NATIVE TITLE DEVELOPMENT — WAANYI PEOPLES CLAIM*

INTRODUCTION

On 14 February 1995, French J, as President of the National Native Title Tribunal, handed down his reasons in respect of an application by the Waanyi people for the determination of the existence of Native Title.[1] French J's decision in this case is extremely important to the development of the laws relating to Native Title in this country.

BACKGROUND INFORMATION

On 27 June 1994, the North Ganalanja Aboriginal Corporation and the Bidanggu Aboriginal Corporation lodged an application on behalf of the Waanyi people for the determination that Native Title existed over an area of land near Lawn Hill some 250 kilometres north-west of Mt Isa in Queensland. This application sought to establish that Native Title existed over an area of land which included the area the subject of the proposed Century CRA Lead/Zinc Mining Operation.

The Native Title Registrar declined to accept the application on the grounds that the claim prima facie could not be made out in accordance with s 63(1) of the *Native Title Act* 1993 (Cth).

The Waanyi then sought to have the Presidential Member of the National Native Title Tribunal (French J) invoke his powers pursuant to s 63(4) of the *Native Title Act* 1993 (Cth) to direct the Registrar to accept the application on the basis that he considered that a prima facie case could be made out.

French J although agreeing with the National Native Title Registrar that a prima facie case could not be made out nevertheless invited submissions from the Waanyi people to prove that a prima facie case could in fact be made out.

French J indicated that to prove a prima facie case in this instance the Waanyi would have to prove:

1. The existence or availability of evidence capable of justifying a finding that, if not extinguished by prior legislative or executive act, native title exists on the land the subject of the application.
2. That having regard to the known land tenure history available Native Title has not been extinguished.[2]

French J also invited due to the importance of the outcomes in the matter, the State of Queensland, Century Zinc Ltd (Century Zinc) and CRA Exploration Pty Ltd (CRA) to make submissions. Century Zinc and CRA were invited principally to make submissions because the Native Title claim would effect their proposed operations on the claim land.

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1. *In the Matter of the Native Title Act 1993 and In the Matter of the Waanyi Peoples Native Title Determination Application* — Unreported Judgment of the National Native Title Tribunal QN94/9 14 February 1995 (hereafter referred to as the judgment).
2. Ibid, p 3.

KEY ISSUES OF JUDGMENT

The judgment in this case raised four key issues which this paper will address being:

- how to establish a prima facie case;
- how to prove the existence of Native Title;
- how to extinguish Native Title; and
- the need for reform.

HOW TO ESTABLISH A PRIMA FACIE CASE

Section 63(1)(b) of the *Native Title Act* 1993 (Cth) provides that subject to compliance with the requirements of s 62 of the *Native Title Act* 1993 (Cth) (a provision regarding the material and fees to accompany an application) the Registrar must accept an application, unless he or she is of the opinion that prima facie the claim cannot be made out.

As earlier discussed, French J set out the elements that needed to be proved to establish a prima facie case. However, significantly French J went on to propose certain rules regarding the Native Title Tribunal and establishing in that Tribunal a "prima facie case".

The rules proposed were as follows:

1. The Tribunal is an administrative body. Its members and the Registrar of Native Title perform administrative functions when they make decisions under the Act.
2. In construing the Act, the members and the Registrar must apply the same rules as would be applicable in a court of law.
3. Section 63 is to be construed according to the ordinary meaning of its words and having regard to the underlying purpose of the Act.
4. The Registrar must accept an application which complies with the formal requirements of s 62 unless of the opinion that the application is frivolous or vexatious or that prima facie the claim cannot be made out.
5. A claim prima facie cannot be made out if, at first sight or as a matter of first impression, it could not succeed.
6. The applicants are not obliged to lodge evidence in support of the application to make out a prima facie case.
7. The Registrar may, but is not obliged to, make inquiries or receive information to determine whether it can be said at the outset that a claim could not be made out. These inquiries may include land tenure and land tenure history searches and receiving advice on the plausibility of a claim from an anthropological perspective.
8. The Presidential Member, to whom an application is referred by the Registrar, will apply the same test as the Registrar applies under para 63(1)(a) in deciding whether or not he or she is of the same opinion as the Registrar. The Presidential Member may, however, find that prima facie a claim cannot be made out on grounds other than or additional to those relied upon by the Registrar.
9. An applicant who is invited, under s 63(3), to show the Presidential Member that a prima facie claim can be made out must show that evidence exists or can be obtained which is capable of establishing each of the elements of Native Title. It does not require production of the evidence itself.
10. For the purpose of showing that a prima facie claim can be made out, it is not necessary for the applicant to show that it has evidence to negative extinguishment by legislative or executive act.
11. The Presidential Member may have regard to evidence of extinguishing events in determining whether a prima facie claim can be made out.
12. The Presidential Member in deciding whether a prima facie claim can be made out can form a concluded view on a question of law which, if decided one way, would be fatal to the application.

