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

FIRST RESPONDENT'S SUBMISSIONS

PART I: Certification as to form

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

PART II: Statement of issues on appeal

2. This appeal is about the application of principles concerning extinguishment of non-exclusive native title rights by what are said to be inconsistent statutory rights.

3. The rights in question are rights ("**lease rights**") under the Mt Goldsworthy leases ("**leases**") and determined native title rights ("**native title rights**") over an area also the subject of the lease rights ("**lease area**").

4. The first issue is whether there is inconsistency between those two sets of rights such that the native title rights are wholly extinguished over the lease area. It involves consideration of whether the leases provide a right to exclude all others including the native title rights holders from the lease area; or whether the lease rights otherwise were wholly inconsistent with all the native title rights.

5. Secondly, whether there is inconsistency between the two sets of rights resulting in 'partial extinguishment' limited to part of the lease area ("**the developed areas**") where certain activities were done under the lease rights ("**development activities**") which activities

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while continuing were inconsistent with the doing there of activities under the native title rights. This raises the correctness of the decision of the Full Court of the Federal Court in *De Rose v South Australia (No.2)* (2005) 145 FCR 290 ("***De Rose (No.2)***").

PART III: Certification as to section 78B *Judiciary Act*

6. The first respondent has considered whether any notice should be given in compliance with sec 78B of the *Judiciary Act 1903* (Cth) and concluded that this is not necessary.

PART IV: Statement as to contested material facts

7. The first respondent does not contest the facts set out the appellant's submissions dated 24 October 2013 at paras 6-8 ("**AS** 6-8").

10 **8.** The first respondent does not contest the matters set out in the Appellant's chronology.

PART V: Constitutional provisions, statutes and regulations

9. It is proposed that applicable statutes and regulations will be provided in an agreed book. There are no relevant constitutional provisions.

PART VI: Argument

10. In *Yanner v Eaton* (1999) 201 CLR 351 ("***Yanner***"), 396 [110] Gummow J explained:

> In *Wik,* the Court considered the grant of particular statutory interests. The statutory grants did not "clearly, plainly and distinctly [authorise] activities and other enjoyment of the land which *necessarily* were *inconsistent* with the *continued* <u>*existence*</u> of any of the incidents of native title which could have been subsisting at the time of these
20 grants". Further, the subsistence of native title rights was not *abrogated* by the mere existence of unperformed conditions in the grant of a pastoral lease. These conditions had no immediate legal effect, in terms of inconsistency, whilst unperformed. If performance had occurred, questions would have arisen respecting *operational inconsistency* between the performed condition and the *continued* <u>*exercise*</u> of native title rights. [Emphasis added, footnotes omitted]

11. The distinction between the continued *existence* and the continued *exercise* of rights is critical to the application of principles of extinguishment of native title at common law.

12. It is common ground that the principles of extinguishment of native title at common law determine the outcome of the appeal: see AS 14 and the submission of the Attorney-
30 General for the State of South Australia 8 ("**SAS** 8").

13. It is common ground that none of the provisions of Pt 2, Divs 2, 2A or 2B of the *Native Title Act 1993* (Cth) ("**NTA**") applies to the leases: AS 10-13. That does not entail that the NTA plays no role in the outcome of the appeal: contra AS 14. The appeal involves claims made under the NTA for rights defined in the NTA: *Western Australia v Ward* (2002)

213 CLR 1 ("***Ward***") 60 [2], 65-66 [16], 208 [468.1], *Akiba v Commonwealth* (2013) 87 ALJR 916, [2013] HCA 33 ("***Akiba***") 929 [51] per Hayne, Keifel and Bell JJ. The NTA postulates, consistent with common law principles, that an act may affect native title without extinguishing it: NTA, secs 226, 227, *Ward* 213 CLR 67-68 [22], 69-70 [26]-[29], 208 [468.3], *Akiba* 923-924 [25]-[26] per French CJ and Crennan J, 930 [51], 930-931 [54]-[57] per Hayne, Keifel and Bell JJ. Further, the NTA makes an explicit distinction between native title rights and their exercise: NTA, sec 211, *Yanner* 373 [39] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, *Akiba* 923-925 [25]-[29] per French CJ and Crennan J. The NTA also confirms that "extinguish" means permanently extinguish: NTA, sec 237A. Subsection 238(4) of the

10 NTA provides:

> If the act is partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title continues to exist in its entirety, but the rights and interests have no effect in relation to the act to the extent of the inconsistency.

