CONCLUSION

The view that there are difficulties with the warden's functions under the Mining Act is not justified.

The decision in *Re Calder SM; Ex parte Gardner* should be limited to the narrow issue it decided, namely, that exemption applications under s 102 of the Mining Act are administrative proceedings. However, for the reasons set out above such proceedings are judicial proceedings.

COMMENT ON "THE DENIAL OF NATIVE TITLE TO THE RESOURCE PROVINCES OF THE BURRUP PENINISULA AND THE PILBARA: *DANIEL v STATE OF WESTERN AUSTRALIA*"

Lisa Wright*

In a recent article,[1] Professor Richard Bartlett commented (among other things) on the limited geographic extent of the non-exclusive native title rights and interests found to exist in *Daniel v State of Western Australia*.[2]

In part, as he noted, this resulted from a finding that a non-exclusive pastoral lease granted after the commencement of the *Racial Discrimination Act 1975* (Cth) (RDA)[3] over an area that had, apparently, been subject to other non-exclusive pastoral leases granted prior to the commencement of the RDA was a category A past act i.e. an act that wholly extinguished native title.[4]

This aspect of the decision is worthy of further comment because, at present, it cannot be said that the state of the law is clear and certain on this point.[5] It has been noted that: "*If* this [RD Nicholson J's finding in *Daniel v State of Western Australia*[6]] is correct, and applied across Western Australia, the area of land affected could be large".[7] However, there is now doubt as to whether or not this finding was correct. In *Neowarra v State of Western Australia*[8], Sundberg J reached a different conclusion in circumstances that do not, on the face of it, seem to be distinguishable either in fact or in law.[9]

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1 R Bartlett, "The Denial of Native Title to the Resource Provinces of the Burrup Peninsula and the Pilbara: *Daniel v State of Western Australia*" (2003) 22 ARELJ 453.

2 [2003] FCA 666, RD Nicholson J.

3 But before 1 January 1994, with the lease in question being in existence on 1 January 1994 – see *Native Title Act 1994* (Cth), ss 228 and 229 and *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA), s 6.

4 Ibid at [919]. Although the prior history of dealings is not apparent on the face of the reasons for decision, see S Wright, "Case Note – *Daniel v Western Australia* [2003] FCA 666 ("Ngarluma Yinjibarndi")' (2003-2004) 6 NTN 47 at 49.

5 Note that the case giving rise to this conflict appeared after Professor Bartlett wrote his article.

6 [2003] FCA 666.

7 J Bursle and G Gishbul , "Ngarluma Yinjibarndi – Implications for the Mining Industry" (2003-2004) 6 NTN 50 at 52, emphasis added.

8 [2003] FCA 1402.

9 Ibid at [523], [526], [528], [529], [531], [532] and [542]. In both *Daniel* and *Neowarra*, there was no doubt that the leases in question were non-exclusive pastoral leases, although see fn 11.

While it is entirely proper for there to be such differences of opinion at first instance, it is unfortunate that an apparently conflicting decision was delivered after the decision in *Daniel v State of Western Australia*[10] without any reasons as to how, if at all, the circumstances of that case could be distinguished. Neither judge gave detailed reasons in support of their findings. Indeed, they both appear to view the answer to the question as to the effect of a non-exclusive pastoral lease granted after the RDA commenced over an area with a prior non-exclusive pastoral lease history as axiomatic.[11]

The issue is further complicated because the joint judgement in *State of Western Australia v Ward*[12] as to the application of the NTA and the state analogue[13] in these circumstances is, with respect, somewhat opaque.

What follows here merely highlights some aspects of *Ward* that may be relevant to this question.

FINDING THAT PASTORAL LEASE WAS A CATEGORY A PAST ACT

Nicholson J's conclusion indicates that he was of the view that the act of granting a non-exclusive pastoral lease under the *Land Act 1933* (WA) in these circumstances was invalid to some extent because of the existence of native title but would have been valid to that extent if native title had not existed at the time of the grant. If this were not the case, then the relevant provisions of the state analogue would not be attracted.[14] As noted, the significance of this finding is that a category A past act wholly extinguishes native title whereas a non-exclusive pastoral lease does not.[15]

There seems to be no doubt that this decision was not based on a finding that the grant in question brought about the extinguishment of any further native title rights and interests than had the grant of the earlier leases.[16] Rather (crudely put), the difference appears to turn on the question of whether or not the fact that the grant of a non-exclusive pastoral lease in these circumstance would extend the time during which the native title rights and interests that survived the earlier grants would have to give way to the exercise of the pastoralist's rights under the lease in the event of any conflict between the two has any relevance to the application of the past act provisions.