13. The issues to be addressed by the Presidential Member in deciding whether a prima facie claim can be made out are not limited to those upon which the Registrar formed the opinion that prima facie a claim could not be made out.

EXISTENCE OF NATIVE TITLE?

NATIVE TITLE — CONCEPT AND INDICIA

The general concept of Native Title is defined in the case of *Mabo v Queensland (No 2)*[3] by Brennan J:[4]

> [T]he term 'Native Title' conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.

The nature and incidents of Native Title in a particular case are matters of fact to be ascertained by the evidence. The following general propositions, however, can be derived from *Mabo v Queensland (No 2)*[5] in the judgment of Brennan J:[6]

1. Where a clan or group has continued to acknowledge the laws and, so far as is practicable, to observe the customs based on the traditions of that clan or group, whereby their traditional connexion with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people identify and protect the Native Title rights and interests to which they give rise.
2. Where there is no longer "any real acknowledgment of traditional law and any real observance of traditional customs the foundation of Native Title has disappeared". Where Native Title has been lost by abandonment of traditional laws and customs it cannot be revived. In that event, the Crown's radical title expands to a full beneficial title.
3. Native Title may be protected by legal or equitable remedies appropriate to the particular rights and interest established by the evidence whether proprietary, personal or usufructuary.
4. Traditional laws and customs will determine the incidents of Native Title. These may relate to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in lands. Judicial sanctions may be withheld in the event that the traditional laws or customs are repugnant to natural justice, equity and good conscience.
5. The laws and customs of people may change and the rights and interests of members of the people among themselves change accordingly. But so long as an identifiable community remains, the members of which are identified by one another as member of that community living under its laws and customs, the communal Native Title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs as currently acknowledged and observed.
6. The rights and interests which constitute Native Title can be possessed only by the indigenous inhabitants and their descendants unless there are indigenous laws which provide for alienation to strangers. A right or interest possessed as a Native Title cannot be acquired from an indigenous people by one who, not being a member of the people, does not acknowledge their laws and observe their customs. Nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people. Such a right or interest can be acquired outside those laws and customs only by the Crown.
7. The Crown's sovereignty over all land in the territory carries the capacity to accept the surrender of Native Title which may be surrendered on purchase or voluntarily. On surrender the Crown's radical title is expanded to absolute ownership.

3. (1992) 175 CLR 1.
4. Ibid at 57.
5. Ibid.
6. Ibid at 59-61.

French J referred to the judgments of Deane and Gaudron JJ in *Mabo v Queensland (No 2).*[7] In that case, Deane and Gaudron JJ

> summarised the nature, contents and limitations of common law Native Title and identified it as comprising communal rights enjoyed by a tribe or other group. The content of the rights and interests is defined by traditional law and custom. Law and custom may change but such changes will not extinguish the Native Title provided they do not diminish or extinguish the relationship to the land. The enjoyment of rights can be varied and dealt with under the traditional law or custom but are not assignable outside the overall native system. Their Honours did not identify any limit to the size of the grouping or the scope of the "native system" in which Native Title could be identified.[8]

French J emphasised Deane and Gaudron JJ's view that Native Title can be lost by abandonment of connection with the land or surrender to the Crown or extinction of the relevant tribe or group. However he indicated where the relevant tribe or group continues to occupy or use the land, then that group will not lose Native Title.[9]

French J also endorsed the comments of Toohey J in *Mabo v Queensland (No 2).*[10] He agreed with Toohey J that for Native Title to subsist there must be a society organised sufficiently to create and sustain rights and duties whose presence on the land was part of a functioning society.

BACKGROUND HISTORY — WAANYI AND THE CLAIM LAND

It was established to the satisfaction of the Tribunal that:

- the land under the claim was prior to the 1880s, occupied by the Injilarija people;
- the Injilarija people enjoyed rights and interests in the land according to their own traditional laws and customs;
- the rights and interests of the Injilarija people were respected by other language groups including the Waanyi according to common traditional laws and customs;
- upon the disappearance or extinction of the Injilarija people it was possible for the Waanyi people to acquire rights and interests in the land according to their own traditional laws and customs, and/or laws and customs common to themselves and the Injilarija;
- the movement of Waanyi people eastwards into what was formerly Injilarija lands was consistent with the traditional laws and customs common to both groups; and
- the Waanyi people thereafter maintained a connection with the land from the 1890s to the present, albeit that connection may not have extended to physical occupation of the land in recent times.[11]

The Tribunal as a result of this evidence was able to justify a finding that Native Title, if not extinguished by prior legislative or executive act, exists on the land the subject of the application.

