# The State of Western Australia v Ward

## High Court of Australia P59/2000

by **Benita Ross,** Solicitor, Mallesons Stephen Jaques

The High Court handed down its landmark native title decision in the *Ward case* on 8 August 2002. Three other appeals against the decision of the Full Court of the Federal Court (P62/2000, P63/2000 and P67/2000) were also heard and determined at the same time. The judgments of the High Court total 406 pages.

This casenote focuses on the joint reasons of the majority judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ. Kirby J in a short separate judgment agreed with the majority judgment, preferring not to outline in detail his own reasons because: "This is an area of the law where past experience suggests that certainty has its own merit and where individual judges should be willing to surrender their personal preferences so as to contribute to certainty of binding principle..." [597].

Callinan J reached a different view to the joint majority judges and held that native title had been extinguished over the whole claim area. His Honour referred to "the chasm between common law and native title" and suggested that "it might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory...attempt to fold native title rights into the common law." [970]. McHugh J agreed with the orders proposed by Callinan J and gave supporting reasons.

## Background

The case relates to a native title claim in the Kimberley region of Western Australia and the Northern Territory. The claim area is about 7900 square kilometres and the claim was instituted in the Federal Court on 2 February 1995.

By orders made on 24 November 1998 and 26 February 1999 Lee J made a determination that native title existed in respect of a large portion of the claim area. On 3 March 2000 the Full Court of the Federal Court (Beaumont and von Doussa JJ; North J dissenting) delivered a judgment and made orders setting aside the orders made by Lee J.

The central issue for the High Court in the four appeals was:

(a) whether there can be partial extinguishment or suspension of native title rights and interests, and

(b) what principles should be adopted in determining whether native title rights and interests have been extinguished in whole or in part.

The Court considered in turn, whether various dealings with the land (eg the grant of pastoral leases and mining tenements, resumption and vesting of land) extinguished native title rights and interests in the land.

Having ruled on the legal principles the High Court allowed each of the appeals and remitted the matter back to the Full Court of the Federal Court for further hearing and determination. The main reason for not being able to finally dispose of the case was because the evidence and findings below did not determine with sufficient particularity the actual native title rights and interests "connected" to the land and waters in accordance with the alleged traditional laws and customs of the applicants [86].

## Extent and extinguishment of native title interests

The court rejected the adverse dominion approach to extinguishment. Instead, their Honours held that before the question of extinguishment can be addressed, it is necessary to identify the nature and extent of the native title rights and interests that exist. Whether such native title is extinguished by the grant of rights to third parties requires a comparison of the legal nature of the third party rights with the native title rights and interests.

*"Generally, it will only be possible to determine the inconsistency said to have arisen between the rights of the native title holders and the third party grantee once the legal content of both sets of rights said to conflict has been established." [149].*

On this approach to extinguishment they held: "Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of inconsistency; if they are not , there will be no extinguishment. Absent particular statutory provision to the contrary, questions of suspension of one set of rights in favour of another do not arise." [82].

The starting point "requires first an identification of the content of traditional laws and customs and, secondly, the characterisation of the effect of those laws and customs as constituting a "connection" of the peoples with the land or waters in question" [64]. The result is that the courts must define with particularity the precise nature of the alleged native title right or interest. It is suggested this is best described by reference to the nature of the activity and how it relates to the actual use of the land or waters.

Apart from observing that the absence of evidence of recent use does not of itself require the conclusion that there can be no relevant connection, the majority reasons expressly state that no view is offered on what is the nature of the "connection" that must be shown to exist is [64]. This is discussed in the Yorta Yorta decision.

The majority judgment agrees that the metaphor of "a bundle of rights" is useful because it draws attention to the fact that there may be more than one right or interest and, secondly that there may be several kinds of rights or interests in relation to land that exist under traditional law and custom. "Not all of those rights and interests may be capable of full or accurate expression as rights to control what others may do on or with the land." [95].

## Minerals and petroleum

The court held that there are no native title rights or interests to petroleum or minerals in Western Australia. This is because all rights in minerals and petroleum have been the subject of "legislative disposition" and are thereby vested in the Crown [384].

## Pastoral leases

The court held that pastoral leases in Western Australia prevail over native title rights, but to the extent that they are not inconsistent, they do not extinguish native title. Only those rights and interests which are truly and fundamentally inconsistent with a corresponding right of a pastoral lessee are extinguished.

This is because pastoral leases confer only limited rights. They do not give the holder a right to exclusive possession of the land in common law property parlance. In particular, while the land is unimproved and unenclosed, pastoral leases reserve a right to any person to enter, pass over the land etc.