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10 [2003] FCA 666, RD Nicholson J.

11 It is also not helpful that Nicholson J discussed the provisions of the NTA dealing with previous *exclusive* possession acts and the interaction of those provisions with the past act regime. With respect, following State of *Western Australia v Ward* (2002) 191 ALR 1, it is not possible for a pastoral lease of the kind considered to fall within the definition of either a previous exclusive possession act as defined by *Native Title Act 1994* (Cth), s 23B or a 'relevant act' as defined in the *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1995 (WA), s 12I(1). See the comments in the summary of this case in *Native Title Hot Spots Issue 6*, available at http://www.nntt.gov.au/publications/newsletters.html.

12 (2002) 191 ALR 1, Gleeson CJ, Gaudron, Gummow and Hayne JJ.

13 *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA).

14 See *State of Western Australia v Ward* (2002) 191 ALR 1 at [114] and [135], Gleeson CJ, Gaudron, Gummow and Hayne JJ. While invalidity may arise in circumstances other than those covered by s 10(1) of the RDA, it seems that none of them arose in either *Daniel* or *Neowarra*.

15 *Daniel v State of Western Australia* [2003] FCA 666 at [917] to [919]. See also *Native Title Act* 1994 (Cth) ss 15, 23G(2), 228 and 229 and *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1995 (WA) ss 5, 6 and 12M(2). Note that pastoral leases granted on the same terms but prior to the commencement of the *Racial Discrimination Act* 1975 (Cth) take effect as previous non-exclusive possession acts that only partially extinguished native title – see *State of Western Australia v Ward* (2002) 191 ALR 1 at [187] to [194], Gleeson CJ, Gaudron, Gummow and Hayne JJ and *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1995 (WA) s 12M(1).

16 To this extent, Nicholson and Sundberg JJ appear to be in agreement.

The fact that the extension of the period during which native title rights are prevailed over appears to be an act that is "partly inconsistent with the continued…enjoyment or exercise" of the remaining native title rights.[17]

However, questions of the application of the past act regime do not turn on whether or not the act in question "affects" native title.

Rather, they turn on whether or not the act in question was invalid to any extent because native title existed at the time but the act would have been valid to that extent if native title had not existed at that time i.e. the court must find that the grant of a non-exclusive pastoral lease in these circumstances was invalid to that extent when granted and subsequently validated by s 5 of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA). As noted, a finding of invalidity in these circumstances would, according to the joint judgment in *Ward*, be as a result of the operation of s 10(1) of the RDA.[18] Therefore, those findings need to be examined.

WARD ON THE OPERATION OF THE RDA

According to the joint judgment in *Ward*, s 10(1) of the RDA is directed at the unequal *enjoyment* of certain human rights and fundamental freedoms that are or should be conferred irrespective of race, colour or national or ethnic origin. It is wrong to confine its operation to laws with a discriminatory purpose. Rather, it is "directed at 'the practical operation and effect' of the impugned legislation and is 'concerned not merely with matters of form but with matters of substance.' "[19] Having canvassed the law on point, their Honours gave came to the conclusion that s 10(1) applied in at least two different ways, depending on the circumstances.

Firstly, in cases where the State law, *for example*, provided for the extinguishment of "land titles" but provided compensation only in respect of non-native title, acts done pursuant to that law would be valid but a complementary right (eg to compensation) would be conferred on the native title holders by s 10(1) in order to nullify the discriminatory effect of the law. Therefore, the past act provisions would not be attracted.[20]

They went on to say that, in cases where the State law, *for example*, extinguished *only* native title and left other titles intact, the "discriminatory burden of extinguishment is removed because the operation of the State law is rendered invalid by s 109 of the [Commonwealth] Constitution".[21] In these cases, s 10(1) would "confer upon native title holders the same…immunity from legislative interference…with the relevant human right as that of other members of the community".[22] It is only in these circumstances that the past act provisions of the NTA or state analogue would be attracted to displace the effect flowing from s 10(1) by validating that act to the extent necessary.[23] Therefore, it would only be if the grant of the leases considered in *Daniel v State of Western Australia*[24] and *Neowarra v State of Western Australia*[25] were made under legislation that had this effect that the finding in *Daniel* would be correct.