Significantly though the Tribunal did canvass two issues which merit more discussion, namely:

- the issue of succession; and
- the issue of physical presence.

ISSUE OF SUCCESSION

There was evidence given that the original aboriginal inhabitants of the land the Injilarija people had as a result of a number of massacres become extinct. The Waanyi argued that consistent with the traditional laws and customs common

7. Ibid.
8. Judgment, op cit n 1, p 18.
9. Ibid, p 18.
10. (1992) 175 CLR 1.
11. Judgment, op cit n 1, p 20.

to both themselves and the Injilarija a successionary law or custom existed which entitled the Waanyi to the former Injilarija lands. French J on this point stated that the Waanyi's

> case on Native Title would, no doubt, face considerable obstacles, not least the characterisation of their connection with the land as traditional. But that characterisation and their possible succession to the land after the Injilarija depends upon factual exploration of the social structure that encompasses both groups as part of a cultural block and the question whether, if some structure exists, it can be said to embody traditional laws and customs regulating succession to the land that would be recognised by the common law.[12]

On the facts in the case, French J went onto hold that

> [U]pon the disappearance or extinction of the Injilarija people it was possible for the Waanyi people to acquire rights and interests in the land according to their traditional laws and customs, and/or laws and customs common to themselves and the Injilarija.[13]

Further,

> [T]he movement of the Waanyi people eastwards into what was formerly Injilarija lands was consistent with the traditional laws and customs common to both groups.[14]

ISSUE OF CONNECTION WITH THE LAND

The issue of connection with the land in this case depended heavily on satisfying the Tribunal upon the issue of succession. After having satisfied the Tribunal upon the issue of succession the Waanyi then had to prove that they had maintained connection with the land. Connection in this context had two elements:

- traditional societal connection to the land; and
- physical presence and continuity of occupation.

In relation to the issue of traditional societal connection to the land French J referred to the comments of Toohey J in *Mabo v Queensland (No 2).*[15] French J indicated

> that for Native Title to subsist there must be a society sufficiently organised to create and sustain rights and duties. There is no separate requirement to prove what kind of society beyond proof that presence on the land was part of a functioning system.[16]

French J considered that

> there was evidence of the persistence among the Waanyi of strong intellectual traditions in relation to themselves and their lands and the continuity of what could only be described a viable society.[17]

Further, that the

> claimed land lies within a wider area with which they have connection.[18]

Accordingly, French J concluded that a traditional societal connection existed to the land the subject of the claim.

12. Ibid.
13. Ibid.
14. Ibid.
15. (1992) 175 CLR 1 at 188.
16. Judgment, op cit n 1, p 22.
17. Ibid, p 22.
18. Ibid.

This conclusion, despite contrary submissions, in his view was not affected by any modification of traditional rights. French J cited with approval a statement by Toohey J in *Mabo v Queensland (No 2)*[19] that

> indigenous people cannot, as it were, surrender its rights by modifying its way of life.

In relation to the issue of physical presence and continuity of occupation, evidence was given that the Waanyi's connection with the land had been broken by a number of events including the grant of pastoral leases. The Tribunal then had to consider the issues of physical presence and continuity of occupation. These matters incidentally had not been directly in issue in *Mabo v Queensland (No 2).*[20] French J stated in relation to this issue that

> [T]he proposition that a continuing physical presence on the land is a necessary condition of the subsistence of Native Title receives support from the judgment in *Mabo (No 2).* But physical presence was not an issue in that case. It is, in any event, a question of mixed law and fact to be answered in part by reference to Aboriginal traditional law and custom particularly where and to the extent that it deals with movement, relocation and dispossession. There is no basis to form a concluded view that there was not indigenous conventions in pre-colonial times regulating the recognition of one group's entitlement to country even in its physical absence.[21]

French J concluded that

> [T]he Waanyi people . . . maintained a connection with the land from the 1890s to the present, albeit that connection may not have extended to physical occupation of the land in recent times.[22]

EXTINGUISHMENT OF NATIVE TITLE

ASSUMPTION IN FAVOUR OF ABORIGINALS

French J held that given the serious effect of extinguishments upon Native Title holders it was necessary to assume in favour of aboriginal applicants that a step in extinguishment was not taken, if from the material an inference is open that some step in extinguishment was not taken. We see this where French J states:

> [I]n relation to grants of interests relied upon . . . as having extinguished Native Title, there is the factual question whether steps said to be sufficient to effect such grants were taken. If, on the materials before me, the inference is open that some step was not taken then it will be assumed in favour of the applicants that the step was not taken. From one point of view this says nothing more than that the applicants would, in that event, have the benefit of a conclusion that a prima facie case could be made out that the claimed extinguishing event did not occur.

