment on the other, by legislative regimes such as those of the kind set up by the Fauna Act.[264]

As with *Mabo (No 2)* and *Wik* this case is likely to have ramifications broader than native title claims to take and keep fauna in Queensland. There are numerous statutes in every State and Territory of Australia which purport to vest property of various kinds in the Crown, or in some other quasi governmental instrumentality such as a statutory authority or a local council. Examples include flora and fauna, roads,[265] railways, waters,[266] ports and harbours, and minerals.[267]

[257] Gleeson CJ, Gaudron, Kirby and Hayne JJ at paras 17-21, and Gummow J at paras 85-86.
[258] Paragraphs 22-30.
[259] Paragraph 30.
[260] Paragraph 86.
[261] McHugh J at paras 49-52 and Callinan J paras 137-146.
[262] Gleeson CJ, Gaudron, Kirby and Hayne JJ at para 37, Gummow J at paras 74-75, and Callinan J at 152-3 and 156-7.
[263] Paragraphs 35 and 106ff. Gummow J had more to say about "operational inconsistency" between a condition in a lease once it was performed and the continued exercise of native title rights – para 110.
[264] See Gleeson CJ, Gaudron, Kirby and Hayne JJ at paras 36-39 and Gummow J at paras 109 and 115.
[265] Compare *Fourmile v Selpam* (1997) 80 FCR 151; 152 ALR 294.
[266] See too para 29.
[267] Compare *Wik Peoples v Queensland* (1996) 63 FCR 450; 134 ALR 637 and *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370. At para 158 of *Yarmirr* Olney J expressly relied upon the majority decision of the Queensland Court of Appeal in *Yanner's* case. See too observations by Callinan J at para 147 regarding private ownership, in the United States, of natural gas and oil.

There are at least two fundamental questions likely to require further judicial determination:

- whether and to what extent other particular vestings of property extinguish a claimed native title right or interest;
- to what extent can commodities such as flora and fauna, water, air and minerals be subject of native title, at least in a sense analogous to private ownership? If such a commodity is not capable of ownership by an individual or by the Crown would the common law recognise such a native title interest? Indeed it was argued in the *Yorta Yorta* case (at first instance) that the waters flowing in the rivers within the claim area could not be subject of a native title right analogous to private ownership.[268]

FUTURE ACT REGIME

The future act regime is established under Div 3 of the NTA, much of which was inserted with the 1998 amendments to the NTA. The regime provides statutory validity for grants made and other acts done under it, even if they extinguish or impair native title. The definition of "future act" requires that, amongst other things, the act be one which affects or would affect native title.[269] An act "affects" native title if it extinguishes native title or is otherwise wholly or partly inconsistent with its continued existence, enjoyment or exercise.[270] Thus an act will only be a future act in circumstances where native title does or may exist.[271]

Subdivisions G through to N, and P, cover a wide range of future acts, and in most cases, provide for their validity, application of the non-extinguishment principle, compensation and procedural rights. In circumstances to which subdiv P applies, subject to certain exceptions, the right to negotiate regime must be complied with in order to ensure validity.[272] Where the act is covered by subdivs G to N, it is valid, even, it seems, if the procedural requirements are not complied with.[273] Otherwise, in most cases the future act will be invalid to the extent that it affects native title.[274]

[268] This argument was advanced primarily on behalf of the Murray Darling Basin Commission and also by Victoria, New South Wales and Murray Irrigation Limited. Because Olney J dismissed the *Yorta Yorta* claim for other reasons he did not find it necessary to deal with this argument.
[269] Section 233(1)(c), NTA.
[270] Section 227, NTA.
[271] Thus the regime can be ignored in circumstances where native title has been extinguished (eg by a grant of freehold) or where it has been determined not to exist (as in *Yorta Yorta*, and *Kennedy*).
[272] Section 28, NTA.
[273] See eg, ss 24GB(5), 24HA(3), 24ID(1)(a), 24JB(1), 24KA(3), 24LA(3), 24MD(1) and 24NA(2). See too *Lardil FC* discussed below.
[274] Section 24OA, NTA.

