COMMENTS

THE CLASSIFICATION OF THE FUNCTIONS AND POWERS OF THE WARDEN IN WESTERN AUSTRALIA: A CASE OF IMAGINED AND NON-EXISTENT DIFFICULTIES?

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In a recent article published in this journal Mark Gerus discussed the functions and powers of the warden and the warden's court under the *Mining Act 1978* (WA)[1] (the Mining Act). In his article Gerus discussed the decision of Ipp J in Re Calder; Ex parte Gardner.[2] This case and Gerus' article highlighted perceived difficulties with the meaning of such terms as "warden", "warden's court" and "warden in open court".

FORFEITURE BY THE WARDEN

Ipp J's conclusion in *Re Calder; Ex parte Gardner* that the warden is acting administratively when hearing plaints for forfeiture and applications for the grant of prospecting licences is contrary to the decision of the Judicial Committee of the Privy Council on appeal from the Supreme Court of Queensland in *Smith v The Queen.*[3]

The Privy Council was considering the *Crown Lands Alienation Act 1874* (Qld) (the Alienation Act). Section 51(5) of the Alienation Act relevantly provided that if during the term of a lease it shall be proved to the satisfaction of the Commissioner that the lessee has abandoned his lease and failed in regard to the performance of the performance of the conditions of residence during a period of six months, it shall be lawful for the Governor to declare the lease absolutely forfeited and vacated.

Section 5 of the Alienation Act provided that all questions shall be decided by the Commissioner who shall give his opinion in open court subject to confirmation by the Governor-in-Council. The parties and the Privy Council assumed that the use of the words "in open Court" designated the proceedings as judicial proceedings. The Privy Council stated that the Commissioner's inquiry under s 51(5) was "in the nature of a judicial inquiry".[4]

Section 96 of the Mining Act, unlike ss 48 and 98, does not use the words "in open Court", but *Smith v The Queen* is still applicable. The wording of s 96(2) of the Mining Act is similar to that of s 51(5) of the Alienation Act. Section 96(2) of the Mining Act provides that the warden shall not make an order of forfeiture unless the warden is satisfied that the requirements of the Act in relation to the mining tenement have not been complied with in a material respect and that the

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1 M Gerus, "The Functions and Powers of the Warden of Mines in Open Court and the Reform of Warden's Court Procedure under the Mining Act 1978 (WA)" (2003) 22 ARELJ 189.

2 (1999) 20 WAR 525.

3 (1878) 3 App Cas 614.

4 (1878) 3 App Cas 614 at 623 per Sir Robert Collier.

matter is of sufficient gravity to justify the forfeiture of the mining tenement. Pursuant to s 96(1)(b) "any person" [5] can make an application for forfeiture.

The method of commencing s 96 forfeiture proceedings is prescribed by r 48 of the Mining Regulations 1981 (the Mining Regulations). Such proceedings are commenced by plaint (Form 33 in the First Schedule) and there are two parties.[6] Form 33 is titled "In the Warden's Court" and is the form used for commencement of all civil proceedings in the warden's court (r 121). The use of a form titled "In the Warden's Court", is an indication that the proceedings are judicial and are to be heard in the warden's court.[7]

An application under s 96(1)(a) by the Minister or the mining registrar is dealt with differently. Regulation 49(3) provides for lodging of an objection to an order for forfeiture in Form 16 in the First Schedule. Form 16 states that the objection will be heard in the warden's court.

In the circumstances, forfeiture by the warden involves an exercise of judicial power.

IN OPEN COURT

In *Re Calder SM; Ex parte Gardner*[8] Ipp J stated that the use of the words "in open court" in the Mining Act meant only that the functions were to be performed publicly. However, the Mining Act could have provided for a public inquiry.[9]

The phrase "in open court" is a phrase of venerable standing. It was used in Coke upon Littleton.[10] Proceedings heard "in open Court" are "judicial proceedings".[11] The legislature has specifically used the words "in open court". These words when used in the Mining Act indicate that the proceedings are judicial. The position is no different with proceedings that result in a recommendation to the Minister. The fact that the person or body hearing the matter does not make

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5 See *Truth About Motorways Pty Ltd v MacQuarie Infrastructure Investment Management Ltd* (2002) CLR 591 at 602 par [17] per Gleeson CJ and McHugh J; cf *R v The Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1969-1970) 123 CLR 361 at 402.

