Margarula v Rose [1999] NTSC 22

PARTIES:	YVONNE MARGARULA
	v
	SCOTT ROSE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	JA79 of 1998 (9810168)
DELIVERED:	12 March 1999
HEARING DATES:	15, 22 and 23 February 1999
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Appellant:	D. Dalrymple
Respondent:	R. Webb; J. Whitbread

Solicitors:

Appellant:	Dalrymple & Associates
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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ril99005

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Margarula v Rose [1999] NTSC 22
No. JA79 of 1998

IN THE MATTER OF the *Justices Act*

AND IN THE MATTER OF an appeal against conviction and sentence handed down in the Court of Summary Jurisdiction at Darwin

BETWEEN:

YVONNE MARGARULA
Appellant

AND:

SCOTT ROSE
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 12 March 1999)

[1] On 1 September 1998 the appellant was found guilty of having trespassed unlawfully on enclosed premises, namely a large storage container owned by Energy Resources of Australia (herein 'ERA'), contrary to s5 of the *Trespass Act.* She was convicted and ordered to pay a $500 fine and $20 victim levy. She appeals against both conviction and sentence. The grounds of appeal, which were amended at the beginning of the hearing, appear in the document filed on 16 February 1999.

[2] At the hearing before the learned Magistrate many facts were agreed and the only witnesses called were Mr Holger Topp, an employee of ERA, and the appellant.

[3] The agreed facts as contained in Exhibit 1 before his Worship were as follows:

> "At 4.30am on Tuesday the 19th May 1998 Senior Constable Campbell was on duty with Sergeant O'Sullivan, Senior Constable Gray, Senior Constable Lawrence and Constable Edwards. It was still night time. They were at the main gate inside the fenced off area of the portal mine site.
>
> The portal mine site is surrounded by an 8 feet high cyclone and barbed wire fence. About 300 metres north of the main gate, and still within the fenced off portal mine site, is a cargo shipping container. At this time the officer (sic) could see lights in the area of the container. Senior Constable Campbell, Senior Constable Gray, Senior Constable Lawrence and Sergeant O'Sullivan walked to the container area. They could see several persons on top of the container which is approximately 8 feet tall.
>
> Senior Constable Lawrence and Senior Constable Campbell walked up to the container. A torch light was shone on them and they could hear the persons on the container talking. Campbell said, "It's the police", then climbed to the top of the container and Senior Constable Lawrence climbed up after him. Sergeant O'Sullivan and Senior Constable Gray stayed on the ground at the base of the container.
>
> Campbell and Lawrence saw five adults and a young boy on top of the container. Campbell walked up to each of the defendants – Yvonne Margarula, Christine Crough-Christophorsen, Reuben Nango and Jacqueline Katona, and said to each of them that they were not allowed to be there. Margarula, Crough-Christophorsen, Nango and Katona were each told to leave by Campbell to which each replied "No." Campbell then arrested each defendant.

> Campbell, Lawrence and the defendants all waited on top of the container for a few minutes while Senior Constable Gray returned to the main gate, got a police Toyota troop carrier and drove it to the container. Margarula and the other defendants were taken down from the top of the container and put in the rear of the troop carrier with the other persons who had been on the container and driven to the portal main gate. The defendants were then transferred to a Police general duties vehicle and driven by general duties Police to Jabiru Police Station. The named officers had no further dealing with the defendants. Senior Constable Lawrence and Senior Constable Campbell found on the container a make-shift ladder, apparently used to get to the top of the container, several tins of paint and brushes on top of the container and the words "support Aboriginal rights" painted on the top of the container in 18 inch high letters. In possession of the persons on the container was a video camera and a satellite telephone, flares, Aboriginal flags, copies of a media release, paint filled eggs and food and water. The painting was fresh, it was still wet."

[4] Two further exhibits enlarged the agreed facts. Exhibit 10 included the following:

> "When Senior Constable Campbell and Senior Constable Lawrence arrested Jacqueline Katona, she requested that the defendants be allowed to stay until dawn."

[5] Exhibit 11 added the following agreed facts:

> "On Monday 18 May 1998, Paul Leadbeater, a helicopter pilot based in Jabiru, was told that the ABC wanted a helicopter for the next morning to do some filming of the Jabiluka mine site.
>
> When he got back to his office at Jabiru he called the ABC and explained that the Jabiluka mine site was a restricted area and that the ABC would need permission from the Police or ERA. Mr Leadbeater was told that the ABC would organise it for first light the next morning.
>
> On the evening of 18 May 1998, Mr Leadbeater spoke with Andrew Jackson from ERA. Mr Leadbeater was advised that ERA had not given permission to use the restricted airspace.

> Mr Leadbeater then telephoned the Police and advised them of the request to hire the helicopter.
>
> At about 5.30am on 19 May 1998, Mr Leadbeater received a phone call from the ABC film crew wanting to be taken in the helicopter to Jabiluka. Mr Leadbeater refused."

[6] It is convenient to address the issues raised in the appeal by reference to the amended grounds of appeal filed on 16 February 1999. In relation to those grounds of appeal I note that ground 1 was withdrawn on 22 February 1999 and grounds 7 and 10 were withdrawn on 23 February 1999.

Ground 2

> **"The learned Magistrate erred in finding that at the time of the alleged offence the appellant was not acting in accordance with her entitlements under s71(1) of the *Aboriginal Land Rights (Northern Territory) Act* (as referred to in clause 17 of the Jabiluka Project Agreement), and in particular erred in:**
>
> **(i) finding that entitlements under s71(1) do not include a right of a traditional Aboriginal owner to protect the country of which she is a beneficial owner by way of "political" protest carried out on an area of land within that country;**
>
> **(ii) regarding as a relevant consideration in ascertaining whether the appellant was acting in accordance with her entitlements under s71(1) the existence and subject matter of the Jabiluka Project Agreement".**

[7] Section 71 of the *Aboriginal Land Rights (Northern Territory) Act* (herein "ALRA") deals with traditional rights to use or occupy Aboriginal land. As the section was at the base of many of the submissions made on behalf of the appellant, I set it out in full:

> "(1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.
>
> (2) Subsection (1) does not authorise an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust or an Aboriginal Council or other incorporated association of Aboriginals."

