MINERALS, MINING LEASES AND NATIVE TITLE

Ken Jagger[*]

Complete extinguishment by legislation of any native title right to minerals and petroleum is considered, along with the partial extinguishment of native title rights and interests by the grant of mining leases. Such mining leases are not invalidated by the Racial Discrimination Act, but compensation is payable. The precise scope of extinguishment of native title by the grant of mining leases remains to be determined, but a greater degree of certainty has been provided which should assist negotiation. Comment is made that the proof of native title rights and interests is likely to be more difficult.

1. BACKGROUND

The claim area the subject of the proceedings in the *State of Western Australia v Ben Ward*[1] (the *Ward* case) covered 52 mining leases granted under the *Mining Act* 1978 (the *Mining Act*) and a small portion of the Argyle Diamond Mine Lease (Argyle Lease) granted pursuant to the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 (although not the mining area itself).

A majority of the Full Court of the Federal Court had held, that:

(a) the State had appropriated full beneficial ownership of minerals in petroleum and accordingly any native title that may have existed in minerals and petroleum had been extinguished;

(b) the grant of a mining lease conferred "exclusive possession" and therefore wholly extinguished any native title rights and interests;

(c) similarly, the grant of the Argyle Lease and the very size of the infrastructure of the project contemplated by the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 indicated the existence of a situation of complete inconsistency with native title; and

(d) the RDA did not operate to invalidate the grant of these mining leases.

On appeal to the High Court the claimants contended that:

(a) the evidence established a native title right to minerals and petroleum;

(b) the *Mining Act* 1904 and the *Petroleum Act* 1936 did not operate to appropriate ownership of minerals and petroleum to the State. Rather those provisions merely made those minerals and petroleum subject to legislative disposition;

(c) the provisions of the *Racial Discrimination Act* 1975 (RDA) operated to invalidate the grant of mining leases granted under the *Mining Act* and the grant of the Argyle Lease.

---

[*] Freehills, Perth.

[1] [2002] HCA 28 (8 Aug 2002).

The mining leases were therefore validated under the *Native Title Act* 1993 (NTA) and were category C past acts to which the "non-extinguishment principle" applied;

(d) accordingly native title was not extinguished to any extent by the grant of mining leases granted under the *Mining Act.*

2. THE DECISION OF THE HIGH COURT

2.1 Native title in minerals

The majority of the High Court (Gleeson CJ, Gaudron, Gummow and Hayne JJ) held there was no evidence of any traditional aboriginal law, custom or use relating to minerals (assuming ochre is not a mineral), petroleum or any of the substances dealt with in either the *Mining Act* 1904 or the *Mining Act* 1978.[2]

Because of the majority's evidentiary findings, the question of extinguishment did not specifically arise. However the majority held that even if a native title right to minerals and petroleum had been established, then those rights would have been extinguished by the operation of s 117 of the *Mining Act* 1904 and s 9 of the *Petroleum Act* 1936 which vested the property in those substances in the Crown[3]. In this regard, the majority stated that:

(a) the Crown could and did deal with minerals separately from the land and could grant separate rights to search for and recover them; and

(b) unlike the fauna legislation considered in *Yanner v Eaton*, the vesting of property in minerals was the exercise of full dominion over the substances in question and was not a mere fiction simply expressing the importance of the power to preserve and exploit resources.[4]

The majority therefore agreed with the Full Court that the State had appropriated full beneficial ownership of minerals and petroleum and accordingly any native title that may have existed in minerals and petroleum had been extinguished.

Whether the extinguishment finding in the context of the Western Australian legislation is applicable in other States and Territories will depend upon the particular legislative context. If the evidence in a case established a native title right to minerals or petroleum and the relevant mining or petroleum legislation did not operate in the manner of the Western Australian legislation vesting full beneficial ownership in the Crown, then a native title right to those resources may be able to be established.

It should be noted that other than in the Western Australian context the issue has only been previously directly considered in Queensland. Drummond J in *Wik Peoples v State of Queensland* [5] concluded that the Crown acquired full beneficial ownership of minerals and petroleum in

---

2 At [382].
3 At [383].
4 At [384].
5 [1996] 63 FCR 450.

Queensland extinguishing any native title rights in those resources. The conclusions of Drummond J in *Wik* are entirely consistent with the reasoning of the majority in the *Ward* case.