14. French CJ and Crennan J in *Akiba* 924 [26] identified this "non-extinguishment" principle as a statutory construct but said that it is:

> ... nevertheless underpinned by a logical proposition of general application: that a particular use of a native title right can be restricted or prohibited by legislation without that right or interest being extinguished.

20 **15.** **The court below**. There are three lines of reasoning in the Court below. The first respondent says that Mansfield J was correct in finding that the leases did not wholly extinguish the native title {*Brown (on behalf of the Ngarla People) v Western Australia* (2012) 208 FCR 505, [2012] FCAFC 154 ("**FFC**") 521 [70]}, but in error in failing to find that *De Rose (No.2)* 333 [157], 335 [166]-[167] was plainly wrong {FFC 522 [73]}; that Greenwood J was correct in the result, in finding that *Ward* does not support a finding of partial extinguishment at a place that the lessee has chosen to use {FFC 584-585 [418]}, and in finding that the leases did not confer a right to exclude all others for all purposes so as to extinguish native title {FFC 583-584 [412]}, but in error in finding nevertheless that the rights under the leases were necessarily inconsistent with the native title rights {FFC 586 [424],

30 586-587 [431]}; and that Barker J was correct in the result and in reasoning that the leases were not wholly inconsistent with the native title rights {FFC 596-597 [479]} and that *De Rose (No.2)* is plainly wrong and should not be followed {FFC 595 [471]}.

16. **Inconsistency of rights**. Fundamental to extinguishment at common law, is whether *rights* are *inconsistent*: *Ward* 89 [78], *Akiba* 926 [35] per French CJ and Crennan J, 930 [52] per Hayne, Kiefel and Bell JJ. That involves a critical distinction between a *right itself* and its

exercise by *activities* done under it: *Akiba* 925 [29], 926 [35] per French CJ and Crennan J, 930 [52], 932 [65], 933 [68] per Hayne, Kiefel and Bell JJ. Barker J understood this {FFC 595 [470]}, contra AS 24-26. Because the subject of the inconsistency is rights and the consequence for one of the rights is extinguishment, the inconsistency must be such as goes to the very existence of the rights; ie, there must be inconsistency which is independent of any manner or activity by which it might be exercised.

17. While generally accepting the five propositions set out at AS 15-19 the first respondent contends that as stated and as explained by the appellant's submission, they do not expose or require the appellant to confront some critical aspects of the principles of
10 inconsistency of rights: see this submission at par 16 ("**1RS** 16") regarding the 1st proposition, 1RS 43 regarding the 2nd proposition, and 1RS 21 regarding the 5th proposition.

18. Importantly, the five propositions ignore that inconsistency of rights is a strict concept reserved for situations objectively, clearly, plainly and distinctly necessitating the serious consequence of extinguishment of rights which have their origins in traditional laws and custom: *Wik Peoples v Queensland* (1996) 187 CLR 1 ("***Wik***") 155.2 per Gaudron J, 185.5, 201.4, 203.1 per Gummow J, also *Akiba* 87 ALJR at 925 [30] per French CJ and Crennan J.

19. Also ignored are the epithets often used in judgments of this Court in relation to inconsistency of rights to emphasise the seriousness of the exercise; epithets that include notions of "necessarily" (*Wik* 190.2 per Gummow J), by "necessary implication" (*Wik* 130.6,
20 133.1 per Toohey J, 185.8 per Gummow J, 247.7 per Kirby J), "abrogating" a right (*Wik* 185.7 per Gummow J, *Akiba* 925-926 [31] per French CJ and Crennan J), including "prohibition" (*Wik* 185.8 per Gummow J), and of being absent where two rights to can co-exist (*Wik* 126.4 per Toohey J) or when it is not 'inevitable: *Yanner* 201 CLR at 396 [111] per Gummow J. It is also said there is a "strong presumption" against extinguishment (*Wik* 247.6, 250.4 per Kirby J). There must be a high degree of certainty about the presence of inconsistency of rights before the conclusion of extinguishment follows; there must be "necessary extinguishment": *Wik* 195.5 per Gummow J. The strictness of the concept of inconsistency of rights is emphasised by the question as identified in *Yanner* 396 [109], by Gummow J:

30 > ... whether the statutory right *necessarily* curtails the exercise of the native title right such that the conclusion of *abrogation* is *compelled* [italics added]

20. The appellant seeks to diminish the authority of such statements as *obiter dicta*, (AS 24, 75), as involving "indeterminate" terms (namely "inconsistent" and "co-exist") (AS 75), as being unexplained (AS 78), and as involving terms of doubtful assistance (namely,

"continuance") (AS 79); all the time overlooking the clinical exactness of the statements it questions and the distinction between the existence and exercise of a right. It warns that "loose" use of "abrogation" is "apt to confuse" (AS 78). That the appellant misunderstands the statements is indicated by the example in AS 75, where it suggests of Toohey J's test of whether two rights can co-exist, that a freehold might co-exist with native title rights because a fee simple title holder might not preclude the exercise of the native title rights. However, permission based access is not access as of right. It cannot negate the inconsistency between a right to exclude and a right to access: *Ward* 213 CLR at 67 [21].

21. Exclusive possession and the right to exclude. The appellant's 5th proposition as to principles of inconsistency of rights is that "exclusive possession extinguishes all native title rights": AS 20. Its primary contention is that the appeal should be determined by the leases being characterised as conferring exclusive possession: AS 20, 29-62.

22. Characterisation is determinative of inconsistency with and thereby extinguishment of all native title rights in the case of a grant of a fee simple and a leasehold interest *as known to the common law*: *Yanner* 201 CLR 395-6 [107]-[108] per Gummow J, *Wilson v Anderson* (2002) 213 CLR 401 ("***Wilson***") 427 [36] per Gaudron, Gummow and Hayne JJ, *Fejo v Northern Territory* (1998) 195 CLR 96 ("***Fejo***") 126 [43], 150-151 [105] per Kirby J.

23. At trial the parties agreed that if the grant of the leases "*in fact* conferred exclusive possession in the sense of a legal right to exclude all others from the land, native title rights were necessarily extinguished" [italics added]: *Brown (on behalf of the Ngarla People) v State of Western Australia (No 2)* [2010] FCA 498 ("**FC**") {FC [116], [175]}. It was also agreed that use of the terms "exclusive possession", "lease" or "demise" in a statutory grant is not conclusive of legal inconsistency: FC [116].

24. Critical to whether the pastoral leases considered in *Ward* gave the holder a right to exclusive possession, were the questions posed at *Ward* 128 [182]:

> Did the grant of a pastoral lease over Crown land prohibit the continued use or occupation of that land, in accordance with native title rights and interests, by the holders of those rights? Did it make use or occupation of the land by those persons for those purposes ``unlawful or unauthorised"?

The question was then considered, and it was said at *Ward* 128 [183]:

> That would be so *only* if a pastoral lease gave the holder the right ... to exclude native title holders *from the land*. [Second italics added]

And, at *Ward* 128 [186]:

> In considering whether a lease confers the right of exclusive possession on the lessee the proper order of inquiry is first to examine what are the rights granted and only then to classify the grant.

25. Thus, the classification of a grant as one involving exclusive possession such as will be inconsistent with and extinguish all native title requires the presence of a right to exclude native title holders *from the land*; ie, from the whole of the area the subject of the granted rights. Barker J understood and accepted the significance of the presence of such a right to questions about inconsistency of rights: FFC 592 [459], contra AS 24-26.

26. **Exclusive possession not conferred by the leases**. The contention that the leases confer a right of exclusive possession dominates the appellant's submission: AS 29-72.

