HIGH COURT OF AUSTRALIA

17 April 2019

TJUNGARRAYI & ORS v STATE OF WESTERN AUSTRALIA & ORS; KN (DECEASED) AND OTHERS (TJIWARL & TJIWARL #2) v STATE OF WESTERN AUSTRALIA & ORS
[2019] HCA 12

Today the High Court unanimously allowed two appeals from decisions of the Full Court of the Federal Court of Australia. The issue in the appeals was whether petroleum exploration permits granted under the *Petroleum and Geothermal Energy Resources Act 1967* (WA) and mineral exploration licences granted under the *Mining Act 1978* (WA) fell within the meaning of the word "lease" in s 47B(1)(b)(i) of the *Native Title Act 1993* (Cth) ("the NTA").

Each of the two appeals before the High Court arose out of a claim for a determination of native title by a claim group. In each claim there were parcels of unallocated Crown land occupied by claim group members. Parts of each claim area intersected with parts of the areas covered by petroleum exploration permits or mineral exploration licences ("the exploration tenements"). In each claim the traditional laws and customs acknowledged and observed by the native title claim group in relation to the claim area conferred rights to possession, occupation, use and enjoyment of the claim area to the exclusion of all others. The right to exclusive possession had been extinguished by acts of partial extinguishment that occurred before the enactment of the NTA, but non-exclusive rights to access, use and remain on the claim area remained recognisable as native title rights.

Generally speaking, when native title rights and interests are extinguished, the extinguishment is permanent. The rights and interests do not revive even if the act that caused the extinguishment ceases to have effect. However, s 47B of the NTA provides that any historic extinguishment of native title rights and interests is to be "disregarded" for the purposes of a claim for a determination of native title rights and interests over vacant Crown land. Section 47B(1)(b)(i) provides that the provision does not apply if the relevant area of land is "covered by a ... lease". In each claim the claim group argued that the right to exclusive possession could be recognised as a native title right if the historic extinguishment of that right could be disregarded under s 47B. The State of Western Australia argued that s 47B did not apply to the extent that the relevant areas were covered by the exploration tenements because each such tenement was a "lease" within the exclusion in s 47B(1)(b)(i).

In the Federal Court of Australia, the primary judge in each matter held that the relevant exploration tenements were not "lease[s]" within the meaning of s 47B(1)(b)(i). On appeal, the Full Court of the Federal Court in each matter disagreed, holding that the relevant exploration tenements were each a "lease" within the meaning of the provision. The Full Court relied principally on s 242(2), which relevantly provides that "[i]n the case only of references to a mining lease, the expression *lease* also includes a licence ... or an authority".

By grant of special leave, both claim groups appealed to the High Court. The High Court, by majority, held that the extended definition of "lease" in s 242(2) only applies where there is a textual reference to a "mining lease". As s 47B(1)(b)(i) contains no textual reference to a "mining lease", s 242(2) does not apply to that provision. Accordingly, and because the exploration tenements could be leases for the purposes of the NTA only if s 242(2) operated to produce that result, the majority held that the exploration tenements were not "lease[s]" within the meaning of s 47B(1)(b)(i).

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- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*