High Court upholds certain native title rights despite the grant of two mineral leases

By Courtney Robertson

Lawyer

The High Court has determined that the grant of two mineral leases for iron ore did not extinguish certain native title rights held by the Ngarla People in respect of land in the Pilbara region of Western Australia.[1] The landmark ruling dismissed arguments brought by the State of Western Australia that the mineral leases permanently extinguished all native title rights in the subject land.

Factual background

In 1964 the State of Western Australia entered into an agreement with a number of joint venturers (the current joint venturers are BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy of Australia Pty Ltd and Mitsui Iron Ore Corporation Pty Ltd) for the development and exploitation of iron ore at Mount Goldsworthy, a former mining town located in the Pilbara region of Western Australia.[2]

Pursuant to the State Agreement, the State of Western Australia granted the joint venturers mineral leases for iron ore which were to expire in 1986, with the right to renew. Each mineral lease has been renewed and remains in force.

It was undisputed that subject to the question of extinguishment, the Ngarla People hold native title to the land the subject of the mineral leases. The agreed native title rights are non-exclusive rights to:

1. access and camp on the land;
2. take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land;
3. engage in ritual and ceremony on the land; and
4. care for, maintain and protect from physical harm particular sites and areas of significance to the native title holders.[3]

Relevantly, the State Agreement provided that the State would grant the joint venturers mineral leases for iron ore.[4]

So long as the joint venturers performed their obligations under the State Agreement (eg they mined iron ore, transported it, constructed a railway, roads, a wharf, and laid out and developed town sites), the State would not resume any property used for the purposes of the State Agreement[5] nor would it rezone the land which was the subject of mineral leases granted pursuant to the State Agreement.[6]

Importantly, the joint venturers agreed,[7] *inter alia*, that they would:

> … allow the State and third parties to have access (with or without stock vehicles and rolling stock) over the mineral lease (by separate route road or railway) PROVIDED THAT such access over shall not unduly prejudice or interfere with the Joint Venturers' operations [under the State Agreement].

The clause immediately above is later referred to in this paper as the **Third Party Clause**.

It is relevant to note that the

mineral leases were granted before the enactment of the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth). Evidently, the provisions of the *Racial Discrimination Act 1975* (Cth) were not relied on in the Full Court of the Federal Court or in the High Court, and the underlying question of extinguishment was not governed by statute.

The instruments granting the mineral leases provided that in consideration of the rents and royalties, the Crown "by these presents grant and demise" to the joint venturers as tenants in common in equal shares:

> ALL THAT piece or parcel of land [identified in the instrument] and all those mines, veins, seams, lodes and deposits of iron ore in on or under the said land (hereinafter called 'the said mine') together with all rights, liberties, easements, advantages and [appurtenances] thereto belonging or appertaining to a lessee of a mineral lease under the MINING ACT, 1904 ... or to which the JOINT VENTURERS are entitled under the [State] Agreement TO HOLD the said land and mine and all and singular the premises hereby demised for the full term of twenty one years ... for the purposes but upon and subject to the terms, covenants and conditions set out in the [State] Agreement and to the Mining Act (as modified by the [State] Agreement) YIELDING and paying therefor the rent and royalties as set out in the [State] Agreement.[8]

In accordance with the State Agreement, the joint venturers developed the Mount Goldsworthy iron ore project. Mining was undertaken using open pit mining. The mine was closed in December 1982; the town built was closed in 1992. The land on which the town once stood has been restored and the pit filled with water.

Procedural background

In terms of the procedural history of this case, Mr Brown and others, on behalf of the Ngarla People, applied to the Federal Court for native title determinations in respect of land and waters in the Pilbara region of Western Australia which included the land the subject of the mineral leases.

Justice Bennett made a consent determination of native title in relation to part of the claimed areas excluding the areas the subject of the mineral leases.[9] Justice Bennett then ordered the trial of a number of questions relating to the effect of the grant of the mineral leases.

