HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, GAGELER AND KEANE JJ

STATE OF WESTERN AUSTRALIA APPELLANT

AND

ALEXANDER BROWN & ORS RESPONDENTS

Western Australia v Brown
[2014] HCA 8
12 March 2014
P49/2013

ORDER

1. Appeal dismissed.

2. Appellant to pay the costs of the first respondents.

On appeal from the Federal Court of Australia

Representation

G R Donaldson SC, Solicitor-General for the State of Western Australia with G J Ranson for the appellant (instructed by State Solicitor (WA))

B W Walker QC with R W Blowes SC and C L Tan for the first respondents (instructed by Yamatji Marlpa Aboriginal Corporation)

P D Quinlan SC with J M Bursle for the second respondents (instructed by Ashurst)

Intervener

M G Hinton QC, Solicitor-General for the State of South Australia with D F O'Leary for the Attorney-General for the State of South Australia, as amicus curiae (instructed by Crown Solicitor (SA))

CATCHWORDS

Western Australia v Brown

Native title – Native title rights in relation to land – Agreement made in 1964 between State of Western Australia and joint venturers to develop iron ore deposits at Mount Goldsworthy – Mineral leases for iron ore granted pursuant to agreement – Joint venturers required under agreement to give State and third parties access to land subject of mineral leases provided such access did not unduly prejudice or interfere with joint venturers' operations – Whether mineral leases granted joint venturers right of exclusive possession – Whether joint venturers' rights under mineral leases inconsistent with claimed native title rights and interests – Whether claimed native title rights and interests extinguished by actual or potential conflicting use or development of land by joint venturers subsequent to grant of mineral leases.

Words and phrases – "exclusive possession", "extinguishment", "inconsistency of rights".

Iron Ore (Mount Goldsworthy) Agreement Act 1964 (WA), Schedule.

1 FRENCH CJ, HAYNE, KIEFEL, GAGELER AND KEANE JJ. In 1964, the State of Western Australia made an agreement with some joint venturers about the development and exploitation of iron ore deposits at Mount Goldsworthy. The agreement was approved by s 4(1) of the *Iron Ore (Mount Goldsworthy) Agreement Act* 1964 (WA) and it is convenient to refer to it as "the State Agreement". The State Agreement obliged the State to grant, and the State did grant, to the joint venturers mineral leases for iron ore (in a form provided by the agreement). Two leases are relevant to this matter. Each was for a term which expired in 1986, with the right to renew from time to time for further periods each of 21 years. Each has been renewed and is still in force.

2 The parties to this litigation agree that, subject to the question of extinguishment, the Ngarla People hold native title to the land which is subject to the two mineral leases. The parties agree that the relevant native title rights and interests are non-exclusive rights (a) to access and camp on the land; (b) to take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land; (c) to engage in ritual and ceremony on the land; and (d) to care for, maintain and protect from physical harm particular sites and areas of significance to the native title holders.

3 Did the grant of the mineral leases extinguish those native title rights and interests in relation to the land subject to the mineral leases? This Court's decision in *Western Australia v Ward*[1] requires that the question be answered "No". The rights granted under the mineral leases are not inconsistent with the claimed native title rights and interests.

The State Agreement

4 The Mount Goldsworthy iron ore project was a very large development. The State Agreement made detailed provisions about the rights and obligations of the State and of the joint venturers. It is enough, for present purposes, to notice only the following provisions.

5 The State Agreement provided[2] that, "[a]s soon as conveniently may be" after the commencement date specified in the agreement, and after application by the joint venturers, the State would grant the joint venturers "a mineral lease ... for iron ore" in the form provided in the schedule to the agreement and later

---

1 (2002) 213 CLR 1; [2002] HCA 28.

2 *Iron Ore (Mount Goldsworthy) Agreement Act* 1964 (WA), Schedule, cl 8(2)(a).

grant[3] similar mineral leases over other areas. The form of mineral lease provided by the State Agreement was generally similar to the form of mineral lease then provided by the *Mining Act* 1904 (WA).

6 The State agreed[4] that, subject to the joint venturers performing their obligations under the State Agreement, the State and its authorities would not resume any property used for the purposes of the agreement. The State further agreed[5] not to rezone the land which was the subject of a mineral lease granted in accordance with the State Agreement.