EXTINGUISHMENT OF NATIVE TITLE — GENERAL PRINCIPLES

It is relevant at this point to consider the general principles regarding extinguishment of Native Title. French J in his judgment referred extensively to the judgments in *Mabo v Queensland (No 2).*[23] French J summarised the position regarding extinguishment when he states:[24]

19. (1992) 175 CLR 1 at 192.
20. Ibid.
21. Judgment, op cit n 1, p 22.
22. Ibid, p 20.
23. (1992) 175 CLR 1.
24. Judgment, op cit n 1, p 23.

> the exercise of a power to extinguish Native Title must reveal a "plain and clear intention" to do so, whether that action be taken by the legislature or by the executive.

French J supported the view of Brennan J in *Mabo v Queensland (No 2)*[25] that Native Title can be extinguished, although it is not extinguished

> unless there is a clear and plain intention to do so.[26]

Moreover, a

> clear and plain intention to extinguish Native Title is not revealed by a law which merely regulates the enjoyment of Native Title or which creates a regime of control that is consistent with the continued enjoyment of Native Title.[27]

> It need hardly be said that where an executive act is relied upon to extinguish traditional title, the intention of the legislature that executive power should extend this far must likewise appear plainly and with clarity.

French J supported the view of Brennan J in *Mabo v Queensland (No 2)*[28] that a plain and clear intention will be evidenced by the granting of an inconsistent interest in land. We see where French J cites part of Brennan J's judgment as follows:

> A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a Native Title in respect of the same land necessarily extinguishes the Native Title. The extinguishing of Native Title does not depend on the actual intention of the Governor-in-Council (who may not have averted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy the Native Title.

The proposition proffered by Brennan J is subject however to the following proposition:

> Where the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy Native Title, Native Title is extinguished to the extent of the inconsistency. Thus Native Title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (for example authorities to prospect for minerals).

The central issue is therefore directed at "inconsistency". Partial inconsistency will only enable partial extinguishment. Accordingly, that raises issues regarding the effect of grants of interest in land "which may be capable of co-existing with some elements of Native Title".[29]

In the Waanyi case, the Tribunal was asked to consider on the basis of the submissions made to it whether the existence of any other tenures extinguished Native Title and to what extent, and also what was the effect of s 144B of the *Native Title Act* 1993 (Qld).

25. (1992) 175 CLR 1.
26. Ibid at 68.
27. Ibid.
28. Ibid.
29. Judgment, op cit n 1, p 24.

BACKGROUND TENURE HISTORY

A Background tenure history was undertaken in relation to the site which established the existence of the following grants:

- an 1881 Licence;
- an 1883 Pastoral Lease; and
- a 1904 Lease.

An area within the 1904 Lease was surrendered to the Crown who created in respect of that area a Camping and Water reserve. Although it was important to establish, as far as extinguishment was concerned, the existence of the Licence and Grants. This is because it is likely that a Camping and Water reserve will not extinguish Native Title.

We can see this from the judgment of Brennan J in *Mabo v Queensland (No 2)*[30] where he indicated that

> [W]here the Crown has validly and effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy Native Title, Native Title is extinguished to the extent of the inconsistency. Thus Native Title has been extinguished to parcels of the waste lands of the Crown that have been validly appropriated for use (whether by dedication, setting aside, reservation or other valid means) and used for roads, railways, post offices and other permanent public works which preclude the continuing concurrent enjoyment of Native Title. Native Title continues where the waste lands of the Crown have not been so appropriated or used or where the appropriation and use is consistent with the continuing concurrent enjoyment of Native Title over the land (for example land set aside as a national park).

CONSTITUTIONAL LIMITATION OF GRANTS

The Waanyi submitted that the legislature of Queensland both before and after federation, lacked power to make laws extinguishing Native Title. They also submitted that the State of Queensland could not make laws authorising the grant of leases for pastoral purposes or licences or permissions which were not subject to the reservation of subsisting Native Title rights in favour of aboriginal people.

