IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P49 of 2013

ON APPEAL FROM the Full Court of the Federal Court of Australia

BETWEEN:

STATE OF WESTERN AUSTRALIA

Appellant

and

ALEXANDER BROWN, JEFFREY BROWN, CLINTON COOK AND CHARLIE COPPIN

First Respondent

BHP BILLITON MINERALS PTY LTD, ITOCHU MINERALS & ENERGY OF AUSTRALIA PTY LTD AND MITSUI IRON ORE CORPORATION PTY LTD

Second Respondent

APPELLANT'S SUBMISSIONS

PART I: FORM OF SUBMISSIONS

1. This submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. The issue in this appeal is whether the Mt Goldsworthy leases extinguished native title rights and interests over the area of the leases. This issue requires consideration of whether the Mt Goldsworthy leases conferred on the holder exclusive possession which wholly extinguished all existing native title rights and interests in the lease areas. The issue also requires consideration of an alternative; if the Mt Goldsworthy leases did not confer exclusive possession, whether the Mt Goldsworthy leases conferred rights inconsistent with any or all of the native title rights and interests which existed in the lease areas and thereby extinguished these rights.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903*

3. The Appellant has considered whether any notice should be given in compliance with s.78B of the *Judiciary Act 1903* (Cth) and has decided that it is not necessary to do so as no constitutional issues are raised by any party.

Filed on behalf of:	State Solicitor for Western Australia Solicitor for the Appellant	Date:	24 October 2013
Prepared by:	Alicia Warren / Griff Ranson		
Law firm:	State Solicitor's Office	SSO Ref:	3734/13
Telephone:	(08) 9264 1188	Fax:	(08) 9264 1440
Email:	a.warren@sso.wa.gov.au / g.ranson@sso.wa.gov.au		
Address for service	Level 16, Westralia Square, 141 St George's Terrace Perth WA 6000		

PART IV: CITATIONS

4. The reasons for judgment at trial are reported at *Brown (on behalf of the Ngarla People) v Western Australia* [2010] FCA 498 ('*Brown (No.2)*'). The native title determination is at *Brown (on behalf of the Ngarla People) v Western Australia (No.3)* [2010] FCA 859 ('*Brown (No.3)*').

5. The reasons for judgment of the Full Federal Court are reported at *Brown (on behalf of the Ngarla People) v Western Australia* [2012] FCAFC 154 ('*Brown (FC)*'). The determination and further reasons for judgement of the Full Federal Court are at *Brown (on behalf of the Ngarla People) v Western Australia (No.2)* [2013] FCAFC 18 ('*Brown (FC) (No.2)*').

PART V: RELEVANT FACTS

6. The *Iron Ore (Mt Goldsworthy) Agreement* ('Mt Goldsworthy Agreement'), to which the Appellant and Second Respondents are parties, was executed on 15 October 1964. The Mt Goldsworthy Agreement was approved and given effect by section 4(1) of the *Iron Ore (Mt Goldsworthy) Agreement Act 1964* (WA) ('*Mt Goldsworthy Act*') (and is scheduled to that Act)[1]. The Mt Goldsworthy Agreement is a "Government Agreement" and the lease areas are "subject land" within the meaning of the *Government Agreements Act 1979* (WA) ('*Government Agreements Act*')[2].

7. Mineral Lease (Special Agreement) ML 235SA was granted on 17 February 1966, pursuant to clause 8(2)(a) of the Mt Goldsworthy Agreement[3]. It is in the form of a lease scheduled to the Mt Goldsworthy Agreement. Mineral Lease (Special Agreement) ML 249SA was granted on 21 August 1973, pursuant to clause 11(6) of the Mt Goldsworthy Agreement[4]. ML 249SA is in the same form as ML 235SA. ML 235SA and ML 249SA are together the 'Mt Goldsworthy leases'.

Native title rights in the lease area

8. The parties have agreed that, if not extinguished, the claimants hold the following non-exclusive rights over the leased areas; to access, and to camp on, the land and waters; to take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters; to engage in ritual and ceremony; and to care for, maintain and protect from physical harm particular sites and areas of significance to the native title holders[5].

PART VI: ARGUMENT

EXTINGUISHMENT OF NATIVE TITLE: PRELIMINARY OBSERVATIONS

The place of common (or general) law and statutory extinguishment

9. *Ward*[6] clarified most issues about how extinguishment of native title occurs.

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[1] *Brown (FC)* at [104] (Greenwood J).
[2] Both terms are defined in s.2 of the *Government Agreements Act*.
[3] *Brown (FC)* at [185] (Greenwood J).
[4] *Brown (FC)* at [186] (Greenwood J).
[5] *Brown (No.2)* at [2].
[6] *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1.

10. The *Native Title Act 1993* (Cth) expressly provides for extinguishment of native title – in Part 2 Division 2 in relation to past acts[7]; in Part 2 Division 2A in relation to intermediate period acts[8]; and in Part 2 Division 2B in relation to previous exclusive possession acts and previous non-exclusive possession acts.

11. As explained in *Ward*, these statutory mechanisms presuppose that extinguishment can have occurred prior to their operation[9]. This is because, *first*, of s.23B(9C)(a) of the Act[10]. *Second*, because of s.23G(1)(b)(i) (in Part 2 Division 2B), which recognises that extinguishment could have occurred "apart from" the *Native Title Act,* which means at common (or general) law, and provides that in that event, even if the act is a previous non-exclusive possession act, native title has been extinguished.

12. Further to this, Part 2 Division 2B of the Act "provides the analytical starting point"[11]. Part 2 Division 2B has no operation here because of s.23B(2)(c)(viii) – it is not a previous exclusive possession act – and s.23F – it is not a previous non-exclusive possession act[12]. Part 2 Division 2 of the Act (s.15) provides for extinguishment of native title by certain of past acts. Past act is defined in s.228. Broadly, a past act is an act[13] that occurred prior to 1 January 1994[14], and was invalid due to the *Racial Discrimination Act 1975* (Cth)[15]. The *Racial Discrimination Act 1975* (Cth) can have no invalidating effect on an act which occurred prior to the commencement of the *Racial Discrimination Act 1975* (Cth) (on 31 October 1975). So, an act which occurred prior to 31 October 1975 is valid, and not, therefore, a past act.

13. The Mt Goldsworthy leases were granted prior to 31 October 1975. Therefore, Part 2 Division 2 of the Act does not apply to them[16]. The Mt Goldsworthy leases are not intermediate period acts as defined in s.232A and therefore Part 2 Division 2A of the Act does not apply[17].

14. Accordingly, the extinguishing effect of the Mt Goldsworthy leases is determined at common law, or "under the general law"[18].

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[7] Section 15 states the extinguishing effect and consequence of the various categories of past act; i.e. *category A past act* (s.15(1)(a) and (b)), *category B past act* (s.15(1)(c)), *category C past act* (s.15(1)(d)), *category D past act* (s.15(1)(d)).

[8] Defined in s.232A.

[9] *Ward* at 62 [5], 63 [10], 67 [21], 131 [192], 149 [258], 166 [309], 169 [317] and 176 [341]. See also *Brown (No.2)* at [59]; *Brown (FC)* at [24] (Mansfield J).

[10] *Brown (No.2)* at [60].

[11] *Ward* at 63 [10]. See also *Brown (No.2)* at [59]; *Brown (FC)* at [24] (Mansfield J).

