consider the point in his initial reasons and merely assumed that the pastoral leases were category A past acts [919]. Justice Nicholson did not allow the matter to be re-argued despite the contrary opinion expressed in *Neowarra*.

The issue is a complex one involving the question of invalidity[3] under section 10 of the Racial Discrimination Act and the interpretation of the High Court's reasoning in *Ward* on the matter. Only if such an invalidity is present could the pastoral leases constitute past acts. It can be considered that the grant of a pastoral lease in such circumstances involves the imposition of a "discriminatory burden"[4] and accordingly will bring about such an invalidity within the reasoning in *Ward*. But such conclusion goes beyond the circumstances that were considered in *Ward* and is also contrary to the analysis in the foundation case of *Mabo No.1*. It would seem inevitable that this aspect of the decision would be appealed.

CONSTRUCTION OF STATE AGREEMENTS – PROPOSAL TO MODIFY, EXPAND OR OTHERWISE VARY AN APPROVED PROPOSAL[*]

Mineralogy Pty Limited & Ors v the State of Western Australia & Anor [2004] WASCA 69 (Supreme Court of Western Australia, CIV 2463 of 2004; 14 April 2005, Steytler P, Roberts-Smith JA, McLure JA)

Construction of State agreement – proposal to significantly modify expand or otherwise vary activities carried on in relation to an approved project – production of interim product for sale rather than further processing not a valid proposal – confined to facts.

Facts and nature of the action

This decision concerned an appeal from a decision of Pullin J of the Supreme Court of Western Australia, delivered 21 December 2004 (*Mineralogy Pty Ltd & Ors v The State of Western Australia & Anor* [2004] WASC 275 (Supreme Court of Western Australia, CIV 2463 of 2004; 21 December 2004, Pullin J)).

Mineralogy Pty Limited (Mineralogy) and the other Appellants are parties to the State Agreement scheduled to and ratified by the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA). The State Agreement provides for, among other things, the development of defined iron ore projects on tenements near Cape Preston, Western Australia by Mineralogy either alone or with the other Appellants who are parties to the State Agreement as co-proponents.

The defined iron ore projects ("Project") are Project 1 (production of high grade iron ore pellets), Project 2 (direct reduced iron), Project 3 (steel) or a combination of those.

---

3 See the helpful comment on this question: L.Wright ," Comment On "The Denial Of Native Title To The Resource Provinces of the Burrup Peninsula and the Pilbara: *Daniel v State of Western Australia"* (2004) 23ARELJ 55

4 R Bartlett, "Native Title in Australia", Second Ed., Lexis Nexis, Australia, 2004 *"The Effect of Inconsistency"* Para [15.12]

* Lucas Wilk, LLB (Hons) B Comm, Senior Associate, Blake Dawson Waldron;
Sally Marsh, LLB (Hons) BSc (Hons), Lawyer, Blake Dawson Waldron;
Matthew Pudovskis, LLB (Hons) BSc, Articled Clerk, Blake Dawson Waldron.

Mineralogy and a co-proponent obtained approval for a project to produce high grade iron ore pellets from iron ore concentrates (Project 1) under the State Agreement. They then applied under clause 8 of the State Agreement for approval to modify, expand or vary the pellet project to produce additional iron ore concentrates for sale rather than further processing into pellets (Concentrates Proposal). Iron ore concentrate is an interim product in the process of producing pellets.

"Project 1" is defined as

> a project or projects for the production of high grade iron ore pellets within Western Australia … from a mine or mines within Area A and a pellet production facility located within Area A … including expansions of projects the subject of approved proposals from time to time and may include inter alia a mine, concentrator, port, desalination plant, pellet plant, power station pipelines and other necessary facilities to enable pellets to be produced, transported and shipped and provision for the supply of a minor tonnage of iron ore concentrates for use as heavy media in the coal washing industry.

Clause 8 of the State Agreement provides:

> If Project Proponents at any time during the continuance of this Agreement desire to significantly modify expand or otherwise vary their activities carried on pursuant to this Agreement in relation to a Project beyond those activities specified in the approved proposals relating to that Project they shall … [give notice to the Minister and submit detailed proposals].

The Minister considered that he could not validly consider the Concentrates Proposal under clause 8 of the State Agreement.

At first instance, Pullin J held that for activities proposed to be an expansion, modification or variation of activities in relation to the approved project, the approved activities must have the same purpose as the approved project. Pullin J held that the Concentrates Proposal was not a valid proposal under clause 8 because the purpose of producing additional concentrates (sale) was not the same as the purposes for which iron ore concentrates were to be produced in the approved project (further processing into pellets). Mineralogy and the other companies who are party to the State Agreement appealed the decision of Pullin J.

Judgments

The judgment was delivered by McLure JA. Steytler P and Roberts-Smith JA agreed with McLure JA. The appeal was unanimously dismissed.

Construction of State Agreements

McLure JA agreed with the approach taken by Pullin J regarding the principles for construction of State Agreements. State Agreements are not to be interpreted like statutes; instead, the usual principles which govern the proper construction of a written contract apply. The primary duty of the court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. The court should not adopt a narrow or pedantic approach to construction particularly in the case of commercial arrangements.

