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High Court decision clarifies the test for extinguishment of native title

The recent High Court decision in *State of Western Australia v Brown* [2014] HCA 8 (*Brown*) (12 March 2014) clarifies that the question of whether rights granted by the Crown are inconsistent with, and therefore extinguish, native title rights and interests must be decided by reference to the nature and content of the rights as they stood at the time of the grant. The subsequent use of the land by the grantee is relevant only to the extent to which it directs attention to the nature and content of the rights that were granted.

In *Brown*, the High Court held that the grant of 2 mineral leases in an area of land and waters in the Pilbara region of Western Australia did not extinguish the non-exclusive native title rights and interests of the Ngarla People in respect of that area. In so doing, the High Court reaffirmed the approach to questions of extinguishment that it applied in *Wik Peoples v Queensland* (1996) 187 CLR 1 (*Wik*) and *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*), and rejected the notion of contingent extinguishment, that is extinguishment arising from use under a lease, applied by the Full Court of the Federal Court in *De Rose v South Australia (No 2)* (2005) 145 FCR 290 (*De Rose*).

Background

The mineral leases

The 2 mineral leases were granted pursuant to an agreement made in 1964 between the State of Western Australia and some joint venturers for the development and exploitation of iron ore deposits at Mount Goldsworthy (the State Agreement). Under the first mineral lease granted, mine site infrastructure and a town site were developed, together comprising about one-third of the mineral lease area. The mine was closed in 1982 and the town was closed in 1992. The pit is now filled with water, the town has been removed and the land has been restored.

As any extinguishment effected by the grants in this case was not subject to the *Racial Discrimination Act 1975* or the *Native Title Act 1993,* their extinguishing effect, if any, had to be determined in accordance with the common law (see *Brown* at [31]).

Background to the proceedings

Alexander Brown and others (on behalf of the Ngarla People) applied to the Federal Court for native title determinations in respect of an area that included the areas the subject of the joint venturers' 2 mineral leases.

In 2007, a consent determination of native title was made with respect to part of the claimed area other than the areas the subject of the joint venturers' 2 mineral leases *Brown (on behalf of the Ngarla People) v State of Western Australia* [2007] FCA 1025).

In 2010, in *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* (2010) 268 ALR 149, Bennett J held that the joint venturers' 2 mineral leases did not confer a right of

exclusive possession such that any native title rights and interests were wholly extinguished; but that the rights granted pursuant to those leases and the State Agreement were inconsistent with the continued existence of the Ngarla People's claimed native title rights and interests in the area where the mines, the town site and associated infrastructure were constructed.

The High Court noted that Bennett J's holding of inconsistency, and consequent extinguishment of native title, on account of activities undertaken by the joint venturers followed from the decision in *De Rose* (see *Brown* at [23]). It was held in *De Rose* that the construction of improvements on pastoral lease land by the lessee pursuant to their rights under the pastoral lease, extinguished native title rights and interests in the land on which the improvements were constructed and certain adjacent land.

The Ngarla People appealed from Bennett J's decision, and the Full Court of the Federal Court upheld the appeal. However, their Honours were divided in opinion as to what consequences followed from the joint venturers having exercised their rights under the mineral leases to build the mine, the town and associated facilities (see *Brown* at [27]).

Native title rights and interests

The parties to the litigation agreed that, subject to the question of possible extinguishment, the Ngarla People hold native title to the land the subject of the 2 mineral leases. It was agreed that the native title comprises non-exclusive rights to access and camp on the land; to take traditional resources (excluding minerals) from the land; to engage in ritual and ceremony on the land; and to care for, maintain and protect from physical harm particular sites and areas of significance to the Ngarla People (see *Brown* at [2]).

The High Court's decision

In a unanimous decision (French CJ, Hayne, Kiefel, Gageler and Keane JJ), the High Court held that the grant of the 2 mineral leases had not extinguished the non-exclusive native title rights and interests claimed by the Ngarla People, as the rights granted under those leases were not inconsistent with the claimed native title rights and interests.

The test for extinguishment requires the identification of, and a comparison between, 2 sets of rights

The High Court applied the test for extinguishment laid down in *Ward*. That is, their Honours looked at whether the rights granted under the mineral leases were inconsistent with the claimed native title rights and interests (at [33]). This is an objective inquiry requiring the identification of, and a comparison between, the 2 sets of rights (see [33], [34] and [37]).

There are no degrees of inconsistency

Following *Ward*, the High Court held that there cannot be degrees of inconsistency; 2 rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment (at [38]). Their Honours agreed with the claimants' counsel that inconsistency is that state of affairs where the existence of one right necessarily implies the non-existence of the other (at [38]).

The question of inconsistency must be decided at the time of grant

The High Court held that the question of whether 2 or more rights are inconsistent must be decided by reference to the nature and content of the rights as they stood at the time of the grant: at *that* time, were the rights as granted inconsistent with the relevant native title rights and interests (at [37])?

To the extent that the decision in *De Rose* countenances a notion of contingent extinguishment (that is, contingent on the later performance of some act in exercise of the

‘potentially inconsistent’ rights granted), the High Court held it is wrong and should not be followed (at [37], [60] to [62]).

Extinguishment turns on the nature and content of the rights, not the manner in which they are exercised

The High Court rejected the State’s submission that native title could be extinguished by the *exercise* of rights granted by or under statute, as contrary to the principles established and applied in *Wik* and *Ward*, and postulating a test for inconsistency that turns upon the manner of exercise of one of the allegedly competing rights rather than upon the right’s nature and content (at [59]).

Rather, what the joint venturers did or did not do in exercise of the rights granted under their 2 mineral leases is important only to the extent to which it directs attention to the nature and content of the rights that were granted (at [37]).

It should be noted that this case does not concern, or question, previous High Court findings that native title may have been extinguished by the appropriation and use of land by executive governments (see *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 67, 69–70 (Brennan J); *Western Australia v The Commonwealth* (1995) 183 CLR 373 (the Native Title Act case) at 433–434).

Mineral leases did not confer exclusive possession

Neither the mineral leases nor the State Agreement provided expressly that the joint venturers were to have the right to exclude anyone and everyone from the land for any reason or no reason at all. On the contrary, the State Agreement required the joint venturers to allow the State and third parties to have access over the land the subject of the mineral leases, provided that the access did not unduly prejudice or interfere with the joint venturers’ operations. The High Court held that this express provision precluded construing the leases as impliedly providing a right of exclusive possession (see [45] to [46], [57] and [63]).

Rather, the mineral leases gave the joint venturers more limited rights: to carry out mining and associated works anywhere on the land without interference by others. The High Court held that those more limited rights were not inconsistent with the coexistence of the claimed native title rights and interests (at [57]).

The exercise of a grantee’s rights prevail over the exercise of the native title rights

The High Court held that any rights that the joint venturers had, and exercised, took priority over the rights and interests of the native title holders for so long as the joint venturers enjoyed and exercised those rights. Any competition between the exercise of the 2 rights must be resolved in favour of the rights granted by the statute. But when the joint venturers cease to exercise their rights, or their rights come to an end, the native title rights and interests remain, unaffected (at [64]).

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