

- doing any act which may affect any improvements, including plant and equipment, which are owned or used by Ross Mining NL, Capricornia Prospecting Pty Limited or Timbarra Gold Mines Pty Limited on any part of the land at Timbarra Plateau near Tenterfield which is subject to ML1386 or ML 1426.

NATIVE TITLE – CLAIM FOR DETERMINATION – *NATIVE TITLE ACT 1993 (CTH)* – PASTORAL LEASE – *WESTERN LANDS ACT 1901 (NSW)* – LEASE DOES NOT NECESSARILY EXTINGUISH NATIVE TITLE*

Anderson v Wilson & Ors (2000) 97 FCR 453

(Full Court of Federal Court of Australia, 5 April 2000.)

Michael Anderson on behalf of the Euahlay–I Dixon Clan made an application for determination of native title in respect of land in the western division of New South Wales. A Western Land Lease was granted under the *Western Lands Act 1901 (NSW)* over the land in respect of which the native title claim has been made and the current lessee is Douglas Wilson. The Lease was granted in March 1955.

As part of the proceedings, the Court agreed to hear and determine legal questions as to whether the *Western Lands Act*, the regulations made under that Act and/or the Western Lands Lease extinguish native title rights. The Court agreed to adopt this procedure because if there was an extinguishment then that would be a complete answer to the native title claim. The case was run as a test case by the NSW Farmers Federation with a view to clarifying the effect of Western Lands Leases on native title rights.

The questions before the Court were modelled on the questions asked in the case of the *Wik Peoples v State of Queensland* (“Wik Case”). The questions asked involved (a) whether the *Western Lands Act*, regulations made under that Act as in force at the time of the grant of the Lease or the terms and conditions of the Western Lands Lease itself, conferred upon the lessee a right to exclusive possession of the Leased land and (b) if the answer to question (a) was yes, whether any native title rights were extinguished by the grant of the Lease or alternatively suspended upon the grant of the Lease for the duration of the Lease.

The Full Court in effect decided that the native title rights (if any existed) were not necessarily extinguished by the *Western Lands Act*, the regulations made under that Act or the grant of the Western Lands Lease.

In reaching that conclusion the Court followed the reasoning of the majority in the Wik Case and concluded that the Western Lands Lease had similar characteristics to the pastoral leases considered in the Wik Case. A number of arguments were advanced to distinguish the pastoral leases in the Wik Case from Leases granted under the *Western Lands Act*, but the Court was not convinced that the differences were sufficiently material to justify a departure from the Wik Case. The Court commented that the question of whether the lease conferred exclusive possession of the land in the abstract was not the main issue. The main issue was whether the rights conferred upon the lessee were inconsistent with the continuing existence of any or all native title rights. It was indicated that in the present case the terms of the lease made it impossible to conclude that there could be no native title rights capable of being exercised consistently with the rights of the lessee.

* Tony J Wassaf, Allen Allen & Hemsley, Sydney.

It will therefore be necessary for evidence to be taken to ascertain the nature and content of the native title rights (if any) that existed immediately prior to the grant of the Lease in 1955 and for the appropriate legal test for inconsistency then to be applied to determine whether any such rights have survived the grant of the Lease.

In addition to the Wik Case dealing with pastoral leases in Queensland, there are now cases which have examined the impact of pastoral leases in Western Australia, Northern Territory and New South Wales on native title and all of those cases have produced the same result (relying on the Wik Case) namely that pastoral leases in those States and Territory do not necessarily extinguish all native title rights that may exist over the land covered by those pastoral leases.

It should be noted however, that these cases do not apply to pastoral leases granted after 31 October 1975 and before 1 January 1994 which have been validated as Category A past acts under the native title legislation of the Commonwealth and of each State and Territory of Australia. For those pastoral leases, there is a statutory extinguishment under that legislation with respect to any native title rights that might otherwise have existed.

MINING ACT 1992 (NSW) S 62(1)(C) – INTERPRETATION – EACH OF THE IMPROVEMENTS LISTED IS REQUIRED TO BE “SUBSTANTIAL”*

Kayuga Coal Pty Limited v J E Ducey & Others

[2000] NSWCA 54

(Court of Appeal, Supreme Court of New South Wales, 19 April 2000)

At [1999] 18 AMPLJ 208 there was a summary of the Supreme Court decision in *Kayuga Coal Pty Limited v Ducey*. Kayuga Coal appealed the decision but the Court dismissed the appeal with costs. In doing so, the Court of Appeal made the following points:

- The Warden and Master Harrison were in error in concluding that the word “substantial” only qualified “building” and not the other words in brackets in s 62(1)(c) of the *Mining Act 1992* (NSW) – the result is that s 62(1)(c) needs to be read as “on which is situated any improvement (being a substantial building, substantial dam, substantial reservoir, substantial contour bank, substantial graded bank, substantial levee, substantial water disposal area, substantial soil conservation work or other substantial and valuable work or structure)..”
- The Warden had determined that the test for an improvement was whether the object in question fulfilled the intention for which it was designed. The Court said that there was no statutory warrant for this test.
- The appellant argued that the reference to value implicit in the words “valuable work or structure” should be understood as referring to works of special value or considerable value. The Court held that there was no justification for this.

* Tony J Wassaf, Allen Allen & Hemsley, Sydney.