New Visiting Research Fellow

Stuart Bradfield has joined the Native Title Research Unit as a Visiting Research Fellow.

Stuart spent the last two years teaching in the politics department at Macquarie University. Before that he was a visiting PhD student with the Indigenous Governance program at the University of Victoria, British Columbia, researching the British Columbian treaty process. Stuart's thesis, which will be submitted in January, looked at the establishment of a treaty relationship as a means of resolving the question of Aboriginal status in this country, with some comparison with contemporary developments in Canada.

While at the NTRU, Stuart will investigate the emerging culture of agreement making surrounding the native title process. In particular, he is interested in the possibility of agreement/treaty making as a vehicle for expanding native title outcomes for claimants, particularly with reference to issues of self-government, and the recognition of other inherent Aboriginal rights.

De Rose Hill appeal

The Yankunytjatjara people will lodge an appeal with the full bench of the Federal Court over their native title claim over the De Rose Hill cattle station. Appeal papers will be lodged with the court before the deadline of November 22. Dr Lisa Strelein has written commentary about the decision in the Features section, below.

New Issues Paper

The NTRU has published Issues Paper volume 2 number 18, 'Diaspora, Materialism, Tradition: Anthropological Issues in the Recent High Court Appeal of the Yorta Yorta', by James F Weiner. Dr Weiner inspects some of the appeals made to tradition and continuity of tradition in the High Court appeal of the Yorta Yorta native title case.

Current and previous Issues Papers from the *Land, Rights, Laws: Issues of Native Title* series are posted on the NTRU webpage. You can also subscribe to the Issues Paper mailing list through the form on our website or by contacting the Native Title Administration Officer on 02 6246 1161.

FEATURES

De Rose v South Australia [2002] FCA 1342 (1 November 2002)

by Lisa Strelein, NTRU

The decision in the *De Rose Hill case* concerned a pastoral property in the far north-west of South Australia. A group of Aboriginal people asserted native title over the lease area as Nguraritja, or traditional owners, for the land. The case was heard by a single Judge of the Federal Court.

Justice O'Loughlin determined that any physical or spiritual connection to the land by the applicants had been abandoned and this had led to a break down in the observance of traditional customs that was fatal to their application.

The decision is alarming because of the applicants' presence on the property up until relatively recently when access became more problematic, and their strong acknowledgment of law, customs and language of the Western Desert. However, the Judge seemed to take a unique view of the legal concept of 'connection' and the threshold for abandonment that sets a dangerous precedent for native title cases throughout Australia.

The applicants

The applicants sought a determination of native title based on their status as Nguraritja. Many applicants referred to themselves as Yunkunytjatjara others referred to themselves, or their parents as Pitjantjatajra, or Antikirinya. The evidence of the Aboriginal witnesses was accepted that the claimed area fell within Yunkunytjatjara country.[1] The claimant group are part of the Western Desert society and follow the laws and customs of the broader community. The evidence of movements of Pitjantjatjara people into the region was accepted as part of the traditional population movement throughout the Western Desert region.

The claim was not made as a communal claim, on behalf of a particular 'people', in the sense of a discrete system of laws. Nor did the applicants claim individual rights and interests. The Judge therefore approached the claim as one asserting some form of group rights.[320] This led the Judge into a number of errors.

Connection to land

The applicants explained that the boundaries of the station were not the limits of their country, as the relationships and bases from which to assert connection under Western Desert Law allow personal connections to extend throughout the region. The Judge agreed that the arbitrary fixing of boundaries for the purpose of defining a claim area should not be an impediment. However, the Judge seemed to remain confused as to why the claimants had chosen De Rose Hill as the boundaries for the claim.[203] In trying to attach some particular significance to the station, his Honour experienced some difficulty determining the relationship to the land apart from the attachment to particular sites.[331] This is despite the Judge's acceptance of the evidence that these sites comprise part of a larger totemic geography of which De Rose Hill is but one part.

Connection to the claimed area was demonstrated through personal association, whether through birth, long term residence, knowledge or inheritance, and acceptance by the community as Nguraritja. Perhaps influenced by this, the Judge's examination of connection in the broader region throughout which the system of law and customs was acknowledged to operate was minimal, with focus instead on the personal claims of each witness to status as Nguraritja and personal links with the station over their lifetime.[206]

Two of the witnesses were born on De Rose Hill station, many worked there or lived there for part of their life, some for substantial periods. Most had left some time ago, with the last of the stockmen leaving the station in 1978. Occasional access for hunting had continued but there was substantial evidence of intimidation and discouragement of Aboriginal people accessing the property since that time.