[8] Section 71 was referred to in clause 17.2 of the Agreement (Exhibit 24) pursuant to which ERA obtained an estate or interest in the land. Clause 17.2 provides:

> "Subject as herein provided, any Aboriginal entitled by Aboriginal tradition to the use or occupation of any part of the Jabiluka Project Area may, in relation to that part, exercise the rights conferred by s71 of the Act, subject to the limitations set out in that section."

[9] The expression "Aboriginal tradition" is defined in the Act as follows:

> "The body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships".

[10] When the matter came before me there was no dispute that the appellant was a traditional Aboriginal owner of the relevant land for the purposes of the ALRA. In written submissions filed on behalf of the appellant it was accepted that the appellant's evidence, touching on the issue of whether her entry onto or use of the land was in accordance with Aboriginal tradition,

was accurately summarised by his Worship in the following passages of his reasons for decision:

> "Now, I will deal firstly – Yvonne Margarula because, in many respects, the fate of the other accused depend on her fate in this matter. Her evidence was that she had entered the land to protect the land and to object to a fence which had been constructed on an area of the mineral lease. She gave evidence that she had a traditional right to protect her country. She said she was protecting her country and the mine site at the time of the offences, and she said that she believed she had to look after her country, visit the country and make sure it was safe.
>
> She also gave evidence that she was a member of the Mirrar clan who are traditional owners of the land in question under the *Aboriginal Land Rights Act*, and she also gave evidence that she was a traditionally oriented person, born in the bush. Now, as I said before, rights were reserved to traditional owners to use and occupation of the land in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals."

[11] It is the complaint of the appellant that the learned Magistrate failed to correctly apply s71(1) of the ALRA. The approach adopted by his Worship was as follows:

> "First of all I have to consider whether or not protection of one's country is a traditional right. I have thought about that. I have looked closely at the evidence. I am inclined to think that protection of one's country in Aboriginal culture is a traditional right. I might be wrong about that but for purposes I will proceed on that basis.
>
> Mr Young put forward what I consider to be a fairly elaborate argument that traditional rights can be exercised in modern forms, and he relied upon the Mabo case. Mabo was, of course, a unique case and I think that it must be squarely viewed on its particular facts. See, in this particular case, Yvonne Margarula is saying that first of all she had a traditional right to protect her country which entitled her to go onto the land, and then she says she had a right to act as she did.

> In my opinion, the manner in which she acted, the manner in which she used or occupied the Aboriginal land, I am satisfied beyond reasonable doubt, was not in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land.
>
> I am satisfied beyond reasonable doubt that her actions fall outside the provisions of clause 71(1) of the Jabiluka Project Agreement, despite what Mr Young tells me about traditional rights being capable of being exercised in modern form."

Shortly thereafter his Worship corrected the reference from "clause 71(1) of the Jabiluka Project Agreement" to being "s71(1) of the *Land Rights Act*".

His Worship then went on to say:

> "In my opinion, when one looks at clause 17.2 of the Agreement, which must be read in conjunction with s71(1) of the *Aboriginal Land Rights Act,* I am satisfied beyond all reasonable doubt that the use or occupation to which the accused put the land was not in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals.
>
> The question, of course, is what is contemplated by s71(1) of the *Aboriginal Land Rights Act* and what is also contemplated by clause 17.2 of the Agreement. What I think is envisaged is that Aboriginal people are able to enter upon the land to exercise traditional rights, namely to do with the cultivation of the land, the harvesting of the land, the fishing – all those sorts of traditional rights. I totally accept that protection of country, conservation of country, may well be intertwined with the exercise of those common traditional rights. But the accused seeks to rely upon a customary right to protest against the mining of the uranium and to object to the construction of the fence.
>
> You see, the Agreement itself already addresses the mining of the uranium and it is in that context that the traditional rights are permitted. If you like, there is an acknowledgment in the Agreement in relation to the mining of the uranium. So the Agreement addressed mining rights, and on a true construction of the Agreement I just cannot, for one moment, find that the action taken by the accused, Yvonne Margarula, was in accordance with what was

> contemplated by clause 17.2 of the Agreement, of course, which is read in conjunction with 71(1) of the *Aboriginal Land Rights Act.*"

[12] The contention of the appellant is that his Worship applied a very narrow interpretation of s71(1) of the ALRA. She says that the section must contemplate a modern community on Aboriginal land and, if his Worship be correct, people carrying out normal urban activities in communities on Aboriginal land would be trespassing unless they could characterise their activity as the exercise of a "traditional right".

[13] In order to determine the nature of the operation of s71 of the ALRA, it is necessary to consider its provisions in the context of the Act.

[14] Land may become Aboriginal land by being "scheduled" pursuant to Schedule 1 of the Act or through the claims process established by the Act. In the present case the land granted to the Jabiluka Aboriginal Land Trust was granted pursuant to findings made by an Aboriginal Land Commissioner. The Commissioner made a recommendation to the relevant Minister that the area of Crown land should be granted to a Land Trust for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of that area of land. The Minister having been satisfied that this should occur then made the relevant grant in fee simple.

[15] A Land Trust is established "to hold title to land in the Northern Territory for the benefit of Aboriginals entitled by Aboriginal tradition to the use or

occupation of the land concerned, whether or not the traditional entitlement is qualified as to place, time, circumstance, purpose or permission" (s4).

[16] The functions of a Land Trust are set out in s5 and include the function of holding title to land vested in it in accordance with the ALRA. A Land Trust is specifically precluded from exercising its functions in relation to land "except in accordance with a direction given to it by the Land Council for the area in which land is situated". In this case that Land Council is the Northern Land Council (herein "NLC").