7 The joint venturers agreed[6] that, within three years of the commencement date fixed by the State Agreement, they would do all that was necessary to enable them to mine iron ore from the land the subject of the initial mineral lease, to transport ore by rail to the joint venturers' wharf and to commence shipment of ore from the wharf at an annual rate of not less than one million tons of ore. In particular, the joint venturers agreed[7] to construct a railway, to make roads, to construct a wharf, to lay out and develop townsites and to provide suitable housing, recreational and other facilities and services. Some of this was to be done on the land the subject of a mineral lease but some of it had to occur elsewhere.

8 The joint venturers agreed[8] that, "[t]hroughout the continuance" of the State Agreement, 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

---

3 *Iron Ore (Mount Goldsworthy) Agreement Act* 1964, Schedule, cl 11(6).

4 *Iron Ore (Mount Goldsworthy) Agreement Act* 1964, Schedule, cl 8(5)(b).

5 *Iron Ore (Mount Goldsworthy) Agreement Act* 1964, Schedule, cl 10(g).

6 *Iron Ore (Mount Goldsworthy) Agreement Act* 1964, Schedule, cl 9(1).

7 *Iron Ore (Mount Goldsworthy) Agreement Act* 1964, Schedule, cl 9(1)(c), (d), (e), (f)(ii).

8 *Iron Ore (Mount Goldsworthy) Agreement Act* 1964, Schedule, cl 9(2)(g).

> prejudice or interfere with the Joint Venturers' operations [under the State Agreement]".

9 The State Agreement has been varied three times since it was first made. Nothing turns on those variations. There have been assignments of interests in the joint venture and in the mineral leases. Again, nothing turns on the detail of those changes and it is convenient to refer to the "joint venturers" without distinguishing between the differing compositions of the joint venture over the years.

The mineral leases

10 The State has granted two mineral leases that are relevant to this litigation. The first (variously referred to as "ML 235", "ML 235SA" or "AML 7000235") was granted by instrument dated 17 February 1966. The second (referred to as "ML 249", "ML 249SA" or "AML 7000249") was granted by instrument dated 8 May 1974. Both mineral leases were granted before the enactment of the *Racial Discrimination Act* 1975 (Cth) and long before the enactment of the *Native Title Act* 1993 (Cth).

11 Argument in this Court proceeded on the basis that there is no relevant difference between the two mineral leases and that each was in the form provided for by the State Agreement. It is therefore convenient to refer only to the first of them (ML 235).

12 The recitals to the instrument recorded that, by the State Agreement, the State had agreed to grant the joint venturers "a mineral lease", that the State Agreement had been ratified by the *Iron Ore (Mount Goldsworthy) Agreement Act* 1964 and that the Act had authorised the grant of a mineral lease or leases to the joint venturers.

13 The instrument provided that, "in consideration of the rents and royalties reserved by and of the provisions of the [State] Agreement", the Crown "do[es] 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".

14 The instrument further provided that "this lease is subject to the observance and performance" by the joint venturers of certain covenants and conditions, including that the joint venturers "use the land bona fide exclusively for the purposes of the [State] Agreement".

Subsequent activities

15 In accordance with their obligations under the State Agreement, the joint venturers developed the Mount Goldsworthy iron ore project. Construction of the townsite and mine operations on the land the subject of ML 235 began in 1965. A town of over 200 houses (and separate single men's quarters) was built, together with roads, a shopping centre, a school, clubs and sporting facilities, a medical centre, a police station and other associated works. In 1977, the town reached a maximum population of 1,400 people.

16 Together, the minesite infrastructure and the town covered about one third of the area of ML 235. (The parties agreed that there was no evidence that any significant construction was carried out on the remainder of the area of ML 235.)

17 Mining was conducted using open pit mining. Before mining began, the peak of Mount Goldsworthy was about 132 metres above sea level. When mining stopped, Mount Goldsworthy had been transformed into a pit about 135 metres below sea level.

18 The mine was closed in December 1982. The town was closed in 1992. The town has since been completely removed and the land on which it stood restored. The pit remains, but is now filled with water.

Procedural history

19 Alexander Brown and others (on behalf of the Ngarla People) applied to the Federal Court of Australia for native title determinations in respect of land and waters in the Pilbara region of Western Australia. The claimed areas included the areas subject to the two mineral leases referred to at the start of

these reasons. On 30 May 2007, the primary judge (Bennett J) made[9] a consent determination of native title with respect to part of the claimed areas other than the areas the subject of the mineral leases.