The Judge drew the extraordinary conclusion that twenty years was a substantial period of absence which had resulted in a failure to observe the law and custom that connected the applicants to the claim area. The breakdown in law and custom identified by the Judge as a result of the lack of access was highly localised and referred primarily to the observance of laws and customs in relation to the physical landscape of the claim area.

The Judge accepted that the absence of a physical connection was not fatal to a claim, that native title could be sustained by a non-physical connection maintained through the acknowledgment and observance of traditional laws and customs.[377] However, the Judge applied an idea of non-physical connection as being a 'spiritual' one, in the sense of requiring religious observance of ceremony and responsibility for the sites of significance within the pastoral station.

The Judge acknowledged that the claimants were actively engaged in cultural activities

[1] Although early ethnographic maps show it as Antikirinya country. [297-9]

outside of the claim area. His Honour accepted that witnesses had substantial knowledge of the sites within the claim area and activities associated with those sites – they knew and were able to perform the ceremonies, stories, dances and songs of the Tjukurpa for the area. His Honour went so far as to acknowledge that such knowledge would have gone a long way toward satisfying the Court that there was a relevant connection. However, 'The physical activities that would have been tangible evidence of a spiritual connection to the claim area occurred long ago'.[904] He concluded that, 'Save for some occasional hunting trips, not one witness … has attended to any religious cultural or traditional ceremony or duty on De Rose Hill in almost twenty years.'[106][2]

The Judge was unconvinced that the laws and customs were being handed down to younger generations. Nor did his Honour appreciate that the native title process would be utilised by knowledge holders to pass on information. The Judge saw it as too late – the damage has been done, twenty years was too long.[3]

Apart from the absurdity of the time-scale applied by the Judge, his findings in relation to the absence of physical connection fly in the face of established High Court views. Failure to maintain physical connection to one part of a claim area has been held not to defeat the claim as a whole. Failure to access this area over a relatively short period in a community's history should not be treated differently merely because the claim is over a discrete part of the traditional country. The observance of law and custom in the broader region was relevant to the inquiry as to the maintenance of laws and customs which sustained the community's entitlement under traditional law to the claim area and therefore to recognition of native title.

The Judge's reasoning also appears inconsistent with the findings of the High Court in *Ward* that suggested that failure to exercise a right does not constitute an abandonment of the right.[4] These issues raise a question as to whether a different result would have been reached if the claim had been made by Yunkunytjatjara over the whole of their traditional territory as a discrete communal nationhood claim. Such a claim may have been more familiar to the Court but obviously inappropriate to the claimants. There is a danger to be avoided in native title jurisprudence of judges developing a vision of what a native title claim looks like.

Social and political life

In relation to social and political identity, his Honour found that there was no evidence of an organised community centred around the claim area. He found no evidence of a coherent social group since the departure from the station and no clear direction for plans to use the country if native title were recognised. He assessed the connection to the De Rose Hill station as focused on 'European style work practices' and that social interaction was dominated by that work.

The Judge thought the evidence in relation to customary practices was 'not impressive when compared with the information that has been collected by early ethnographers'. His Honour discussed practices in relation to body piercing and scarring, circumcision, particular magical, mystical and spiritual practices, infant betrothal, and post birth practices. None of these were rights and interests asserted or laws and customs in

[2] This assessment should be should be contrasted to documented practises of active 'off country' maintenance of country during long term absences in the Western Desert. See Tonkinson, R. and M. Tonkinson 2001 'Knowing' and 'Being' in Place in the Western Desert, in A. Anderson, I. Lilley and S. O'Connor (eds) *Histories of Old Ages: Essays in Honour of Rhys Jones*, pp.133-139. Pandanus Books, RSPAS, The Australian National University, Canberra.

[3] Compare commentary from Justice Kirby in *Members of the Yorta Yorta Aboriginal Community v Vic*, M128/2001 (24 May 2002) transcript, 'when Australia began to accept their entitlement to a separate identity, it flourished again, it came again. Now, the question is: was there abandonment in that history or was it simply the reality of those times that they had to face up to?'