[17] The land held by a Land Trust is a statutory form of communal fee simple. The title does not confer proprietary rights on any individual person. The incidents of the title are to be found by reference to common law fee simple as modified by the terms of the ALRA. There are many such modifications to be found in the Act.

[18] A Land Trust is able to deal with the land in certain ways but, for present purposes, only with the consent in writing of the Minister and at the direction in writing of the relevant Land Council (s19). The Land Council, in turn, is required to have regard to the interests of, and shall consult with, the traditional Aboriginal owners of the land and any other Aboriginals interested in the land. The Land Council is precluded from taking any action in any matter in connection with the land unless it is satisfied that the traditional Aboriginal owners of that land understand the nature and purpose of the proposed action and, as a group, consent to it. Further, any

Aboriginal community or group that may be affected by the proposed action must be consulted and have adequate opportunity to express its view to the Land Council (s19 and s23).

[19] The permitted uses of the land are set out in s19(2) and include granting an estate or interest in the land vested in it to an Aboriginal, an Aboriginal Council or an Incorporated Aboriginal Association for use for residential purposes by the Aboriginal and his family or an employee of the Aboriginal or the Council or Association; for use in the conduct of a business by the Aboriginal, the Council or Association; or for any community purpose of the Aboriginal community or group for whose benefit the Land Trust holds the land.

[20] Section 19(4A) permits the Land Trust, with the consent in writing of the Minister (subject to certain exceptions) and at the direction of the Land Council, to grant an estate or interest in the whole, or any part, of the land vested in it to any person for any purpose.

[21] Part IV of the Act deals with mining and establishes a procedure for the granting of mining interests over Aboriginal land. There is, in these proceedings, no dispute that the mineral lease held by ERA was validly granted in accordance with the appropriate procedures and that there was an agreement reached through the NLC representing the traditional Aboriginal owners. The Agreement (which annexes the mineral lease) is Exhibit 24 in these proceedings.

[22] In summary form the ALRA provides for the granting to a Land Trust of a modified fee simple interest in land to be held for the benefit of Aboriginals entitled by Aboriginal tradition to the use or occupation of land. It then permits the creation of estates or interests in the land in favour of others. In the present case such an estate or interest has been created in ERA by virtue of the Jabiluka Uranium Project Agreement and the Mineral Lease.

[23] Entry onto Aboriginal land is dealt with in s70 and s71 of the Act. Section 70(1) provides that a "person" shall not enter or remain on Aboriginal land "except in the performance of functions under this Act or otherwise in accordance with this Act or a law of the Northern Territory". However s70(2) permits a person who has an estate or interest in the land to enter and remain on the land for any purpose that is "necessary for the use or enjoyment of that estate or interest by the owner of the estate or interest". This subsection has application to ERA.

[24] It is in this context that s71 of the Act is to be considered.

[25] Brennan J in *The Queen v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 (at 358) observed:

> "However, if the Aboriginal Land Commissioner finds that "there are Aboriginals who are the traditional Aboriginal owners of the land" and recommends that land be granted in accordance with s11 and s12, and if the land is granted under s12 and becomes Aboriginal land, any Aboriginal has or any Aboriginal group have his or their traditional rights restored – not in a form unrecognised by law, but in the form of rights conferred by statute. Subject to the proprietary rights of third parties (not being a Land Trust or an Aboriginal Council or corporation) Aboriginals are entitled to their traditional

> rights of entry, occupation and use with respect to Aboriginal land (s71). … The Act thus protects the exercise of those usufructuary rights which Aboriginal tradition either required certain groups of Aboriginals to exercise or allowed certain groups to enjoy with respect to land.
>
> The usufructuary rights of Aboriginals in respect of Aboriginal land, once acquired, might be overridden by the granting of a lease or licence by a Land Trust (s19(3)), or by a surrender of that land to the Crown (s19(4)), but any of those events requires the approval of the traditional Aboriginal owners, and of any Aboriginal community or group that might be affected thereby (s19(5)(a) and (b)). The Aboriginal people connected with the tract of country were thus made competent to use their country in a non-traditional way if and when an Aboriginal consensus to do so should be established."

[26] In his submissions counsel for the appellant conceded "that pursuant to the lease with the Government ERA had a right to possession of the land on which the container was located". However the submission was made that the entitlement to possession was "a non-exclusive right of possession as it was a right to share possession with those persons entitled to its use pursuant to the Agreement and s71 of the ALRA."

[27] Whilst that right of possession may be non-exclusive, the extent to which others may share possession is regulated by the provisions of s70 and s71 of the Act as is noted above. Section 70(1) provides that "a person" shall not enter or remain on Aboriginal land except in circumstances provided for by the Act or a law of the Northern Territory.

[28] In this case the appellant relies upon the provisions of s71 to justify her entry to and presence upon the land at the relevant location.

[29] Section 71(1) confers specific rights on Aboriginals for entry, occupation or use of the land in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land. The section looks to an evolving tradition to determine what should occur in the present. It looks to those rights which Aboriginal tradition either required or permitted Aboriginals to enjoy with respect to land. In relation to all other rights of entry, occupation or use, it is necessary for the person wishing to exercise or enjoy those rights to do so by reference to some other source of authority, eg by the acquisition of an estate or interest in land or pursuant to permission granted under the *Aboriginal Land Act (NT)*.

[30] In the present case the appellant was, according to her evidence, seeking to protect her country. In the course of her evidence the following passage appears:

> "And who are the Aboriginal people that according to Aboriginal law have to look after the land on which they want to dig the Jabiluka Mine?---Mirrar clan.
>
> And who are the people that have the main say for that area?---The Mirrar.
>
> Who are the traditional Aboriginal owners under the *Land Rights Act* for that place?---Mirrar.
>
> …
>
> What are you allowed to do – what are Mirrar people allowed to do, according to Aboriginal law, on your land?---Protect my country."

[31] Later the following exchange occurred:

> "What were you doing when you went on to that land at that mine site?---Protect my country.
>
> Why do you have to protect your country?---It's my land, it's the Mirrar lands."