The requirements of the future act provisions, and the possible invalidity of other future acts not within the scope of subdivs G to N or P, can be avoided by the execution and registration of an appropriate *indigenous land use agreement* (ILUA).[275] It is even possible for an ILUA to validate an act that has already been done invalidly.[276] It is not within the scope of this paper to further discuss ILUA's.[277]

The *right to negotiate regime* has been subject of numerous decisions of the NNTT,[278] and of judicial consideration by the Federal Court. These include decisions about the expedited procedure set up by s 32,[279] the obligation to negotiate in good faith imposed by s 31(1)(b)[280] and the nature and content of s 29 notices.[281]

Although the NTA permits the States and Territories to set up alternative provision regimes, only Western Australia, Queensland and the Northern Territory have attempted to do so.[282] Only the Queensland provisions have passed the scrutiny of the Commonwealth Parliament, resulting in the conferral of jurisdiction upon its Land and Resources Tribunal.[283] However, certain of the alternative State procedures set up by Queensland pursuant to s 43 have subsequently been held invalid.[284] (It has been suggested that this decision may also throw into doubt the validity of the South Australian regime.)

[275] See subdivs B to E.
[276] Section 24EBA, NTA.
[277] Numerous articles and papers have been written about ILUA's, some of which appear in 4 NTN 47, 64, 68, 69, 227 and 240 and 5 NTN 30.
[278] Whilst hundreds of the NNTT decisions have been in relation to land in WA there have only been five NNTT decisions concerning land in the eastern side of the country. These are *Yallourn Energy v Hood*, NNTT (Sumner DP), 17 September 1999, noted at 4 NTN 118; *Normandy Pajingo Pty Ltd v Queensland*, NNTT (Sumner DP), 29 September 2000, subject of article, "Negotiating in Good Faith – The First Queensland Decision" by Gavin Scott 4 NTN 205; *South Blackwater Coal Ltd v Queensland*, NNTT (Sumner DP), 27 March 2001; *Bissett v Mineral Deposits (Operations) Pty Ltd*, NNTT (Sosso) (2001) 166 FLR 46; and *Victorian Gold Mines NL v Victoria*, NNTT (Sumner DP), 4 July 2002.
[279] See for example, *Smith on behalf of the Gnaala Karla Booja People v Western Australia* [2001] FCA 19, French J, 19 January 2001, noted at 5 NTN 17 and articles "Expedited procedures – s 237 of the NTA" by Nadja Mack 4 NTN 183 and "The Moses Silver Determination: The Expedited Procedure in the Northern Territory" by Daniel Lavery 5 NTN 131.
[280] See eg article, "Negotiating in Good Faith – The First Queensland Decision" by Gavin Scott 4 NTN 205.
[281] See articles by Sonia Brownhill, "Native Title Act, s 29 Notices for Exploration License and Mining Titles in the Northern Territory" at 5 NTN 38 and "Casenote on *Holt v Manzie*" at 4 NTN 231; and the subsequent decisions of *Holt v Manzie* [2001] FCA 401 noted at 5 NTN 50 and *Holt v Manzie* [2001] FCA 627 noted at 5 NTN 71.
[282] See articles concerning each of these attempts at 4 NTN 2, 9 and 4 respectively.
[283] See articles "Queensland New Mining and Native Title Regime" by Kathrine Morgan-Wicks (2000) 4 NTN 202 and 218.
[284] *Central Queensland Land Council Aboriginal Corporation v Attorney General of the Commonwealth of Australia and Queensland* [2002] FCA 58, Wilcox J, 8 February 2002. See too article entitled "Where to now? – Queensland and its alternative to state procedures" by John Briggs, Peter Cain and Gavin Scott, Brisbane in 5 NTN 114.

The Full Federal Court has had to consider the kind of rights and obligations prescribed in *subdivs G to N* in two cases, *Harris* and *Lardil*.

Harris[285]

This matter commenced with an attack upon the validity of 109 notices of intention to grant boating and tourism related permits in the Great Barrier Reef area. The notices were all issued within a short period of time and gave the registered native title claimants 28 days within which to comment. It was submitted inter alia, that more time should have been provided for responses, particularly in light of the large number of notices issued, and that the notices should contained more detail, for example as to the area to which each permit would apply, the identity of the applicant for the permit, and a better description of the nature of activities proposed to be carried out under the permit. Although not expressly stated, it would appear that those notifications were issued in purported compliance with s 24HA(7) of the NTA.