6 See *Boulter v Kent Justices* [1897] AC 556 at 568-569 per Lord Herschell.

7 *In re Andrew* (1875) 1 Ch D 358 at 360, 361; *In re Norman; Ex parte Board of Trade* [1893] 2 QB 369; *Eldorado Ice Cream Co Ltd v Clark* [1938] 1 KB 715; see also *Hales v Bolton Leathers Ltd* [1950] 1 KB 493 at 505 CA; [1951] AC 531 at 539, 544 and 548 HL; *Vandyk v Minister of Pensions and National Insurance* [1955] 1 QB 29 at 37; *Stephens v Cuckfield RDC* [1960] 2 QB 373 at 380-381; *Britt v Buckinghamshire County Council* [1964] 1 QB 77 at 84, 85, 88 and 92; *R v Secretary of State for the Home Department; Ex parte Mehari* [1994] QB 474 at 486.

8 (1999) 20 WAR 525 at 528-529.

9 See *Errington v Minister of Health* [1935] 1 KB 249; *Boulter v Kent Justices* [1897] AC 556.

10 See *Fanshaw v Knowles* [1916] 2 KB 538 at 543-544*; Hawksley v Fewtrell* [1954] 1 QB 228 at 233-234.

11 *Kenyon v Eastwood* (1887) 57 LJ QB 455 at 456-457; *Kimber v The Press Association Ltd* [1893] 1 QB 65 at 68, 73, 75-76; *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 255 at 271; *McPherson v McPherson* [1933] 2 DLR 244 at 253-254; *Dando v Anastassiou* [1951] VLR 235 at 237; *Hawlesley v Fewtrell* [1954] 1 QB 228 at 243; *Moularis v Nankervis* [1985] VR 369 at 377; see also *Brandy v Human Rights and Equal Opportunity Commission* (1994-1995) 183 CLR 245 at 267; cf *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431 at 448.

the final decision does not prevent those proceedings from being judicial proceedings.[12] The important question in this context is the nature of the hearing.[13]

The exception that proves the rule that proceedings in open court are judicial proceedings is the position with committal proceedings. Such proceedings have consistently been held not to be judicial proceedings but to be an exercise of an executive or ministerial function. However this is largely for historical reasons. The original "inquiries" which preceded the present form of committal proceedings were conducted in secret.[14]

APPLICATION FOR A PROSPECTING LICENCE

In *Re Calder SM; Ex parte Gardner*, Ipp J stated that he agreed with the conclusion of Murray J in *Re Minister for Mines, Fuel and Energy; Ex parte Trythall*[15] that the warden was acting administratively when hearing applications under s 42 of the Mining Act for the grant of a prospecting licence. Murray J based his conclusion on that point on the decision of the Full Court in *Westside Mines Pty Ltd v Tortola Pty Ltd*.[16]

The argument before the Full Court in *Westside Mines Pty Ltd v Tortola Pty Ltd* was that "the warden" in s 146 meant the warden's court and that the power to reserve questions for the opinion of the Supreme Court only arose out of proceedings before the warden's court.[17] The purpose of the argument was to support the submission that there was no power to state a case by the warden on an application for a prospecting licence. The corollary being that therefore there could be no appeal to the Full Court from an opinion given by a Supreme Court without authority.

Burt CJ stated that it could not be said that the grant of a prospecting licence was merely a ministerial act and not a judicial act.[18] Wallace J agreed with the reasons of Burt CJ.

Rowland J's reasoning was slightly different to that of Burt CJ.

At that time s 42 of the Mining Act provided that an application for a prospecting licence should be heard in open court and any person was entitled to object to the granting of the licence. Section 59 of the Mining Act contained similar provisions in respect of an exploration licence. However s 59(2) stated that an objector "may be heard by the warden in opposition to the granting of the application". Rowland J stated that the additional words in s 59(2) seemed to him to mean that the objector was given power to have his objection heard in opposition to the application on the hearing of the application. On the other hand under s 42 there was only one party to the application and what was heard by the warden as the proceeding was the objection.