[32] Again in her evidence the following exchange occurred:

> "And what about when you were at that mine when the Police arrested you, why was Jacki, Christine and Rueben – why were they with you?---Protect their country.
>
> And when you went to that mine, the time you got arrested – when you went to the mine what were you going to do there?---Protect my country."

[33] In seeking to protect her country it seems the appellant was endeavouring to draw attention to her opposition to the proposed development of Jabiluka. In a press release which became Exhibit 17, and which was relied on by her counsel, she is quoted as saying:

> "This is our country. The Mirrar said no to this mine. It is our responsibility to protect this country and we will not allow this hole to be dug."

[34] The question which then arises is whether the appellant was entitled to be upon the container in the circumstances described in the agreed facts by virtue of some right protected by s71(1) of the ALRA. In other words was her entry upon that land and her use and occupation of that land "in accordance with Aboriginal tradition governing the rights of" the appellant "with respect to that land"?

[35] It is clear that s71(1) is intended to entitle Aboriginals to enter upon Aboriginal land and use or occupy that land in accordance with Aboriginal tradition. Further, there can be little dispute that, in general terms, the protection of the land accords with obligations traditionally accepted by Aboriginals in respect of land for which they hold traditional responsibility. The section is not narrowly confined to traditional Aboriginal owners but rather extends to "an Aboriginal or a group of Aboriginals" whose entitlement to entry, occupation or use is in accordance with Aboriginal tradition.

[36] As was observed by Lockhart J in *Pareroultja v Tickner* (1993) 42 FCR 32 at 42:

> "The *Land Rights Act* is directed to two groups of Aboriginal people: those who are defined as "traditional Aboriginal owners" and the wider group known as Aboriginals who are entitled to enter, occupy or use Aboriginal land to the extent that such entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land. The beneficiaries of land held by a Land Trust are the broader group of Aboriginals all of whom have a right to enter, occupy and use the land provided they satisfy the other requirements of s71."

[37] The concept of Aboriginal tradition is an evolving concept developing to meet circumstances as they change. In *Mabo v Queensland (No.2)* (1991-92) 175 CLR 1 at 109-110, Deane and Gaudron JJ observed that:

> "Ordinarily, common law native title is a communal native title and the rights under it are communal rights enjoyed by a tribe or other group. It is so with Aboriginal title in the Australian states and internal Territories. Since the title preserves entitlement to use or enjoyment under the traditional law or custom of the relevant

> territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom. The traditional law or custom is not, however, frozen as at the moment of establishment of a colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land."

[38] Toohey J (at 192) noted that there: "is no question that indigenous society can and will change on contact with European culture". He went on to say:

> "But modification of traditional society in itself does not mean traditional title no longer exists. Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. An indigenous society cannot, as it were, surrender rights by modifying its way of life."

[39] In this matter his Worship found "that protection of one's country in Aboriginal culture is a traditional right" and he proceeded on that basis. There is no challenge by either party to this finding by his Worship.

[40] However his Worship then went on to note that the appellant and her companions had climbed a cyclone-mesh barbed wire fence to gain entry to the land. The fence was some 8 feet in height. They had then climbed upon the container which was on the land and was also about 8 feet high. They had with them a makeshift ladder. He went on to say:

> "In my opinion, the manner in which she acted, the manner in which she used or occupied the Aboriginal land, I am satisfied beyond reasonable doubt, was not in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land.

> I am satisfied beyond reasonable doubt that her actions fall outside the provisions of (s71(1) of the *Land Rights Act*) despite what Mr Young tells me about traditional rights being capable of being exercised in modern form."

[41] Later in his reasons he explained the basis for this view as follows:

> "The question, of course, is what is contemplated by s71(1) of the *Aboriginal Land Rights Act* and what is also contemplated by clause 17.2 of the Agreement. What I think is envisaged is that Aboriginal people are able to enter upon the land to exercise traditional rights, namely to do with cultivation of the land, the harvesting of the land, the fishing – all of those sorts of traditional rights. And I totally accept that protection of country, conservation of country may well be intertwined with the exercise of those common traditional rights. But the accused seeks to rely upon a customary right to protest against the mining of the uranium and to object to the construction of the fence".

[42] His Worship referred to the Agreement and the fact that it addressed the issue of mining of uranium on this land. He recorded that there was "an acknowledgment in the Agreement in relation to the mining of uranium", and then went on to say:

> "So the Agreement addresses mining rights, and on a true construction of the Agreement I just cannot, for one moment, find that the action taken by the accused, Yvonne Margarula, was in accordance with what was contemplated by clause 17.2 of the Agreement, of course, which is read in conjunction with s71(1) of the *Aboriginal Land Rights Act*."

[43] The difficulty his Worship was addressing was that, by operation of the ALRA, the traditional Aboriginal owners had approved mining on the land involving, as that must, the disturbance of the soil, digging of holes ("underground mining methods" were contemplated) and the erection of machinery, conveyor apparatus, plant buildings and other structures to be

used in the process. The Agreement, which was entered into with the NLC, included a warranty by the NLC that it had consulted with the relevant traditional Aboriginal owners, that they understood the nature and purpose of the Agreement and the Jabiluka project and, as a group, consented to both. In addition the NLC warranted that any Aboriginal community or group that may be affected by the project had been consulted and had adequate opportunity to express its views. The approval process was, it seems, conducted in accordance with the requirements of the Act and the NLC fulfilled its obligations under s19 and s23 of the Act. In these proceedings there has been no challenge to, or criticism of, the conduct of the NLC. That being so, any right or obligation existing in accordance with Aboriginal tradition to protect the land from the very enterprise which had been approved, must be regarded as having been fulfilled. The Agreement and the environmental requirements of the project are spelled out in detail in the document signed by the parties, following the processes required by the ALRA. The protection of the land as required by Aboriginal tradition must be taken to have been secured by virtue of that process.

