points – the common law versus the statute. This may indicate that the conclusion, that the leases grant exclusive possession, has been influenced by the introduction of the statutory scheme for confirmation of extinguishment. However, as the Western Division Leases were not scheduled interests, the question of exclusive possession remained the substance of the inquiry in both instances.

The process of bringing Western Division Leases within the Torrens titles system was formalised by an amendment to the *Real Property Act 1900* (NSW) in 1980, after the introduction of the RDA. The holders of registered leases were issued with a certificate of title and received the benefits of indefeasibility under the Real Property Act.[17] The impact of the creation of indefeasible title through registration on any persisting native title rights and interests, may therefore have possible compensation implications.[83]

Broader significance

The 'perpetual lease', this paradoxical tenure, as the Court described it, was not unique to NSW. The Court in *Ward* attributed the same reasoning to a permit to occupy and to certain leases in relation to the Keep River National Park.[432] It should be noted however, that in the latter case, the non-extinguishment principle applied as the tenure was one concerned with nature conservation.[448]

The Martu Native Title Determination

by Michael Rynne[18]

"They remain one of the most strongly "tradition-oriented" groups of Aboriginal people in Australia today partly because of the protection that their physical environment gave them against non-Aboriginal intruders. It is not a welcoming environment for those who do not know how to locate and use its resources for survival. Of great importance is the continuing strength of their belief in the Dreaming."[19]

With such a finding the Martu people may well have believed that recognition of their native title rights and interests was well overdue when Justice French made the consent determination at Pungurr rockholes on 27 September 2002. The partial determination was one of exclusive possession over 136,000 kilometres of unallocated Crown land in the West Australian desert; remaining areas are subject to further mediation. The application had not been programmed to trial nor the Court approached to cease mediation. Consequently the incentive for agreement was primarily the will of the parties to resolve relevant issues.

History of Proceedings

The application was lodged on 26 June 1996 for and on behalf of the Martu people who comprised the descendants of groups representing 12 language areas in the western desert of Western Australia. The initial native title representative body (NTRB) was the Western Desert Puntukurnuparna Corporation. Subsequently the Ngaanyatjarra Council assumed NTRB responsibilities for the claim as a consequence of the 1999 NTRB re-recognition process.[20]

Other parties were the State, mining entities with productive mining and exploration interests, local government and Telstra. One claim already existed to part of the area and other overlapping claims were soon lodged; various sub groups of the Martu made claims, the northeastern corner was subject to an overlap with the Ngurrara people and the Ngalia people claiming a small area in the south.

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[17] The Leased Land in question was brought under the RPA and a computer folio (the modern equivalent of certificate of title) was issued in April 1987.

[18] The author is a Barrister who has represented the Martu people since 1998.

[19] French J at para 8 of the Court's reasons for determination.

[20] The application area fell partly within three NTRB areas: Pilbara, Kimberly, and Central Desert.

A threshold to the commencement of formal mediation was the State's satisfaction that the overlapping claims were resolved and that the applicants native title rights and interests were supported by some evidence. Long standing political associations were an important part of resolving the overlapping claims amongst the Martu in favour of supporting one native title application.

The overlap with the Ngurrara people was somewhat different. Since the 1960s the Ngurrara people's identity as a group separate to the Martu was maintained by each looking to different Indigenous and non-Indigenous service providers. While members of each group were descended from the original inhabitants, interaction was primarily limited to cultural ties to the overlap area and some family associations. Resolving this overlap was possible by directing the text of any determination to reflect this association. Once resolved the Ngurrara people withdrew their separate claim to the overlap area, became a party to the Martu claim, and were recognised as holding the same rights and interests with the Martu in the previously overlapped area.

The Ngalia overlap area was excised from the determination application. The reasons for dealing with this small overlap in such a way are outlined in *James on behalf of the Martu People v State of Western Australia* [2002] FCA 849 (2 July 2002).

While resolving the issue of overlapping claims the applicants submitted an anthropological report (connection report) to the State seeking to address relevant criteria. The process of consideration and final acceptance of the report took some time and once the consent of the parties had been secured it was filed with the Federal Court.[21]

After the connection report was accepted, the mediation with other parties moved forward. The mediation process was lengthy and technical. It was also the only option that the applicants would contemplate – the Martu had considered it a sign of great disrespect that they would be required to litigate recognition of their rights. Additionally the mediation proceeded in a somewhat uncertain environment with the High Court yet to hand down its decision in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward*); this impacted on pre-1994 mining leases.

As agreement became imminent and all parties to the application were required to consent to the determination it became apparent that the issue of parties who had not participated in the mediation process for various reasons had to be addressed. Application was made to the Federal Court to make orders deeming parties as only those who filed a notice of address for service. Orders were subsequently made.[22] One party inadvertently failed to file a notice and sought rejoinder. While that application was unopposed and granted, it was apparent that parties who failed to comply with such orders should not expect rejoinder without sufficient reasons.

It then became a case of expect the unexpected. After agreement in principle had been reached and the text of the agreement was being settled, the High Court handed down its decision in *Ward*. Consequently the determination made reflected that pre-1994 mining leases, vested and unvested reserves, and an area of unallocated Crown land that was excised from a national park would not form part of the determination area. These areas remain subject to mediation.

The conclusion of the determination (albeit only partially, but nonetheless over a large tract of land) represented the culmination of a 25-year struggle of the Martu for recognition of rights to their traditional lands.