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17 *Native Title Act* 1994 (Cth) s 227.
18 (2002) 191 ALR 1 at [98] to [126], Gleeson CJ, Gaudron, Gummow and Hayne JJ.
19 Ibid at [105] and [115], quoting *Mabo v Queensland (No. 1)* (1988) 166 CLR 186 at 230, Deane J.
20 Ibid at [106] to [108].
21 Ibid at [108].
22 Ibid at [108].
23 Ibid at [108].
24 [2003] FCA 666, RD Nicholson J.
25 [2003] FCA 1402, Sundberg J.

The third scenario identified in *State of Western Australia v Ward*[26] that may apply to a lease granted in the circumstances considered in *Daniel v State of Western Australia*[27] and *Neowarra v State of Western Australia*[28] is that s 10(1) of the RDA has no operation in the circumstances. This appears to be the view adopted by Sundberg J.

ACT IN QUESTION NEED NOT EXTINGUISH

In both cases in *State of Western Australia v Ward*[29] where s 10(1) was said to have operation (noted above), their Honours used acts that had the effect of extinguishing native title to some extent by way of example only. They were careful to point out that s 10(1) "may also be engaged by legislation which regulates or impairs the enjoyment of native title without effecting extinguishment".[30] As with extinguishment, the question in these cases would be whether that section had no operation, merely provided "complementary" rights to the native title holders or invalidated the act in question to some extent.

It was also pointed out that, in both *Mabo (No. 1)* and the *Native Title Act Case*,[31] the human right in question was the right to own and inherit property (including the right to be immune from arbitrary deprivation of property), with "property" extending to native title rights and interests.[32] In this context, the use of the word "arbitrary" was said to "emphasise the absence of (and the need for) compensation".[33]

In circumstances such as those that arose in *Daniel v State of Western Australia*[34] and *Neowarra v State of Western Australia*[35] i.e. the grant of a pastoral lease under the *Land Act 1993* (WA), it was said that:

> "it will be appropriate to compare the effect of that legislation upon native title holders with the effect on other title holders. This will not necessarily involve any analysis of the general laws of the State…If, under the relevant legislative scheme, no provision is made respecting compensation for interference with, or abrogation of, any rights and interests in the land, then the failure to compensate in respect of native title would not be sufficient to engage s 10(1). However, it may be that the power conferred by the legislation is exercised in a manner that, as a matter of fact, is discriminatory and thereby engages s 10(1)." [36]

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26 Ibid at [108].
27 [2003] FCA 666, RD Nicholson J.
28 [2003] FCA 1402, Sundberg J.
29 *State of Western Australia v Ward* (2002) 191 ALR 1, Gleeson CJ, Gaudron, Gummow and Hayne JJ.
30 Ibid at [123].
31 Respectively *Mabo v Queensland (No. 1)* (1988) 166 CLR 186 at 217, Brennan, Toohey and Gaudron JJ and *Western Australia v Commonwealth (*the *Native Title Act Case)* (1995) 183 CLR 373 at 436 to 437.
32 *State of Western Australia v Ward* (2002) 191 ALR 1 at [116], Gleeson CJ, Gaudron, Gummow and Hayne JJ.
33 Ibid at [124].
34 [2003] FCA 666, RD Nicholson J.
35 [2003] FCA 1402, Sundberg J.
36 *State of Western Australia v Ward* (2002) 191 ALR 1 at [126], Gleeson CJ, Gaudron, Gummow and Hayne JJ.

APPLICATION OF THESE PRINCIPLES IN WARD

Only one of the non-exclusive pastoral leases considered in *Ward* was granted in circumstances analogous to those considered in *Daniel v State of Western Australia*[37] and *Neowarra v State of Western Australia*.[38] This was a lease in the Northern Territory granted in 1979 under the Crown Lands Ordinance 1931 as amended by the Crown Lands Ordinance (No 3) (referred to as the Newry Lease).

The whole area leased had, prior to the commencement of the RDA, been subject to an earlier non-exclusive pastoral lease.[39] The Newry Lease was surrendered in 1987, which meant that it could not, by definition, have been a category A past act.[40] It was, however, potentially a category D past act. If it was, it would have to be because it was invalid to some extent, as discussed above, and subsequently validated.