The State Agreement

McLure JA held that the contractual purpose and scope of the State Agreement is detailed and reflected in the definition of "Project", "Project 1", "Project 2" and "Project 3". The purposes of Project 1 and Projects 2 and 3 correspond with, and give content to, the contractual purpose identified in recital (c) which states that the processing of iron ore is principally for the production and sale of pellets, DRI or steel. McLure JA and Roberts-Smith JA referred to the significant commercial benefits provided by the State to Mineralogy in relation to projects, and Roberts-Smith JA additionally referred to the importance to the State of employment and other advantages to be gained from value-added production.

Clause 8 Limited Power to Vary Activities

The Appellants contended that the words "carried on pursuant to this Agreement in relation to a Project" in clause 8 qualify only the existing activity to be modified, expanded or varied, not the proposed activities. They argued that the Concentrates Proposal is a significant modification, expansion or variation of the approved proposal because it is a significant expansion of the mining and concentration activities which also form part of the approved proposal to produce pellets. Production of iron ore concentrates is an interim product in the production of pellets.

McLure JA held that the words "carried on pursuant to this agreement in relation to a project" qualify, and are intended to confine, the activities as varied. That is, the activities as varied must be in relation to a Project. She noted that clause 8 refers to variations to a Project and that the term Project is defined by reference to purposes (the production of pellets and incidentally the supply of minor tonnages of iron ore concentrate for use in the coal washing industry), the area on which the mine and pellet production plant are to be located and thirdly, the definition provides a non-exhaustive list of facilities (and impliedly activities) to give effect to the purpose.

McLure JA then held that the power in clause 8 to vary *activities* is narrower than a power to vary a Project since the definition of Project refers to a combination of purposes and a list of facilities (activities) to achieve the purpose. On that view, the focus on activities in clause 8 is intended to confine variations to the purposes identified in the definition of Project 1. The Minister would not therefore have the power to approve or a duty to consider the Concentrates Proposal because it is outside the scope of the variation power in clause 8. That is the Concentrates Proposal does not accord with the purposes in the definition of Project 1, being the production of pellets.

McLure JA held that this construction is consistent with the State Agreement as a whole.

McLure JA held that the Minister's lack of power to refuse or to approve or reject a proposal in clause 7 (which applies to variation proposals submitted under clause 8) are predicated on the parties having agreed to and detailed the purpose and scope of the State Agreement by reference to the definition of "Project". She decided that the Minister's limited power under clause 7 is a very strong indicator that the parties did not intend to permit variations not relevantly connected with an approved project.

McLure JA gave consideration to the Appellants' argument that the royalty clause (clause 11(1)), is consistent with a conclusion that the State Agreement provides for non-Project-related activities. Clause 11(1)(c) provides for the payment of royalties in relation to all *minerals* obtained from the Mining Leases (being mining leases dedicated to or granted in respect of a Project). Minerals are

described by reference to firstly, iron ore concentrates processed under the State Agreement into pellets, DRI or steel, secondly, "other iron ore concentrates and on all other iron ore" and thirdly, "all other minerals". A concessional royalty is only payable in respect of the first category. "Minerals" is defined in clause 11(6) to include minerals processed or partly processed under the State Agreement.

The Appellants argued that the provision of a royalty for iron ore concentrates, iron ore and all other minerals indicated that the parties intended that those products could be produced under the State Agreement and that the Minister could consider proposals for the production of those products under clause 8.

McLure JA did not accept the Appellants' argument. She found that the State Agreement does not purport to regulate the recovery of all minerals from the Mining Lease and that in relation to non-Project related minerals, such as nickel or gold, the royalty clause that applies to "all other minerals" will apply. She also held that the royalty for iron ore recognises that the Mining Leases contain ore that is not magnetite ore and therefore not relevant for Project purposes. She also noted that the definition of minerals is inclusive and that all aspects of the definition do not apply in all contexts in which the word appears in clause 11. She concluded that the fact that the definition of minerals includes processed or partly processed minerals does not require a conclusion that the State Agreement makes provision for the processing of non-Project related minerals.

The narrow construction of clause 8 may have implications for other projects in Western Australia that operate under State Agreements because clauses similar to clause 8 are found in several other State Agreements in Western Australia.

JURISDICTION OF WARDEN TO STAY OBJECTIONS TO EXEMPTION APPLICATIONS AND PLAINTS FOR FORFEITURE AFTER CORPORATE TENEMENT HOLDER PLACED IN ADMINISTRATION [*]

Van Blitterswyk v Sons of Gwalia Ltd, Sons of Gwalia (Murchison) Ltd, Tarmoola Australia Pty Ltd, City Resources (WA) Pty Ltd, Anglogold Ashanti Australia Ltd [2005] Wamw 06 (28 February 2005)

Mining Act 1978 (WA) – consideration of "Wardens Court" and "warden sitting in open court" – objections to exemption applications and related plaints for forfeiture when tenement holders are companies under administration – whether warden sitting in open court is a court for the purposes of s 440D(1) of the Corporations Act – whether objections and plaints should be stayed – stay granted.

Facts

The parties agreed the following facts:

- the tenement holders, Sons of Gwalia Ltd (administrators appointed), Sons of Gwalia (Murchison) NL (administrators appointed), Tarmoola Australia Pty Ltd (administrators

[*] Christopher Stevenson, Barrister, Francis Burt Chambers, Perth.