[4] *WA v Ward* (2002) 191 ALR 1, at [64]

relation to land relied upon to establish native title.[5] This is a peculiar romantic fascination with 'tribalism' and a refusal to import aspects of economic and political life into 'Aboriginal life'. His Honour states, for example, that work and children's education are 'non-Aboriginal factors' in decision-making about residence.[681] The Judge appeared highly critical of the applicants because their Aboriginal culture and laws had not held them to the claim area.

This essentialising of Indigenous peoples relationship to land as 'essentially spiritual' is serving to undermine their rights to the land as a proprietary interest. It also undermines the historical importance of opportunities to combine employment with the maintenance of connection to traditional country in ameliorating the impacts of dispossession.

The Judge's perception that the applicants were not 'forcibly removed', due to the absence of some extreme action on the part of the state or the leaseholders, does not give due weight to impact of land and employment policies. The impact of grants of pastoral leases on Indigenous peoples' sense of ownership over the land should not be understated. Until at least the decision of the High Court in *Wik* this land was considered the pastoralists' land. The removal of employment options on pastoral leases was part of this process of dispossession.

Access

The Judge found that the applicants had not demonstrated intent in maintaining their attachment. His Honour considered that access should have been found, 'surreptitiously if necessary', to perform their duties as Nguraritja.[106] This seems extraordinary when one considers the evidence of violence and intimidation that was reflected in the judgement.[436] The Judge considered that because the most senior stockmen felt able to occasionally visit the station after they had left, this was evidence that access was available to the claimant group if they had wanted it.[439] There was a lack of appreciation of the social alternatives available to the witnesses when it came to residence, through traditional law and historical social movements. Land to which each of the witnesses could access through their relationships within Yankunytjatjara country and also within the wider Western Desert region.

The Judge underplayed the intimidation that claimants felt in accessing the land. Not simply through the use of actual force, firearms, and locked gates; but the historical relations of power that are implicit in the pastoralist as the white boss and the Aboriginal owners as barely enjoying the status of employees. White law imposed this new conception of ownership over their own sense of ownership and allowed their effective exclusion up until the recognition of native title in 1992. The idea that Aboriginal people would know and enforce their rights under legislative reservations is to underestimate the influence of historical understandings of entitlement. In contrast, the *Mabo* decision had a much greater impact on Aboriginal and Torres Strait Islander peoples' sense of entitlement to assert their ownership of traditional lands. It is not surprising the claimants exercised their economic and cultural choices to live elsewhere until a firm recognition of their right to be on the claim area was recognised by the non-Indigenous community.

The evidence of Aboriginal witnesses and the role of experts

The Judge commented on the question of evidence from Indigenous witnesses and the hearsay rule. His Honour was of the view that proof of the existence or otherwise of native title depends upon events that occurred in the past and actions of earlier generations. He therefore accepted evidence, which in other proceedings may be considered hearsay. He held that Aboriginal witnesses should be able to give evidence of their beliefs, based upon what they have been told. This is evidence not just of the

[5] Indeed, had they been they may have fallen short of recognition by the common law under the 'repugnancy' rule. See [508, 512]

fact that the witness believes those statements, or that the statements were made, but also, that in all probability, as evidence of the truth of the facts asserted.[270-1]

The Judge rejected the need to establish the circumstances of Aboriginal people as they existed at the time of sovereignty, noting the difficulties of proof facing Aboriginal claimants seeking historical and anthropological material to support their claim. His Honour favoured the inferences drawn from the evidence of the Aboriginal witnesses over the opinions of experts or historical material.

The Court heard evidence from a variety of experts on the linguistics, history, archaeology, and anthropology of the claim group and the region. The evidence of different experts was received with differing levels of acceptance. General theories applicable to the broader region were not accepted as applying to the claim area without specific evidence. Where theories or observations were inconsistent with the evidence of witnesses, the Judge was reticent to accept them. Despite these limitations and the significant disruption of the lead anthropological witness being unable to give evidence,[6] the supporting evidence adduced by the claimants was generally thought valuable. However, the Judge was critical of the applicants where they were unable to clearly articulate their connection to country or their laws and customs. His Honour refused to accept the observations of experts in the absence of reasonable primary evidence from the claimants, complaining that, 'The onus is upon the claimants, if they wish to establish their right to a determination of native title, to give the evidence that will establish that right. They had the opportunity to do that in closed session but they failed to do so.'[342]

[6] The Judge expressed sympathy for the anthropological expert asked to fill the breach at the 11th hour but accused him of advocacy for presenting what he considered a sometimes sanitised view of the evidence he had collected.[352, 357]