Unfortunately, the findings in relation to this lease are somewhat ambiguous. Their Honours noted that this was the only lease that "*might* attract the operation of the RDA. *If* the RDA did work an invalidity", s 4 of the *Validation (Native Title) Act 1994* (NT) (the Territory Validation Act) would validate the grant.[41] They went on:

> "However the grants of all the pastoral leases pre-date 23 December 1996. *If* valid, (*including, in the case of the Newry lease, by operation of s 4 Territory Validation Act*) they are…previous non-exclusive possession acts."[42]

Having noted that some native title rights were inconsistent with the grant of these leases and, therefore, extinguished "independently of the operation of the Territory Validation Act",[43] they said:

> "*If it were necessary* to consider the Newry Lease, *standing independently of what had gone before*, a different result would apply. Paragraph (b) of the Territory Validation Act would be attracted, with the result that native title rights and interests *were suspended* whilst the…Lease…or any renewal, regrant or extension was in force"[44]

Suspension would result from the fact that the grant of this lease was a category D past act. What is meant by "standing independently of what had gone before" in this context is not entirely clear, although it may well be a reference to the prior grants that had "gone before". In other words, their Honours may have been implying that it would only be necessary to have regard to the past act provisions if there had been no prior grant of a previous non-exclusive pastoral lease over the area concerned. If so, then this would support Sundberg J's findings i.e. an act that has the effect, in substance, of extending the period in which the native title rights that survived the earlier grant were prevailed over did not attract s 10(1) of the RDA.

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37 [2003] FCA 666, RD Nicholson J.

38 [2003] FCA 1402, Sundberg J.

39 While there were significant differences between the terms of the two leases, they are not relevant here: see *State of Western Australia v Ward* (2002) 191 ALR 1 at [412] to [415], Gleeson CJ, Gaudron, Gummow and Hayne JJ.

40 See *Native Title Act 1994* (Cth) s 229(2)(a)(i) and the Territory analogue, the *Validation (Native Title) Act 1994* (NT).

41 *State of Western Australia v Ward* (2002) 191 ALR 1 at [418], Gleeson CJ, Gaudron, Gummow and Hayne JJ, emphasis added.

42 Ibid at [419], emphasis added.

43 Ibid at [422].

44 Ibid at [423], emphasis added.

However, the issue is clouded since, at [425], their Honours state that:

> "[I]t is not possible to accurately determine those native title rights and interests that were unaffected by the grants of the respective pastoral leases…and those in respect of which there was extinguishment…or suspension (in the case of the Newry Lease)."

Therefore, it is not possible to draw any conclusion from these comments.[45] Nor does the final determination of native title that settled the Northern Territory aspect of the *Ward* case illuminate the point.[46]

The findings in the joint judgment in *Western Australia v Ward*[47] in relation to a reserve created under the *Land Act 1933* (WA) after the commencement of the RDA may offer some guidance on this point.

Their Honours found that the creation of a reserve extinguished any native title right to control the use of or access to the area concerned and so consideration had to be given to whether or not the past act regime applied. If a native title right to control the use of or access to the area concerned existed at the time the reserve was created and was, thereby, extinguished, then the act of creating the reserve would have been invalid to some extent and validated as a category D past act.[48] This was because, on their Honours' analysis of the relevant legislation:

> "[T]he practical operation and effect of the *Land Act* 1933 was to provide for the *uncompensated destruction* of native title rights and interests, [and so] there was an "arbitrary deprivation of property" and that case is to be understood as being of the second kind identified by Mason J in *Gerhardy*…The *Land Act* 1933 was…to that extent, inconsistent with the RDA and the reservation invalid [but validated as a category D past act]."[49]

However, it was also said that, where such a reserve was created over an area that had previously been subject to a non-exclusive pastoral lease that had already extinguished that right: "The subsequent reservation of the land could not affect that rights and *no question would then arise under the RDA*."[50]

While not directly on point, these principles appear to be relevant to the question raised in *Daniel v State of Western Australia*[51] and *Neowarra v State of Western Australia*.[52] Putting to one side the question of further inconsistent rights being created, such as by the establishment of a public work on the land and/or the future act regime under the NTA, it would seem that the Crown's right to access and use the reserved area for the purpose for which it was reserved (or, indeed, anyone else acting lawfully in so doing) would also prevail over the native title holders rights to "continue

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45 Ibid at [375], where there is a comment that both the grant of a lease of a reserve in 1990 that was found to confer a right of exclusive possession '(and its annual renewal) was a past act that was a category A past act'. However, this seems to be as a result of the way their Honours construed the operation of particular provisions of the *Land Act 1933* (WA) relevant to that grant. Therefore, this appears to be of no relevance in this context.

46 See *Attorney-General of the Northern Territory v Ward* [2003] FCA FC 283.

47 (2002) 191 ALR 1.

48 Ibid at [222], Gleeson CJ, Gaudron, Gummow and Hayne JJ.

49 Ibid at [222], emphasis added, referring to *Gerhardy v Brown* (1985) 159 CLR 70 at 99-98.

50 Ibid at [222], emphasis added.

51 [2003] FCA 666, RD Nicholson J.

