Breach of section 87 of the NP&W Act

Mr Williams submitted that the conditions of the section 87 permit to remove the relics had been breached, as the mining companies' archaeologist alone had authorisation to collect the Aboriginal objects and there was evidence that a number of Wiradjuri people had been casually employed to assist with the collection. However, Bignold J found that on a proper construction of the permit, it did not require all relevant actions to be undertaken by the archaeologist personally. The archaeologist was not precluded from employing assistance to undertake the authorised activities. The Director-General nor the NP&WS, which had been informed of the persons involved in the collection, supported this interpretation and the Court found that section 87 had not been breached.

Breach of the Environmental Planning and Assessment Act

Mr Williams alleged that the construction or installation of the drilling fluids sump and decant system involved a breach of the *Environmental Planning and Assessment Act* 1979 (the EP&A Act) as no development consent had been granted. Bignold J accepted the mining companies' submissions that no consent was required due to section 38 of the *Mining Act 1992*, which provides an exemption to the requirements under the EP&A Act, and therefore the Court held that the EP&A Act had not been breached.

As Mr Williams failed to substantiate any of the alleged breaches of the NP&W Act and EP&A Act, no relief was obtainable. The Class 4 proceedings were dismissed

WHETHER CAVEATABLE INTEREST ARISING FROM INTEREST IN RELICS AS ABORIGINAL OWNER – NATIONAL PARKS AND WILDLIFE ACTS 1967 AND 1974*

Stockland (Constructors) Pty Ltd v Allan Richard Carriage ([2002] NSWSC 1179, NSW Supreme Court, Bergin J, reported at 123 LGERA 289)

Facts

The defendant lodged a caveat over land owned by the plaintiff claiming an estate or interest in the land as Aboriginal traditional owner with custodial ownership and/or an equitable interest in Aboriginal objects on and beneath the surface of the land by virtue of the provisions of the *Real Property Act*, the *National Park and Wildlife Act* 1974 and the *Racial Discrimination Act* 1975. The defendant applied for an order that the caveat be withdrawn.

It was accepted that there were relics on the land based on experts' reports prepared as part of the development consent process for the residential development of the land. The defendant had obtained a consent to destroy the relics under section 90 of the *National Parks and Wildlife Act* 1974. Section 85A of that Act allowed the Director-General to dispose of relics that are the property of the Crown by returning them to an Aboriginal owner who was registered under the *Aboriginal Land Rights Act* 1983. The defendant was not registered.

Section 33D of the *National Parks and Wildlife Act* 1967 deemed any relic on the land not in the possession of any person to be the property of the Crown and a person is not deemed to be in possession of a relic only by reason of the fact that it was in or on land owned or occupied by that person.

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Issue
The issue in the case was whether the defendant had a caveatable interest in the land which turned on whether the relics on the land were the property of the Crown and whether the defendant had an equitable interest in those relics and hence the land by virtue of the *National Parks and Wildlife Act*.

Decision
The *Real Property Act* and *Racial Discrimination Act* were not relevant to the issue. The relics were located on the plaintiff's land but were not in the possession of any person as the plaintiff had not exercised any control over the relics. On that basis, the relics were deemed to be property of the Crown pursuant to section 33D.

As the defendant was not a registered Aboriginal owner, section 85A did not apply. As the Director General had not made any decision under that section and the consent to destroy the relics had already been granted, that section was unlikely to be available to the defendant in any case.

It was concluded that he defendant did not have an interest in the relics and hence did not have a caveatable interest in the land. The Court ordered that the caveat be withdrawn.

EXTINGUISHMENT OF NATIVE TITLE RIGHTS AND INTERESTS*

Lawson v Minister for Land & Water Conservation for the State of New South Wales ([2003] FCA 1127, Federal Court of Australia, 17 October 2003)

Extinguishment of native title rights and interests – Whether vesting of land in the Crown for an estate in fee simple was "previous exclusive possession act' – Section 23B(2) Native Title Act 1993

Background
A series of questions were formulated for a decision in advance of trial in two concurrent proceedings brought on behalf of the Barkandji People under the *Native Title Act* 1993 (Cth) (NT Act). The first proceeding related to a native title determination application, which had been made prior to the 1998 amendments of NT Act. In the second proceeding, an application for compensation had been made over the whole of the claim area.

The questions related to the identification of the precise area of land or water covered by the applications and the characterisation of certain acts, including the vesting of the land for an estate in fee simple. It was at issue whether native title had been extinguished in the area covered by the applications. Section 23B(2) of the NT Act provides that an act is a previous exclusive possession act if:

(a) it is valid;

(b) it took place on or before 23 December 1996; and

(c) it consists of the grant or vesting of a freehold estate.

Section 20(1) of the *Native (New South Wales) Title Act* 1994 (NSW) confirms that a previous exclusive possession act extinguishes any native title in relation to the land or waters covered by the freehold estate concerned.

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