An application for an interlocutory injunction to restrain the granting of the permits pending the hearing of the principal proceeding was rejected, primarily upon application of the balance of convenience.[286] An argument based upon the alleged invalidity of the Native Title (Notices) Determination 1998 insofar as it purports to determine the way in which notice is to be given for the purpose of s 24HA(7) of the NTA was subsequently heard and also rejected.[287]

In relation to the claim based upon non-compliance with s 24HA, with one exception her Honour rejected the various attacks upon the validity of the notices.[288] She did agree with the contention that the respondent had not complied with s 8(3)(a) of the Determination in that it had not provided "a clear description of the area that may be affected by the act or class of acts". Both parties appealed against those parts of her Honour's decisions adverse to them.

The Full Court found in favour of the Great Barrier Reef Marine Park Authority (GBRMPA), concluding that it had in fact provided more information to the registered native title claimants than s 24HA in fact required. The court rejected the contention that the normal rules of procedural fairness must be applied, because, in the view of

[285] *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60; 173 ALR 159 (*Harris FC*). See too article, "Future Act Notification: *Harris v Great Barrier Reef Marine Park Authority*" by John Briggs and Stuart MacGregor 4 NTN 158.
[286] *Gurubana Gunggandji People v Great Barrier Reef Marine Park Authority* [1999] FCA 202, Kiefel J, 26 February 1999, noted at 4 NTN 35.
[287] *Harris (Gurubana Gunggandji People of Yarraba) v Great Barrier Reef Marine Park Authority* (1999) 162 ALR 651, noted at 4 NTN 56.
[288] *Harris v Great Barrier Reef Marine Park Authority* (1999) 165 ALR 234, noted at (1999) 4 NTN 79.

their Honours, the NTA is so specific in the way in which it confers rights of notice, comment, negotiation and participation in relation to various future acts. The court observed that the rights conferred by s 24HA were somewhat narrower than those conferred by certain other provisions in Div 3, in particular under subdivs M and P.[289]

While observing that the notice must be given before the future act is done, the court held that it could be given under s 24HA after the government authority had already made its decision to do the act. This necessarily means that native title parties are excluded from the decision making process itself.[290] The court also held that government authorities are not obliged to provide copies of the applications for future acts or information provided in support of such applications. Nor is there any need to notify native title parties as to which part of their claim is likely to be affected by the future act. All that is required is the provision of general information.

Nor is it necessary to provide a separate notification in respect of each future act. It is sufficient if the notice refers to a class of acts.[291]

The "right to comment" is merely that. It does not carry with it a right to participate in the decision making process or to seek further information from the decision-maker. The rights conferred under s 24HA do not imply any right to veto the future act.

However the government authority is required to have regard to any comments received but is then free to decide whether and how it is to use the information provided. There is no obligation upon the government authority to avoid or minimise harm to native title interests.

Lardil[292]

The applicants, registered native title claimants, sought a declaration that a permit issued to Pasminco by the State of Queensland permitting the construction of a buoy mooring was invalid, together with final injunctions restraining the construction of such buoy mooring and the issue of a further permit without first complying with the future act provisions of the NTA. They disavowed any need to prove that they in fact held native title; rather they relied upon the statutory rights which they had as registered native title claimants.

[289] Paragraph 29.
[290] Paragraph 38.
[291] Paragraphs 44-45.
[292] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (2001) 108 FCR 453; 185 ALR 513 *(Lardil FC)*.

The court (Cooper J) held[293] that the applicants failed to establish that they had any native title to the relevant sea, and thus that the granting of the permit would be a future act. Accordingly the applicants failed to prove that they were entitled to the rights conferred under the future act regime of the NTA, including the provision of relevant procedural rights. The fact that the claim had been registered did not of itself confer procedural rights upon the applicants.

Cooper J concluded that the purpose of the future act regime was to enable the grantee of a permit etc. to ensure validity. The relevant future act provisions do not impose on the State or Pasminco any duty or obligation to do anything or to follow any particular procedure in doing the acts, or the proposed acts, complained of.