20 On 5 October 2007, the primary judge ordered the trial of some questions relating to the effect of the grant of the mineral leases. The order recorded that it was agreed that, subject to the answers given to the questions, "native title exists in the land [the subject of the mineral leases] in the manner recognised" in the consent determination which had been made on 30 May 2007. The questions included[10] the following:

> "(1) Did the grant of the [mineral] leases pursuant to the ... State Agreement confer on the holders of those leases a right of exclusive possession such that any native title rights and interests were wholly extinguished?
>
> (2) If the grant of the [mineral] leases did not confer exclusive possession so as to extinguish any native title rights and interests, are the rights granted pursuant to the [mineral] leases and the ... State Agreement inconsistent with any or all of the bundle of native title rights and interests recognised in [the consent determination of 30 May 2007]? If the answer is 'yes', which ones?
>
> (3) If the answer to (2) is 'yes', in relation to any and each of such native title rights which are inconsistent, are these rights wholly extinguished?
>
> (4) Was native title wholly extinguished to the area (or part of the area) of the [mineral] leases through the rights as exercised under the [mineral] leases and the ... State Agreement?
>
> (5) If the answer to (4) is 'yes', in which areas has native title been wholly extinguished?"

---

9 *Brown (on behalf of the Ngarla People) v State of Western Australia* [2007] FCA 1025.

10 *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* (2010) 268 ALR 149 at 153-154 [3].

21 For the purposes of the trial of those separate questions, the parties submitted a statement and chronology of agreed relevant facts and a statement and chronology of further undisputed facts, the relevance of which was contested.

22 On the trial of the separate questions, the primary judge held[11] that the mineral leases (ML 235 and ML 249) did not confer on the joint venturers a right of exclusive possession such that any native title rights and interests were wholly extinguished. The primary judge further held[12], however, that the rights granted pursuant to ML 235 and ML 249 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". The rights which the joint venturers exercised with respect to this "developed" area were said[13] to be "analogous to rights of exclusive possession". But the analogy was neither explored nor explained further. Her Honour subsequently made[14] a determination of native title reflecting the conclusions which have been described.

23 The holding of inconsistency, and consequent extinguishment of native title, on account of activities undertaken by the joint venturers on the land the subject of the mineral leases subsequent to the grant of those interests, followed from the decision of the Full Court of the Federal Court in *De Rose v South Australia (No 2)*[15]. It will be necessary to say more about that decision but, in order to understand the subsequent procedural history of this matter, two points should be made about it now. The Full Court held[16] in *De Rose (No 2)* that the grant in a pastoral lease of the right to construct improvements on the land (such as a dwelling house or shed), *when exercised*, was inconsistent with native title

---

11 *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* (2010) 268 ALR 149 at 205 [230].

12 (2010) 268 ALR 149 at 205 [231].

13 (2010) 268 ALR 149 at 200 [202].

14 *Brown (on behalf of the Ngarla People) v State of Western Australia (No 3)* [2010] FCA 859.

15 (2005) 145 FCR 290.

16 (2005) 145 FCR 290 at 331-332 [149].

rights to access and move about the land, hunt and gather on the land, camp on the land, engage in ceremonies and cultural activities on the land and maintain and protect places of significance. The Full Court further held[17] that construction of improvements by the holders of the pastoral lease on the land extinguished native title rights and interests in the land on which the improvements were constructed and in any adjacent land reasonably necessary for or incidental to the operation or enjoyment of the improvements.

24 In the present matter, the native title holders appealed to the Full Court of the Federal Court against the orders and determination made by the primary judge. They alleged, in effect, that her Honour should have held that their native title rights and interests were not extinguished to any extent by the grant of the mineral leases or by any subsequent activities on the leased land.

25 The State of Western Australia and the joint venturers each cross-appealed against the determination. Each alleged that the claimed native title rights and interests were wholly extinguished over the whole of the area of the mineral leases, either because those leases conferred on the holders a right of exclusive possession or because the rights granted by the leases and the State Agreement were inconsistent with all of the native title rights and interests.

