Daniel v State of Western Australia [2003] FCA 1425 (05 December 2003)

By Serica Mackay

The Federal Court handed down reasons in the initial *Daniel* decision in July 2003. At that time, a draft determination was released outlining the non-exclusive native title rights and interests held by the Ngarluma and Yindjibarndi peoples. Parties were given an opportunity to respond to the draft determination in order to determine whether there was inconsistency in the exercise of the native title right and the tenure holder's right that would result in extinguishment. The judgment of Nicholson J on 5 December 2003 provides his findings on these submissions. This is a brief summary of his findings.

The draft determination included a range of non-exclusive native title rights and interest held by the Ngarluma and Yindjibarndi peoples such as a right to access (including to enter, to travel over and remain), a right to camp, build shelters or to live on the area, and a rights to engage in ritual and ceremony.

Submissions were made by a range of respondents (including the State of Western Australia, the Commonwealth, Telstra and a number of mining and farming interests) challenging the consistency of nearly all of the rights and interests. In general, the respondents claimed that the exercise of the native title right would prevent the tenure holder from being able to exercise their right.

In his findings, Nicholson J maintains the distinction between the grant of rights that are inconsistent with and therefore extinguish native title and rights which will merely prevail over native title rights. In the process, his Honour demonstrates a preference for finding that the native title and tenure holder's rights could coexist – the native title rights yielding to the extent there is overlap or clash. Nicholson J applies the 'reasonable user' test propounded in *Ward* and uses it as the basis to find that there is no inconsistency in a number of instances. Nicholson J held that the relevant test for inconsistency where prevailing rights are at issue is whether at that location, at that time, the exercise of the native title rights would prevent the rights of the tenure holding prevailing.

For example, Nicholson J agreed with the submission of the native title holders that none of the native title rights listed in the draft Determination are necessarily inconsistent with the rights under jetty licences. If the jetty licence area is not being used, there is nothing inconsistent with native title holders exercising their rights, including the right to camp or remain on the area. However, if the area is being used the rights under the jetty licence will prevail while those activities are being carried out.

This decision is an important development in clarifying what it means to hold native title. The application of the 'reasonable user' test reinforces the status of native title owners as co-holders of country. Although their title may be less robust in the face of extinguishing acts by the Crown, it is not an empty right where it survives.

De Rose v South Australia [2003] FCAFC 286 (16 December 2003). Yankunytjatjara People SC94/2, SG6001/96.

By Dr Lisa Strelein

The applicants in the South Australian *De Rose Hill case* have successfully appealed the decision of the trial judge, who had determined that native title did not exist in relation to the claim area because of a loss of the requisite connection under s223(1)(b) of the *Native Title Act 1993* (Cth). The decision of Justice O'Loughlin was strongly criticised. His Honour made judgements about the extent to which individual applicants had maintained their responsibilities under traditional law and custom and the extent to which 'non-aboriginal factors' such as employment and educational priorities had influenced decisions about residence away from the claim area. The trial judge held that in very recent history the physical or spiritual connection to the land had

been abandoned and the observance of traditional law and custom had broken down.

In December 2003, a full Federal Court rejected the conclusions of the trial judge noting the broader observance of the laws and customs of the Western Desert and the specific knowledge of law in relation to the claim area; the relatively recent and short absence from the area and active protection of sites under heritage laws, as well as the bringing of the native title claim itself [145]; as well as the intimidatory exclusion from the area by the coexisting pastoral lease holders [322].

The full Court was critical of the trial judge for presuming to make his own judgment about the individual entitlements of the claimants under traditional law and custom, a matter which is properly internal to the Western Desert law system [312-313]. The full Court recognised that the applicants formed a small group within the much larger Western Desert cultural bloc who share the same laws and customs. The applicants did not assert and were not required to show that they constituted a discrete society [282]. *NNTT Media release.* 17 December 2003. Yankunytjatjara claim: SC97/9, SG6022/98.

The Western Desert Bloc was the normative system upon which the claim could successfully be founded [275]. It existed at the time of sovereignty and the traditional laws and customs had continued substantially uninterrupted throughout the period [279]. This reliance on a broader normative system distinguished the circumstances of the applicants in this case from those in the *Yorta Yorta* case who faced the obstacle of 'substantial interruption' to the acknowledgement and observance of traditional law and custom which was held to have applied to the whole normative society [281].

The Court noted that in the *Yorta Yorta* appeal, the High Court rejected the language of 'abandonment' in favour of this concept of interruption [312]. The High Court stated that if continuity of acknowledgement and observance is interrupted, the reasons are irrelevant. However, the full Court in this decision notes that the reasons why observance or acknowledgement have been affected should be taken into consideration when assessing whether there was in fact an absence of continuity amounting to an interruption [326].

The High Court in *Ward* has held that physical contact is not required to maintain the connection to the claim area. The full Court in *De Rose* acknowledged that even long absence and movement due to access to food or other changes in conditions is not a new or unknown phenomenon under the traditional laws and customs of the Western Desert. In particular the Court concluded that it may well be possible to maintain a connection with land despite moving away from the area for what the trial judge dismissed as 'European social and work practices'[328].

The full Court found that the trial judge was wrong in law but they were unable to make a conclusion as to whether the claim had been proved [330]. The applicants still needed to demonstrate that they continue to acknowledge and observe the traditional laws and customs of the Western Desert Bloc and that they possess rights and interests under those laws and customs [281]. This may require further evidence about what the Western Desert law says about the applicants' entitlements [331].

As the trial judge has now retired, the matter cannot be sent back for further consideration. The Full Court has therefore directed the parties to a mediation conference, convened by the Registrar of the Federal Court to identify what if any issues remain in dispute that will need to come back to the Federal Court [412-3].

Public Works on Aboriginal and Torres Strait Islander Owned Lands

Erubam Le (Darnley Islanders) #1 v State of Queensland [2003] FCAFC 227 (14 October 2003)

By Dr Lisa Strelein

The *Native Title Newsletter 5/2002* noted the withdrawal by the Queensland government from six consent determinations in the Torres Strait. The Erubam Le (the applicants) took