27. The primary judge and the members of the court below all concluded the leases did not confer a right to exclude native title holders from *the lease area* and in that sense, did not
10 confer a right of exclusive possession: FC [181], [184], [185], [188] FFC 520 [60]-[62], 521 [70] per Mansfield J, 583-584 [412] per Greenwood J, 596 [476]-[477] per Barker J. That conclusion is not shown to be erroneous.

28. The touchstone of a right of exclusive possession is the right to control access to the land the subject of the right: *Wik* 187 CLR at 194.9-195.2 per Gummow J, AS 33. Without a right to exclude all others (including a landlord, if there is one) from the whole of the lease area there is no exclusive possession at common law. Without a right to exclude native title holders from the lease area for the duration of the leases, native title is not wholly extinguished: *Wilson* 213 CLR at 461 [151] per Kirby J; see also *Wik* 122 per Toohey J.

29. The exclusive possession and right to exclude conferred by the leases are qualified.
20 Possession was granted for the purposes of the State agreement, and required the lessees to use the lease areas bona fide exclusively for the purposes of the State agreement: FC [181], FFC 541-542 [188], [190] per Greenwood J; AS 45.

30. The test for exclusive possession posited at AS 35 is necessary for the appellant's argument but clearly wrong. The test posited is that if X can exclude *Y if Y's presence interferes with the lawful enjoyment or activities of X*, then that right is inconsistent with any right of Y. The test is wrong because the right of X is conditioned by a requirement of interference by Y. A correct test would identify an unconditional right to exclude.

31. Exclusive possession for mining and related purposes does not entail a right to exclude all others from, and for the duration of, the right. Rather, it is a right that authorises the lessee
30 to carry out mining development activities and precludes others from doing so: *Ward* 213 CLR at 165-166 [308]. The rights provided to the lessees, qualitatively, are no larger even if they contemplate a wide range of uses some of which, in smaller scale projects, might ordinarily be the subject of further tenure: see AS 45-46 and see 1RS 62 below.

32. Reliance in AS 48 and 71 to *Goldsworthy Mining v Federal Commissioner of Taxation*

(1973) 128 CLR 199 is misplaced. That case did not concern the leases, but rather a dredging lease over the sea-bed of the harbour. It was a special lease issued pursuant sec 116 of the *Land Act 1933* (WA); not a mining lease: FFC 581 [400] per Greenwood J. As Greenwood J pointed out in the court below, the decision turned upon revenue questions in the particular context of the legislation in issue: FFC 582 [404]. No question arose in that case as to whether instruments underpinning the tenure in question evinced a clear and plain intention to extinguish native title or whether the presence on the lease area of a holder of a native title right of access would be unlawful or inconsistent with the rights of the lessee.

33. Contrary to AS 69 no authority known to the first respondent suggests that statutory and contractual exceptions which allow for entry by a particular class of persons for particular purposes, for example, as would permit entry to with an emergency involving a crime, a fire or the supply of utility services, are such as would defeat the classification of a right to exclude as comprising exclusive possession at common law.

34. Contrary to AS 70, clause 9(2)(g) of the State Agreement is not relevantly dissimilar to the reservation permitting entry of any person to the pastoral leases considered in *Ward* 213 CLR at 126 [178]. The provision in *Ward* was considered sufficient to warrant the conclusion that the pastoral lease did not give the holder a right to exclusive possession of the land. It makes no difference that the reservation in clause 9(2)(g) which obliges the lessees to allow third parties to have access over the leases is subject to a proviso that such access "shall not unduly prejudice or interfere with the Joint Venturer's operations" under the State agreement: {FC [202]}, {FFC 516 [42] per Mansfield J, 540 [180], 579 [388], 581-582 [401], 583 [410] per Greenwood J}. With or without such proviso the presence of a general right of access by third parties is inconsistent with a right of exclusive possession. The two rights simply cannot co-exist. The ability of third parties to be lawfully present on the land necessarily abrogates the right to control access that is central to the right of exclusive possession. Even without the proviso, the lessees would be entitled to prevent any person interfering with the exercise of the granted rights: *Ward* 160 [291], and see AS 57. If the native title holder (somewhere) on the lease area and not interfering with the exercise of the lease rights lawfully cannot be removed, there can be no right of exclusive possession. The co-existence of the rights and the entitlement of the statutory rights holder to protection against interference merely demonstrates that an unextinguished native title right may not be exercised to as interfere with the statutory lease rights: see 1RS 80-83 below. A right to exclude those who would interfere assumes there is no inconsistency with a right of access by others: contra AS 57.