It was held that the mineral leases did not confer on the joint venturers a right of exclusive possession.[10] It was however, also held that the rights granted pursuant to the mineral leases and the State Agreement were inconsistent with the continued existence of any of the determined native title rights and interests "in the area where the mines, the town sites and

associated infrastructure were constructed".[11]

The latter conclusion was come to on the basis of the decision of the Full Court of the Federal Court in *De Rose v South Australia (No 2)* (2005) 145 FRC 290 (***De Rose (No 2)***).

In late 2010, the Ngarla People appealed to the Full Court of the Federal Court. Their appeal, which alleged that Justice Bennett should have held that their native title rights and interests were not extinguished to any extent, was upheld.[12] The State of Western Australia's and the joint venturers' cross appeal against the determination, namely, that the claimed native title rights and interests were wholly extinguished over the whole of the area of the mineral leases was dismissed.[13]

Evidently, the State, by special leave, appealed to the High Court against the orders made by the Full Court of the Federal Court on the following grounds:

1. the native title rights and interests were wholly extinguished over the whole of the area of the mineral leases, either because:
    a. those leases conferred on the holders a right of exclusive possession; or
    b. because the rights granted by the mineral leases and the State Agreement were inconsistent with all of the native title rights and interests; alternatively
2. the native title rights and interests were extinguished "in respect of those lands … on which the [joint venturers] exercised their rights to develop and construct mines, a town and associated works".[14]

The question posed to the High Court

The question posed to the High Court in this matter was whether the grant of the mineral leases extinguished some or all of the claimed native title rights and interests in relation to the land subject to the mineral leases. As established in *Western Australia v Ward* (2002) 213 CLR 1 (***Ward***),[15] it is therefore necessary to consider "whether the rights [granted] are inconsistent with the alleged native title rights and interests" which is "an objective inquiry [that] requires identification of and comparison between the two sets of rights".

The relevant native title rights and interests in this case were agreed, as those set out at the beginning of this paper.

The State of Western Australia argued that the mineral leases granted the joint venturers exclusive possession of the land the subject of the instruments.

Based on the reasoning of *Wik Peoples v Queensland* (1996) 187 CLR 1 (*Wik*),[16] the High Court noted that "It is necessary to identify the rights which are actually conferred upon the joint venturers".[17] At [44] the High Court observed that the relevant instrument permitted the joint venturers to go into and under the land for the duration of the mineral leases and to extract, and remove the iron ore they found.

Neither the relevant instrument nor the State Agreement provided the joint venturers with exclusive possession of the land the subject of the mineral leases, or the right to exclude any and everyone from that land for any reason or no reason at all.[18] Rather, the Third Party Clause permitted third party access over the land the subject of the mineral leases, on certain conditions.

The State of Western Australia also argued that the native title rights could clash with rights under the mineral leases in that they could not be exercised simultaneously in the one place. For example, a native title holder could not hunt over land being excavated to recover iron ore or over land on which there stood one of the houses constructed by the joint venturers.[19]

On the State's case, theoretically, the mineral leases gave the joint venturers the rights to mine anywhere on the land, and the right to build many and very large improvements anywhere on the land. Thus, the rights granted by the mineral leases were wholly inconsistent with the claimed native title rights and interests, the State relying on the reasons of Brennan CJ in *Wik* at 87.[20]

In response to this argument, the High Court drew attention to the very paragraph from which the statement relied upon by the State was taken, in which Brennan CJ emphasized that extinguishment of native title does not depend upon the exercise of the allegedly inconsistent right. Rather, the inconsistency is, as his Honour expressed at 87 in *Wik* "between the rights" and not "between the manner of their exercise".

To this end, at [55] the High Court made the following observations:

> The decisions in both *Wik* and *Ward* established that the grant of rights to use land for particular purposes (whether pastoral, mining or other purposes), if not accompanied by the grant of a right to exclude any

> and everyone from the land for any reason or no reason, is not necessarily inconsistent with, and does not necessarily extinguish, native title rights such as rights to camp, hunt and gather, conduct ceremonies on land and care for land.