They based the submission on the proposition that the legislative power of Queensland is expressly limited by "contracts, promises and engagements" existing at the time of the enactment of Imperial and local laws from which Queensland's constitution was derived.

The Waanyi sought to identify promises made to reserve Native Title rights which limited the legislative power to dispose of Crown lands.

Prior to 1859 Queensland was part of the colony of New South Wales. Section 2 of the *New South Wales Constitution Act* 1855 (Imp) conferred upon the legislature of the colony of New South Wales the entire management and control of the wastelands belonging to the Crown in the colony of New South Wales. This conferral was expressed to be subject to the following proviso:

> Provided, that nothing herein contained shall effect or be construed to affect any Contract or to prevent the Fulfilment of any Promise or Engagement made by or on behalf of Her Majesty with respect to any Lands situate in the said Colony, in Cases where such Contracts, Promises or Engagements shall have been lawfully made before the Time which this Act shall take effect within the said Colony, nor to disturb or any way interfere with or prejudice any vested or other Rights which have accrued or belong to the licensed Occupants or Lessees of any Crown Lands within or without the settled Districts, under and by virtue of the Provisions

30. (1992) 175 CLR 1 at 70.

of any of the Acts of Parliament so appealed as aforesaid, or of any Order or Orders of Her Majesty in Council issued in pursuance thereof.

In 1859 an Order in Council was made which provided for the constitution of the colony of Queensland:

This Order in Council conferred a legislature on the new colony comprising a Legislative Assembly and a Legislative Council. The Order in Council provided in cl 17 that subject to the *New South Wales Constitution Act* 1855 (Imp) "which concerned the maintenance of existing contracts", the legislature of the Colony of Queensland would have power to make laws for regulating the sale, letting disposal and occupation of wastelands of the Crown within the colony.[31]

Further s 30 of the *Constitution Act* 1867 (Qld) provided:

Subject to the provisions contained in the Imperial Act of the 18th and 19th Victoria Ch 54 and of an Act of the 18th and 19th years of Her Majesty entitled "An Act to repeal the Acts of Parliament now in force respecting the disposal of waste lands of the Crown in Her Majety's Australian Colonies and to make other provisions in lieu thereof" which concern the maintenance of existing contracts it shall be lawful for the legislature of this colony to make laws for regulating the sale, letting, disposal and occupation of the wastelands of the Crown within the said colony.

By s 40 of the *Constitution Act* 1867 (Qld) the entire management and control of the wastelands belonging to the Crown and the Colony of Queensland was vested in the legislature of the Colony subject to the following proviso:

Provided that nothing herein contained shall affect or be construed to affect any contract or to prevent the fulfilment of any promise or engagement made by or on behalf of Her Majesty with respect to any lands situate within the said colony in cases where such contracts, promises or engagements shall have been lawfully made before the time at which this Act shall take effect within this colony nor disturb or in any way interfere with or prejudice any vested or other rights which have accrued or belong to licensed occupants or lessees of any Crown lands within or without the settled districts under and by virtue of the Act or the Imperial Parliament passed in the ninth and tenth years of Her Majesty's reign Chapter one hundred and four or of any Order or Orders of Her Majesty in Council issued in pursuance thereof.

The Waanyi then sought to establish that certain instruments existed which evidenced their contention that there existed a "contract, promise or engagement" which read with the provision of the Queensland Constitution limited the power of the legislature to grant land or to lease land for pastoral purposes in a way to impair or extinguish Native Title.

The Waanyi identified from various despatches and other documents "the contract, promise or engagement" relied upon by them as follows:

Such contract, promise or engagement was made by or on behalf of Her Majesty with respect to the rights of Aboriginal persons in land situate in the said Colony leased or occupied for pastoral purposes.

Particulars

The contract, promise or engagement was a contract promise or engagement:

(a) to preserve and protect such rights and interest of Aboriginal persons in such lands from any extinguishment or impairment;
(b) to reserve from each and every crown ground of an estate or interest in or of an entitlement over such lands such rights and interest of Aboriginal persons in such lands, including rights of access to and rights of occupation and use of such lands and waters and resources of such land;
(c) in relation to the granting of any pastoral lease, to grant to the lessee an exclusive right of pasturage but not an exclusive right of possession;
(d) to ensure the rights conferred upon lessee or occupiers of such land are not inconsistent with the concurrent and continuing exercise of such rights and interest of aboriginal people in relation to such lands and the waters and resources of such lands.