35. Any right to exclude provided by sec 4 of the *Government Agreement Act 1979* (WA)

("***Government Act***") clearly does not supplement the leases with a general entitlement to exclude native title holders from the lease area: AS 60, 61, 99. The section, set out in the footnote to AS 60, assumes third persons may be lawfully on the subject land and contemplates their remaining on the land after being warned to leave, provided they do not prevent, obstruct, or hinder any activity which is being carried on pursuant to or the purposes of a Government agreement. The text of the section is inconsistent with any intent to extinguish non-exclusive native title rights. Statements made in the context of the second reading of the legislation indicate that the provision was directed at protestors interrupting mining, not the exclusion of Aboriginal people. In *Wik,* penal provisions prohibiting unauthorised use and occupation of Crown lands were found to not extend to people exercising native title rights and interests: *Wik* 187 CLR at 154-155 per Gaudron J, 190-195 per Gummow J; see also *Ward* 213 CLR at 127-128 [181]-[184]. See 1RS 34, 56.

36. Contrary to AS 41, 43, it is no complete answer that the statutory instrument of grant used words not inconsistent with a common law lease – such as, "lease", "grant and demise", "tenants in common" and so on. The inquiry requires attention to whether the rights given under the leases are inconsistent with the native title rights and interests: *Ward* 126 [177] and see 1RS 23, 24. The leases in *De Rose (No.2)* were variously held under tenancy in common and joint tenancies: *De Rose v South Australia* (2003) FCR 325, 333 [15], 334 [21].

37. Similar words of grant, in a similar mineral lease (ML4SA), under a similar State agreement approved by the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) and involving the *Mining Act 1904* (WA) were considered, albeit briefly, by Nicholson J in *Daniel v Western Australia* [2003] FCA 666 ("***Daniel***"). It was held in that case that the mineral lease did not extinguish native title: *Daniel* [848], FC [99]. Nicholson J found nothing to distinguish mineral leases under the *Mining Act 1904* (WA) from the mining leases under the Mining Act 1978 (WA) in *Ward*: Daniel [789], FC [97].

38. The appellant relies on distinguishing the form of leases under the *Mining Act 1904* (WA) from the form under the *Mining Act 1978* (WA) in order to distinguish the result (of non-extinguishment) in *Ward*: AS 37, 42, 43, 47, 62, 86, 91. Such reliance is misplaced. It was observed in *Ward* 160 [290], that one of the existing features of the *Mining Act 1904* (WA) was that the rights it conferred were limited to specific minerals and allowed for more than one party having rights in the same ground. If leases under the *Mining Act 1978* do not give exclusive possession or the right to exclude native title holders from the lease area, it must be less likely that leases taking their form from the *Mining Act 1904* did so.

39. So far as the 'expansiveness' relied on at AS 43 refers to the leases as involving a

demise of land separate from and over and above rights available under a *Mining Act 1904* (WA) mineral lease, and thereby as being more extensive than a right to mine under that Act, it is significant that the words of the grant of the leases merely mirror the standard form of mineral leases granted under that Act: *Mining Act 1904* (WA) Regulations, Form 3. In any event, whatever the words of grant, the reservation in para 9(2)(g) of the State agreement in favour of access by third parties, and sec 4 of the *Government Act*, precludes characterisation of the lease as one conferring exclusive possession: see 1RS 34, 35.

40. Rights held under similarly expansive tenements for a large mining project in Western Australia were considered in *Ward* 213 CLR at 171-175 [322]-[335]. The Argyle Mining Lease was similarly granted pursuant to a Government Agreement and ratified by legislation; the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA) (**Argyle Agreement Act**). The majority rejected the conclusion that native title rights were entirely extinguished despite:

(a) the Argyle Agreement Act conferring "exclusive possession" of the land for the purposes of both the *Mining Act 1904* and *Mining Act 1978*: *Ward* 172 [326];

(b) the size of the infrastructure involved in the project: *Ward* 173-4 [330];

(c) the nature, intensity and range of activities contemplated (including the construction of a township, airports and roads): *Ward* 173-4 [330]; and

(d) the "element of permanence" in the use authorized: *Ward* 174 [332].