Rowland J stated that there was power in the warden to state a case arising out of a proceeding being the hearing of an objection to an application which lies in the grant of the warden but not

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12 *Smith v the Queen* (1878) 3 App Cas 614; *Estate and Trust Agencies (1927) Ltd v Singapore Investment Trust* [1937] AC 898 at 917; *Commonwealth v Queensland* (1975) 7 ALR 351 at 369; *Trapp v Mackie* [1979] 1 All ER 489 at 494-495 and 499.

13 Cf *Brandy v Human Rights and Equal Opportunity Commission* (1994-1995) 183 CLR 245 at 258; *Copartnership Farms v Harvey-Smith* [1918] 2 KB 405 at 410; *Trapp v Mackie* [1979] 1 All ER 489 at 499.

14 *Grassby v The Queen* (1989) 168 CLR 1 at 11-12 per Dawson J; See also *Moularis v Nankervis* [1985] VR 369 at 377.

15 (1991) 7 WAR 375.

16 [1985] WAR 343.

17 [1985] WAR 343 at 345 per Burt CJ.

18 [1985] WAR 343 at 346.

arising out of the hearing of the application itself.[19] As his Honour considered that it was judicial functions that were proceedings capable of being the subject of a case stated, it follows that, in his Honour's view, the hearing of the objection was a judicial proceeding.

Section 42 has since been amended and s 42(3) now provides that where there is an objection "the warden shall hear and determine the application for the prospecting licence in open court … and may give any person who has lodged such a notice of objection an opportunity to be heard."

Accordingly, on Rowland J's reasoning, the application itself would now be a judicial hearing.

In *R v City of Westminster Assessment Committee; Ex parte Grosvenor House (Park Lane) Ltd* [20] the Court of Appeal was considering the *Valuation (Metropolis) Act 1869*. Section 47(6) of that Act provided that the committee "should hear and determine any objection". Parcq LJ stated that the function was "clearly judicial".[21] The words "hear and determine" are used in s 42(3) of the Mining Act and r 49(3) of the Mining Regulations. The function is "clearly judicial".[22]

Accordingly, insofar as Murray J concluded that the court in *Westside Mines Pty Ltd v Tortola Pty* Ltd held that the warden was acting administratively when hearing applications under s 42 of the Mining Act, his Honour misstated the effect of that decision.

Murray J also relied on a statement of Barwick CJ in *Wade v Burns*[23] where Barwick CJ stated:

> "In connection with the grant or refusal of an application for authority to enter, the Warden is acting ministerially as an official, and not in any sense of a jurisdiction. It is, of course, otherwise when he constitutes the Warden's Court. Such powers, authorities or discretions as are given to him are given expressly."

However Barwick CJ's comments are not relevant to the question of the warden's function under s 42 of the Mining Act. In *Wade v Burns* the High Court (by a majority) held that in the case of the particular application in issue, the Mining Act 1906 (NSW) did not give the warden the authority to decide the jurisdictional facts.[24] The reference by Barwick CJ to the Warden's Court was only by way of comparison. Barwick CJ was making the point that, unlike the position with an application for an authority to enter, the Warden's Court did have the power and authority to decide jurisdictional facts. The warden under s 42 of the Mining Act has the authority to decide the jurisdictional facts.

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19 [1985] WAR 343 at 350-351.

20 [1941] 1 KB 53.

21 [1941] 1 KB 53 at 66-67. See also *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431 at 448; *Commonwealth v Queensland* (1975) 7 ALR 351 at 369; *In re the Judiciary Act and In re the Navigation Act* (1921) 29 CLR 257 at 263-264.

22 See also *The Queen v The Corporation of Dublin* [1897] LR Ir 371 at 377; *The British Imperial Oil Co Ltd v The Federal Commissioner of Taxation* (1925) 35 CLR 422 at 432; *Australian and Pear Marketing Board v Tonking* (1942) 46 CLR 77 at 83,106; *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at 21; *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 211.

23 (1966) 115 CLR 537 at 551.

24 As to "jurisdictional facts" see eg *R v Blakely; Ex parte Association of Architects etc of Australia* (1950) 82 CLR 54 at 69-70, 90-91; *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 117-118; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1968-1969) 123 CLR 361 at 375; *Corporation of City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 148 par [28].