Notably the determination was achieved while working clearly within the process established in the Native Title Act of mediation as a precursor to judicial proceedings. From my perspective, commencing a proc-

[21] Judgment para 5.

[22] *James on behalf of the Martu People v State of Western Australia* [2002] FCA 849 (2 July 2002).

ess of mediation in the context of litigation was not to be viewed as anything remarkable. Attempting to settle litigation through mediation is standard practice in a contemporary legal system that recognises the benefits of parties owning the outcome of a dispute. Perhaps native title mediation is remarkable for two reasons. The first is recognising that it is as much concerned with identifying the dispute as it is with settling it. Second, even where connection is not substantially at issue, the process of resolving recognition is probably as demanding as litigating – if not more so in the case of multiple tenures and overlapping claims – but nonetheless demanded in order protect and enhance social capital with the ancillary benefit of minimising litigation time and money.

The Determination

The determination appears in the reasons of Justice French of the Federal Court in *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208 (27 September 2002).[23] For present purposes this paper is confined to what is does recognise and an illustration of how that interacts with other interests.

The rights and interests recognised were:

(a) the right to possess, occupy, use and enjoy the land and waters of the determination area to the exclusion of all others, including:

(i)the right to live on the determination area;

(ii)the right to make decisions about the use and enjoyment of the determination area;

(iii)the right to hunt and gather, and to take the waters for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial, and communal needs;

(iv)the right to control access to, and activities conducted by others on, the land and waters of the determination area;

(v)the right to maintain and protect sites and areas which are of significance to the common law holders under their traditional laws and customs; and

(vi)the right as against any other Aboriginal group or individual to be acknowledged as the traditional Aboriginal owners of the determination area;

(b) the right to use the following traditionally accessed resources:

A. ochre;

B. soils;

C. rocks and stones; and,

D. flora and fauna

for the purpose of satisfying their personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs;

(c) the right to take, use and enjoy the flowing and subterranean waters in accordance with their traditional laws and customs for personal, domestic, social, cultural, religious, spiritual, ceremonial and communal needs, including the right to hunt on and gather and fish from the flowing and subterranean waters.

Some commentators choose to describe those rights listed at (a) above as "exclusive" and those at (b) & (c) as "non exclusive". Of themselves the individual rights should not be seen as exclusive or non-exclusive. Rather my preference is to adopt a view of the late Ron Casten QC who opined that one merely looks at all of the rights and interests recognised and determines if their sum total equates to exclusive possession. Adopting that view, paragraph (a) is seen as representing an example of the rights considered as founding exclusive possession.

Native title is subject to laws of the State, Commonwealth and common law. How this works in practice is illustrated in the second schedule of the determination that reads in part with my emphasis:

[23] Readily accessed at www.austlii.edu.au

For the avoidance of doubt in respect of the relationship between the native title rights and interests described in paragraph 5 and the rights of holders of the mining leases set out above, **the rights conferred by the mining leases are exclusive rights to conduct mining operations** on the areas the subject of the mining leases.
The later rights **prevail over the native title rights and interests and their exercise is wholly inconsistent** with the continued exercise by the common law holders of their native title rights and interests on those areas of the mining leases **where mining operations are conducted,** while the mining leases or any renewal of them are is in force.

The text thus identifies that it is the mining operations as conducted on the leases that prevail over the exercise of the native title rights and interests. Mining operations was defined in the paragraph 1 as:

"mining operations has the meaning given to that expression by the Mining Act 1978 (WA) and includes the construction of roads, tracks or other crossings".

Rights of access and enjoyment of existing roads by the public and interested parties was included and highlighted by the use of maps that illustrated many of the existing roads within the determination area.

At all times in seeking a determination by consent the parties were mindful that agreement is not of itself a complete guarantee that the Federal Court will make a determination. Justice French in his reasons noted that the parties' agreement is but one matter that the Court needs to take into account in considering if the determination can be lawfully made. Others included the determination being fair and just and some evidence that justifies a finding of connection.

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CONFERENCE REPORTS

Genealogies Workshop, AIATSIS, Canberra, 5-6 October 2002

Report by Patrick McConvell and Grace Koch

It has become obvious that the products of commercially available software for constructing genealogies are not meeting the needs of researchers and Indigenous communities.

In order to examine some of these issues, a workshop on Genealogies was held at AIATSIS on 5-6 October. Its purpose was to examine software being used by researchers and Indigenous communities for Native Title, Family Separation and Family History. Approximately 40 people attended the workshop. Representatives came from Aboriginal communities, land councils, native title representative bodies, universities, and regional authorities.

The first day was spent on discussions of what software is available and the types of functionality that Native Title, Family Separation and Family History units and projects require in a computer package for working with genealogies. Central Land Council representatives displayed their use of the Progeny program. The second day brought two presentations that crystallised the thinking on functionality, providing solutions to many of the problems raised the previous day. John Burton, from the Torres Strait Regional Authority, drew upon his experience in computer science and his work with large-scale genealogies to list the requirements of genealogical databases. Next, Prof. Shigenobu Sugito and Sachiko Kubota demonstrated their program, ALLIANCE. Its development has been financed by the Japanese government. They had produced genealogies tailored to the cultural needs of the Galiwin'ku community in Arnhem Land. Community member Elaine Guyman and