26 On 5 November 2012, the Full Court (Mansfield, Greenwood and Barker JJ) published[18] reasons for judgment and made orders that the appeal by the native title holders "be upheld" and the cross-appeals by the State and the joint venturers be dismissed.

27 The Full Court divided in opinion, principally about what consequences followed from the joint venturers having exercised their rights under the mineral leases to build the mine, the town and associated facilities. Mansfield J concluded[19] that the orders and reasons of the primary judge were correct. Greenwood J held[20] that the native title rights and interests of the Ngarla People were not extinguished by the grant of the mineral leases but that the exercise of the rights granted by the leases would prevent the exercise of native title rights

---

17 (2005) 145 FCR 290 at 333 [157], 335 [166].

18 *Brown v Western Australia* (2012) 208 FCR 505.

19 (2012) 208 FCR 505 at 526 [94].

20 (2012) 208 FCR 505 at 586-587 [431].

over *any* part of the leased land for so long as the joint venturers hold rights under the leases. Barker J also held[21] that the native title rights and interests were not extinguished but held[22] that, to the extent that native title rights and interests could not be exercised or enjoyed by reason of the incompatibility of activities conducted by the joint venturers, the exercise of the native title rights and interests "yielded" to the joint venturers' exercised rights.

28 Subsequently, on 22 February 2013, the Full Court set aside[23] the determination of native title made by the primary judge and made a new determination in a form proposed by the native title holders. Because these reasons will show that subsequent use of the land the subject of the mineral leases is irrelevant to the issue of extinguishment, it is not necessary to explore the differences between the members of the Full Court or the particular resolution of those differences which was reflected in the substituted determination of native title.

29 It is sufficient to complete the description of the procedural history of the matter by noting that, by special leave, the State appeals to this Court against the orders of the Full Court. The State again advances the argument (advanced in the Full Court) that native title rights and interests were wholly extinguished over the whole of the area of the mineral leases, either because those leases conferred on the holders a right of exclusive possession or because the rights granted by the leases and the State Agreement were inconsistent with all of the native title rights and interests. In the alternative, the State submits that 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".

30 The joint venturers did not appeal against the orders made by the Full Court. They made submissions supporting the State in its appeal. The Attorney-General for the State of South Australia was granted leave to appear and make submissions as amicus curiae.

---

21 (2012) 208 FCR 505 at 596 [479].

22 (2012) 208 FCR 505 at 597 [479].

23 *Brown (on behalf of the Ngarla People) v State of Western Australia (No 2)* [2013] FCAFC 18.

Extinguishment

31 This is an appeal against a determination of native title made under the *Native Title Act* 1993. The *Native Title Act* 1993 therefore "lies at the core of this litigation"[24]. As noted earlier in these reasons, both of the mineral leases (ML 235 and ML 249) were granted before the enactment of the *Racial Discrimination Act* 1975. No party submitted that the provisions of that Act are engaged in any relevant way. In both the Full Court of the Federal Court[25] and this Court, it was common ground that none of the provisions of the *Native Title Act* 1993 dealing with "past acts", "intermediate period acts" or "previous exclusive possession acts" applied. That is, it was common ground, in both the Full Court and this Court, that the question of extinguishment which lies behind the determination sought under the *Native Title Act* 1993 was not governed by statute.

32 Did the grant of the mineral leases extinguish some or all of the claimed native title rights and interests?

33 To answer this question, it is necessary, as the plurality held[26] in *Ward*, to ask "whether the rights [granted] are inconsistent with the alleged native title rights and interests". This question is[27] "an objective inquiry which requires identification of and comparison between the two sets of rights". Each stage of this inquiry – identification of rights and comparison between rights – will be considered in turn.

Identifying the rights

34 The identification of the relevant rights is an objective inquiry. This means that the legal nature and content of the rights must be ascertained[28]. The

---

24 *Ward* (2002) 213 CLR 1 at 60 [2]. See also *Akiba v The Commonwealth* (2013) 87 ALJR 916 at 930 [54]; 300 ALR 1 at 19; [2013] HCA 33.

25 (2012) 208 FCR 505 at 511-513 [23]-[27].

26 (2002) 213 CLR 1 at 89 [78].

27 (2002) 213 CLR 1 at 89 [78].