His Honour also observed that the relevant provisions, namely ss 24HA and 24NA, expressly provided for validity of acts falling within the description of the acts covered by those provisions, and conferred rights of compensation. The failure to follow the procedural steps in those sections would not deny validity to the acts complained of.

The court also considered the question of jurisdiction of the Federal Court and doubted whether the issues raised are indeed issues with which the court has jurisdiction. His Honour observed that the NTA does not deal with the enforcement of native title rights by curial process and that the parties seeking protection of native title rights must take proceedings in a court of competent jurisdiction. His Honour doubted that the relevant issues fell within the scope of s 213(2) of the NTA, or within the accrued jurisdiction of the Federal Court. It would of course have been different had the applicants sought interlocutory relief pending the determination of their native title claim.

His Honour also held that the Federal Court did not have jurisdiction to entertain questions of non-compliance with State law. He also observed that if the relevant grant was invalid on account of non-compliance with State law (for reasons other than native title) it could not be a future act in any event.

The Full Court dismissed the appeal against the decision of Cooper J and for the most part upheld his Honour's reasons and conclusions. The fundamental reason why the applicants failed arose from the fact that they did not attempt to show that they in fact held native title, but merely relied upon their status as registered native title claimants. Absent a finding that they held native title a court could not

[293] *Lardil, Kaiadilt, Yangkaal and Gangalidda Peoples v Queensland* (1999) 95 FCR 14; 177 ALR 743.

be satisfied that the granting of the authority was a future act thereby attracting whatever remedies were available under the future act regime.

Their Honours also agreed with the trial judge's conclusions to the effect that non-compliance with the relevant procedural requirements within the future act regime does not cause the authority to be invalid, particularly where there are express provisions to the contrary. See for example s 24HA(3) and s 24NA(2) and compare these with s 25(4) in relation to future acts to which the right to negotiate provisions apply.

The Full Court also concluded that s 213(2) of the NTA provided the court with the relevant jurisdiction, including, albeit with the aid of its accrued jurisdiction, power to consider the arguments concerning invalidity based upon breaches of State laws.

Their Honours also concluded that the proceedings were not of a kind to which s 85A applied, and they subsequently awarded costs against the unsuccessful appellants.[294]

Comment

The effect of these two decisions would appear to be that procedural rights under subdiv H, and by analogy under other similar subdivisions such as subdivs G to L, are very limited. Further, even where they are not observed by the relevant government authority, there may be little opportunity to restrain the making of the relevant grant or doing of the relevant activity unless the balance of convenience favours the granting of interlocutory relief. Once the act is done it would appear to have statutory validity.

Even if the applicants in *Lardil* had, instead of seeking final relief and disavowing any intention to prove their native title, sought interlocutory relief pending the outcome of the substantive proceeding (the hearing of which has now been completed[295]), they would have had to satisfy the court that the balance of convenience favoured the granting of interlocutory relief.

It is difficult to see how the balance of convenience could favour applicants if the only "unlawfulness" relied upon is a failure to give a s 24HA notice, with the consequence that they would be deprived of the limited statutory right to comment outlined in *Harris FC*. The situation may well be different if, in addition to the failure to accord them their procedural rights, the applicants for interlocutory relief express a concern about action being taken pursuant to the permit

[294] [2001] FCA 464, 26 April 2001.
[295] See notes at (2000) 4 NTN 239.

contemplated, which action might have the effect of impairing their native title rights, for example by interfering with a site of special significance. But in that event, it would be the likelihood of physical damage to such a site, rather than a possible infringement of procedural rights, that would more clearly swing the balance of convenience in favour of granting interlocutory relief.

The question then remains – what legal remedies are available where the only breach that can be alleged is the failure to provide the procedural rights set out in subdivs G to N?

Right to Negotiate Regime

As previously noted there have been numerous decisions of the NNTT as a consequence of the issue of s 29 notices, often by governments wishing to acquire land for certain purposes, and more often by mining companies desiring mining tenements of various kinds.