2.2 Mining leases

The majority overturned the Full Court's finding that the grant of a mining lease under the *Mining Act* conferred exclusive possession and wholly extinguished native title.[6]

Rather, the majority referred to the legislative history of the *Mining Act* and its key purposes being to avoid the duality of mining titles.[7] The majority considered that the grant of exclusive possession for mining purposes under a mining lease, is directed at preventing others from carrying out mining related activities on the relevant land. Although the lessee can prevent anyone else seeking to use the land for mining purposes it does not follow that all others were necessarily excluded from all parts of the lease area.[8]

The holder of a mining lease therefore has a right to exclude persons for the specified purpose of mining, and may exercise that right in a way which would prevent the exercise of relevant native title rights and interests for so long as the holder of the mining lease carries on that activity.[9]

A mining lease is not necessarily inconsistent with all native title but may have a partially extinguishing effect. The majority did not consider that they could determine the native title rights and interests that may have been extinguished or identify those that remain. However they did state that a grant of a mining lease is inconsistent with a native title right to control access to the land.[10] This is one of the matters that will need to be reconsidered by the Full Court of the Federal Court.

The majority recognises that certain native title rights and interests while not being wholly inconsistent with the rights of the holder of the mining lease (and therefore not extinguished), may conflict at some point in time with the rights of the tenement holder. In these circumstances the rights of the mining lease holder will "prevail" as follows:

> The holder of a mining lease having a right to exclude for the specified purposes, the holder may exercise that right in a way which would prevent the exercise of some relevant native title right or interest for so long as the holder of the mining lease carries on that activity.[11]

Callinan J in his dissenting judgement commented on the implications of the majority judgement, stating that the notion of exclusive possession existing only in respect of the areas in fact used for mining, if true, could invite constant disputes about whether areas covered by the lease were actually being used for mining or for purposes incidental to that activity. Callinan J commented that it would mean that the holder of a mining lease could sue a native title holder for trespass if

---

6 *Ward* at [296].
7 At [290].
8 At [308].
9 At [308].
10 At [309].
11 At [308].

the latter were on land incidentally being used for mining purposes, but on a different part of the land, perhaps no further than 100m away, the lessee might have no remedy.[12]

2.3 The operation of the RDA

It had been contended by the claimants, that the RDA operated to invalidate the grant of mining leases granted under the *Mining Act*. The consequence of this submission would have been that mining leases were invalid and validated by operation of the NTA and the *Titles (Validation) and Native Title (Effect of Past Acts) Act* 1985 (the Validation Act), and consequently would have been "category C past acts" to which the non-extinguishment principle applied.

The majority rejected this contention. They did so on the basis that the *Mining Act* provides for compensation to be paid to the "owner" and the "occupier" (as those terms are defined in the *Mining Act*) where the relevant land is the subject of mining operations.

The majority held that:

(c) If the holders of native title can properly be described as "owners" or "occupiers" of the relevant land, then subject to any statutory limitation period that may arise, they are entitled to compensation according to s 123 of the *Mining Act*. In this case the RDA would simply not be engaged. There would be no invalidity in respect of the grant of the mining leases and to the extent that the grant of those mining leases extinguished native title, that native title would remain extinguished.[13]

(d) If the holders of native title cannot properly be described "owners" or "occupiers" under the *Mining Act*, s 10 of the RDA is engaged. Section 10 would operate to confer, as a matter of Federal law, the right to compensation upon those holders of native title, to the same extent as the *Mining Act* confers that right upon "owners" or "occupiers".[14]

However, s 45(1) of the NTA provides that if the RDA has the effect that compensation is payable to native title holders in respect of an act that validly effects native title to any extent, the compensation, insofar as it relates to the effect of native title, is to be determined in accordance with s 50 of the NTA. The majority stated that if it were not for the special provisions of s 45 of the NTA, s 10 of the RDA would ensure that the amount of compensation would be that determined in accordance with s 123 of the *Mining Act*.[15]

The majority held that the result is that to the extent that the grants of the respective mining leases extinguished native title, that native title remains extinguished and in place thereof the holders of that native title have a statutory entitlement to compensation unlimited by the provisions of s 123 of the *Mining Act*.[16]

It should be noted that s 45(2) of the NTA provides that to the extent that the relevant act (being the grant of the mining lease) occurred before 1 January 1994, that compensation can be claimed from the State.