28 cf *Wik Peoples v Queensland* (1996) 187 CLR 1 at 71-72 per Brennan CJ, 185 per Gummow J; [1996] HCA 40.

nature and content of a right is not ascertained by reference to the way it has been, or will be, exercised. That is why the plurality in *Ward* said[29] that consideration of the way in which a right has been exercised is relevant only in so far as it assists the correct identification of the nature and content of the right.

The claimed native title rights and interests

35 As was said[30] in *Ward*, "[q]uestions of extinguishment first require identification of the native title rights and interests that are alleged to exist". As already noted, the nature and extent of those rights was agreed in this case. It was agreed that those rights were non-exclusive rights to access and camp on the land, to take flora, fauna, fish, water and other 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.

36 It is important to recognise that particular considerations apply to the identification of native title rights and interests. In examining the "intersection of traditional laws and customs with the common law"[31] (or, in this case, the intersection with rights derived from statute), it is important[32] to pay careful attention to the content of the traditional laws and customs. It is especially important not to confine[33] the understanding of rights and interests which have their origin in traditional laws and customs "to the common lawyer's one-dimensional view of property as control over access". Yet it is no less important to recognise that, as *Fejo v Northern Territory* made clear[34], a right of exclusive possession affords the holder the right to "use the land as he or she sees fit and [to] *exclude any and everyone from access to the land*" (emphasis added). The grant of a right to exclude any and everyone from access to the land for any

---

29 (2002) 213 CLR 1 at 89 [78].

30 (2002) 213 CLR 1 at 208 [468]. See also at 91-95 [83]-[95]; *Akiba* (2013) 87 ALJR 916 at 930 [51]; 300 ALR 1 at 19.

31 *Fejo v Northern Territory* (1998) 195 CLR 96 at 128 [46]; [1998] HCA 58.

32 *Ward* (2002) 213 CLR 1 at 92 [85].

33 *Ward* (2002) 213 CLR 1 at 95 [95].

34 (1998) 195 CLR 96 at 128 [47].

reason or no reason is inconsistent with the continued existence not only of any right in any person other than the grantee to gain access to the land but also of any right which depends upon access to the land.

Determining inconsistency

37 The determination of whether two or more rights are inconsistent is also an objective inquiry. The question of inconsistency of rights can always be decided at the time of the grant of the allegedly inconsistent rights. And it 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? As these reasons will later demonstrate, to the extent to which the decision in *De Rose (No 2)* countenances a notion of contingent extinguishment (contingent on the later performance of some act in exercise of the "potentially inconsistent" rights granted), it is wrong and should not be followed. In the present case, then, the question of inconsistency is to be determined at the time of the grant of the relevant mineral leases. What the joint venturers did or did not do in exercise of the rights granted under the mineral leases is important[35] only to the extent to which it directs attention to the nature and content of the rights which were granted.

38 There cannot be "degrees of inconsistency of rights". "Two 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."[36] As counsel for the native title holders put the point in argument in this Court, inconsistency is that state of affairs where "the existence of one right necessarily implies the non-existence of the other". And one right necessarily implies the non-existence of the other when there is logical antinomy between them: that is, when a statement asserting the existence of one right cannot, without logical contradiction, stand at the same time as a statement asserting the existence of the other right.

39 The joint venturers and South Australia sought to formulate a test for determining whether rights granted are inconsistent by analogy with s 109 of the Constitution. Reference was made to notions of "direct" and "indirect" inconsistency and to whether the existence or enjoyment of native title rights would alter, impair or detract from the *enjoyment* of a right conferred by statute.

---

35 *Ward* (2002) 213 CLR 1 at 89 [78].

36 *Ward* (2002) 213 CLR 1 at 91 [82].

Yet, as was acknowledged in argument, the analogy is necessarily imperfect. An inconsistent State law is inoperative[37] only for so long as there is inconsistent federal law. A native title right, once extinguished, cannot be revived[38]. More fundamentally, however, the analogy is apt to mislead, at least to the extent to which it directs attention to the *enjoyment* of rights rather than the necessary comparison between the legal nature and content of the right granted and the native title right asserted. The analogy should not be pursued.

40 It is convenient to turn to the task of identifying the rights which the State granted to the joint venturers pursuant to the *Iron Ore (Mount Goldsworthy) Agreement Act* 1964 and comparing those rights with the claimed native title rights and interests.

Exclusive possession?

