Mining and extinguishment of native title

David Parish reports on *Western Australia v Brown* [2014] HCA 8

In assessing whether native title has been extinguished under the *Native Title Act 1993* (Cth) it is necessary to determine whether the competing rights are inconsistent with the asserted native title rights and interests.[1] This requires an objective inquiry that identifies and compares the two sets of rights.[2]

In *Western Australia v Brown*[3] the court was asked to decide whether the grant of two mining leases at Mount Goldsworthy in 1964 extinguished native title of the Ngarla People.

Finding that native title was not extinguished by the grant, the court held that the inquiry into extinguishment was directed at the grant of the title at the time of that grant and not the subsequent or potential use of the grantee. In doing so, the High Court rejected the analysis of the full court of the Federal Court in *De Rose v South Australia (No 2)*[4] and approved the principles enunciated by Brennan CJ in his dissent in *Wik Peoples v Queensland*.[5]

Background

The primary judge held that while the mineral leases did not confer the right of exclusive possession upon the joint venturers[6] so as to wholly extinguish native title rights and interests; where the exercise of rights under the mining leases was inconsistent with native title, such as where mines, town sites and infrastructure had been developed, analogous to rights of exclusive possession, native title was diminished correspondingly.[7] This finding was consistent with the full court of the Federal Court decision in *De Rose v South Australia (No 2)* in which the exercise of a pastoral lease was held to be inconsistent with the native title rights to access and use the land.[8]

Hence the crux of the dispute in the full court became whether the grant *and the subsequent use* of the land subject to the mineral lease extinguished to any extent the native title of the Ngarla People. Brown appealed the primary judge's finding that native title was extinguished to any extent; the state and the licence holders cross-appealed on the basis that native title was wholly extinguished.

This left the full court of the Federal Court to ask what the effect of the developments were on the land and to answer the same question three different ways: the title was extinguished to the extent of the subsequent use (as found by the primary judge and approved by Mansfield J); or to the extent of any part of the land used inconsistently with native title (Greenwood J); or no title was extinguished but

it yielded to any inconsistency (Barker J).[9] While divided in its opinion, the full court agreed with the orders proposed by Brown.

The state appealed to the High Court, submitting that the mineral leases either granted an exclusive possession inconsistent with native title or the rights and uses given by the grant had the effect.[10] With the principles of the full court in *De Rose (No 2)* under scrutiny, South Australia joined the proceedings as amicus curae.

Exclusive possession

First, the state argued the joint venturers had exclusive possession of the land by virtue of the mineral leases. This argument was rejected by the High Court.

The important analytical principle that comes out of this case is that, unlike the decision in *De Rose (No 2),* the High Court held that nature and content of the right must be determined at the time the grant was made and not by reference to some later performance or some contingent or potential extinguishment made possible by the grant.[11]

With this in mind the High Court analysed the mineral leases and the legislative instrument that gave rise to them[12] to identify what rights the state had granted to the licence holders. The court found that at the time of the grant, the nature and content of the right was to go into and under the land to take away the iron ore they found there.[13] There was nothing with the flavour of exclusive possessory rights to exclude all for any reason of the kind referred to in *Fejo v Northern Territory*[14] and so it could not be said the licence holders had exclusive possession inconsistent with native title rights.[15]

Actual or conflicting use

Secondly, the state argued that because the grant permitted them to mine anywhere on the land and make improvements anywhere on the land the rights granted by the leases were inconsistent with native title,[16] likewise because actual development had occurred.[17] However, this contention had already been rejected by the High Court in finding that contingent or potential use at the time of the grant was not relevant to identifying the nature and content of the right.[18]

Yet the High Court still took time to consider a statement from Brennan CJ in *Wik* that the state had relied upon and to note that in its full context it meant the opposite. Brennan CJ had stated in *Wik* that while two rights cannot co-exist in different hands if they cannot be exercised at the same time (the statement emphasized by the state), the focus of inconsistency had to be between the rights at the moment they are conferred and not their manner of exercise (the statement emphasized by the High Court in the present case). In approving Brennan CJ's observations, the High Court continued 'These propositions, though stated in a dissenting judgment, state principles which must now be taken to be firmly established.'[19]

Conclusion

The High Court's decision approves the dissenting analysis of Brennan CJ in *Wik* that the grant conferred when comparing title rights and interests must be determined at the time of, and by reference to, the actual grant of interest and not by the exercise or potential exercise of use.

Endnotes

1. *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at 89 [78].
2. [2002] HCA 28; (2002) 213 CLR 1.
3. [2014] HCA 8.
4. [2005] FCAFC 137; (2005) 145 FCR 290.
5. [1996] HCA 40; (1996) 187 CLR 1 at 87.
6. [2014] HCA 8 at [22]; *Brown (on behalf of the Ngarla People) v State of Western Australia* (No 2) [2010] FCA 498; (2010) 268 ALR 149 at 205 [230].
7. [2014] HCA 8 at [22]; and [2010] FCA 498; (2010) 268 ALR 149 at 200 [202].
8. (2005) 145 FCR 290 at 331–332 [149].
9. [2014] HCA 8 at [27].
10. [2014] HCA 8 at [29].
11. [2014] HCA 8 at [37].
12. *Iron Ore (Mount Goldsworthy) Agreement Act 1964.*
13. [2014] HCA 8 at [44].
14. [1998] HCA 58; (1998) 195 CLR 96 at 128 [47].
15. [2014] HCA 8 at [46] and [47].
16. [2014] HCA 8 at [48].
17. [2014] HCA 8 at [59].
18. [2014] HCA 8 at [51].
19. [2014] HCA 8 at [51].