[12] *Brown (No.2)* at [65]; *Brown (FC)* at [23], [26], [79] (Mansfield J), [245]-[246], [248]-[249] (Greenwood J).

[13] Defined in s.226.

[14] Section 228(2)(a)(ii).

[15] This is the effect of s.228(2)(b). That this is the relevant practical effect of s.228(2)(b) was confirmed in *Ward* at 110 [135], 111 [139]. See also *De Rose v South Australia* [2003] FCAFC 286; (2003) 133 FCR 325 at 425 [348], 427 [360]; *Daniel v Western Australia* [2003] FCA 666 at [913]; *Neowarra v Western Australia* [2003] FCA 1402 at [417]; *De Rose v South Australia (No 2)* [2005] FCAFC 110; (2005) 145 FCR 290 at 324 [117], 329 [140]; *Brown (No.2)* at [58], [65]; *Brown (FC)* at [24], [26] (Mansfield J), [242] (Greenwood J).

[16] *Brown (No.2)* at [65]; *Brown (FC)* at [26] (Mansfield J), [242]-[243] (Greenwood J).

[17] *Brown (FC)* at [23] (Mansfield J), [251] (Greenwood J).

[18] *Brown (No.2)* at [66]; *Brown (FC)* at [26]-[27] (Mansfield J), [251] (Greenwood J), [441] (Barker J).

Common law extinguishment

15. A number of propositions as to common law extinguishment are now firmly established by decisions of this court, though, as will be explained, some not followed by Greenwood and Barker JJ below.

16. *First*, the test for extinguishment of native title rights and interests by the grant of other interests by the Crown is "inconsistency", determined by an objective comparison between the legal nature and incidents of the statutory right which has been granted and of the asserted native title rights[19]. An inconsistent statutory right extinguishes any native title right[20].

17. *Second,* the comparison is between competing legal rights; between what the native title holders and the grantee may do as of right, not what they actually do or have done[21]. "Operational inconsistency" is not the test for extinguishment, though what holders of statutory titles actually do or have actually done, may inform an understanding of the rights able to be exercised[22].

18. *Third,* inconsistent statutory rights extinguish native title even if traditional connections and activities of the native title holders on the land are unaffected by the grant[23]. At common law, there are no circumstances in which native title rights or interests may co-exist with, or are merely suppressed or suspended by, inconsistent statutory rights, or revive once rights cease to be exercised[24].

19. *Fourth,* rejection of the notion of extinguishment by operational inconsistency means that, other than in respect of grants contingent upon the happening of a future, post-grant, event, inconsistency can be determined as well at the date of grant of a title as at any later time.

20. *Fifth,* the grant of a title conferring exclusive possession extinguishes all native title rights[25].

Greenwood and Barker JJ in respect of these propositions

21. There are aspects of the judgments of Greenwood and Barker JJ in *Brown (FC)* that are contrary to certain of these propositions.

22. In respect of Greenwood J, the conclusion at [426]-[431] creates a new notion of extinguishment. It is likely that this conclusion followed his Honour's reference to

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[19] *Ward* at 89-91 [78]-[82]; *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* [2013] HCA 33; (2013) 87 ALJR 916 at 926-927 [35] (French CJ and Crennan J), 930 [52], 931-932 [61]-[62] (Hayne, Kiefel and Bell JJ). A similar test was identified in *Mabo v Queensland (No2)* [1992] HCA 23; (1992) 175 CLR 1 at 68 (Brennan J), 89, 110 (Deane and Gaudron JJ); *Wik Peoples v Queensland* [1996] HCA 40; (1996) 187 CLR 1 at 185-186 (Gummow J); *Fejo v Northern Territory* [1998] HCA 58; (1998) 195 CLR 96 at 126 [43].

[20] *Ward* at 89-90 [79], 91 [82]; *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 371-372 [35]; *Akiba* at 926 [32], 926-927 [35] (French CJ and Crennan J), 931-932 [61]-[62] (Hayne, Kiefel and Bell JJ).

[21] *Ward* at 114-115 [149]-[151].

[22] *Ward* at 89 [78], 136 [215], 142-143 [233]-[234].

[23] *Ward* at 67 [21]; *Fejo* at 126-131 [42]-[55].

[24] *Ward* at 90-91 [81]-[82]; *Fejo* at 126-127 [43]-[45], 131 [56]-[58]; *Wik* at 94-95 (Brennan CJ); *Akiba* at 920 [10], 926-927 [35] (French CJ and Crennan J).

[25] *Ward* at 149 [258], 178 [349], 179-180 [356]-[357], 182 [369]-[370]; *Fejo* at 126-127 [43]-[46].

Gummow J's judgment in *Yanner v Eaton*[26]. In the cited passage, Gummow J refers back to his Honour's own judgment in *Wik*[27]. It would appear that Greenwood J interpreted these passages in these judgments of Gummow J to be to the effect that the grant of a title that contains a condition does not extinguish native title until the condition occurs, and then extinguishment occurs by reason of "operational inconsistency between the performed condition"[28] and native title rights. If this is the effect of Gummow J's judgments, then his Honour's reasoning is contrary to *Ward* and plainly overruled by it.

23. The conclusion of Greenwood J at [426]-[431] is irreconcilable with the reasoning of 6 justices of this Court in *Ward*. The logic of Greenwood J's conclusion is that no statutory title could ever extinguish any native title right, because all statutory titles are terminable. This is plainly wrong. The relevance for extinguishment of the duration or permanency of a non-native title interest was specifically addressed by the majority in *Ward* and is to the opposite effect of the reasoning of Greenwood J[29].

24. Barker J's judgment is a departure from settled principle. It too is prefaced by approving reference to the passage in Gummow J's judgment in *Wik*[30], to which Gummow J later referred in his judgment in *Yanner v Eaton*[31]. Having so referred, Barker J then confronts the obvious; that if Gummow J's dicta is construed as Greenwood and Barker JJ would have it, it is inconsistent with *Ward*. Barker J construes the majority judgment in *Ward* in a manner that is, with respect, plainly erroneous. This reasoning commences at [458] and focuses upon the oft-considered [308] (at 165-166) of *Ward*. This part of the reasoning of the majority in *Ward,* and other passages from *Ward* to which Barker J refers, say nothing to the effect that a statutory right simply "prevails over" an inconsistent native title right, such that if the statutory right is not exercised or ceases to be exercised, the native title right revives. This is evident from a plain reading of the passages from the majority judgment in *Ward* to which his Honour refers, and in particular [308]-[309] (at 165-166).

25. Barker J's conclusion is as follows[32]:

> ... I consider that the clash of a statutory right, upon exercise, with the exercise of an indigenous right simply means that the exercise of the statutory right (in the event of actual conflict) has the effect of preventing and prevails over the native title right to the extent of the conflict, but only for so long as the exercise of the statutory right in fact prevents the enjoyment of the native title; and so there is no extinguishment of any relevant native title right upon the exercise of the statutory right in such a case.

26. No support for this reasoning can be seen in any decision of this Court. If adopted it would mean that no title would extinguish any native title right.