Pastoral leases also contain a reservation in favour of Aboriginal people. However, this does not confine the circumstances in which access to the land by native title holders is permitted. On the enclosure/improvement of the land, those who use the land as native title holders continue to be entitled to do so. Pastoral leases granted under WA law do not grant the holder the right to either absolutely, or contingently on taking of certain steps, to exclude native title

holders from the land. For this reason, pastoral leases do not extinguish all native title rights and interests in the land.

However, pastoral leases do extinguish those native rights which are inconsistent with the pastoral lease. In particular, pastoral leases extinguish the native title right to control who enters onto the land. Other than this finding, the High Court did not decide which native title rights and interests were or were not extinguished by pastoral leases in the circumstances of this case. They remitted this issue to the Federal Court to determine in light of their findings, but did state that an example of a native title right probably extinguished by a pastoral lease was the right to burn off the land and an example of a right probably not extinguished is the right to hunt and gather traditional food.

## Mining leases

The majority of the High Court found that the grant of mining leases is not necessarily inconsistent with the continued existence of native title rights and interests. While some native title rights and interests in some areas are no doubt extinguished by mining leases, other native title rights and interests may continue.

Mining Leases in Western Australia grant exclusive possession for mining purposes only (s *85 Mining Act 1978* (WA)). The majority held that this grant is directed at preventing others from carrying out mining activities and it does not necessarily follow that all others are necessarily excluded from all parts of the lease area. Mining leases therefore only extinguish those rights and interests which are inconsistent with the grant of the lease.

The court found that the native title right to control access to the land is extinguished by the grant of a mining lease. If the *Racial Discrimination Act 1975* (Cth) applies, it may be necessary to look behind the grant of the mining lease to a previously granted pastoral lease to confirm the extinguishment of a native title right to control access [309]. However their Honours did not decide whether other native title rights and interests were or were not extinguished by the grant of mining leases and remitted this issue to the Federal Court.

To the extent that mining leases do extinguish native title rights and interests, by reason of the *Mining Act 1978* (WA) and the *Racial Discrimination Act 1975* (Cth), the holders of those native title rights have a statutory right to compensation.

The joint reasons considered the Argyle mining lease and the particular legislative and contractual context within which it was granted. It was held that the State agreement and ratifying Act did result in the extinguishment of native title, the lease having been granted for mining only [333]. However, because the mining lease was within Reserve 31165, all native title had been previously extinguished when the reserve was vested in the Minister under the *Land Act 1933* (pre RDA). Strangely no contention was made by reference to the Scheduled interest provisions in s 23B(2)(c)(i) and Schedule 1 of the NTA - so it was not considered.

## Resumption, reservation and vesting

The resumption of land under the *Land Act 1933* (WA) does not extinguish native title as it does not give the Crown any larger title to the land than the radical title acquired at sovereignty [208].

Resumption under the *Public Works Act 1902* (WA) does extinguish all native title rights and interests because the resumption notice vested an estate in fee simple in the Crown [280].

The designation of land as a reserve does not, without more, extinguish native title rights and interests. After 1975, by operation of the *Racial Discrimination Act 1975 (Cth)* and Titles *Validation Act 1995* (WA), reserving the land suspended the native title right to be asked permission to use the land for as long as the land remained reserved.

Vesting of land under the *Land Act 1933* for purposes such as nature reserves, extinguished all native title rights and interests in that land. This is because the vesting places the legal estate in fee simple to the land in the person who must then hold it on trust for the stated purpose - such rights will be inconsistent with the continued existence of native title [249]. So if the vesting took place before the RDA came into operation native title will be extinguished.

The grant of special leases under s 116 of the *Land Act 1933* wholly extinguished native title rights and interests.

As can be seen it will be necessary in each case to carry out a full historical land search and analysis of the legal effect of the rights granted to ascertain whether native title has been extinguished by a prior act of the State.

## Fishing

The majority judgment confirmed the common law recognition of a public right to fish and navigate in the tidal waters off the coastal sea of Australia. Any claim to an exclusive right to fish will be "fundamentally inconsistent" to the public right, and native title will be extinguished to this extent [388].

## Northern Territory

The same principles were applied to the land interests in the Northern Territory.

## Conclusion

At the conclusion of the joint majority judgment is a 6 page summary of the full reasons [468]. It is recommended that this be the point of departure for those wishing to study the reasoning of the High Court in this landmark decision on native title. Although some legal issues of principle have been determined once and for all, the fact remains that the Federal Court must now complete the task of determining this application, and all other outstanding applications for determination of native title. This is as much a daunting task for the courts as it will be for those involved in the proof of native title rights and interests. Finally, even when this has been done, as the primary judge said in his judgment in this case over 3 years ago - it will still be necessary for all parties concerned to work out how their respective rights and interests can co-exist in practical terms in everyday life. Ironically, deal-making is probably the only sensible way forward for all affected parties. This imposes an obligation on all concerned to act responsibly and with respect for each others interests in working out the basis of future relations.