52 [2003] FCA 1402, Sundberg J.

using the land in the way they had, according to traditional laws and custom, been entitled to use it before its reservation."[53] This is because the native title holders would no longer have any right to control lawful access to or use of the area.

Perhaps because certain native title rights continue to exist and can be exercised (albeit subject to some spatial and/or temporal constraints in cases of conflict with non-native title rights), both on reserves and non-exclusive pastoral leases, there is no "uncompensated destruction" of those native title rights and interests, and so no "arbitrary deprivation of property", which appears to be what is required in order to have the act in question fall into the second the second kind of case identified in *Gerhardy* i.e. one in which s 10(1) operates to give rise to invalidity that it then 'cured' by the application of the past act provisions of the NTA and the state analogue.

In other words, perhaps the fact that the human right to own and inherit the remaining native title rights and interests (including the right to be immune from arbitrary deprivation of those native title rights and interests) is not abrogated over the area concerned is the crucial point, whether that be reserve lands or a non-exclusive pastoral lease, not whether or not those rights can at all times and in all places be exercised without constraint. The human right to own and inherit the native title "property" is still, in a somewhat sterile sense, "enjoyed" even over areas where the rights and interests making up that "property" cannot, for any particular period, be exercised.[54]

This is not, however, particularly satisfactory in the light of the comments that "interference with the enjoyment of native title is capable of amounting to discrimination on the basis of race, colour, or national or ethnic origin"[55] or the first circumstance in which s 10(1) of the RDA operates. For example, a pastoral lessee who builds a dam or a shed in lawful exercise of the rights granted under a non-exclusive pastoral lease, interferes with the exercise and enjoyment of co-existing native title rights to, say, access that area for the duration of the lease with, it seems, no right to compensation for that interference arising. However, it appears that the Crown could have, under the same act that empowered the grant of the pastoral lease, created rights in others on the leased land that prevailed over the lessee's rights without any compensation being payable to the lessee.[56] It is not clear whether or not this would be relevant to any inquiry on this issue.

CONCLUSION

It is not possible to come to any conclusions as to the preferred view of the effect of the grant of a non-exclusive pastoral lease in the circumstances referred to above. Therefore, it is unfortunate that in native title decisions at first instance such as these, where appeal proceedings on substantial points such as this are likely, an appellate court will not have the benefit of the reasoning leading to the findings of the judge at first instance.[57] Appeal proceedings will also delay the settlement

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53 *State of Western Australia v Ward* (2002) 191 ALR 1 at [219], Gleeson CJ, Gaudron, Gummow and Hayne JJ.

54 See, for example, ibid at [308].

55 Ibid at [117].

56 See, for example, ibid at [186].

57 While the initial reasons for decision in *Daniel* were handed down on 3 July 2003, at the time of writing in mid-March 2004, the matter was still not finalised. Nor was *Neowarra*. This is common with native title cases, where an opportunity is usually given for parties to consider a draft determination of native title and how it might work on the ground and then make further submissions. This somtimes leads to a change in the court's view on particular points – see, for example, *Daniel v State of Western Australia* [2003] FCA 1425 – or the parties reaching agreement on certain issues and then seeking a consent determination – see *Attorney-General of the Northern Territory v Ward* [2003] FCA FC 283. It may be

of these points and, obviously, involve even more "amazingly expensive" litigation.[58] Needless to say, there will also be distinct lack of clarity and certainty on these points both for native title claimants and for those attempting to deal with native title in Western Australia, including resource developers seeking interests in areas affected by that uncertainty.[59]

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that this matter is further explored and clarified in both of these cases prior to the finalisation of the determination of native title in each case.

58 See Bartlett op cit at 467.

59 There is also a significant difference between the findings in *Daniel v State of Western Australia* [2003] FCA 666 at [596] and *Neowarra v Sate of Western Australia* [2003] FCA 1402 at [476] in relation to the effect of the reservation in favour of Aboriginal people found in most pastoral leases granted in Western Australia ceasing to apply on native title rights and interests and there appears to be a difference in their Honours' interpretation of s 223(1)(b). Further some of Nicholson J's findings in relation to s 223(1)(b) seem to be at odds with the findings of the Full Court in *De Rose v State of South Australia* [2003] FCA FC 286 at [310] to [312]. While it is beyond the scope of this comment to discuss these apparent differences, they also go to show that much uncertainty remains.