27. One needs only to refer to a passage from the majority judgment in *Ward* to illustrate the error in Barker J's reasoning[33]:

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[26] Specifically at 396 [109]-[111] (Gummow J). Referred to by Greenwood J in *Brown (FC)* at [295]-[300].
[27] At 171, 203 (Gummow J).
[28] *Yanner v Eaton* at 396 [110] (Gummow J). Referred to by Greenwood J in *Brown (FC)* at [300].
[29] *Ward* at 90 [80].
[30] At 202-203 (Gummow J). Referred to by Barker J in *Brown (FC)* at [444].
[31] At 396 [109]-[111], to which Greenwood J referred in *Brown (FC)* at [295]-[300].
[32] *Brown (FC)* at [470].

> Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment. Absent particular statutory provision to the contrary, questions of suspension of one set of rights in favour of another do not arise. .... It is essential to identify and compare the two sets of rights: one deriving from traditional law and custom, the other deriving from the exercise of the new sovereign authority that came with settlement. It is true that the NTA (in par (b)(ii) of s 23G(1)) and the State Validation Act (in par (b)(ii) of s 12M(1)) speak of the "suspension" of inconsistent native title rights and interests in certain circumstances. However, this statutory outcome is postulated upon an inconsistent grant of rights and interests which, apart from the NTA and the State Validation Act, would not extinguish the native title rights and interests. An example would be a post-1975 grant which, by operation of the RDA, was ineffective to extinguish native title rights and interests.

28. Further, the conclusions of Greenwood and Barker JJ overlook a further difficulty. As noted above, extinguishment can be determined at the time of grant, other than in respect of conditional grants. If this were not so, and extinguishment occurred operationally, then each "operation" would be an act and would affect native title. This would render the future act and compensation regimes of the *Native Title Act* impracticable, and would mean that in respect of titles such as the Mt Goldsworthy leases, some things done pursuant to the titles would be acts to which different parts of the past act regime of the *Native Title Act* applied; that is, some things done would be acts in respect to which the general law determined extinguishment, others would be past acts and others intermediate period acts.

EXCLUSIVE POSSESSION

The meaning of exclusive possession

29. The grant of a title conferring exclusive possession extinguishes all native title rights, and no issue of whether a particular native title right is inconsistent with a particular statutory title right arises. Characterisation of a title as one conferring exclusive possession is now central to native title jurisprudence[34].

30. Because a title that confers exclusive possession extinguishes everything, in many cases the inquiry has solely been whether a particular title confers exclusive possession. *Wik* is an example, and was of course considered as a case stated. If a title confers exclusive possession, this is the end of the extinguishment inquiry.

31. Why this is so is important. In considering fee simple titles, it has been posited that, because of the breadth of rights comprising such a title, such a title is necessarily inconsistent with all conceivable native title rights or interests. Because it is everything, nothing else can be. This, at most, explains the extinguishing effect of a fee simple title, and even then, not really. There can be an easement and a covenant over a fee simple title. Other, lesser titles, such as a common law lease, also confer a right of exclusive possession and extinguish all native title rights. Breadth of rights cannot be the criterion of characterization of exclusive possession.

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[33] *Ward* at 91 [82]. The reference to "*statutory provisions*" can be taken to be a reference to provisions of the NTA, such as section 44H, which do not apply in this case.

[34] The notion is now embedded in Part 2 Division 2B of the *Native Title Act.*

32. Toohey J in *Wik* observed that, "[t]he language of the statute authorising the grant and the terms of the grant are all-important."[35] What language comprises a right of exclusive possession is not much discussed in the authorities. It seems clear that the inquiry is not – "how close is title X to a fee simple title". "Closeness" is indeterminate.

33. Gummow J addressed the question in *Wik*[36]:

> ... at common law the term "exclusive possession" is used as a touchstone for the differentiation between the interest of a lessee and that of a licensee, who has no interest in the premises. "Exclusive possession" serves to identify the nature of the interest conferred upon the lessee as one authorising the exclusion from the demised premises (by ejectment and, after entry by the lessee, by trespass) not only of strangers but also, subject to the reservation of any limited right of entry, of the landlord. As Windeyer J put it, a tenant cannot be deprived of the rights of a tenant by being called a licensee.

34. This reasoning is not readily applicable to the grantees of titles over areas of unallocated crown land, where there is no "landlord", and it makes no sense to posit a native title holder as the landlord in this context. As Gummow J observes, critical is whether the title gives rise to a right to exclude and who can lawfully be excluded. This much is evident from the words; central to exclusive possession is the right to exclude.

35. If a title holder (X) can exclude a person (Y) from land if Y's presence interferes with the lawful enjoyment or activities of X, this right of exclusion is inconsistent with any right of Y.

36. Because a characterisation of the Mt Goldsworthy leases as conferring exclusive possession is a complete answer to the extinguishment question, it is logical to start there, before considering the alternative of inconsistency.

THE MT GOLDSWORTHY LEASES CONFER EXCLUSIVE POSSESSION

37. The *Mining Act 1978* (WA) contains transitional and saving provisions[37]. The *Mining Act 1904* (WA), in addition to mining tenements, provided for the creation of temporary reserves over which persons could obtain a right to occupy[38]. All of the early large iron ore mines in Western Australia were developed on land temporarily reserved over which rights to occupy were granted.

38. As noted, the Mt Goldsworthy Agreement is a "Government Agreement" and the lease areas are "subject land" for the purposes of the *Government Agreements Act*.

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[35] *Wik* at 108.

[36] At 194-195 (footnotes omitted).

[37] *Mining Act 1978* (WA) ss.4, 5 and the Second Schedule. While s.5 dealt with saving of State Agreement arrangements, the Second Schedule dealt essentially with saving of non-State Agreements rights.

[38] *Mining Act 1904* (WA) ss.276, 277. See the recent discussion in *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216 at [59]-[73] (McLure P, Newnes JA and Le Miere J agreeing); *Australian Anglo American Prospecting Ltd v CRA Exploration Pty Ltd* [1981] WAR 97 at 99-103 (Brinsden J, Wickham and Wallace JJ agreeing).

39. The Mt Goldsworthy Agreement at clause 2(a) imposed an obligation on the State to grant rights of occupancy[39]. The scheme of the Mt Goldsworthy Agreement is that, upon receiving the right of occupancy in respect of mining area "A", the lease holders could submit to the State a development proposal for mining area "A". This proposal was to be in terms of clause 5(2)(a) of the Mt Goldsworthy Agreement and was to relate to matters such as the construction and development of townsites, employee housing, water supply, road construction as well as mine development. Once this proposal had been approved, the State would then issue a mineral lease in the terms of the Schedule.

40. Clauses 8(2)(a) and clause 11(6) of the Mt Goldsworthy Agreement required the State to grant a "mineral lease" over mining area "A" and mining area "B" respectively. The mineral leases were to be "for iron ore in the form of the lease in the Schedule"[40].

41. Clause 8(2) of the Mt Goldsworthy Agreement imposes an obligation on the State to grant to the joint venturers "leases rights mining tenements easements reserves and licenses". It might be thought then that when a title later granted was termed "a lease" it was a lease and not a "license".