41 As noted earlier, the State (supported by the joint venturers) submitted that the mineral leases granted the joint venturers exclusive possession of the land the subject of the instruments.

42 Three points may be made about ML 235 which apply equally to ML 249.

43 First, like any mineral lease granted under the *Mining Act* 1904, ML 235 was described as a kind of lease: a "mineral lease". The instrument used the term "demise". It granted and demised identified land as well as mines, veins, seams, lodes and deposits of a mineral in, on or under that land. As with the mining leases considered in *Ward*, the rights and obligations of the joint venturers are not to be determined[39] by fastening upon the use of the words "lease" or "demise", or by noticing that there was a demise of land as well as mines. As Toohey J said[40] in *Wik Peoples v Queensland*, "[a] closer examination

---

37 *Butler v Attorney-General (Vict)* (1961) 106 CLR 268; [1961] HCA 32.

38 *Fejo* (1998) 195 CLR 96 at 131 [56]-[58].

39 *Ward* (2002) 213 CLR 1 at 158 [284]-[287]; *Wik* (1996) 187 CLR 1 at 117 per Toohey J. See also *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 192-193 per Windeyer J; [1969] HCA 28; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 212-219; [1973] HCA 7; *O'Keefe v Malone* [1903] AC 365 at 377.

40 (1996) 187 CLR 1 at 117.

is required". It is necessary to identify the rights which are actually conferred upon the joint venturers. And that leads to the second point to be noticed.

44 The grant was expressed to be "for the purposes but upon and subject to the terms, covenants and conditions set out in the [State] Agreement". The joint venturers were required to use the land "bona fide exclusively for the purposes of the [State] Agreement". Read as a whole, in the context provided by the State Agreement, the instrument provided for a "mineral lease" of the kind understood by the common law and described in *Newcrest Mining (WA) Ltd v The Commonwealth*[41]. That is, the instrument gave the joint venturers liberty to go into and under the land, during the currency of the mineral lease, and to get and take away the iron ore that they found there.

45 This being the nature of the right granted to the joint venturers, the third point to be made is that neither the instrument itself nor the State Agreement provided expressly that the joint venturers were not only to have possession of the land which was the subject of the mineral lease for the purposes which have been described but also to have the right to exclude any and everyone from that land for any reason or no reason at all. On the contrary, as already noted, the State Agreement provided expressly that the joint venturers must allow not only the State but also third parties to have access over the land the subject of the mineral lease, provided that the access did not "unduly prejudice or interfere with" the joint venturers' operations. This express provision precludes construing the leases as impliedly providing a right of exclusive possession.

46 It follows that neither ML 235 nor ML 249 gave the joint venturers a right of the kind identified[42] in *Fejo*: the unqualified right to exclude any and everyone from access to the land, for any reason or no reason. The joint venturers could prevent anyone else from using the land for mining purposes and could use any part of the land for the extraction of iron ore or for any of the associated purposes described in the State Agreement (such as building a town, roads and railway). It may be accepted that the grant of these rights would be inconsistent with a native title right of the kind which was at issue in *Ward*: a native title right to control access to land (for any purpose or no purpose). But no

---

41 (1997) 190 CLR 513 at 616 per Gummow J; [1997] HCA 38, citing *Gowan v Christie* (1873) LR 2 Sc & Div 273 at 284 per Lord Cairns.

42 (1998) 195 CLR 96 at 128 [47].

right of that kind was in issue in this case. Neither instrument gave the joint venturers the right to exclusive possession of the land.

47 The first branch of the State's argument must be rejected.

Extinguishment by actual or potential conflicting use?

48 The alternative arguments advanced by the State depended, directly or indirectly, on the proposition that extinguishment could be demonstrated by showing that native title rights could clash with rights under the mineral leases in the sense that the rights could not be exercised simultaneously in the one place. That is, the State's alternative arguments were founded in the observation that 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 in the town. And because the mineral leases gave the joint venturers the right to mine *anywhere* on the land and the right to build many and very large improvements *anywhere* on the land, the State submitted that the rights granted by the leases were wholly inconsistent with the claimed native title rights and interests at the time of the grant of the mineral leases, or at least became so when the joint venturers exercised their rights.

49 It follows from what has already been said in these reasons that these arguments must be rejected. It is as well, however, to examine further the flawed premises upon which the arguments depend.