41. The rejection rested on the proposition that, "[e]xclusive possession was granted for mining purposes only": *Ward* 174 [333]. See also *Ward* 176 [340] in relation to a general purpose lease granted under sec 86 of the *Mining Act 1978* (WA) for crushing and screening plants and associated stockpiling.

42. The outcome of this appeal cannot be determined by characterisation of the leases as common law leases or by their classification as involving exclusive possession. They are not common law leases and they do not confer exclusive possession. Importantly, they conferred no right to exclude native title holders from the lease areas.

43. **The appellant's "logical test" and "common sense" approach**. Absent a lease capable of *characterisation* as an estate including a right to exclude all other from the lease area, it is necessary to ascertain and compare the *content* (the legal nature and incidents) of both sets of rights: *Wik* 187 CLR at 185.8 per Gummow J, *Ward* 114 [149], 160-161 [291], 165-166 [308]-[309], and see the appellant's 1st proposition at AS 16.

44. The appellant's submission misapplies the principles of inconsistency of rights at AS 80. It asserts that the only logical test for determining inconsistency is whether "all native

title and statutory rights can be *exercised* coextensively on the same land at the same time": see also SAS 30. The test as posited is not unambiguous, but whether "coextensively on the same land" is intended to refer to the simultaneous use of the whole of the area the subject of the both sets of rights, or to the simultaneous use of any part of that area, the test would not identify necessary inconsistency of rights or raise a truly logical test for inconsistency of rights. Contrary to the assumption of the test, the *existence* of a right which merely authorises access and activities does not require its *exercise* over the whole area at all times (or at all); it allows for activities authorised under another set of rights to occur when (or where or if) activities are not being done under the first right. Nor does the test readily accommodate the
10 case of a right of exclusive possession, which by its very existence (with being exercised) constitutes an impenetrable barrier to the existence of right of access within the same area.

45. The appellant's test does however raise the (false) conundrum referred to at AS 81 by conceding that application of its logical test would be overly detrimental to native title: AS 80. The appellant's submission does not pause to consider why a test is necessary or to be preferred that admittedly leads to more extinguishment of the rights of native title holders than could be necessary to avoid the abrogation, or protection of the exercise, of rights held by others. As French CJ and Crennan J said in *Akiba* 87 ALJR at 925 [29]:

> ...when a statute purporting to affect the exercise of a native title right or interest for a particular purpose or in a particular way can be construed as doing no more than that,
20 and not as extinguishing an underlying right, or an incident thereof, it should be so construed.

46. The appellant seeks to distinguish the extinguishment inquiry as it arises in the context of regulatory legislation from the inconsistency of rights inquiry: AS 74. That submission overlooks that statute underlies the lease rights, that the State agreement ("**State agreement**") ratified by the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) ("***Agreement Act***") has the force of a statute, that the serious consequences for native title are the same (extinguishment) whether effected directly by statute or the grant of inconsistent rights. It also overlooks a clear analogy available between the *regulation* of native title rights by statute and the *prevention their exercise* at a particular place or time in order to avoid interference
30 with a statutory right without being extinguished.

47. Fatally, the appellant's test ignores the central principle established in *Wik* that if right X can be exercised without abrogating right Y, there is no necessary inconsistency because of the existence of the possibility they can both be exercised on the area over which they both exist. The logical position is made clear if consideration of activities is removed and only the rights themselves are considered. Thus, the existence of a right to exclude access

to the area by native title holders is antithetical to the existence of a native title right of access. Similarly, a public or statutory right of access is antithetical to a native title right to control access to the area.