42. The scheduled mineral lease was in a different form to those granted pursuant to the *Mining Act 1904* (WA)[41]. The leases were expressed to be granted under the terms of the Mt Goldsworthy Agreement. A special type of title was needed for the project of the size and importance contemplated.[42]

43. A number of features of the lease instrument are notable. *First*, the State was to "grant and demise unto the Joint Venturers as tenants in common in equal shares ... all those pieces and parcels of land". The grant of the lease, as "tenants in common" is suggestive of conferring the rights of a common law lessee. *Second*, the demise is of "all those pieces and parcels of land situated ..." to which is added, by use of the word "and", further or additional rights in respect of "all those mines, veins, seams, lodes and deposits of iron ore in on or under the said land (hereinafter called "the said mine")". The demise of the land in this way suggests that after the grant of the conventional lease, the State demises further and additional rights. *Third*, the grant is of the land "together with all rights, liberties, easements, advantages and appurtenances thereto belonging or appertaining to a lessee of a mineral lease under the *Mining Act 1904*". The words "together with" demonstrates that the granted rights were more extensive than a right to mine under the *Mining Act 1904* (WA).

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[39] "[upon surrender of the then existing rights of occupancy] ... to the Joint Venturers and to the Joint Venturers alone rights of occupancy for the purposes of this Agreement (including the sole right to search and prospect for iron ore) over the whole of mining area "A" under section 276 of the Mining Act [1904]..."

[40] See, generally, *Brown (No.2)* at [9]-[11]. Grant of a mineral title limited to certain class of mineral was a common feature of the *Mining Act 1904* (WA).

[41] *Brown (FC)* at [38]-[39] (Mansfield J), [266], [349] (Greenwood J).

[42] *Brown (FC)* at [336]-[340] (Greenwood J). See also *Brown (FC)* at [132]-[133], [135], [266], [352] (Greenwood J). Further, see also the Second Reading Speech of the Iron Ore (Mt Goldsworthy) Agreement Bill 1964 (WA): "The developments expected will have a much more far reaching effect than those contained in the mining, processing and exporting or iron ore itself, because the establishment of towns, railways, roads and ports of great capacity will encourage other operations ... as a result of the development envisaged as a consequence of a possible expenditure of £48,000,000 by Mt Goldsworthy Mining Associates." Western Australia, *Parliamentary Debates*, Legislative Council, 4 November 1964, 2190 (Arthur Griffith, Minister for Mines).

44. *Fourth*, the term of the Mt Goldsworthy leases is extremely and unusually long. Clauses 8(2)(a) and 11(6) provide that the terms are 21 years with "successive renewal for 21 years upon the same terms and conditions". Both the *Mining Act 1978* (WA) and the *Mining Act 1904* (WA) provide leases for an initial term of 21 years with a single further term of 21 years, as of right.

45. *Fifth*, the only qualification on the use to which the leased land can be put is that "the Joint Venturers shall and will use the land bona fide exclusively for the purposes of the said Agreement"[43]. The purposes of the Mt Goldsworthy Agreement are extensive and more than simply mining. They include rights for the lease holders to; mine[44]; construct roads as reasonably required, with gates, crossing and passovers for cattle[45]; construct railways, fencing and crossing places[46]; build towns, schools, recreational and other facilities[47]; build permanent, suitable and adequate houses for workers[48]; construct a harbour and wharf development, dredge berths and install facilities such as wharf machinery, equipment and services[49]; generate, transmit, supply and charge for electrical energy and construct and supply water supplies[50]; construct and provide other works including an airstrip[51]; construct on or in the vicinity of the mineral leases mining plant and equipment, and facilities for (*inter alia)* crushing, screening and stockpiling[52]; establish secondary processing plant[53]; establish industry for the additional upgrade of beneficiated ore[54].

46. The scheme of the Mt Goldsworthy Agreement and leases, was that the joint venturers did not require further tenure which is customary for mining projects, such as miscellaneous licences[55] or general purpose leases[56], or various titles under the *Land Act 1933* (WA), in particular, special leases, to construct facilities such as (*inter alia)* roads, railways, airstrips, mining infrastructure, power stations, waste dumps and housing. As will be seen, in *Ward,* this Court considered certain of these types of title, importantly, special leases.

47. The Mt Goldsworthy leases provided the lease holders with all rights for land contemplated by the Mt Goldsworthy Agreement as well as all the rights available for a mineral lease under the *Mining Act 1904* (WA).

48. It is appropriate to consider these terms in light of the reasoning of Mason J in *Mt Goldsworthy Mining Ltd v Commissioner of Taxation*[57], where it was necessary for his Honour to consider whether a dredging lease in Port Hedland, granted pursuant to the Mt Goldsworthy Agreement, conferred a right of exclusive possession. Relevant were

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[43] Clause 1 of the Mt Goldsworthy Leases; *Brown (No.2)* at [141]; and *Brown (FC)* at [38], [190], [196].
[44] Clause 8(1) of the Mt Goldsworthy Agreement; the Mt Goldsworthy Leases; *Brown (No.2)* at [139]-[140]; *Brown (FC)* at [163]-[164].
[45] Clause 9(1)(d) of the Mt Goldsworthy Agreement; *Brown (No.2)* at [146]; *Brown (FC)* at [177].
[46] Clause 9(1)(c) of the Mt Goldsworthy Agreement; *Brown (No.2)* at [146]; *Brown (FC)* at [177].
[47] Clause 9(1)(f) of the Mt Goldsworthy Agreement; *Brown (No.2)* at [146]; *Brown (FC)* at [38] and [41].
[48] Clause 9(1)(f) of the Mt Goldsworthy Agreement; *Brown (No.2)* at [146]; *Brown (FC)* at [41].
[49] Clause 9(1)(e) of the Mt Goldsworthy Agreement; *Brown (No.2)* at [146]; *Brown (FC)* at [41], [370].
[50] Clause 10(a) of the Mt Goldsworthy Agreement; *Brown (No.2)* at [146]; *Brown (FC)* at [41].
[51] Clause 9(1)(f) of the Mt Goldsworthy Agreement; *Brown (No.2)* at [146]; *Brown (FC)* at [38], [41].
[52] Clause 9(1)(a) of the Mt Goldsworthy Agreement; *Brown (No.2)* at [146]; *Brown (FC)* at [41] and [177].
[53] Clause 12 of the Mt Goldsworthy Agreement (as enacted); *Brown (FC)* at [370].
[54] Clause 13 of the Mt Goldsworthy Agreement (as enacted); *Brown (FC)* at [370].
[55] *Mining Act 1978* (WA) Part IV Division 5.
[56] *Mining Act 1978* (WA) Part IV Division 4.
[57] [1973] HCA 7; (1973) 128 CLR 199.

the presence in the instrument of terms such as "demise", "rent", "term" which were consistent with the conferral of exclusive possession[58]. Similarly, in respect of reservations in the dredging lease, his Honour observed[59]:

> ... the joint venturers are required ... to permit the Crown and any vessel to use any part of the demised premises for navigation, anchorage or other purpose incidental to shipping. The joint venturers are required to consent to the granting of easements or rights in or over the demised premises as may from time to time be reasonably necessary for the overall development or use of the harbour of Port Hedland (cl. 3 (5)). Although these provisions restrict the use to which the joint venturers may put the premises and impose obligations of an important kind, in my view they are not inconsistent with existence of a right of exclusive possession in the joint venturers. Indeed the provisions assume the existence of that right.

49. Limitation of the Mt Goldsworthy leases to mining for iron ore is not inconsistent with exclusive possession.

The similarity between the Mt Goldsworthy leases and *Land Act 1933* (WA) special leases

50. The Mt Goldsworthy leases are in the nature of special leases for a range of commercial, industrial and town purposes as well as including the "conventional" rights of a mineral lease.