Alternative determination and extinguishment

The Judge was satisfied that a determination of native title was potentially available to the claimants if they had been able to establish the requisite connection. The State had originally argued that Imperial legislation establishing the colony had wholly extinguished native title throughout the state. However, they withdrew those submissions during the course of the trial. Similarly, the government, after the decision in *Ward*, did not press its argument that the pastoral leases extinguished native title.[237, 245]

The Judge held that native title had not been extinguished by historical events and would not have been wholly extinguished by the grant of the particular pastoral leases that make up De Rose Hill station. His Honour determined that the pastoral leases did not grant the lessee a right of exclusive possession and expressly reserved the rights of Indigenous peoples over the land, first through a clause in the lease itself and later as a statutory provision.

Any extinguishment would therefore be limited to the extent of any inconsistency. Citing the Full Court of the Federal Court in *Ward*, his Honour noted that the immediate consequence of the grant of a pastoral leases was that the exclusive right of the native title holders to possess occupy use and enjoy the land was, 'Henceforth … a shared one'.[7] However, his Honour summarised the decision of the High Court in *Ward* concluding that, having lost the right to exclusive possession, the native title holders also lost the exclusive native title right to control access to the land and to control the use to be made of the land.

The Judge takes an extreme interpretation of this conclusion, suggesting for example that where the lessee refuses entry to an Aboriginal person who is an invitee of the native title holders, the lessee's decision will prevail. There is no suggestion of a concept of reasonableness in the exercise of this

[7] [531], citing *WA v Ward* (2002) 191 ALR 1, at [316]

power which undermines any sense of 'shared' possession.

The Judge submitted that if he were in error in relation to the loss of connection, an appropriate determination would recognise no more than access to the claim area for hunting, gathering, use of water and natural resources for shelter and cultural or hunting artefacts, as well as the right to hold meetings and religious ceremonies including the right to invite others to participate, but that those rights would be subject to the discretion of the pastoral leaseholder. In effect, native title would provide less rights and interests than those protected under legislation.

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Mediation of Native Title in Queensland – A Torres Strait Experience

by Terry Waia, Chairperson of Torres Strait Regional Authority

The Torres Strait Regional Authority is the native title representative body in the Torres Strait region. Stretching approximately 150 km between the northern most tip of Australia and the south coast of Papua New Guinea, the waters of the Torres Strait are dotted with over 100 islands as well as coral cays, exposed sandbanks and reefs. The Strait's population of approximately 8,000 people is dispersed over 19 small island communities. The communities are all remote, approximately 1000 km from the nearest city and have a population of between 50 and 800 people.

With the exception of Murray Island (Mer), Horn Island and Thursday Island, each of the outer community islands in the Torres Strait are held under Deed of Grant in Trust (DOGIT). DOGIT is a form of inalienable freehold held in trust for the benefit of the Torres Strait Islander inhabitants.

Beginning with the historic *Mabo* decision in 1992, the Torres Strait has led the way in native title in Australia. There have now been 15 successful native title determinations in the Torres Strait, 14 of which have been made by the Federal Court with the consent of all parties, including the State government. One of the earliest consent determinations to be made under the *Native Title Act 1993* (Cth) was in the Torres Strait in 1999, over my home island of Saibai.

In September 2002, six further claims were listed for consent determination by the Federal Court, including over the community Islands of Yam (Iama), Badu, Boigu, Darnley (Erub) and Stephen (Ugar). These determinations would have seen native title recognised over all of the outer community islands in the Torres Strait.

To the shock and disappointment of the communities involved, these court dates were vacated just three weeks before the Federal Court was due to sit in the Torres Strait after the State of Queensland wrote to the Federal Court advising that it was no longer prepared to consent to the determinations in the terms that had been agreed.

The abandoning of these determinations at the eleventh hour has been devestating for those communities affected, most of whom lodged their claims in the Court back in 1996 and have been preparing for the Federal Court hearings and subsequent celebrations for the past six months.

On Darnley Island, the Erub community had put so much work into preparing for the native title celebrations that they decided to go ahead anyway and celebrate their traditional land ownership of their Island despite the court proceedings being abandoned. Senior native title holders, while expressing their disappointment and dissatisfaction with the State Government's handling of their native title claim, affirmed their knowledge that the land of Erub was the 'birthright' of the Erubam Le, and that the day was to celebrate this knowledge, and the fight of Erubam Le past and present to have this ownership acknowledged by Australia. Similar celebrations are being planned by Iama people.