approval" of the transfer of the EA in advance of completion (and therefore in advance of paying the purchase price). This is unacceptable from a purchaser's perspective, as it then takes the risk that the EPA will in fact approve the transfer post completion.

In light of this problem, the EPA is often prepared, upon request, to accept an application for transfer of an EA directly from the parties, rather than via DNRM&E, and to deal with the application in advance of completion. Despite the lack of legislative recognition of the process, the EPA prepares a new EA instrument, in the names of the party/ies who will hold the EA after the transfer, and forwards this to DNRM&E to hold until such time as the transfer of the relevant mining lease is approved and registered, whereupon the new EA instrument is delivered to the parties. At the same time as sending the new EA instrument to the DNRM&E, the EPA sends a copy to the parties as evidence that the transfer of the EA has been "pre-approved". This process has been used successfully in a number of transactions.

However, quite recently I encountered an EPA District Manager who was unwilling to adopt this process. The issue was ultimately resolved by the EPA issuing a letter, in advance of completion, to the effect that they considered the purchaser to be suitable to hold the relevant EA, and that they would process and approve the transfer of the EA to the purchaser at the appropriate time. This gave the purchaser the comfort it required, and the transaction proceeded on this basis.

Conclusion

These issues highlight the fact that the provisions of the MRA and EP Act can create practical difficulties for purchasers wishing to obtain certainty before parting with the purchase price for a mine acquisition in Queensland.

Until such time as the provisions of the MRA and the EP Act are amended, we must rely upon good sense to prevail, and for the DNRM&E and EPA to continue to work co-operatively to facilitate the certainty of outcome demanded by purchasers, despite the lack of a workable legislative framework for pre-approvals.

SOUTH AUSTRALIA

MAINTAINING CONNECTION TO THE LAND*

De Rose Hill & Ors v State of South Australia ([2003] FCA FC 286)

Native title – Connect – Pastoral lease – Extinguishment

In *De Rose Hill & Ors v State of South Australia* [2002] FCA 1342 the trial judge O'Loughlin J found that the native tile claim on behalf of the Yankunytjatjara people failed because they had abandoned their connection with the land being De Rose Hill cattle station. That decision was noted previously in this Journal.[1]

The Full Federal Court has now delivered its reasons in an appeal from that decision. The Full Court considered that the trial judge was wrong in finding that the claimants had abandoned their connection to the land as it was based on his own construct of what connection and abandonment entailed. The correct question under section 223(1)(b) of the *Native Title Act (1993)* (Cth) (NTA),

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1 [2002] 22 ARELJ 23.

according to the Full Court, is whether the claimants *"by their traditional laws acknowledged and traditional laws observed,* have a connection with the claim area".[2] The Full Court considered that it could not make a finding on this issue without further submissions and the parties have now been directed to consider what further evidence they wish to refer to the court before it finally determines the appeal. As the trial judge had retired and it would have been too burdensome to refer the matter to another judge the Full Court decided it was more efficient for it to finalise the appeal.

The evidence that the Full Court wants to examine is evidence bearing on the significance, under the traditional laws and customs of the Western Desert Bloc, of a failure by the traditional owners to discharge their responsibilities in relation to the land. The trial judge's finding of abandonment was based on evidence that the last of the claimants had left the land in 1978 principally to settle in the township of Indulkana which had been established in the 1960s to accommodate aborigines. They had not returned to perform ceremonies or care for sacred sites and only went on the land for an occasional hunt for kangaroos. There was evidence of caring for sacred sites after the native title claim was lodged which the Full Court may consider differently from the trial judge.[3] The Full Court is also likely to consider differently evidence that the claimants feared the response of the station owners ("the Fullers") if they attempted to visit the station.[4]

The facts in this case differed from the case of *Yorta Yorta* as in that case the society under which traditional laws and customs could apply had ceased to exist; see *Members of the Yorta Yorta Aboriginal Community v Victoria*.[5]

Other issues decided by the Full Court concerned whether:

(a) the claimants needed to constitute or form part of a social, communal or political group;

(b) a spiritual connection only is sufficient to satisfy s 223 of the NTA;

(c) the *Pastoral Act 1989* (SA) combined with the NTA and *Native Title Act (South Australia) 1994* (SA) extinguished native title over the station?