51. The majority in *Ward* considered special leases granted under the (repealed) *Land Act 1933* (WA)[60]:

> That the nature of the tenure granted by a special lease was different from a pastoral lease can be seen, not only from the considerations already mentioned, but also from consideration of the purposes for which special leases could be granted. Section 116 provided a number of specific purposes for which a special lease might be granted, including taking guano, quarrying, and for sites for various kinds of buildings or other works. Section 116(14) provided that a special lease might be granted for "any other purpose approved by the Governor by notice in the *Gazette*". In 1934, grazing was approved as a purpose for the grant of a special lease. At least some of the uses specified in the Act (for example, as "sites for tanneries, factories, saw or other mills, stores, warehouses, or dwellings" (s 116(5))) are uses in which it might ordinarily be expected that the user would wish to control access to the land. One of the stated purposes (quarrying) could be the subject of a licence under s 118. Other purposes could not.
>
> All this being so, the majority in the Full Court erred in not concluding that the grant of a special lease granted the lessee a right of exclusive possession.

52. The Mt Goldsworthy leases, and the rights conferred by the Mt Goldsworthy Agreement, are no less extensive than the rights conferred by the special leases considered in *Ward*.

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[58] *Goldsworthy Mining Ltd* at 212.
[59] *Goldsworthy Mining Ltd* at 213.
[60] *Ward* at 179-180 [356]-[357] (footnotes omitted).

Other tenure under the Mt Goldsworthy Agreement

53. In addition to the mineral leases, the joint venturers could seek additional tenure. Pursuant to clauses 8(2)(b)(i) and 12A(1) of the Mt Goldsworthy Agreement, they could require fee simple titles or other required titles for townsite lots, and special leases within townsites and railways. Clause 8(2)(b)(i) also obliged the State to[61]:

> ... grant to the Joint Venturers as tenants in common in equal shares in fee simple or for such terms or periods and on such terms and conditions ... under the *Mining Act*, the *Jetties Act 1926* or under the provisions of the *Land Act* [as modified] ... as the Joint Venturers reasonably require for their works and operations hereunder including the construction or provisions of the railway, wharf, roads, airstrip, water supplies and stone and soil for construction purposes.

54. Clause 8(2)(c) required the State to grant on request[62]:

> ... such machinery and tailings leases (including leases for the dumping of overburden) and such other leases, licenses, reserves and tenements under the *Mining Act* or under the provisions of the *Land Act* [as modified] ... as the Joint Venturers may reasonably require and request for their purposes under this Agreement on or near the mineral lease.

55. Section 4(3) of the Mt Goldsworthy Act also provides that "the provisions of section 96 of the *Public Works Act 1902* (WA), do not apply to any railway constructed pursuant to this Agreement."[63]

56. There is no limitation on the areas within the leased areas at which these rights can be exercised. The entirety of the area could be mined, quarried, used for stockpiling, waste dumps, used for roads, railways, airstrips, to build towns, schools, recreational facilities, build power stations, transmission lines, water infrastructure.

In addition – the right to exclude

57. Certain of the rights and activities noted inevitably carry with them a right to exclude those who would interfere with the free exercise of such rights. Rights, for example, to conduct open cut mining, cause explosions, establish and use schools or live in private dwellings cannot be understood as permitting access by others.

58. Further to this are the terms of the *Governments Agreements Act*, the implications of which, in respect of extinguishment, was not considered in *Ward*.

59. As noted, the Mt Goldsworthy Agreement is a "Government agreement" for the purposes of the *Government Agreements Act*. It is an agreement scheduled to an Act under the control of a Minister. The whole of the lease areas are "subject land". It is land that is set aside for the purposes of implementing the Mt Goldsworthy Agreement.

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[61] *Brown (No.2)* at [143]; *Brown (FC)* at [39] (Mansfield J), [166], [379] (Greenwood J).
[62] *Brown (No.2)* at [144]; *Brown (FC)* at [40] (Mansfield J), [168] (Greenwood J).
[63] *Brown (FC)* at [129] (Greenwood J). As explained by the Second Reading Speech: "this new agreement makes arrangements outside of section 96 of the *Public Works Act* to the effect that that provision in the *Public Works Act* does not apply, and therefore the companies may proceed with the construction of a railway not according to, or under the requirements of, the *Public Works Act*, but under the requirements of this agreement." Western Australia, *Parliamentary Debates*, Legislative Council, 12 November 1964, 2549 (Frank Wise, Leader of the Opposition).

60. Section 4 of the *Government Agreements Act* provides to the lease holder a right to exclude[64].

61. Although the notion of "lawful authority" in (1) might be thought to beg the question, and although the identification of legislative intent or statutory purpose in statutes passed when native title was not contemplated is problematic, the notion clearly enough could not excuse a putative native title holder being present on lease area if told to leave. The purpose of the provision is evident, to give to the Joint Venturers a right to exclude all from the lease area.

62. The leases (having regard to the *Mt Goldsworthy Act*, the *Government Agreements Act*, the Mt Goldsworthy Agreement and the *Mining Act 1904* (WA)) confer exclusive possession.

The rights exercisable, informed by the evidence

63. To inform an understanding of the rights able to be exercised by the lease holders, evidence was led at trial. Bennett J made various findings in this respect[65], none of which have been or are challenged.

64. The lease holders transformed a mountain 132 metres above sea level into a pit 135 metres below sea level[66].

65. As her Honour found; the lease holders were and are lawfully able to explore for minerals on the Mt Goldsworthy leases, and they exercised this right over a large area of the leases and would continue to do so into the future[67]. The exercise of this right involved and would involve drilling holes, removing samples, and constructing an exploration camp for accommodation[68].

66. The lease holders dumped ore waste on the lease area and created waste dumps (up to 35 metres high)[69], created 'bunds' or mounds of waste which prevented entry into the site[70]; they used, and stored on site[71], massive earth moving machinery to remove ore from the pit and deposit and arrange waste[72]; they conducted ore crushing and screening on site and loading onto trains at the railway handling operations on the lease[73].

67. In addition, the lease holders were authorised to and did construct the following on the lease area; a railway and roads[74], power stations and power sub-stations[75], a radio base

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[64] (1) A person shall not without lawful authority remain on any subject land after being warned to leave it by — (a) the owner or occupier, or a person authorised by or on behalf of the owner or occupier, of that subject land; or (b) a member of the Police Force. Penalty: $5 000 or 12 months' imprisonment.
(2) A person shall not without lawful authority prevent, obstruct, or hinder any activity which is being, or is about to be, carried on pursuant to, or for the purposes of or incidental to implementing, a Government agreement, or attempt to do so. Penalty: $5 000 or 12 months' imprisonment.

[65] *Brown (No.2)* at [19]-[43], [49]-[57], [190].

[66] *Brown (No.2)* at [19]-[20]; *Brown (FC)* at [205] (Greenwood J).

[67] *Brown (No.2)* at [49]-[54], [190]; *Brown (FC)* at [47] (Mansfield J), [208]-[210] (Greenwood J).

[68] *Brown (No.2)* at [49]-[54], [190]; *Brown (FC)* at [209] (Greenwood J).

[69] *Brown (No.2)* at [20], [190]; *Brown (FC)* at [207] (Greenwood J).