31. Judgment, op cit n 1, p 37.

French J held in relation to this submission as follows:[32]

> The characterisation of the various expressions in these despatches as a contract, promise or engagement, that characterisation is, in my opinion, untenable. There are opinions, observations and statements of what is necessary to be done in order to protect the interest of aboriginal people. There is however, in my opinion, nothing that amounts to a contract, promise or engagement within the ordinary meaning of those words. In my opinion there was no limitation on the power of the Queensland legislature to grant leases without reservations in favour of the aboriginal inhabitants of the country the subject of the grant. Nor was there any limitation derived from the terms of the order in Council in 1859 that the *Constitution Act* 1867 on its power to extinguish Native Title.
>
> This conclusion is consistent with the views of Dawson J in *Mabo v Queensland (No 1)*[33] that any contract, promise engagement or right of the type referred to in the proviso has long since ceased to exist nor were they in 1859 the source of any limitation upon the power of the Queensland Parliament to deal with waste lands.

French J then went on to consider the specific dealings with the land and whether they extinguished Native Title.

1881 LICENCE

A licence was created in 1881. It was granted pursuant to the *Pastoral Leases Act* 1869 (Qld).

The Waanyi people submitted that the licence did not convey an interest in the land. In relation to this submission French J stated:

> [W]hether a licence conveys an interest in land or a proprietary interest of any kind will depend upon its terms and conditions and the provisions of the statute (if any) under which it is granted. An instrument designated as a licence will, if it confers an exclusive and transferable right to occupy land for a defined period, be characterised as a lease.[34]

French J also referred to the case of *R v Toohey Ex Parte Meneling Station Pty Ltd.*[35] In that case it was held that a grazing licence issued under the *Crown Lands Act* 1931 (NT) did not convey any interest in land over which it was granted. Further

> [T]he characterisation of the licence as conferring a mere personal right turned upon its statutory features including the power of the Minister to terminate it at will, its non-assignability and the requirement that the licensee obtain permission before making erecting improvements on the land.[36]

French J found in relation the *Pastoral Leases Act* 1869 (Qld) pursuant to which the 1881 Licence was issued

> did not contain any provision for the termination of the licence without cause. There was provision for the transfer of licences and leases. There was no express provision conferring a right of exclusive occupation upon licence holders although the Act did not contemplate concurrent licences over the same land.[37]

32. Ibid, p 49.
33. (1988) 166 CLR 186 at 239.
34. French J, on this point, referred to the following cases and judgments: *O'Keefe v Malone* [1903] AC 365 at 377 (PC); *O'Keefe v Williams* (1910) 11 CLR 171 at 196-197 (Barton J) and 208-209 (Isaacs J); *Radaich v Smith* (1959) 101 CLR 209 at 214 (McTiernan J), at 219 (Taylor J), at 220 (Menzies J), at 222 (Windeyer J), at 213 (Dixon CJ concurring); *Attorney-General (Vic) ex rel Lever v Dandenong* [1942] VLR 33.
35. (1982) 158 CLR 327.
36. Judgment, op cit n 1, p 53.
37. Ibid.

He also found that there was provision for a Licensee to lay information against any person in unlawful occupation however, that unlawful occupation was defined as follows:

> Any person unless lawfully claiming under subsisting lease or license or otherwise under this Act who shall be found occupying any Crown land or land granted reserved or dedicated for public purposes either by residing or by erecting any hut or building thereon or by clearing digging-up enclosing or cultivating any part thereof or cutting timber otherwise than firewood not for sale thereon shall be liable on a conviction to a penalty.[38]

From an examination of the nature of the 1881 Licence it was possible for French J to establish whether or not the Licence extinguished Native Title. French J concluded in this regard:

> Licences granted under the *Pastoral Leases Act* 1869 had indicia of proprietary rights and limited rights of protection against "unlawful occupation". The extent to which the prohibition of unlawful occupation was consistent with the exercise by aboriginal people with traditional rights and interest in relation to the land is debateable but in my opinion, no plain and clear intention to generally exclude such persons will prohibit the traditional pursuits emerges from the nature of the interest granted.[39]

French J went on to state that

> [T]he question whether and to what extent the licence grant would have extinguished or impaired Native Title depends upon the question whether the rights conferred by the licence were inconsistent with the enjoyment of Native Title rights and interests. Having regard to the general principles effecting the extinguishment of Native Title rights and interest it cannot be said that the grant of the licence was so completely inconsistent with Native Title rights and interest as to do more than temporarily impair their enjoyment. To the extent the grant of such a licence interfered with the rights and interest of Native Title holders it was, an interference of a temporary and limited nature and not such as to indicate an intention to permanently extinguish those rights or interest.[40]

French J makes it clear that licences such as the 1881 Licence will not extinguish Native Title.