Cohesive Local Community or Group

The trial judge thought it was important that there had not been for some years a group of *Anangu* who could properly be described as a community having a connection with the land.[6] His Honour had commented that the claimants "were spread to the four winds". It was not part of the claimants' case that they constituted a discrete society or community at any time. Their claim was based on the traditional laws and customs of Western Desert Bloc society. Those rules determining how a person becomes *Ngurarítja* (traditional owner), as found by the trial judge, did not require the *Ngurarítja* to be part of a cohesive, social group or community and was determined by various means such as place of birth, knowledge of dreaming stories etc. The Full Court therefore decided that the trial judge's findings were in error in this respect. It is interesting to note that the trial judge rejected the thesis of the well known anthropologist Professor Ronald Berndt who considered that the land owning group in Western Desert Society was an enlarged family unit, consisting of a man and his living descendants in the male line [282].

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2 [2003] FCAFC 286 at [303].
3 [2003] FCAFC 286 at [318].
4 [2003] FCAFC 286 at [321-6].
5 [2002] HCA 58.
6 [2002] FCA 1342 at [911]; Full Court discussion at [273-83].

Because of the wording of s 223 (1) (definition of native title) and s 225 (determinations) of the NTA that refer to communal and group rights it might be thought that a group needs to be identified. These sections also contemplate individual rights although a determination is required to identify the person or persons who hold the common or group rights. It will be interesting to see if the Full Court determines the group as the Yankunytjatjara people or some other sub-group of the Western Desert Bloc in the event they accept that a connection to the land has been maintained.

Spiritual Connection

This Full Federal Court confirmed the view of the Full Court in *Ward* that a connection with the land could be purely spiritual and the performance of responsibility for land could be maintained even where the Aboriginal people cannot visit the land.[7] In doing so it noted that the High Court in *Ward* did not dissent from the view of the Full Court in *Ward* on this issue.

Pastoral Act Extinguishment

The Fullers argued that the effect of the *Pastoral Act 1989* was to grant a new statutory lease in place of the three pastoral leases held over the station. That being so the effect of the NT (SA) Act was to extinguish any native title that otherwise existed over the land because it was a "category A past act": see s 33. The *Pastoral Act*, it was argued, in particular cl 5 of Division 3 of the Schedule, to the extent it granted a new lease, was invalid because it breached the terms of the *Racial Discrimination Act 1975* (Cth) in the extension of the life of the lease and providing greater security of tenure.

The Full Court examined the common law as to renewal and extension of leases which normally provided that a new lease was created upon renewal. The court held that the common law did not determine the matter because pastoral leases are statutory leases and hence the issue is resolved by statutory construction. According to the court, the language of cl 5 was clear as it provided that a lease existing prior to the commencement of the Pastoral Act *1989* "becomes, on that commencement, and *continues in force as* a pastoral lease under this Act with a term of 42 years from that commencement" (emphasis added): "If the intent was to terminate the existing leases and create a fresh lease there would have been no point in using the expression 'continues in force'" said the Full Court at [398]. The Fullers' extinguishment argument was therefore not accepted.

Attempts are being made to mediate the claim and so the Full Court may not finally determine the matter. This Journal will report on further developments.

VICTORIA

MINISTERIAL STATEMENT ON THE MINING, EXTRACTIVE AND PETROLEUM INDUSTRIES*

On 3 December 2003 the Victorian Minister for Energy Industries and Resources, Theo Theophanous, released a Ministerial Statement entitled "Promoting Victoria's Prospects: the Challenge for the Mining, Extractive and Petroleum Industries". The Statement outlines the Victorian Government's intentions for developing and regulating the mining, extractive and

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7 [2003] FCA FC 286 at [316]; *Western Australia v Ward* [2000] FCA 191 at [243]; (2000) 99 FCR 316.

* James McLaren and Michael O'Neill, Mallesons Stephen Jaques.