[70] *Brown (No.2)* at [190].

[71] *Brown (No.2)* at [190].

[72] *Brown (No.2)* at [22], [190]; *Brown (FC)* at [227] (Greenwood J).

[73] *Brown (No.2)* at [21], [24], [190]; *Brown (FC)* at [227] (Greenwood J).

[74] *Brown (No.2)* at [24]-[25], [190]; *Brown (FC)* at [227] (Greenwood J).

and antennae[76], water wells[77], sewerage pumping stations and sewerage treatment plants[78], workshops and storage yards of various kinds and for various purposes[79], bulk fuel oil storage tanks[80], ramps, weighbridges, car parks, offices, workshops[81] and explosives storage facilities[82]. They were lawfully able to quarry rock from the leases[83].

68. The leaseholders constructed a town (Goldsworthy) on the lease area and over time built and maintained a construction camp[84], various forms of accommodation for up to 1,400 people in houses, caravans, flats and barracks[85], shops, a medical centre, a police station, dining facilities, a cinema, a petrol station, a bank[86], social and sporting facilities of various kinds[87], schools[88], administrative buildings[89], sewage and refuse sites[90] and water wells and treatment facilities[91].

The errors of Greenwood J in respect of exclusive possession

69. At [412] Greenwood J concluded that any reservation on a title determines that the title does not confer exclusive possession. This reasoning overlooks that all titles are subject to statutory rights that disentitle the holder to "exclude all others for all purposes"[92]. The holder of a fee simple title cannot exclude (for example), the police, members of the emergency services, government employees or utility providers[93]. The holder of a fee simple title over part of which is an easement cannot exclude the easement holder.

70. To the extent that clause 9(2)(g) of the Mt Goldsworthy Agreement provided for third party access, Greenwood J erred at [410] in concluding that clause was "similar in terms" to the pastoral lease reservation considered in *Ward* at 126 [178]. Importantly, the reservation considered in *Ward* at 126 [178] did not have the limiting factor contained in clause 9(2)(g) of the Mt Goldsworthy Agreement which permitted access only in circumstances where the access "did not unduly prejudice or interfere with" the lease holders operation.

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[75] *Brown (No.2)* at [26], [190]; *Brown (FC)* at [227] (Greenwood J).
[76] *Brown (No.2)* at [28], [190]; *Brown (FC)* at [227] (Greenwood J).
[77] *Brown (No.2)* at [29], [190]; *Brown (FC)* at [227] (Greenwood J.
[78] *Brown (No.2)* at [30], [190]; *Brown (FC)* at [227] (Greenwood J).
[79] *Brown (No.2)* at [32], [36], [190]; *Brown (FC)* at [227] (Greenwood J).
[80] *Brown (No.2)* at [36], [190].
[81] *Brown (No.2)* at [36], [190].
[82] *Brown (No.2)* at [34], [190].
[83] *Brown (No.2)* at [190].
[84] *Brown (No.2)* at [38]; *Brown (FC)* at [227] (Greenwood J).
[85] *Brown (No.2)* at [38]; *Brown (FC)* at [227] (Greenwood J).
[86] *Brown (No.2)* at [39]-[40]; *Brown (FC)* at [227] (Greenwood J).
[87] *Brown (No.2)* at [40]; *Brown (FC)* at [227] (Greenwood J).
[88] *Brown (No.2)* at [40]; *Brown (FC)* at [227] (Greenwood J).
[89] *Brown (No.2)* at [40]; *Brown (FC)* at [227] (Greenwood J).
[90] *Brown (No.2)* at [40]; *Brown (FC)* at [227] (Greenwood J).
[91] *Brown (No.2)* at [40]; *Brown (FC)* at [227] (Greenwood J).
[92] *Brown (FC)* at [412].
[93] For example, *Criminal Investigation Act 2006* (WA) ss.35-37; *Fire Brigades Act 1942* (WA) ss.33, 34(c); *Public Works Act 1902* (WA) ss.82, 83A; *Water Agencies (Power) Act 1984* (WA) ss.71, 73; *Electricity Act 1945* (WA) ss.18, 24; *Telecommunications Act 1997* (Cth) Schedule 3.

71. Further, in *Mt Goldsworthy Mining Ltd v Commissioner of Taxation*[94] a reservation permitting "the Crown and any vessel to use any part of the demised premises for navigation, anchorage or other purpose incidental to shipping" was not inconsistent with Mason J's characterisation of the dredging lease there conferring exclusive possession[95]. Similarly, in *Wilson v Anderson*[96] reservations of access in favour of Crown inspectors and for third parties to search for and remove minerals did not prevent a finding that the leases in questions conferred exclusive possession[97].

72. Greenwood J's reasoning at [408] and [411] in respect of grants of third party tenements over the leased area overlooks that the holder of a fee simple title does not own minerals or petroleum under the surface of their land[98] and that the *Mining Act 1904* (WA) did not prohibit the grant of mining titles over freehold[99].

INCONSISTENCY

What it means

73. The core of the matter which remains not fully resolved by *Ward* is what is meant by inconsistent in this context. This did not have to be resolved in *Mabo* or in *Wik* or in *Fejo*. In *Ward,* as was made clear in the majority judgment[100], by reason of the erroneous form of the determination at trial, of what was in the bundle of the applicants' native title rights, no proper analysis of inconsistency was possible.

74. Further, as observed by French CJ and Crennan J in *Akiba,* the extinguishment inquiry, where it arises in the context of the effect upon native title of regulatory legislation, rather than, as here, "inconsistency of rights"[101], presents more complex issues.

75. Decisions prior to *Ward* are littered with *obiter dictum* as to what is contemplated by this notion of inconsistency. Toohey J in *Wik* referred to the "[in]ability of the two [i.e. native title and statutory title] to co-exist"[102], and thereby replaced one indeterminate term (inconsistent) with another (co-exist). Toohey J's different word cannot respond to the truism that, over a term of decades, some native title rights may "co-exist" with (for instance) a fee simple title in the sense that it is conceivable that a fee simple titleholder might not preclude the exercise of native title rights.

76. In *Wik*, Gummow J observed that inconsistency[103]:

> ... requires a comparison between the legal nature and incidents of the existing [native title] right and of the statutory right. The question is whether the respective incidents

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[94] [1973] HCA 7; (1973) 128 CLR 199.
[95] *Goldsworthy Mining Ltd* at 213.
[96] [2002] HCA 29; (2002) 213 CLR 401.
[97] *Wilson v Anderson* at 451 [114]-[116] (Gaudron, Gummow and Hayne JJ), 481 [203] (Callinan J). As Callinan J noted at 481 [203]; "[i]t has long been established that even very extensive reservations of rights of entry for official and other purposes are entirely compatible with ordinary leaseholds and also with freehold titles".
[98] *Ward* at 185-186 [383]-[384].
[99] *Mining Act 1904* (WA) Part VII.
[100] *Ward* at, *inter alia*, 94-95 [93]-[94], 114 [149].
[101] *Akiba* at 925 [29], 926-927 [35].
[102] *Wik* at 126.
[103] *Wik* at 185. Referred to approvingly in *Akiba* at 925-926 [31] (French CJ and Crennan J).

> thereof are such that the existing [native title] right cannot be exercised without abrogating the statutory right. If it cannot, then by necessary implication, the statute extinguishes the existing [native title] right.