---

12 At [850].
13 At [319].
14 At [320].
15 At [321].
16 At [321].

The majority has held therefore that the RDA does not operate to invalidate the grant of mining leases under the *Mining Act* and the grant of mining leases may at least partially extinguish native title. The RDA does however operate to ensure that native title holders are compensated for the extinguishing effect of those grants.

2.4 *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981 and the grant of the Argyle Lease

The majority held that their observations in respect of mining leases were relevant to the Argyle Lease.[17]

For the same reasons, the majority held that the grant of the Argyle Lease did not confer exclusive possession and would not have wholly extinguished native title.[18] It should be noted however, that the Court was not required to determine the precise extinguishing effect of the grant of the Argyle Lease, as they had concluded that the portion of the Argyle Lease which was within the claim area, was the subject of previous extinguishment of native title.[19]

Nevertheless, the majority considered that native title might have been wholly extinguished on parts of the Argyle Lease:

(e) by the establishment of a designated security area by exercise of the power conferred upon the Governor by s 15(1) of the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act* 1981;[20] and

(f) by operation of ss 245(3) and s 23B(2)(c)(vii) of the NTA which provisions relate to areas where a private residence or a township have been established pursuant to a mining lease.[21]

Therefore, although the issue does not fall for determination in the *Ward* case, it is likely that native title will have at least been partially extinguished within the balance of the Argyle Lease area (not the subject of the *Ward* claim) and in some parts may have been wholly extinguished.

3. IMPLICATIONS FOR NATIVE TITLE CLAIMANTS AND THE MINING INDUSTRY

3.1 Proof of native title

In the *Ward* case there had been evidence led by the claimants of a right to take and use ochre for ceremonial purposes. The majority's finding in the *Ward* case that there was no evidence of any native title right to minerals is indicative of a narrow approach to the proof of native title rights and interests. The majority made it clear that the correct approach to the establishment of native title rights is to identify the traditional laws and customs of the claimants but no less importantly,

---

17 At [331].
18 At [333].
19 At [335].
20 At [328].
21 At [334].

identify the particular rights and interests in relation to land and waters which are possessed under those laws or customs.[22]

The majority appear to have taken the view that claimants must establish a traditional law or custom giving rise to the possession of a right to the particular substances defined as minerals in petroleum in the *Mining Act* 1904, *Mining Act* 1978 or the *Petroleum Act* 1936. General evidence of a right to use resources such as ochre is not enough. This approach may make the proof of native title rights and interests generally difficult for claimants.

Kirby J alluded to this problem in the context of minerals. His Honour considered that the common law supports the recognition of historical uses of resources such as ochre. The common law envisages an extension of such recognition to modern conditions, developed over time, so as to incorporate the use of other minerals and resources of modern relevance.[23]

Further, Kirby J held that where a native claim establishes possession, occupation, use and enjoyment of the land and waters to the exclusion of others, there was a presumption that such rights carry with it the enjoyment of minerals and like resources of the land and water. A separate enquiry as to the identity of the resources would be unnecessary.[24] Kirby J therefore appears to contemplate that in circumstances where the native title rights are less than an exclusive right or possession, occupation, use and enjoyment, evidence of historical use of a particular resource might, having regard to modern conditions, allow the recognition of a broader native title right.

Kirby J did not consider it was necessary to make a specific finding in relation to the existence of native title rights to minerals and petroleum in the *Ward* case, because of the view that he took as to the extinguishing effect with the *Mining Act* 1904 and *Petroleum Act* 1936.[25]

It is entirely likely that the High Court will in an appropriate case revisit the concept of the expansion of native title rights over time to reflect modern conditions. Using the example of a right to take ochre for ceremonial purposes there appear to be a number of possible approaches to this issue:

(a) the most expansive approach (apparently favoured by Kirby J) would be to allow a right to take a resource of the land such as ochre for a particular purpose to expand into a right to take other resources such as minerals over time as those minerals and their uses were identified;

(b) an approach whereby a right to take ochre for a particular purpose could expand to a right to take ochre for other purposes as those uses were identified over time (but not expand to a right to take other resources such as minerals);

(c) simply allowing native title rights to change in the manner of their exercise to reflect modern conditions. For instance, a native title right to take ochre would not be restricted to the traditional method of taking but could be extracted by modern methods.