Virtually all of those decisions concern land in Western Australia, and indeed the greatest proportion concern land in what is known as the Eastern Goldfields area. This land is subject of the first of the Goldfields native title claims to be heard by the court, namely the *Wongatha* proceedings.[296] The *Wongatha* claim[297] is a combination of 20 other claims that had previously been lodged over parts of the *Wongatha* claim area, many of which have been subject of decisions concerning the right to negotiate.[298] The *Wongatha* claim area extends from Menzies and Leonora, north of Kalgoorlie, eastwards to the South Australian border and covers an area of over 220,000 square kilometres, approximately the size of Victoria. Overlapping the *Wongatha* claim area are several other Goldfields claims including *Koara*,[299] *Wutha*,[300] *Mantjintjarra Ngalia*,[301] *Ngalia Kutjungkatja # 1*[302]

[296] The *Wongatha* proceedings involve several overlapping claims, the lead claim being the *Wongatha* claim. Other Goldfields claims had been listed to follow the hearing of the *Wongatha* proceedings but these have now been adjourned indefinitely at the joint request of the claimants and the State.

[297] *Ron Harrington-Smith and others on behalf of the Wongatha People v The State of Western Australia and others* – WAG 6005 of 1998 – *"Wongatha"*. The hearing of the proceedings, before Lindgren J, commenced in February 2002. Evidence has been taken from Aboriginal witnesses during sittings in March, June and July and further such evidence will be taken in November. Expert evidence will be taken early next year.

[298] A well known decision of the NNTT constituted by three members was *WA v Thomas and others* (1996) 133 FLR 124.

[299] *Richard Evans on behalf of the Koara Peoples v Western Australia and others* – WAG 6008 of 1998 – *"Koara"*.

[300] *Raymond Ashwin on behalf of the Wutha Peoples v Western Australia and others* - WAG 6064 of 1998 – *"Wutha"*.

[301] *Phyllis Thomas on behalf of Mantjintjarra Ngalia Peoples v Western Australia and others* – WAG 6069 of 1998 – *"Mantjintjarra Ngalia"*.

[302] *Dolly Walker and Kado Muir on behalf of the Ngalia Kutjungkatja People v Western Australia and others* - WAG 6011 of 2000 – *"Ngalia Kutjungkatja #1"*.

and *# 2*,[303] *Maduwongga*[304] and *Cosmo Newberry*.[305] The court's decision in the *Wongatha* proceedings (subject to any appeal) will end the uncertainty which resulted in the issue of thousands of s 29 notices and hundreds of agreements and NNTT decisions, all of which proceeded upon the assumption that native title exists over the relevant claim areas and consequently that the future act regime is applicable.

The *Wongatha* proceedings have revealed the existence of numerous and substantial benefits having been promised, and in most cases provided, to those fortunate enough to have become registered native title claimants. In most cases the benefits have been paid pursuant to Ancillary Agreements, which are confidential agreements ancillary to the formal and public s 31 Agreements which get lodged with the NNTT. Because they are confidential it is difficult for third parties to find out much about them, except for example where they are used and referred to in other proceedings, such as in the various *Anaconda* matters.[306] Several such agreements have been referred to during the *Wongatha* proceedings.

A number of registered native title claimants in the *Wongatha* proceedings have been fully engaged in native title claims and negotiations since 1994, shortly after the NTA commenced. Several have been able to obtain for themselves and their immediate families substantial benefits including valuable contracts. Unfortunately however, many of those on whose behalf the registered native title claimants were authorised to negotiate have received little or nothing. As well as tainting the credit of various claimants, such revelations appear contrary to assertions often made that all members of a particular group share everything with each other and that the group's rights are exclusive.

It would appear that many right to negotiate matters have been resolved in ways not contemplated by Parliament when it set up the right to negotiate regime. The regime was set up to provide valuable statutory rights to all native title holders, not just those who were authorised to bring the claim on their behalf, namely the applicants, and upon registration the registered native title claimants. Agreements made under s 31(1)(b) of the NTA and NNTT determinations bind all members of the native title claim group[307] and are intended to be for

[303] *Dolly Walker on behalf of the Ngalia Kutjungkatja People v Western Australia and others* – WAG 6001 of 2002 – "*Ngalia Kutjungkatja # 2*".
[304] *Strickland and Nudding v Western Australia and others* – WAG 76 of 1997 – *"Maduwongga"*.
[305] *Harvey Murray on behalf of the Cosmo Newberry People v Western Australia* – WAG 144 of 1998 *"Cosmo Newberry"*.
[306] See for example, *Leo Thomas on behalf of the Waljan people and others v Anaconda Nickel Ltd*, NNTT (Hon C J Sumner), 19 March 1999.
[307] Section 41(1) and (2), NTA.

the benefit of all members of the claim group, not just those who represent them as registered native title claimants.

