

**STATE OF WESTERN AUSTRALIA v. BROWN AND ORS (P49/2013)**

Court appealed from: Full Court of the Federal Court of Australia  
[2012] FCAFC 154 & [2013] FCAFC 18

Date of judgment: 5 November 2012 & 22 February 2013

Date special leave granted: 12 September 2013

In 1960, a joint venture was established to develop the iron ore deposits at Mount Goldsworthy in the Pilbara region of Western Australia. In February 1962, the West Australian Government awarded the successful tender to the joint venturers. The State of Western Australia and the joint venturers executed an agreement, the operative form of which was given effect to by the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) (“the 1964 Act”). The current joint venturers are BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy of Australia Pty Ltd and Mitsui Iron Ore Corporation Pty Ltd (the second respondent).

In late May 2007, Bennett J made a consent determination under the *Native Title Act 1993* (Cth) as to the native title rights and interests of the Ngarla People in relation to land in the Pilbara region. Excised from the determination was an area of land which was subject to the Mount Goldsworthy mineral leases. The leases were granted pursuant to a joint venture agreement made in mid October 1964. They were approved and given effect to by s 4(1) of the 1964 Act. An order was made by Bennett J on 5 October 2007 to determine as a separate question whether the Mount Goldsworthy mineral leases were subject to the native title rights and interests of the Ngarla People or whether the rights granted to the joint venturers extinguished those native title rights and interests.

At first instance, Bennett J found that the Mount Goldsworthy mineral leases did not confer exclusive possession on the joint venturers so as to extinguish wholly the native title rights and interests of the Ngarla People, but found that the rights granted under those mineral leases and the underlying agreement were inconsistent with the native title rights and interests continuing to exist in the area where the mines, town sites and associated infrastructure were constructed, but not in the undeveloped areas. As a consequence of this inconsistency, her Honour held that the Ngarla People’s native title rights and interests were wholly extinguished in the developed areas of the mineral leases.

Brown (on behalf of the Ngarla People), the first respondent, appealed. The appellant and the second respondent cross-appealed, arguing that the trial judge should have found that the Ngarla People’s native title rights and interests were wholly extinguished across the whole of the area which was subject to the mineral leases.

The Full Court of the Federal Court of Australia, per Greenwood and Barker JJ, Mansfield J dissenting, allowed the appeal and dismissed the cross-appeal. Greenwood J found that the native title rights of the Ngarla people were not extinguished by the grant but the exercise of the granted rights by the mining companies would prevent the exercise of each of the native title rights (over the whole land) for so long as the mining companies carried on the activities contemplated by the agreement. His Honour

concluded that the Ngarla people were prevented from exercising their native title rights over the whole land while the joint adventurers continued to hold their rights as granted.

The grounds of appeal include:

- The Full Court erred in law in finding that the determined native title rights continue to exist in the area of the Mt Goldsworthy Leases when the Full Court should have found that each determined native title right was extinguished in respect of the entirety of the lands the subject of the Mt Goldsworthy Leases by reason both:
  - (a) that the grant of the Mt Goldsworthy Leases conferred on the Lessees a right of exclusive possession; and
  - (b) that the rights granted to the Lessees pursuant to the Mt Goldsworthy Leases, the 1964 Act and the *Mining Act 1904* (WA) were exercisable on all parts of the leased land and were wholly inconsistent with each determined native title right.

The Attorney-General for the State of South Australia and the Australian Lawyers for Human Rights are seeking leave to intervene as amicus curiae.