50 The State sought to support its broader proposition (that a right to mine or build *anywhere* on the land was wholly inconsistent with the claimed native title rights and interests) by reference to the reasons of Brennan CJ in *Wik*. Particular emphasis was given to his Honour's statement[43] that "[t]he law ... cannot recognise the co-existence in different hands of two rights that cannot both be exercised at the same time". This statement must be understood in the context in which it appears.

51 In particular, it is important to notice that, in the very paragraph from which the statement relied on by the State was taken, Brennan CJ emphasised that extinguishment of native title does not depend upon the *exercise* of the allegedly inconsistent right: the inconsistency is, as his Honour said[44], "between

---

43 (1996) 187 CLR 1 at 87 (footnote omitted).

44 (1996) 187 CLR 1 at 87.

the *rights*" and not "between the manner of their exercise" (emphasis added). That is, questions of extinguishment must be resolved[45] as a matter of law, not as a matter of fact. Hence, inconsistency arises[46] "at the moment when those [inconsistent] rights are conferred". These propositions, though stated in a dissenting judgment, state principles which must now be taken to be firmly established.

52 In *Wik*, the Court divided on whether the pastoral leases in issue in that case gave the holders a right of exclusive possession (in the sense of a right to exclude any and everyone from the land for any reason or no reason). The majority concluded that the relevant pastoral leases did not give such a right to their holders and that it followed[47] that there was no necessary extinguishment of native title rights and interests. Brennan CJ, and other Justices who dissented, concluded that the pastoral leases did give the holders exclusive possession.

53 The statement by Brennan CJ, on which the State placed such emphasis, responded to the argument advanced on behalf of the Wik and Thayorre Peoples that only *practical* inconsistency between the exercise of competing rights can extinguish native title rights and interests. The observation which Brennan CJ made about simultaneous exercise of rights was made in answer to the argument that the manner of *exercise* of the competing rights was relevant to the question of extinguishment. As has already been seen, that argument was rejected. But the observation answered that argument because, even if the argument were correct, the rights that could not both be exercised at the same time were, on the one hand, rights such as a right to hunt and gather on the land and, on the other, the leaseholder's right to exclude any and everyone from the land for any reason or no reason.

54 Two other submissions made by the State may be noted at this point, but put aside from consideration. It is not to the point to observe, as the State did, that other forms of land tenure might have been granted to the joint venturers. Nor is it to the point to observe, as the State did, that the State Agreement obliged the State not to resume or rezone the land which was the subject of the mineral leases and that the holder of an interest in fee simple in land will seldom

---

45 (1996) 187 CLR 1 at 87.

46 (1996) 187 CLR 1 at 87.

47 (1996) 187 CLR 1 at 132-133 per Toohey J (Gaudron, Gummow and Kirby JJ concurring).

have the benefit of such obligations. Even if it is right to say, as the State did, that in these respects the joint venturers had rights that were greater than those of the holder of a fee simple, the observation is irrelevant to the question of extinguishment. The joint venturers' rights to insist upon performance of these obligations did not intersect in any way with the claimed native title rights and interests.

55 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. As the State rightly pointed out, both *Wik* and *Ward* were decided before the native title rights claimed had been determined. But neither case could have been determined as it was if, as the State submitted, the grant of rights to perform acts or erect structures on land was necessarily inconsistent with the native title rights and interests claimed in this case. And contrary to the submissions made by the State, observing that the Mount Goldsworthy iron ore project was very large, requiring a large mine and extensive associated facilities, founds no tenable legal distinction between this case and the earlier decisions of this Court.

56 Rather, it is necessary to ask whether the existence of the rights granted to the joint venturers necessarily implied that the claimed native title rights and interests could no longer exist.

57 For the reasons which have been given, the mineral leases in issue in this case did not give the joint venturers a right of exclusive possession. In this respect, the mineral leases were no different from the pastoral leases considered in *Wik*, the mining leases considered in *Ward* or the Argyle mining lease also considered in *Ward*. 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. The joint venturers were given more limited rights: to carry out mining and associated works anywhere on the land without interference by others. Those more limited rights were not, and are not, inconsistent with the coexistence of the claimed native title rights and interests over the land. (No party submitted that any distinction should be drawn between the several native title rights and interests that were claimed.) That the rights were not inconsistent can readily be demonstrated by considering the position which would have obtained on the day following the grant of the first of the mineral leases. On that day, the native title holders could have exercised all of the rights that now are claimed anywhere on the land without any breach of any right which had been

granted to the joint venturers. That being so, there was not then, and is not now, any inconsistency between the rights granted to the joint venturers and the claimed native title rights and interests.