In the circumstances, the conclusion of Ipp J that the warden hearing an application for a prospecting licence is acting administratively, to the extent that it is based on Murray J's reasons in *Re Minister for Mines; Ex parte Trythall*, cannot be supported.

Ipp J's conclusion is also contrary to the decision of White J in *Re Boothman SM; Ex parte Optimum Resources Pty Ltd v Kalgoorlie Consolidated Goldmines Pty Ltd.*[25] In that case White J stated that the warden constituted an inferior court when considering an application for the grant of a prospecting licence. White J relied on the statement of Burt CJ in *Westside Mines Pty Ltd v Tortola*[26] that the authority of the warden under the Mining Act to make the grant of a prospecting licence could not be said to be an entirely ministerial act on the part of the warden and not a judicial act.

Ipp J also referred to the fact that under s 36 of the Mining Act an appeal against the warden's decision lies to the Minister and that the Minister has wider powers to grant an application for a prospecting licence than the warden. Ipp J stated that the appeal to the Minister (and not to the Supreme Court) and the wide powers on appeal are inconsistent with the warden's decision being a judicial function.[27] The fact that there may be a right of appeal is not a relevant consideration.[28]

In any event, the appeal to the Minister under s 36 of the Mining Act is only against refusal of a grant or against any conditions the applicant considers unreasonable. An objector has no right of appeal to the Minister.

RECOMMENDATORY PROVISIONS

Ipp J in *Re Calder SM; Ex parte Gardner* stated that the warden was acting administratively when making recommendations.

In support of his conclusion in *Re Calder SM; Ex parte Gardner* that the warden was acting administratively when hearing applications and making recommendations to the Minister, Ipp J relied, inter alia, on the following comments of Rowland J in *Westside Mines Pty Ltd v Tortola Pty Ltd:*[29] "Construed in this rather literal manner, the Act seems to separate the purely ministerial from the judicial functions exercised by the warden…"

However as stated above, Rowland J was saying, in effect, that the hearing of an objection to a prospecting licence, was a judicial act. Rowland J also expressed a tentative opinion, to the effect, that, when hearing an objection to an application for a tenement which lay in grant of the Minister, the warden was acting in a judicial capacity.[30] Rowland J left open the question whether the decision on a hearing of such an objection was capable of being appealed from and whether there was an obligation on the warden to give a decision on the objection and whether such a decision was a final decision that could be appealed.[31]

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25 Unreported Supreme Court WA, Full Court, 11 July 1997 Lib No 970347C at 12-13.

26 [1985] WAR 343 at 346.

27 *Re Calder SM; Ex parte Gardner* (1999) 20 WAR 525 at 530.

28 *The Commonwealth v Kreglinger & Fernau Ltd* (1925) 37 CLR 393 at 407-408 per Isaacs J; *Ex parte Thompson; Re Ryan* (1940) 41 SR (NSW) 10 at 14-15 per Jordan CJ.

29 [1985] WAR 343 at 350.

30 [1985] WAR 343 at 351; see also *R v Harlock; Ex parte Stanford & Atkinson Pty Ltd* (1974) WAR 101 at 103 per Hale J.

31 [1985] WAR 343 at 351.

Ipp J then went onto discuss whether the making of a recommendation to the Minister under s 98 of the Mining Act for forfeiture of a tenement was a judicial function. His Honour held that there was no difference in principle between the warden's functions in making a recommendation for the grant of a tenement and the warden's functions in making a recommendation for the forfeiture of a tenement. Ipp J did not discuss ss 98(5) or 99(1).

Pursuant to s 99(1) of the Mining Act, the Minister can only make a declaration of forfeiture "after receiving the recommendation of the warden". Therefore, if no recommendation for forfeiture is made by the warden, the Minister has no power to make a declaration of forfeiture. Section 98(6) provides that as soon as practicable after the "hearing" of the application, the warden shall forward to the Minister the notes of evidence,[32] a report and the warden's recommendation, if any. The Minister, may, before acting on the recommendation, require the warden to take such further evidence or rehear the application as the Minister directs.