77. To similar effect was his Honour's observation in *Yanner v Eaton*[104]:

> The question to be asked in each case is whether the statutory right necessarily curtails the exercise of the native title right such that the conclusion of abrogation is compelled, or whether to some extent the title survives, or whether there is no inconsistency at all. Indeed statute may regulate the exercise of the native title right without in any degree abrogating it.

78. Gummow J does not explain this notion of abrogation, or curtailing. As recently illustrated in *Akiba*[105], when dealing with regulatory legislation, the notion of non-abrogation may be helpful. That the loose use of the term "abrogation" is apt to confuse is (with respect) exemplified by Barker J's judgment in this matter.

79. In *Ward*[106], Gleeson CJ, Gaudron, Gummow and Hayne JJ referred with approval to the judgment of Beaumont and von Doussa JJ in the Full Court, where their Honours referred to inconsistency between the statutory right and "the continuance of native title rights and interests". Again, it is doubtful that continuance assists much.

The logical test

80. As a matter of logic, the only test for determining inconsistency is to ask – could all native title and statutory rights be exercised coextensively on the same land at the same time? Those native title rights that could not be coextensively exercised are extinguished. This logical approach would result in substantial extinguishment by virtually all titles.

81. This approach does, however, address the conundrum with which decisions following *Ward* have grappled. If the holder of a mining lease can, pursuant to it, dig a massive open pit; and the digging of a massive open pit is inconsistent with native title right X; and the lease holder can dig this pit anywhere on the lease area at any time during the term of the lease; and inconsistency is determined at the time of grant – how can native title right X not be extinguished over the whole of the lease area by the grant of the lease?

82. It is this conundrum that has given rise to the decision of the Full Federal Court in *De Rose (No.2)*[107] dealing with pastoral leases.

De Rose (No.2)

83. *De Rose (No.2),* in respect of pastoral leases, establishes the following; although a right exercisable pursuant to a title extinguishes inconsistent native title rights, such extinguishment is inchoate until the right is actually exercised. This can be illustrated by the example of a right to construct a dwelling within a pastoral lease. Such a native

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[104] At 396 [109].
[105] At 925-926 [31]. French CJ and Crennan J cited Gummow J in *Wik* at 185 and used the language of abrogation at 927 [38] in distinguishing *Harper v Minister for Sea Fisheries* [1989] HCA 47; (1989) 168 CLR 314.
[106] At 89-91 [78]-[82].
[107] At 331-333 [146]-[157].

title right is inconsistent with (say) a native title right to hunt (with a gun) in the area of the dwelling. *De Rose (No.2)* decides that a right to hunt (with a firearm) will have been extinguished over the entirety of pastoral lease by the construction of a dwelling, and construction of the dwelling crystallizes extinguishment. Understood in this way, the reasoning in *De Rose (No.2)* is not revival of operational inconsistency. Upon grant, there did not exist a native title right to hunt once the dwelling was built. Any such native title right was extinguished at grant. Because constructing the dwelling did not itself extinguish native title (it having already been extinguished), the physical acts would not *affect* native title within the meaning of s.227 of the *Native Title Act*. Accordingly, in the example, it matters not for the purpose of determining extinguishment whether construction of the dwelling occurred in 1976, 1995 or at any other time. As the activity does not *affect* native title it is for extinguishment purposes irrelevant[108], and extinguishment occurred at grant.

84. This reasoning was applied in this matter by Bennett J and Mansfield J to the Mt Goldsworthy leases. Before considering it, and the correct position, it is important to clarify what *Ward* decides and leaves open in respect of the Mt Goldsworthy leases.

What *Ward* decides in respect of mining leases

85. In this matter, for the first time, the Court has before it a clear articulation of the native title rights found to (otherwise) exist over land and, not only the constitutive documents and legislation comprising the mining titles, but detailed evidence as to the rights lawfully exercised pursuant to them.

86. Much of the reasoning in *Ward* dealing with mining titles is not applicable to this matter[109]. *First*, the Mt Goldsworthy leases are different in form and nature to the mining leases considered in *Ward*[110]. There, all mining tenements were granted under the *Mining Act 1978* (WA). *Second*, because of the trial judge's failure in *Ward* to make proper findings as to native title rights, all observations by the majority in *Ward*, to the effect that that particular acts did not extinguish native title, were *obiter dictum*[111]. *Third*, the reasoning of the majority relating to the Argyle mining lease[112] is *obiter dictum*. The whole of the Argyle mining lease, within the claim area in *Ward*, was within a reserve that itself extinguished native title[113]. *Fourth*, all of the mining leases considered in *Ward* (including the Argyle mining lease) were *past acts*[114]. Extinguishment was considered exclusively as a matter of the past act regime in Part 2 Division 2 of the *Native Title Act*. The Court did not consider common law

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[108] This understanding lies at the heart of s.44H of the *Native Title Act*. See the discussion in *De Rose (No.2)* at 334-335 [159]-[165].

[109] Note the reference in *Ward* at 113 [144] to the Mt Goldsworthy Agreement. It is not contended that this dicta is greatly relevant to this matter.

[110] See *Brown (FC)* at [349]. Greenwood J emphasised: "The position of the joint venturers under the Agreement and the Mt Goldsworthy leases is different to that of the project proponents in the *Argyle Diamond Mine* joint venture where the mineral lease was to be granted under and subject to the *Mining Act 1978*, except as otherwise provided for in the State Agreement in that case. The Mt Goldsworthy Leases were granted under the Agreement itself with the authority of the 1964 adopting Act."

[111] *Ward* at 162 [296], 165-166 [308], 166-167 [310], 175 [335].

[112] Commencing in *Ward* at 171 [322].

[113] *Ward* at 171 [324]. It is apparent from the course that *Ward* took that the holder of the Argyle mining lease did not play an active role in contending extinguishment, no doubt because of the extinguishing effect of the underlying reserve. Because of this, the issue did not practically arise; see 174-175 [334]-[335].

[114] *Ward* at 158 [283]. All were granted after the commencement of the *Racial Discrimination Act 1975* (Cth) and prior to 23 December 1996.

extinguishment[115]. *Fifth*, in *Ward* no evidence was led at trial as to the activities undertaken or that could have been on the Argyle mining lease, or on mining leases.

87. *Sixth*, with respect, the reasoning of the majority that touched upon mining leases was incomplete[116]. The key is [331] (at 174) and in particular the last sentence:

> Observations made earlier in the context of the other mining leases respecting the right of exclusive possession for mining purposes are again relevant here. Further, it is not to the point to say that the land could not be leased to a third party for a different purpose. Native title rights and interests are allodial and do not depend upon, and do not derive from, any kind of grant attributable to the Commonwealth or the State. It should be apparent that incidents of native title that may be described as usufructuary in nature, such as the right to hunt, may be able to be exercised over part or all of the land the subject of the relevant mining lease.

88. With respect, it is difficult to understand how this was "apparent" in the absence of evidence. Further, Callinan J (with whom McHugh J agreed) in *Ward* stated that the precise opposite of this proposition to be "unarguably" correct[117].

89. In any event, because the issue did not arise for answer in *Ward*, this reasoning does not address the central issue here.