58 The State's larger alternative submission (that the grant of rights to mine and build improvements anywhere on the land was wholly inconsistent with the claimed native title rights and interests) should be rejected. There remains for consideration the State's narrower alternative submission that the claimed native title rights and interests were extinguished when the joint venturers exercised their rights to develop and construct mines, a town and associated works. It is convenient to refer to this submission as asserting extinguishment by development.

Extinguishment by development?

59 The submission that there could be (and in this case was) extinguishment of native title by the *exercise* of rights granted by or under statute should be rejected. As has already been explained, the submission is directly contrary to the principles established and applied in both *Wik* and *Ward* and postulates a test for inconsistency which turns upon the manner of exercise of one of the allegedly competing rights rather than upon the right's nature and content. As Brennan CJ said[48] in *Wik*, that would deny the law's capacity to determine the priority of rights over or in respect of the same piece of land. No less importantly, as Brennan CJ also pointed out[49], "[t]o postulate extinguishment of native title as dependent on the *exercise* of the private right of the lessee (rather than on the *creation* or *existence* of the private right) would produce situations of uncertainty, perhaps of conflict" (emphasis added).

60 The decision of the Full Court of the Federal Court in *De Rose (No 2)* has already been mentioned. The decision proceeded from a misunderstanding of what was decided in *Ward*. It assumed, wrongly, that the principles applied in *Ward* permit the deferral of consideration of extinguishment until the manner of exercise of the allegedly inconsistent and extinguishing rights is known. So to proceed would be to return to and adopt the argument about practical inconsistency advanced but rejected in *Wik*.

---

48 (1996) 187 CLR 1 at 87.

49 (1996) 187 CLR 1 at 87.

61 *De Rose (No 2)* was not, and this is not, a case in which the "operation of a grant of rights [was] subjected to conditions precedent or subsequent"[50]. That is, *De Rose (No 2)* was not, and this is not, a case in which the rights were[51] "incapable of identification in law without the performance of a further act or the taking of some further step beyond that otherwise said to constitute the grant". To understand[52] the *grant* of a right as being subject to a "condition precedent" that consists in the granted right being *exercised* is to fall into confusion.

62 The decision in *De Rose (No 2)* assumed, again wrongly, that the permitted construction of an improvement on land held under a "lease" which did not give a right of exclusive possession necessarily affected the *existence* of native title rights and interests rather than the manner of their exercise. That is, the decision 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.

63 As the State rightly pointed out, the mineral leases gave the joint venturers the right to mine anywhere on the land and the right to build improvements anywhere on the land. But the mineral leases did not provide that the joint venturers *must* use the *whole* of the land for mining or associated works. Had the mineral leases provided that the whole of the land *must* be used in a way which would not permit any use of the land by native title holders, it may have been open to construe the mineral leases as providing for the joint venturers to exclude any and everyone from the whole of the land for any reason or no reason. But, as has been explained, that is not what these mineral leases provided.

64 In the end, then, the State's narrower alternative argument reduces to the practical observation that two persons cannot occupy the one place. When the joint venturers built a house in the town, native title holders could not (for example) hunt and gather on the land which that house occupied. And the rights which the joint venturers had, and exercised, took and continue to take priority over the rights and interests of the native title holders for so long as the joint venturers enjoy and exercise those rights. Any competition between the *exercise* of the two rights must be resolved in favour of the rights granted by statute. But

---

50 *Ward* (2002) 213 CLR 1 at 114 [150].

51 *Ward* (2002) 213 CLR 1 at 114-115 [150].

52 cf *De Rose (No 2)* (2005) 145 FCR 290 at 333 [156].

when the joint venturers cease to exercise their rights (or their rights come to an end) the native title rights and interests remain, unaffected.

Conclusion and orders

65 For these reasons, the State's appeal must be dismissed with costs. The joint venturers should bear their own costs. There being no cross-appeal against the determination made by the Full Court, that determination stands.