[44] As was observed by Lockhart J (with whom O'Loughlin and Whitlam JJ agreed) in *Pareroultja v Tickner* (supra at 40):

> "The *Land Rights Act* establishes detailed machinery to further the interests of the Aboriginal people including Land Trusts, Land Councils and grants of fee simple to Land Trusts. The *Land Rights Act* does not deprive traditional owners of traditional rights and benefits including native titles. It furthers the interest of the Aboriginal people; and I discern no inconsistency between that objective and the enjoyment of traditional Aboriginal rights by those

> who have the benefit of them. The establishment of Land Trusts and Land Councils is essentially a modern adaptation of traditional Aboriginal decision making processes through their communities. The *Land Rights Act* was created to reflect the rights and obligations that arise from traditional title …".

[45] It follows from the above that when the appellant entered upon the land and used or occupied it in the manner described in the agreed facts and the evidence, she was not exercising a right or obligation in accordance with Aboriginal tradition to protect that land, as that had already been attended to. She may have been seeking to demonstrate her own opposition to the project, but no matter how her conduct is characterized, it was not something which occurred in accordance with Aboriginal tradition as contemplated in s71 of the ALRA. In my opinion his Worship was correct in so holding.

Ground 3

> **"In determining whether the appellant's actions had in any way interfered with ERA's enjoyment of its estate or interest in the land on which the appellant was alleged to have trespassed, the learned Magistrate wrongly had regard to the painting of a slogan on a container (when the weight of the evidence was to the effect that the appellant had no knowledge of the painting of the slogan), and to the appellant's expressed assertion of a right to stop mining on the land and desire to achieve that outcome."**

Ground 4

> **"The learned Magistrate erred in finding that the appellant's actions interfered with ERA's enjoyment of its estate or interest in the land on which the appellant was alleged to have trespassed, or alternatively, erred in finding that any such interference was sufficient to attract the restriction on her entitlements under s71(1) ALRA that is set out in s71(2) ALRA."**

[46] His Worship considered s71(2) of the Act and expressed the view that, even if he was wrong regarding the application of s71(1) of the Act, he was "satisfied beyond reasonable doubt that that particular entry, use or occupation would interfere with the use or enjoyment of ERA's estate or interests." He went on to say:

> "What must be borne in mind is this: that the accused were asserting a right – that is a right to stop mining, uranium mining, but that is a right which is conferred under the Agreement. I do not think anyone has to look any further really than this: that if a person is asserting a right in relation to land which is inconsistent with another, what more do you need to be satisfied that that would interfere with the use and enjoyment of an estate or interest in that.
>
> But of course we have more than that, we have the accused on top of a container. The container has been defaced and the expressed intentions of the accused of course are to be found in the press releases. I am satisfied beyond reasonable doubt that the use, entry or occupation would interfere with the use or enjoyment of ERA's estate or interest."

[47] On appeal the complaints of the appellant regarding this finding were twofold. Firstly it was said that there had been no interference with any existing interest of ERA. This was because the security compound that the appellant entered resulted from an "unapproved change of design". The second basis of complaint was that, even if the establishment of the security compound and the placement of the container were not a change of concept and were not "unauthorised", there was no interference with "ERA's operations".

[48] As has been observed above there was, in this case, no challenge to the validity of the Agreement or the mineral lease. The Agreement provided approval for the mining of an ore body on the land and provided relevant consent to the issue of the mineral lease in respect of the project area. The mineral lease then permitted the mining of uranium ore and other prescribed substances and permitted the erection of machinery, conveyor apparatus, plant, buildings or other structures to be used for or in connection with the mining, transporting, treatment processing or refining operations in respect thereof.

[49] There is no dispute that ERA was entitled to mine the land in accordance with the terms and conditions of the Agreement, the mineral lease and any necessary authorisations. The purpose of the appellant in entering upon the land was said by her to be to stop ERA mining at Jabiluka.

[50] The protection of the country to which the appellant referred as being the reason she went onto the land on the relevant occasion, involved the termination of the rights which the Agreement provided to ERA. The issue to be resolved in respect of s71(2) of the Act was whether such conduct amounted to "an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land" held by ERA. If it involved such interference then s71 would not authorise the relevant entry, use or occupation of the land.

[51] In *Semple v Mant* (1985) 39 SASR 282 the Supreme Court of South Australia considered a case in which demonstrators against the mining of uranium entered the premises of a company engaged in the mining of uranium and distributed literature which protested against uranium mining. Although the South Australian legislation differs from that with which I am concerned, the only issue dealt with on the appeal was whether "the nature of the trespass is such as to interfere with the enjoyment of the premises by the occupier". The Court held that it did.

[52] Zelling J said (283):

> "In a section 17a prosecution the concept is a wider and more factual one: is the trespass by its nature such as to interfere with the occupier's enjoyment of the premises? The enjoyment of these premises by the occupier is for mining purposes. To give out leaflets on the occupier's premises seeking to persuade the occupier's employees not to take part in the occupier's mining activities, must interfere with the occupier's enjoyment of its premises."

[53] Bollen J said (284):

> "The defendants (in the lower court) distributed writings which the occupier did not want distributed on its land. The writings sought to persuade the occupier's employees to leave the job. The defendants did something which was capable of affecting the use made of its land by the occupier. If employees had been persuaded to cease work, operations on the land would, or could have been affected. In my opinion, the activity of walking as trespassers on the occupier's land and distributing these writings by putting them under windscreen wipers on cars amounted to an interference with the occupier's enjoyment of its land."

[54] Similarly, Prior J said at 289:

> "To make the particular findings of fact required in these cases, the nature of each trespass was such as to interfere with the enjoyment of the premises by the occupier. The occupier was entitled to enjoy his premises by having them kept free from those whom he did not wish to be there – kept free from the defendants who were, by the literature they were distributing, seeking to make the occupier's enjoyment of the premises the less by encouraging those lawfully there not to pursue activities which the occupier wished pursued as part of the occupier's use of, and thus, enjoyment of, the land."