The warden can only make a recommendation under s 98(4) if the warden "finds" that there has been non-compliance with expenditure conditions and is "satisfied"[33] that the non-compliance is of sufficient gravity to justify forfeiture. The warden has power to impose a penalty as an alternative to forfeiture. If any penalty imposed by the warden is not paid, the warden "shall" make a recommendation as to whether or not the tenement should be forfeited (s 98(9)). The warden also has the power to dismiss the application. These are clearly judicial powers.

Ipp J left open the question whether the power to impose a penalty under s 98(4) and costs under s 98(8) was judicial or administrative. His Honour stated that there was no reason why an administrative entity should not be given power to impose a penalty or order costs and that it should be borne in mind that the penalty and costs powers were ancillary to the power to make recommendation.[34] However, unless the power was totally arbitrary and without limitation, the imposition of a penalty would involve an exercise of judicial power.[35]

SECTION 132(1) OF THE MINING ACT

Another issue considered by Ipp J in *Re Calder SM; Ex parte Gardner* was s 132(1) of the Mining Act.

Section 132(1) gives the warden's court jurisdiction to hear and determine *"*generally all rights claimed in, under or in relation to any mining tenement… or relating to any matter in respect of which jurisdiction is under any provision of this Act conferred upon either the warden's court or the warden."

Ipp J referred to an analysis of s 132(1) of the Mining Act by Kennedy J in *Richmond v Panda Holdings Pty Ltd.*[36] Kennedy J stated that s 132(1) gave the warden's court jurisdiction to hear forfeiture applications under s 96 of the Act. Wallwork J came to a similar conclusion, although his Honour differed in the result.[37] Ipp J stated that he disagreed with Kennedy J in relation to ss 96 and 132(1). His Honour considered that his comments in relation to ss 98(4) and (8) applied

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32 Cf *The King on Prosecution of Howard Freeman v Arndel* (1906) 3 CLR 558 at 582.

33 Cf *R v The Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1969-1970) 123 CLR 361 at 402, 412–413, 415.

34 (1999) 20 WAR 525 at 531.

35 See *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 at 444, 445; See also *Attorney-General v British Broadcasting Corporation* [1980] 3 All ER 161 at 182d.

36 Unreported, Supreme Court WA, Full Court, 20 October 1998, Lib No 980615A at 9.

37 Lib No 980615C at 13.

to ss 96(3) and (5).[38] His Honour stated that the reference to the warden at the end of s 132(1) was a reference to the warden performing purely judicial functions.[39]

The important words in s 132(1) in relation to this issue are "matter" and "jurisdiction".

In *Croome v Tasmania*[40] it was stated as follows:

> "A 'matter' must be distinguished from the action or judicial proceeding which is commenced in order to obtain a determination of the controversy between the parties[41]. The matter is not the proceeding but the subject matter of the controversy which is amenable to judicial determination in the proceeding[42]." [43]

This decision was in relation to "matters" in the *Judiciary Act 1903* (Cth) which relies on the meaning of "matters" in the Constitution. However, it is still a useful definition.

In *Braun v R,*[44] Kearney and Thomas JJ stated:

> "The concept [of jurisdiction of a court] is one of authority or capacity and the essence of an inquiry into 'jurisdiction' in this sense is as to limits – whether a court has power to hear and determine the particular case."[45]

The effect of s 132(1) is that the warden's court is given jurisdiction to hear and determine matters the subject of judicial determination by a warden.

Ipp J was correct to the extent that he stated that s 132(1) only applied to judicial proceedings. However his Honour was incorrect, with respect, in declining to follow the views of Kennedy and Wallwork JJ in *Richmond v Panda Holdings Pty Ltd* because the warden is acting judicially when hearing and determining forfeiture applications under s 96 of the Mining Act.

The position is less clear where the warden makes no final determination but makes recommendations to the Minister in relation to grants of tenements. Notwithstanding the proceedings may be judicial, it is arguable that as no final determination is made on the application itself, it is not a "matter" within the "jurisdiction" of the warden. However, the warden would seem to be acting in a judicial capacity when hearing an objection to an application for a tenement which lies in the grant of the Minister.[46] There is therefore a matter subject to judicial determination by a warden.