Similarly, the compensation regime set up by the Act, including that applicable in the event that the arbitral body (usually the NNTT) decides that compensation is payable as a condition of a determination that an act may be done, contemplates that compensation is payable to and for the benefit of all native title holders from time to time, not just those who are chosen to be applicants on their behalf.[308]

There are risks for registered native title claimants who do not provide to other members of the native title claim group an appropriate share of the benefits derived in the course of negotiations. It is likely that registered native title claimants owe duties of a fiduciary kind to all members of the native title claim group and thus would be accountable to them for a fair share of any profits which they have derived in their capacity as registered native title claimants. In addition to potential civil liability there is even some prospect of exposure to criminal prosecution.[309]

Unless native title has been extinguished (for example, where the land is or has been freehold) a mining company has little choice but to engage in the future act process until such time as a relevant native title determination is made to the effect that native title does not exist. In most cases a mining company will prefer to negotiate an agreement, albeit on terms that are rather favourable to the registered native title claimant, rather than incur the risk and further delay in pursuing its rights under s 35 of the NTA in obtaining a determination from the arbitral body. Whilst such a course would usually be commercially expedient and appropriate, the grantee party should be conscious of longer term ramifications that might ensue, if for example the correct people were not consulted or did not receive their fair share of the benefits.

Needless to say the extensive payment of benefits by mining companies in the Goldfields area will continue until such time as there is a final decision in the *Wongatha* proceedings. If it transpires that native title does not exist certain of the claimants, particularly certain of the registered native title claimants, will have derived significant benefits because of the future act regime, but their ability to continue to use the future act regime in order to obtain further windfalls will cease.

[308] See ss 38 (1)(c), 41(3) and 52, NTA.

[309] Indeed the trial judge in the *Wongatha* proceedings has warned one registered native title claimant that he is considering referring relevant transcripts and documents to the Attorney-General for further consideration, and that he (the registered native title claimant) was not obliged to answer certain questions for the reason that the answers might incriminate him.

Even if the court holds that some form of native title exists in some places within the *Wongatha* claim area, it appears unlikely that it will be of an exclusive kind – that is of anything akin to a freehold title. Most of the native title determination applications asserted exclusive rights. Presumably then, most of the negotiations were conducted upon the assumption that the grant of the relevant mining tenement would extinguish or impair proprietary rights such as those akin to freehold, rather than merely impair usufructuary rights such as a right to hunt. If the content of the relevant native title is held to be of the latter kind, the level of compensation and other benefits payable as the price of obtaining the mining tenement should be considerably lower than that which is usually agreed.

OTHER JUDICIAL DECISIONS

There have been many other decisions made in native title matters, several relating to matters of practice and procedure. I do not propose to say much about them here.

A number of decisions concern the registration test, and non-compliance of applications with the requirements of ss 61 and 62 of the NTA.[310] Several other decisions involve attempts to replace or remove applicants – most if not all of these have been unsuccessful, primarily due to lack of the authorisation required by s 66 B(1)(b) of the NTA.[311]

Two recent cases concern applications for interlocutory injunctions, both involving competing rights between persons asserting native title on the one hand and persons already holding other rights on the other.[312]

There have been a number of other decisions made in the course of cases currently being heard.[313] These include decisions relating to production of documents,[314] gender restrictions,[315] admissibility of

[310] See for example the Full Court's decision in *State of Western Australia v Strickland* [2000] FCA 652, 18 May 2000, noted at 4 NTN 173, and single judge decisions in *Phillips* noted at 4 NTN 210 and 213, *Brown* noted at 4 NTN 236, *Risk* noted at 5 NTN 25 and 92, and *Ford* and *Martin* noted at 5 NTN 32.

[311] See eg *Johnson v Lawson & Lawson* [2001] FCA 894 noted at 5 NTN 71; *Ridgeway on behalf of the Worimi People* [2001] FCA 848 noted at 5 NTN 72; and *Duren v Kayama Council* [2001] FCA 1363 noted at 5 NTN 118.