[55] In the present case the entry onto and the presence of the appellant upon the land was for the purpose of interfering with the use of the land by ERA. The purpose was to put a stop to mining on this particular land. Further action in this regard was forestalled by the intervention of the police. In all the circumstances there was a sound basis for the findings made by his Worship.

[56] In the event that the appellant entered upon the land without justification she did so as a trespasser. Where there is a claim of justification for entry "the question whether entry was as a trespasser involves no more than identification of the limits of the actual permission, the definition of the actual entry and the determination of whether that entry was within the scope of that permission", *Barker v The Queen* (1983) 153 CLR 338 at 356-357, 364, 373. Here the entry, use and occupation of the land were not authorised by s71.

[57] In my view, and for the reasons expressed above, there was an interference with the enjoyment by ERA of its estate or interest in the land by virtue of

the appellant being on the land for the purpose of putting an end to mining on the land. The painting of the slogan on the container was not a necessary factor in coming to that conclusion.

[58] In his reasons for decision his Worship made it clear that the basis of his finding was the entry upon the land with the appellant asserting the right to stop mining, contrary to the Agreement. He then went on to say that in this case there was "more than that" and he referred to the container having been defaced. That matter was not a factor in the relevant decision making process of his Worship and I need deal with it no further.

Ground 5

> **"The learned Magistrate erred in finding beyond reasonable doubt that the defendant's actions were unlawful despite her belief as to her right to be on the land where the trespass was alleged to have occurred, and in particular erred in:**
>
> **(i) finding beyond reasonable doubt that the appellant did not have an honest belief that she was entitled to act in the way that she did;**
>
> **(ii) based his finding that the appellant did not have an honest belief that she was entitled to act in the way she did on evidence relating to the obtaining of permission from ERA;**
>
> **(a) to go into the "portal" compound;**
>
> **(b) to go onto the container;**
>
> **(c) further basing his finding that the appellant did not have an honest belief that she was entitled to act in the way that she did on a view that the appellant's claim was unreasonable."**

[59] Although his Worship addressed the defence of an honest claim of right in his reasons for decision, he did so in the absence of any submissions from counsel who then appeared for the appellant. However the issue had been raised in a general way in the evidence of the appellant when she said that she had "the right to go" onto the container "because I'm a traditional owner". She had previously indicated that she went upon the land to "protect my country".

[60] The effect of the balance of her evidence was that she knew she had to have permission from ERA to be on the land and that she was likely to be arrested if she ventured onto the land. She did not ask ERA for permission to be on the land, and she expected "ERA security and Police" would "attempt to remove" her from the land.

[61] The defence of honest claim of right arises under s30 of the *Criminal Code*. Section 30(1) provides that "ignorance of the law does not afford an excuse unless knowledge of the law by the offender is expressly declared to be an element of the offence". Section 30(2) then provides:

> "A person is excused from criminal responsibility for an act or omission done or made with respect to, or for an event caused to, property in the exercise of an honest claim of right and without intention to defraud."

[62] The first issue to be resolved is whether the circumstances of this matter involve "an act … done … with respect to … property". Property is defined

in s1 of the *Criminal Code* to include everything, animate or inanimate, capable of being the subject of ownership.

[63] In *Walden v Hensler* (1987) 163 CLR 561 a majority of the High Court gave the Queensland equivalent of s30(2) a wide meaning. Deane J said it "should not be narrowly construed" (580). See also Toohey J at 599 and Guadron J at 605-606.

[64] The view of Brennan J was that the section should be given a narrower interpretation "holding that it applies only to offences in which the causing of another to part with property or the infringing of another's rights over or in respect of property is an element" (574-575).

[65] The case against the appellant in this matter is that her actions interfered with the enjoyment of an estate or interest in the land held by ERA. To my mind the offence was one which was "with respect to … property" and the provisions of s30 have application to it.

[66] The basis of the claim of right made on behalf of the appellant needs to be identified. Although no clear identification was made on behalf of the appellant, it would seem the claim is that she was entitled to enter the land to protect the land and the foundation of that entitlement is to be found in the provisions of s71 of the ALRA. Her entry upon the land was the exercise of a right of entry, occupation or use "in accordance with Aboriginal traditional" and therefore sanctioned by s71(1) of the ALRA.

[67] The nature of the Queensland equivalent of s30(1) was discussed in differing terms by various members of the High Court in *Walden v Hensler* (supra).

[68] Brennan J (at 568-569) quoted from Gibbs J in *Mitchell v Norman; Ex parte Norman* (1965) Qd R 587 where his Honour said that "it is quite clearly established that there can be a claim of right … although the right asserted is one which is unfounded in law or fact". Brennan J went on to observe (569):

> "As the right claimed does not have to be a right recognised by the law of Queensland, the appellant's belief in his entitlement according to Aboriginal law and tradition to keep the carcass and the chick would have sufficed to raise an honest claim of right in the absence of any knowledge that the entitlement claimed had been overridden by the law of Queensland".

[69] Deane J said (580-581):

> "The phrase "honest claim of right" has no defined meaning for the purposes of the Code. It's connotation in s22 must be determined in the context of the opening provision of that section that ignorance of the law does not of itself afford any excuse for an action or omission which would otherwise constitute an offence and against the background of general common law principle to that effect. Plainly, the fact that a person can honestly say that he thought that he was entitled to do the relevant act because he was unaware that it was proscribed by the criminal law does not suffice to provide him with a defence of honest claim of right under s22. Nor does an honest belief of some special entitlement to do the particular act with respect to property necessarily constitute such a defence. An honest belief of a special entitlement to do the act with respect to the property, such as belief of ownership, will only constitute a defence under s22 of the Code if that entitlement would, if well founded, preclude what was done from constituting breach of the relevant criminal law which an accused is assumed to know … in other words, it is not to the point to establish an honest belief of a special relationship with property which, even if it existed, would not constitute an answer to the offence charged."