1883 PASTORAL LEASE

The issue of whether the grant of a lease extinguishes Native Title and to what extent also arose in this case. French J considered that the extinguishment of Native Title will be effected by the creation of a lease which due to its characteristic of exclusive possession is inconsistent with the existence of Native Title.

French J considered that the right of exclusive possession is the defining characteristic of a leasehold interest. He cited with approval the case of *O'Keefe v Williams (No 2)*[41] where Griffith CJ observed:

> In my opinion where one man is put in possession of land by another, full effect cannot be given to the intention of the parties without implying an obligation that the lessor shall neither disturb the possession himself nor authorises disturbance by others . . . I do not know of any ground and reason or authority for applying different canons to construction of contracts between the Crown and a subject and contracts between subject and subject.

French J sought further support from the case of the *Minister for Lands and Forests v McPherson.*[42] Kirby P stated:

38. Ibid, p 54.
39. Ibid.
40. Ibid.
41. (1910) 11 CLR 171 at 192-193.
42. (1991) 22 NSWLR 687 at 698.

> The clear principle of all these decisions of the High Court [43] is that the first duty of the court is to examine the statute to see whether consistently with its terms, other rights and obligations that would apply by the general law attach to the statutory entitlements and duties of the parties. In the case of an interest called a "lease", long known to the law, the mere fact that it also exists under a statute will not confine its incidents exclusively to those contained in the statute. On the face of things the general law, so far as is not inconsistent with the statute will continue to apply.

Incidents of a leasehold grant under general law such as the right to exclusive possession may be implied in relation to the grant of pastoral leases.

It was argued by the Waanyi that the lease in question contained a reservation in favour of Aboriginal people.

RESERVATION IN FAVOUR OF ABORIGINAL PEOPLE

In the absence of the actual instrument of lease, the issue was raised as to whether the lease contained a reservation in favour of Aboriginal people. The *Pastoral Leases Act* 1869 (Qld) made no provision for the inclusion in leases issued pursuant to it any reservation in favour of Aboriginal people.

There was however evidence adduced by the Waanyi that there was a standard form of reservation included in leases issued around that time. The reservation was expressed as follows:

> And we do further reserve the Aboriginal inhabitants of our said Colony such free access to the said run or parcel of land hereby demised, or any part thereof, enter the trees and waters thereon, as will enable them to procure the animals, birds, fish, and other food on which they subsist.

It was also common to impose a condition relating to forfeiture on the lease if the lessee:

> Shall wilfully deprive or attempt to deprive Aboriginal or other inhabitants of a said colony, or any of them, of the privileges hereby reserved to them.

French J stated in relation to this issue as follows:

> [T]he question is whether the grant of the lease by the Executive Council should be regarded as subject to the standard reservation in favour of Aboriginal people. In my opinion no such reservation can be imported into the grant by Executive Council. None was authorised by the Act which itself defines the terms of the leasehold grants effected under it. The insertion in any subsequent instrument of any extra statutory reservation (if valid) would have, at best, constituted a super added contractual obligation. The addition of the reservation would have been a matter of administrative discretion qualifying a right of exclusive possession already granted, a carving of something out of the demised estate. There is nothing in the Act itself which had repealed the Order of Council of 1849, to support an implication of a reservation of the kind proposed.

He went on to add

> [I]ncidents of a leasehold grant under a general law such as the right to exclusive possession may be implied in relation to the grant of pastoral leases. The implied reservation in favour of Aboriginal people does not fall into that category. Such an implication will have to meet the test for reasonableness and equity, necessity for business ethics, obviousness, clear expression and consistency with the expressed terms of the lease laid down in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [44] and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales.* [45]

43. Referring to the decisions of *Davies v Littlejohn* (1923) 34 CLR 183; *De Britt v Carr* (1911) 13 CLR 114; *O'Keefe v Williams (No 2)* (1910) 11 CLR 171.
44. (1978) 52 ALJR 20 at 26.
45. (1982) 149 CLR 337 at 347.

French J concluded that a reservation in favour of aboriginal people was not an incident of the grant of the lease nor could it meet the requirements in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales.* Therefore no such implication could be made.

CONCLUSION ON EXTINGUISHMENT

French J, therefore, concluded that the 1883 lease did not contain any reservations in favour of aboriginals and further the Act under which it was created did not in a mandatory sense require the inclusion of such reservations in every case. He indicated[46]

> [T]he intention of the legislature in providing for the grant and that of the Executive in making it are not to be judged by the sentiments which may have been held by those responsible for the drafting of the Act or the granting of the lease. They are to be judged by whether and to what extent the rights conferred by the lease were inconsistent with those in the name of title holders, if any. Having concluded as I have that the Executive Council effected the grant of a leasehold interest conferring a right of exclusive possession for a significant period of time, I am bound by the judgments in *Mabo (No 2)* to conclude that any subsisting Native Title was extinguished.

