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

matters to the full Federal Court for separate determination as to the legal effect of the establishment of certain public works by or on behalf of, and on land owned by, the Erub Island Council under a Deed of Grant in Trust (DOGIT).

The Court held that the Island Council is a statutory authority under the NTA because it was established by a specific Act of incorporation, rather than a more general Act such as the *Aboriginal Councils and Associations Act 1976* (Cth). The parties had agreed that the works in question were valid public works, although their validity may have been arguable.

The Court found that works constructed prior to 1996 were previous exclusive possession acts (PEPAs), under s23B(7), which specifically includes public works. PEPAs are deemed to extinguish native title. The Court held that the exception in favour of grants or vesting for the benefit of Aboriginal and Torres Strait Islander peoples (s23D) did not apply because the creation of a public work is not a grant or vesting.

Works constructed after December 1996 did not extinguish native title. Although the Court found that the DOGIT itself was a valid past act, it contained no specific reservation to authorise the later works (s15(1)(b)).

The Court considered whether s47A applied to enable the courts to disregard certain extinguishing acts for the purpose of native title. The Court determined that the grant of the DOGIT fell squarely within the provision. However, like their conclusion with respect to s23D, the Court found that public works are not a grant or a vesting, and nor are they the creation of an interest. The pre 1996 works did not fall within s47A and their extinguishing effect remains.

The Court alluded to the fact that the extinguishing effect in this case may come from the NTA and not from the common law. The NTA provides for compensation to be payable in such circumstances (s23J). The compensation question was not addressed.

The applicants have sought leave to appeal.

The Combined 13th and 14th Periodic Report of the Government of Australia under Article 9 of the International Convention on the Elimination of all Forms of Racial Discrimination.

A Summary of Australia's Report

By Serica Mackay

Australia ratified the Convention on the Elimination of All Forms of Racial Discrimination (hereafter 'CERD' or 'the Convention') on 30 Sept 1975 and implements it primarily through the *Racial Discrimination Act 1975 (Cth)*.

Countries that have ratified the Convention are obliged to submit comprehensive reports to CERD every four years and brief updating reports every two years regarding their implementation of and compliance with the Convention. These reports are considered by the CERD Committee and 'concluding observations' – which include positive comments as well as concerns and recommendations – are provided to the country.

The Report, submitted to both the United Nations and Federal Parliament in late November 2003 covers the period since the last reporting period, which ended in June 1998 and addresses issues raised by the CERD Committee during its consideration of Australia's 10th, 11th and 12th Reports.

The Report begins by noting the increasing number of consensual agreements and the simultaneous move away from litigation as a means of recognising native title. In documenting the outcomes that the move towards agreement making has delivered for Indigenous people, the Report contrasts the number of determinations of native title following the 1998 amendments to the *Native Title Act* (43 as at 30 June 2002) with the number of determinations prior to its enactment (five, including *Mabo*). However, it is interesting to note the statement implies that the increase in determinations is a result of the 1998 Amendments and underestimates the time involved in suc-