[70] Dawson J made the following observations at 592-593:

> "It is not ignorance of the criminal law which founds a claim of right, but ignorance of the civil law, because a claim of right is not a claim to freedom to act in a particular manner – to the absence of prohibition. It is a claim to an entitlement in or with respect to property which goes to establish the absence of mens rea. A claim of that sort is necessarily a claim to a private right arising under civil law: see *Cooper v Phibbs*, per Lord Westbury. As Hanger J pointed out in *Olsen*: "section 22, after stating that ignorance of the law is no excuse, does not proceed to say that ignorance of the law is an excuse in the case of an offence relating to property for an act done with respect to property. It refers to an act done in the exercise of an honest claim of right and without intention to defraud."

[71] Toohey J considered the matter at 601-602 where he said:

> "The second paragraph of s22 stands by way of qualification to the preceding paragraph. Ignorance of the law affords no excuse for an act or omission unless knowledge of the law is expressly declared to be an element of the offence concerned. And so it would be no answer to the charge against the appellant that he was unaware of the provisions of the *Fauna Conservation Act* or he misunderstood its provisions. Thus in *Olsen* a claim by the appellants that they could buy sorghum from any person because they honestly but wrongly believed that the provisions of certain marketing Acts did not apply to their transaction was seen by Mansfield CJ to amount to a claim "that because they were ignorant of the law they were not criminally responsible.
>
> Equally a belief on the part of a person charged with an offence that his act or omission was morally justified does not of itself attract the operation of the second paragraph of s22. The paragraph is more limited, not only by reason of its reference to property but also because of its requirement of a claim of right."

[72] Later his Honour observed that it was no answer to the section that the right claimed by the appellant had "no existence in law" and he quoted from *Bernhard* (1938) 2 KB 246 at 270 where Charles J, delivering the judgment of the Court, said:

> "We are, however, bound by a long series of decisions … to hold that this view is incorrect, and that a person has a claim of right …if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact."

[73] Finally Gaudron J said at 606:

> "Section 22 of the *Criminal Code* is in two parts: the first part gives expression to the principle encompassed in the maxim "ignorantia juris non excusat"; the second part provides, not by way of exception, but by way of qualification to this principle, the defence of claim of right. Such a defence is not constituted by mere ignorance of the criminal law, and therefore must have some foundation or basis independent of a mere belief in a liberty to engage in that which is not unlawful. Equally, however, ignorance of the criminal law does not preclude the assertion of a supposed right, notwithstanding that such assertion involves a belief, founded in ignorance, that conduct proscribed by the criminal law is lawful."

[74] Turning to the circumstances of the present case the appellant is presumed to know the law by virtue of s30(1) including that it is a criminal offence to unlawfully trespass upon "enclosed premises" as defined in the *Trespass Act*. The basis of her honest claim of right pursuant to s30(2) depends upon an assertion that, by virtue of the preservation of rights of entry, use and occupation in accordance with Aboriginal tradition, found in s70(1) of the ALRA she had a right to be upon the land notwithstanding the interest of ERA in that same land. As I understand it hers is not a claim based upon Aboriginal customary law alone but rather one based upon a statutory recognition of Aboriginal tradition. This being so the claim does not suffer the complication that existed in *Walden v Hensler* (supra) where the appellant relied upon customary rights which did not have recognition in the general law in force in Queensland.

[75] The claim of right made by the appellant was simply expressed. She is a traditional owner and as such is entitled to be upon the land. That entitlement is preserved by the ALRA. If that was an honest claim then in the circumstances of this matter, according to the views expressed by each of the members of the High Court in *Walden v Hensler* (although for different reasons), this would suffice to raise a defence of honest claim of right.

[76] The defence of honest claim of right having been raised it is for the prosecution to show beyond reasonable doubt that the appellant was not exercising an honest claim of right. For the defence to apply the belief of the appellant must be genuinely held. It need have no foundation in law or fact and it need not be reasonable. However reasonableness is a factor which is part of the objective circumstances which may be considered in determining the issue of genuine belief, *R v Lopatta* (1983) 35 SASR 101 at 107; *R v Langham* (1984) 36 SASR 48 at 51-53; *R v Bowman* (1987) 49 NTR 48 at 54.

[77] It is therefore necessary to consider whether the appellant held a genuine belief that she was entitled to enter upon the land in the circumstances that prevailed. His Worship found the appellant did not have a relevant genuine belief. He said in dealing with the possible defence of mistake of fact:

> "I am satisfied beyond reasonable doubt that any such mistake of fact was not honest and I rely upon – in that regard I rely upon Yvonne Margarula's evidence to the effect that she knew she was going to be arrested; she gave evidence that she knew she had to ask ERA's

> permission to go into the portal compound and that she did not have permission to go on the container. So I really think they are matters which militate against an honest belief."

[78] In dealing specifically with the possible defence of a claim of right his Worship said:

> "However, the claim of right must be honest. I do not believe the claim of right was honest for the same reasons that I found that – in the context of mistake of fact – the belief was not honest, and finally, in any event, even if the claim of right was honest – I withdraw that. In relation to claim of right, it is not required that the claim of right also be reasonable. However, the law is clear that in deciding whether or not a claim of right is honest, one looks at the reasonableness of a claim that is being made. In the context of claim of right, I am satisfied beyond reasonable doubt that the claim was not honest for the reasons I gave earlier and in coming to that conclusion I have also relied upon the reasonableness of the claim."

[79] Having made those findings his Worship was, at a later time, addressed by different counsel in relation to matters regarding sentence. The topic of the state of mind of the appellant upon entering the land was once again discussed and additional matters were placed before his Worship from the bar table and without calling further evidence. His Worship was informed that prior to entering upon the land the appellant had "received some advice" and believed it "was arguable" that there was existing some right and that she sought to "test the existence of that right". It was put to his Worship that this submission, which was being made on sentence and was unsupported by any evidence, "doesn't equate to an honest belief in a right".