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38 Op cit 34.

39 (1990) 20 WAR 525 at 535.

40 (1997) 191 CLR 119.

41 *Fencott v Muller* (1983) 152 CLR 570 at 603.

42 *In re the Judiciary Act and In re the Navigation Act* (1921) 29 CLR 257 at 265-266; *Fencott v Muller* (1983) 152 CLR 570 at 603; *Crown v Commissioner for Railways* (Qld) (1985) 159 CLR 22 at 37; *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372.

43 (1997) 191 CLR 119 at 124-125 Cf *Abebe v Commonwealth* (1999) 197 CLR 510 at 537-538; *Truth About Motorways Pty Ltd v MacQuarie Infrastructure Management Ltd* (1999) 200 CLR 591 at 611-612; *Re East; Ex parte Nguyen* (1998) 196 CLR 354 at 386-387.

44 (1997) 112 NTR 31.

45 (1999) 112 NTR 31 at 39; cf *Anisminic Ltd v Foreign Compensation Commission* [1968] 2 QB 862 at 889 per Diplock J; *Re McC* [1985] AC 528 at 536.

46 *Westside Mines Pty Ltd v Tortola Pty Ltd* [1985] WAR 343 at 350-351 per Rowland J, op cit note 30; see also s 134(1)(d) of the Mining Act.

CONCLUSION

The view that there are difficulties with the warden's functions under the Mining Act is not justified.

The decision in *Re Calder SM; Ex parte Gardner* should be limited to the narrow issue it decided, namely, that exemption applications under s 102 of the Mining Act are administrative proceedings. However, for the reasons set out above such proceedings are judicial proceedings.

COMMENT ON "THE DENIAL OF NATIVE TITLE TO THE RESOURCE PROVINCES OF THE BURRUP PENINISULA AND THE PILBARA: *DANIEL v STATE OF WESTERN AUSTRALIA*"

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In a recent article,[1] Professor Richard Bartlett commented (among other things) on the limited geographic extent of the non-exclusive native title rights and interests found to exist in *Daniel v State of Western Australia*.[2]

In part, as he noted, this resulted from a finding that a non-exclusive pastoral lease granted after the commencement of the *Racial Discrimination Act 1975* (Cth) (RDA)[3] over an area that had, apparently, been subject to other non-exclusive pastoral leases granted prior to the commencement of the RDA was a category A past act i.e. an act that wholly extinguished native title.[4]

This aspect of the decision is worthy of further comment because, at present, it cannot be said that the state of the law is clear and certain on this point.[5] It has been noted that: "*If* this [RD Nicholson J's finding in *Daniel v State of Western Australia*[6]] is correct, and applied across Western Australia, the area of land affected could be large".[7] However, there is now doubt as to whether or not this finding was correct. In *Neowarra v State of Western Australia*[8], Sundberg J reached a different conclusion in circumstances that do not, on the face of it, seem to be distinguishable either in fact or in law.[9]

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1 R Bartlett, "The Denial of Native Title to the Resource Provinces of the Burrup Peninsula and the Pilbara: *Daniel v State of Western Australia*" (2003) 22 ARELJ 453.

2 [2003] FCA 666, RD Nicholson J.

3 But before 1 January 1994, with the lease in question being in existence on 1 January 1994 – see *Native Title Act 1994* (Cth), ss 228 and 229 and *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA), s 6.

4 Ibid at [919]. Although the prior history of dealings is not apparent on the face of the reasons for decision, see S Wright, "Case Note – *Daniel v Western Australia* [2003] FCA 666 ("Ngarluma Yinjibarndi")' (2003-2004) 6 NTN 47 at 49.

5 Note that the case giving rise to this conflict appeared after Professor Bartlett wrote his article.

6 [2003] FCA 666.

7 J Bursle and G Gishbul , "Ngarluma Yinjibarndi – Implications for the Mining Industry" (2003-2004) 6 NTN 50 at 52, emphasis added.

8 [2003] FCA 1402.

9 Ibid at [523], [526], [528], [529], [531], [532] and [542]. In both *Daniel* and *Neowarra*, there was no doubt that the leases in question were non-exclusive pastoral leases, although see fn 11.