---

22 At [18].
23 At [574].
24 At [575].
25 At [576].

Given the majority's emphasis on the need for evidence of the actual traditions and customs giving rise to the native title right, the better view may be that it will be necessary for native title claimants to lead evidence of the development of the traditional law and custom itself. It may not be enough to establish a traditional law or custom and rely on a doctrine of natural evolution.

3.2 Native title in minerals

The findings of the High Court in the *Ward* case relating to the extinguishment of any native title rights in minerals and petroleum effectively settles the question in Western Australia. Other than in Queensland the issue has not been litigated in the other States and Territories.

The particular State and Territory legislation relating to the appropriation of ownership of minerals and petroleum by the Crown, must be reviewed to determine the extent of native title rights and interests (if any) in minerals and petroleum.

To the extent that the relevant State or Territory legislation affects an appropriation of those minerals to the Crown, the result will be the same as in the *Ward* case. Any native title right to minerals or petroleum will have been extinguished. However if the legislation did not have this effect, the issue of the possible expansion of native title rights and interest having regard to modern conditions, could be vital.[26]

3.3 Scope of extinguishment of native title by mining leases

The precise scope of the extinguishment of native title by the grant of mining leases in the *Ward* case remains to be determined. It is one of the matters that the Full Court will be required to review.

The ultimate decision of the Court in the *Ward* case will however provide an indication only as to the scope of extinguishment by mining leases. The issue will remain a question to be determined on a case by case basis. In every case, it will be necessary to identify and compare the native title rights and interests established and the rights held under a mining lease, to determine the extent (if any) of the inconsistency between the two sets of rights.

3.4 Co-existence

The characterisation by the majority of mining leases as an exclusive right for mining purposes (rather than a grant of exclusive possession), gives rise to the issue of how miner's rights and native title rights and interests co-exist on a practical onground level.

The majority appears to contemplate that the right to exclude native title holders will be limited in both time and space. That is, the right to exclude can only be exercised insofar as the holder of the mining lease carries on a mining activity in a particular place at a particular time.

The majority's decision simply reinforces the practical need for miners and native title holders to reach agreements as to how their respective sets of rights will interact on the ground. In the

---

[26] At [575].

absence of such arrangements, it is entirely possible that the type of disputes envisaged by Callinan J in his dissenting judgement might arise.

3.5 Compensation

The majority's conclusion that any native title rights in minerals and petroleum had already been extinguished, means that any compensation payable for the effect of the grant of a mining lease on native title will not be assessed by reference to the value of minerals taken nor will there be a right to a share of those minerals (as was suggested in the original determination of the Trial Judge).

The extent of compensation payable by reason of the grant of a mining lease, will depend upon the Court's ultimate finding as to the extinguishing effect of that mining lease. This can only be determined on a case by case basis.

The scope of compensation payable will depend upon whether the native title holders can be characterised as "owners" or "occupiers" as those terms are defined in the *Mining Act*. If they are characterised as "owners" or "occupiers", then their entitlement to compensation will be limited to the matters contemplated in s 123 of the *Mining Act*, whereas if the RDA operates, the compensation is to be determined in accordance with the NTA. Whether this gives rise to any practical difference in awards of compensation remains to be seen.

4. SUMMARY

The determination in the *Ward* case has brought a substantial degree of certainty to these issues. The decision highlights however the need for negotiated settlements between the State, claimants and the mining industry.

The identification of native title rights, extinguishment, co-existence and compensation, if litigated, can only be resolved case by case. The High Court has not delivered a judgment that provides a global answer to these questions, rather the Court has outlined the legal principles to be applied to the task.

A claim by claim, tenement by tenement approach to the resolution of native title and compensation issues is simply not feasible. Prior to *Ward* it was difficult for the parties to reach settlements in the absence of the High Court's determination of fundamental questions such as the nature of native title and the principles of extinguishment. The decision in the *Ward* case has now provided the legal framework that should enable the parties to resolve these issues by negotiation rather than litigation.