[80] On appeal the appellant complained that some of the remarks made by his Worship in sentencing were not consistent with what had been said at the time of making the finding of guilt and "the learned Magistrate appeared to abandon his finding that the appellant's belief was not honest, and instead criticised it for being unreasonable." A reading of the discussion between counsel and his Worship makes it clear that his Worship was considering all the circumstances, including the objective circumstances of the entry onto the land, when he determined that the belief claimed by the appellant was not genuine. It was in that sense that the issue of reasonableness was addressed. Whilst his Worship, in the course of his remarks on sentencing, referred to the belief of the appellant and that she had "rights" which she wished to "test" he did not depart from his earlier conclusion that "it wasn't a genuine claim of right". The consistent theme was that, although the appellant had some belief that she was able to test some undefined rights in relation to entry upon the land, when she entered the land on this occasion she was not exercising an honest claim of right in so doing. The conclusion of his Worship was consistent with the evidence.

[81] In the circumstances this ground of appeal must fail.

Ground 6

> **"The conviction was unsafe and unsatisfactory, in particular in light of:**
>
> **(i) the lack of clarity of both prosecution and defence evidence in relation to critical issues;**

(ii) apparent internal inconsistencies in the learned Magistrate's reasons for decision, and in his subsequent remarks during sentencing".

[82] In determining whether a verdict is unsafe or unsatisfactory I must consider whether, upon the whole of the evidence, it was open to his Worship to be satisfied beyond reasonable doubt that the appellant was guilty. I must bear in mind that a verdict may be unsafe or unsatisfactory, notwithstanding that there was evidence sufficient to entitle his Worship to convict, *Morris v The Queen* (1987) 163 CLR 454. The test to be applied is whether a reasonable tribunal of fact, properly instructed on the law, ought to have entertained a reasonable doubt, *Chamberlain v The Queen [No.2]* (1984) 153 CLR 521.

[83] Each of the individual causes for concern raised by the appellant has been addressed above. I have revisited the evidence and the findings of his Worship and find no basis for interference with the conclusions reached.

Ground 8

"The learned Magistrate erred in regarding as an aggravating factor the intention of the appellant in entering the land to ventilate her claim of entitlement or her beliefs, and further erred in regarding as a relevant consideration for the purposes of sentencing the appellant's involvement in civil litigation unrelated to the appellant's asserted right to enter the land pursuant to ALRA and the Jabiluka Project Agreement."

[84] Whilst this ground was not abandoned by Mr Dalrymple, it was not pursued with any vigour.

[85] In considering penalty his Worship said:

> "On the worst view on the facts that I have before me is that Yvonne Margarula was responsible for this manoeuvre. However, I think it would be somewhat naïve to think that she was the prime mover in this and I'm going to take the more charitable view, is that others were involved in planning this particular enterprise. However, she was a willing participant.
>
> So I think that although one could take the view that she was solely responsible for this enterprise, I think it would be a bit naïve to do that. So I'm taking the most favourable, is that others were involved and she was a willing participant in what amounted to a deliberate, well planned, well orchestrated invasion of another person's right to possession."

[86] Later in his reasons his Worship said:

> "There were, in my opinion, other avenues open to the defendants to ventilate their claims of entitlement or their beliefs that they were entitled to protect traditional Aboriginal land against uranium mining, and in fact the court did hear some evidence about past court proceedings and pending court proceedings.
>
> I think that they are the appropriate forums in which to ventilate those particular rights. I don't believe it's appropriate to ventilate rights which do or may result in the commission of criminal offences. There's a time and place for claim rights to be ventilated. So that's another point that I think weighs heavily in favour of convictions being recorded in these matters."

[87] He then observed, in response to a submission that the defendants were testing their rights, that those rights could have been tested in "other ways apart from bringing these defendants into conflict with the criminal law."

[88] The learned Magistrate found as a matter of fact that the appellant did not genuinely believe that she had an entitlement to enter upon the land. There

was an evidentiary basis for so finding. He was correct in observing that other avenues were open to the defendants (including the appellant) to ventilate their claims and, indeed, he had evidence of the appellant pursuing other avenues. In the circumstances he was entitled to regard the fact that the appellant intentionally entered upon the land knowing, or at least believing, that this would lead to her arrest and forcible removal from the land as being a factor to be taken into account in determining how this matter should be disposed of.

Ground 9

> **"The learned Magistrate erred in the exercise of his discretion under s8 of the *Sentencing Act*, in particular in his characterisation of the appellant's offence as "a serious invasion of ERA's right to peaceable possession of the land".**

[89] The submission made by counsel for the appellant in relation to this ground of appeal was that "it's a question of characterisation of what the evidence was. I'd submit that doesn't accord with the evidence."

[90] The basis upon which the learned Magistrate found that this was a serious invasion was expressed in the following passage from his reasons:

> "The trespass in this case, in my opinion, represented a serious invasion of ERA's right to peaceable possession of the land. I say it's a serious invasion for these reasons, 1; the manner in which the entry occurred, it was deliberate. There's no doubt in my mind about that. It was well planned, well orchestrated. Entry occurred during night time and presumably so that persons entering would not be detected. The invasion, of course, extended to entry of the portal compound. A fence has to be navigated in order to effect the entry.

> A ladder was used and also significant in terms of addressing the seriousness of the invasion of possession is the paraphernalia that accompanied each of the defendants which I referred to yesterday, the paint bombs, the flares, a satellite telephone, press releases which were found in the possession of the defendant. This was a very well planned, orchestrated invasion."

[91] That view was clearly open to his Worship on the basis of the evidence before him and the findings of fact he had made.

[92] As was observed by Kearney J in *Raggett, Douglas and Millar v R* (1990) 50 A Crim R 41 at 42:

> "It is fundamental that a trial Judge's (or Magistrate's) exercise of his sentencing discretion is not to be disturbed on appeal unless error in that exercise is shown … the presumption is that there is no error."

[93] In the present case the approach of the learned Magistrate did not reveal any error.

[94] The appeal is dismissed.

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