[312] *Muthi Muthi People (No 1) v Balranald Local Aboriginal Land Council* [2000] FCA 1781, Matthews J, 28 November 2000, noted at 5 NTN 31; and *Brown-Phillips v Humphries* [2001] FCA 536, Stone J, 30 April 2001, noted at 5 NTN 51.

[313] These include *Smith* noted at 4 NTN 166, *Chapman* noted at 4 NTN 193 and 194, *Daniel*, noted at 4 NTN 165 and 192, and *Lardil* noted at 4 NTN 214.

[314] See for example *Sampi* noted at 5 NTN 32 and *Kohen* noted at 5 NTN 49.

[315] See for example *Sampi* noted at 5 NTN 51.

evidence[316] and group evidence.[317] There have also been decisions concerning particulars,[318] costs,[319] venue,[320] preservation of evidence,[321] parties[322] and representation of parties by non-lawyers.[323]

There have also been decisions regarding funding of native title applications[324] and applications for adjournments because of lack of funding.[325]

CONCLUSION

The High Court's decision in *Yarmirr HC* has resolved important questions regarding native title below the high water mark and should therefore promote the resolution of a great many of the 120 or so sea claims which are current. Its decision in *Ward HC* has resolved many issues regarding extinguishment of native title and the operation of the RDA. In respect of much of the country, native title rights of an exclusive kind will have been extinguished, but questions will remain as to the extent to which other native title rights and interests have been extinguished. The answer to these questions will largely depend upon particular facts. The High Court's decision in *Yorta Yorta HC* should assist resolution of more fundamental questions going to the meaning and proof of native title itself.

[316] See for example *Daniel* noted at 5 NTN 50 and *De Rose v State of SA* (2) [2001] FCA 1614 and *De Rose v State of SA* (3) [2001] FCA 1615.
[317] *Nudding & Strickland on behalf of the Maduwongga People v State of Western Australia* [2002] FCA 934.
[318] *Dieri* noted at 4 NTN 213.
[319] *Lardil FC,* noted at 5 NTN 50.
[320] *De Rose v South Australia* [2001] FCA 1051 noted at 5 NTN 72.
[321] In *Kalkadoon People v Queensland* – Q 6031A of 1999 – the court made orders concerning the preservation of evidence and formulated a protocol. See 5 NTN 151.
[322] *Members of Yorta Yorta Aboriginal Community v The State of Victoria* (1996) 1 AILR 402; *Byron Environment Centre Inc v Arakwal People* (1997) 78 FCR 1; *Chapman v Minister for Land and Water Conservation (NSW)* [2000] FCA 1114 noted at 4 NTN 194; *Woodridge v Minister for Land and Water Conservation (NSW)* (2001) 108 FCR 527 noted at 5 NTN 50; *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* [2002] FCA 184 noted at 5 NTN 136; *Munn v State of Queensland* [2002] FCA 78 noted at 5 NTN 119; *Kooma People v State of Queensland* [2002] FCA 86 noted at 5 NTN 119; *Bissett v Minister for Land and Water Conservation (NSW)* [2002] FCA 365 noted at 5 NTN 137 and *Dolly Walker and Kado Muir on behalf of the Ngalia Kutjungkatja People v State of Western Australia* [2002] FCA 869.
[323] *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* [2002] FCA 871, Lindgren J, 4 July 2002.
[324] See the *Hicks* cases where the court refused to order the representative body or ATSIC to fund *Hicks*' native title application, noted at 4 NTN 172 and 214 and 5 NTN 51. See too *Wadi Wadi people v Victoria,* 18 September 2001 noted at 5 NTN 94.
[325] *Sampi v State of Western Australia* [2000] FCA 1018 noted at 4 NTN 194 and, *Bolton v Western Australia* [2001] FCA 1074 noted at 5 NTN 72, and *Wilkes v State of Western Australia* [2002] FCA 222 noted at 5 NTN 136.

Because the proof native title and the extent of extinguishment in any particular case will turn largely upon its own factual circumstances, it is likely that trials of claims will continue for some time. However, as relevant principles and precedents are established, trials should become shorter and thus less expensive.

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