90. The majority judgment and those of McHugh and Callinan JJ in *Ward* might be understood as rejecting a strict formulaic approach to considering whether a native title right and that exercisable under another title are inconsistent. Determination of inconsistency is to be undertaken in a practical way by looking to the legal rights able to be exercised over the statutory title area (informed or not by what holders of such titles actually do or have actually done) and the determined native title rights over that area.

91. This approach requires identification of the rights able to be exercised pursuant to the relevant title, which here are determined by considering the terms of the *Mining Act 1904* (WA), the *Government Agreements Act*, the Mt Goldsworthy Act, the Mt Goldsworthy Agreement and the Mt Goldsworthy leases[118] and then considering, in a common sense way, whether these rights are inconsistent with the determined native title rights. And, importantly, this process is to be undertaken hypothetically, as at the date of grant. And, importantly, it is not informed by the possibility that in the long run land might be remediated.

92. When this process is undertaken the rights exercisable by the lessees are inconsistent with all of the determined native title rights and all have been extinguished.

93. The issue then to be resolved is whether the native title rights here have been extinguished over the whole of the lease area. This is the *De Rose (No.2)* issue.

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[115] *Ward* at 162 [296], 165-166 [308], 175 [335].
[116] It is to be remembered that *Ward* dealt with many issues and was a matter of great complexity.
[117] *Ward* at 353 [848].
[118] *Ward* at 165-166 [308] is not to be understood as requiring that the criterion applicable for extinguishment is a right or exercise of a right "to exclude". This is confirmed in 89 [78] of *Ward;* what is required is "identification of and comparison between the two sets of rights".

Inconsistency here – the rights exercisable by the leaseholders

94. The rights exercisable by the leaseholders are outlined above at [37]-[47] and [53]-[62], and are informed by the activities undertaken, outlined at [63]-[68].

Inconsistency of these rights with the determined native title rights

95. On any understanding of the word "inconsistent", the rights described above are inconsistent with the determined native title rights.

96. Constructing a pit 135 metres below sea level, where a mountain 132 metres above sea level once stood, is inconsistent with camping on that area, taking flora, fauna, fish, water and other traditional resources from it and engaging in ritual and ceremony on it.

10 97. Likewise, quarrying, stockpiling ore, creating waste dumps, building roads, railways, airstrips, towns, schools, recreational facilities, power stations, transmission lines, water infrastructure, sewerage – cannot be done at the same time as the determined native title rights are exercised.

98. Mansfield and Greenwood JJ (and Bennett J) were correct to find the rights granted under the Mt Goldsworthy leases were inconsistent with all of the determined native title rights[119]. As Bennett J noted, and as Mansfield J approved, it was "inconceivable" how the "rights to excavate an open pit mine which has so dramatically changed the landscape, and to control access to the mining area" were not inconsistent with any of the determined native title rights[120].

20 99. As to the native title right to <u>access, and to camp on, the land and waters</u>; it is inconsistent with the rights of the lease holders to construct services (such as roads, railways and schools), construct and use townsites (including substantial permanent housing), construct mining facilities (including processing and related industry) and reasonably (and safely) mine the land on any part of the mining lease area. Camping and remaining on land may involve activities such as setting up shelters and lighting camp fires. Neither are consistent with the conduct of significant mining operations. Obvious safety and operational reasons would obviously require the exclusion of access and camping on the land by the native title holders. The right of "access" is extinguished by virtually any title. Here, lessees had a right of ejectment pursuant to
30 section 4 of the *Government Agreements Act*.

100. As to the native title rights to <u>take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters</u>; all are contingent upon access, which was extinguished. Furthermore, native title rights to take resources such as flora and water are inconsistent with rights that include rights to clear land for the purposes of mining and infrastructure, quarrying and the like.

101. As to the native title rights to <u>engage in ritual and ceremony and the right to care for, maintain and protect from physical harm, particular sites and areas of significance to the common law holders</u>; both are inconsistent with a right to construct open pit mines, townsites and many other buildings that would physically destroy aspects of
40 the natural landscape including those that may be of significance to the native title

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[119] *Brown (No.2)* at [201]-[202]; *Brown (FC)* at [55]-[56] (Mansfield J), [424] (Greenwood J).
[120] *Brown (No.2)* at [202]; cited in *Brown (FC)* at [86] (Mansfield J).

holders. Legislation such as the *Aboriginal Heritage Act 1972* (WA) regulates the rights of the lessees but does not derogate from them.

102. Findings of inconsistency follow from the determinations in *Ward* in respect of special leases granted under Pt VII of the *Land Act 1933* (WA). Such statutory leases were granted for a stated purpose; contained a reservation that 5% of the land could be resumed for public works; contained a reservation to the Crown to take timber and materials for use in public; reserved minerals to the Crown; provided a right of re-entry to the Crown. The purposes for which a special lease might be granted included; taking guano, quarrying, building tanneries, factories, saw or other mills, stores, warehouses, or dwellings, grazing[121].

103. There is no relevant difference between a special lease for the purpose of quarrying, building factories, saw or other mills, stores, warehouses, or dwellings and the Mt Goldsworthy leases.

The area over which the native title rights are extinguished

104. It is submitted that the authority of *De Rose (No.2)* is limited to pastoral leases. It is notorious that pastoral leases are of considerable size and that improvements, the construction of which are inconsistent with and extinguish native title rights, will only ever be over a small fraction of the lease area.

105. This is to be contrasted with the tenure in this matter. As the evidence disclosed, the activities lawfully able to be conducted here were of an entirely different nature and scale and were undertaken over substantial areas.

106. Pits could (and can) be dug in any area of the lease, stone and sand quarried from and ore waste stockpiled and waste dumped anywhere on the lease area. Roads, railways, airstrips, power stations, transmission lines, water infrastructure and sewerage plants could (and can) be constructed anywhere. A town, along with schools and recreational facilities could have been constructed and was constructed on an area chosen by the lessee.

107. The alternative to this is the determination made by Bennett J.

PART VII: LEGISLATION

108. Relevant provisions of statutes and regulations relevant to the appeal and relied on by the parties will be provided in an agreed book at the time of filing the Appellant's Reply.

PART VIII: ORDERS SOUGHT

109. The Appellant seeks the following orders:

(1) The appeal be allowed.

(2) The determination made on 22 February 2013 giving effect to the judgment of the Full Court given on 5 November 2012 be set aside.

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[121] *Ward* at 179-180 [354]-[356].

(3) There be a determination that native title does not exist in the land and waters the subject of Mineral Leases (Special Agreement) 235SA and 249SA.

[In the alternative to (3): There be a determination that native title does not exist in the land and waters the subject of Mineral Lease (Special Agreement) 235SA on which the Lessees exercised their rights to develop and construct mines, a town and associated works (which areas are set out in the Third Schedule to *Brown (No.3)*].

(4) No order as to costs.

10 (5) Such further or other order or determination as the Court sees fit.

PART IX: TIME ESTIMATE

110. It is estimated that 2 hours will be required for the presentation of the Appellant's oral argument.

Dated the 24th day of October 2013

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G R Donaldson SC
Solicitor General for Western Australia
Telephone: (08) 9264 1806
Facsimile: (08) 9321 1385
Email: grant.donaldson@sg.wa.gov.au

G J Ranson
State Solicitor's Office
Telephone: (08) 9264 1188
Facsimile: (08) 9264 1440
Email: g.ranson@sso.wa.gov.au