The High Court concluded that the mineral leases did not give the joint venturers the right to exclude any and everyone from any and all parts of the land for any reason or no reason. Rather, they were given more limited rights – rights to mine, for example, anywhere on the land, without interference by others.[21] Indeed, those more limited rights could co-exist with the native title rights and interests. To illustrate this, the High Court pointed out that if one considers the co-existence of the rights on the day following the grant of the mineral leases, it is clear that on that day, the Ngarla People could have exercised all of their rights that are now claimed anywhere on the land without being in breach of any right which had been granted to the joint venturers.[22]

The State's alternative argument

The State's submission that there could be extinguishment of native title by the exercise of rights granted was rejected by the High Court – remembering that questions of extinguishment are to be determined as a matter of law, not as a matter of fact.[23] That being the case, inconsistency arises "at the moment when those rights are conferred".[24]

At [62] the High Court concluded, rejecting the Full Court of the Federal Court's decision in *De Rose (No 2)*, that *De Rose (No 2)*

> *"… treated extinguishment as determined by the manner of exercise of the allegedly inconsistent right rather than, as it must be, by the nature and content of the two rights which are said to be inconsistent".*

It is important to note that the High Court maintained that where there are two competing rights, the right granted by statute will prevail. That said, in this case, when the joint venturers cease to exercise their rights, the native title rights and interests will remain, unaffected.[25]

Conclusions

The State of Western Australia's appeal was dismissed with costs. The joint venturers were ordered to bear their own costs. This decision makes clear that the grant of a mineral (or pastoral, for example) lease will not extinguish native title rights and interests unless the lease expressly confers a right of exclusive possession on the lessee. This is notable given the significant proportion of Northern Territory land which is Aboriginal land or subject to Native Title interests. Moreover, mining on Aboriginal land accounts for 80 percent of the Northern Territory's income derived from mining.

Of course, rights can co-exist – in this case, the native title rights did not prevent the joint venturers from doing anything they were lawfully allowed to do pursuant to the mineral leases.

A variation of this casenote by Courtney Robertson is also published in the May/June Indigenous Law Bulletin (8) 12.

(Endnotes)

1. See generally *Western Australia v Brown & Ors* [2014] HCA 8.
2. The agreement was approved by s 4 of the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) (**State Agreement**).
3. *Western Australia v Brown & Ors* [2014] HCA 8 at [2].
4. *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) Schedule, clause 8(2)(a).
5. Ibid, Schedule, clause 8(5)(b).
6. Ibid, Schedule, clause 10(g).
7. Ibid, Schedule, clause 9(2)(g).
8. *Western Australia v Brown & Ors* [2014] HCA 8 at [13].
9. See generally *Brown (on behalf of the Ngarla People) v Western Australia* [2007] FCA 1025.
10. *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* [2010] FCA 498; (2010) 268 ALR 149 at [230].
11. Ibid, at [231].
12. See generally *Brown v Western Australia* [2012] FCAFC 154; (2012) 208 FCR 505.
13. Ibid.
14. *Western Australia v Brown & Ors* [2014] HCA 8 at [29].
15. *Western Australia v Ward* (2002) 213 CLR 1 at [78].
16. *Wik Peoples v Queensland* (1996) 187 CLR 1 at 117.
17. *Western Australia v Brown & Ors* [2014] HCA 8 at [43].
18. Ibid, at [45].
19. Ibid, at [48].
20. Particular emphasis was given to his Honour's statement that the law *"… cannot recognize the co-existence in different hands of two rights that cannot both be exercised at the same time"*.
21. *Western Australia v Brown & Ors* [2014] HCA 8 at [57].
22. Ibid.
23. *Wik Peoples v Queensland* (1996) 187 CLR 1 at 87.
24. Ibid.
25. *Western Australia v Brown & Ors* [2014] HCA 8 at [64].