1904 LEASE

A Lease under the *Land Act* 1902 (Qld) was issued in 1904. This lease bore the same characteristics as the previous lease.

French J having concluded that Native Title had been extinguished by the earlier lease indicated that to also consider whether the 1904 Lease extinguished Native Title was "academic".[47] However, he did consider the matter and concluded that the 1904 Lease would also extinguish Native Title even if Native Title had subsisted in the land to the point of creation of the Lease in 1904.

SECTION 144B OF THE NATIVE TITLE ACT 1993 (QLD)

Submissions to the Tribunal were made as to the effect of s 144B of the *Native Title Act* 1993 (Qld). This section provides:

> (1) In this section—
> "previous act" means an act attributable to the State—
> (a) that took place at any time before January 1, 1994; and
> (b) that, apart from the Commonwealth *Native Title Act* and this Act, is not invalid to any extent irrespective of the existence of Native Title.
>
> (2) To remove any doubt, Native Title for land or waters was extinguished by a previous act that was inconsistent with the continued existence, enjoyment or exercise of Native Title rights and interests for the land or waters.
>
> Example of extinguishment of Native Title—
>
> Issue of pastoral leases under and within the meaning of the *Pastoral Leases Act* 1869, *Crown Lands Act* 1884, *Land Act* 1902 or *Land Act* 1962.

The State of Queensland submitted that s 144B declares that and makes it clear that a pastoral lease extinguishes Native Title. Accordingly, the State of Queensland contended that the claim for Native Title could not therefore stand in the face of s 144B.

46. Judgment, op cit n 1, pp 64-65.
47. Ibid, p 65.

French J did not find it necessary to determine the effect of this section. He left the issue of the resolution of the effect of this section open until another time on the basis that the effect of the Pastoral Leases in this case was to extinguish Native Title.

NEED FOR REFORM?

French J in a postscript to his judgment hinted at the "need" for reform of the laws regulating Native Title. He stated as follows:

> Under the extinguishment principles enunciated in *Mabo (No 2)* the survival of Native Title on land which may today be vacant Crown land depends upon accidents of historical land tenure. The experience of the Tribunal thus far indicates a very substantial history of leasehold and like dealings with land since colonisation commenced. The process of determining whether or not Native Title exists, where its existence is contested, is likely in a significant number of cases to involve consideration of complex historical property dealings and defunct property statutes. States, Territories and significant mining interests are vigorous in their pursuit of extinguishing events against Native Title claims. Challenges to acceptance of Native Title claims rely in large part upon such arguments.
>
> The process must seem perverse to those who maintain their association with their country and upon whom indigenous tradition confers responsibility for that country. The operation of past grants of interest to irrevocably extinguish Native Title, regardless of the current use of the land, reflects a significant moral shortcoming in the principles by which Native Title is recognised.
>
> Time will tell whether any action is taken by the legislatures to overcome what French J sees as "a significant moral shortcoming in the principles by which Native Title is recognised".[48]

CONCLUSION

The Waanyi decision is an important decision for a number of reasons. The decision establishes that pastoral leases do extinguish Native Title.

The decision also considers the effect of reservations in favour of Aborigines in Crown leasehold grants. French J concluded in the case that reservations in such grants in favour of Aborigines are super-added contractual obligations which qualify a right of exclusive possession already granted. The effect of such reservations therefore being to carve "something out of the demised estate".[49] This does not however affect the extinguishing characteristic in so far as Native Title is concerned of the right to exclusive possession.

The case also establishes in terms of proof of existence of Native Title that the Tribunal will accept that the laws regulating Native Title recognise a form of Native Title successionary law. The case also further considers the important indicia for establishing connection with the land.

Lastly, but no less importantly the case is authority for the proposition that an assumption is made in favour of Aboriginal applicants that if from the material an inference is open that some step in extinguishment was not taken it will be assumed by the Tribunal that the step in extinguishment was not taken.

It is true to say therefore that the Waanyi peoples claim has been an important development in the law regarding Native Title in Australia. In time however, the post-script comments accompanying the judgment of French J may be the catalyst for change in the laws regulating Native Title. If this is the case, French J's judgment in this case may grow even more in importance.

48. Ibid, p 71.
49. Ibid, p 62.