48. Where neither set of rights includes a right to exclude the holder of the other set generally from the area over which they both exist there is little if any room for necessary inconsistency between the rights. Thus, if right X and right Y both merely authorise access for the doing of activities which may be done (if at all) on different parts of the area or at different times, there is no necessary inconsistency or extinguishment. This is so whether the same activity is authorised (eg, the public right to fish and a native title right to fish) or different activities (eg, a statutory right to dig a hole and a native title right to camp).

49. At to AS 87-91, the appellant argues for an understanding of the principles reiterated in *Ward* as requiring rather than a strict approach, consideration "in a common sense way, whether [identified] rights are inconsistent with the determined native title rights". Whatever a "common sense" approach might involve, the well-established principles of common law extinguishment are clear, and strict; and recognise the serious consequences for Aboriginal people flowing from extinguishment of native title: *Western Australia v Ward* (2000) 99 FCR 316, 496 [710] per North J.

50. **Inconsistency not revealed by comparison of rights.** The appellant's comparison undertaken at AS 96-103 (and as far as it may assist, AS 68-68) fails to reveal any inconsistency of rights. Rather it merely reveals that there have been and are instances when some of the native title rights could not be exercised on part of the lease area because of the activities undertaken pursuant to the leases. The comparison cannot be characterised as a comparison of *rights* or of the legal content or incidents of rights. Rather, the content of the comparison is plainly activities not rights. The comparison might serve the "logical test" and "common sense" approach contended for respectively at AS 80 and 87-91 and considered at 1RS 43-49 above, but it is not the kind of comparison contemplated *Ward* 213 CLR 89 [78] and considered at 1RS 16-25 above; or a proper application of the inconsistency of rights test. As anticipated by the appellant at AS 80 and 92, both its logical and common sense approaches shown to be weighted towards complete extinguishment of native title.

51. The inadequacy and error of the appellant's approach is clear, taking AS 96 as an example. Nothing is said there at all about rights. Further, the comparison is expressly confined to *part* of the lease area – the area of the pit. Nothing is said regarding the balance of the lease area as a proper comparison of rights would require, as the rights extend to the whole area. Nothing in the comparison indicates that the right to turn the mountain into a pit

and the right to take water and fish could not have co-existed. Nothing even indicates that both activities could not be done on the lease area, taken as a whole. Indeed the possibility might be noted that the removal of the mountain had no effect whatsoever on the rights to fish and take water. That would be so if the two of the activities compared – the taking of fish and water – would not ordinarily have been done on the mountain that became the mine pit because of the natural distribution of the resources in question. On the other hand, the unhindered exercise of the rights to take fish and water might never have (even potentially) hindered the exercise of the right to mine because of the natural distribution of the resources the subject of the lease rights.

52. Similarly, the comparison undertaken at AS 97 is only about activities and rests on the assertion that certain activities cannot be done "at the same time" as the native title rights are exercised – consistent with the appellant's 'logical test'. The analysis is wrong because consideration is limited to activities and rests on a doubtful assumption. There is no basis for the assertion that the mining and related activities cannot be done at the same time as the native title rights are exercised unless the assumption is made, or the fact established, that the actual doing of the activities must (necessarily) extend to the whole of the lease area.

53. The difficulty for the argument at AS 98 is its focus on activities on part only of the area; and its reliance on the findings of the primary judge {FC [201]-[202]} and of Mansfield J {FFC 523 [82]-[83]} in the court below. It rests on the correctness of *De Rose (No.2)*: see 1RS 65-79 below. It contends for extinguishment over less than the lease area; which is to deny the central proposition of the inconsistency of rights doctrine – that two rights are inconsistent or they are not: *Ward* 213 CLR at 91 [82], *Akiba* 87 ALJR at 926 [35] per French CJ and Crennan J.

54. Greenwood J understood that if there is inconsistency of rights, it must extend to the whole area said to be the subject of the rights, not just to part of it. However, he considered that a right to hold the land for the purposes of the State agreement was exercised over the whole of the land even though particular activity at any moment only occurs on part of it {FFC 585-586 [419]-[424]}. Having made that finding and that there was inconsistency of rights, he sought to avoid the consequence of total extinguishment on the basis that it was not an extinguishing inconsistency but merely an inconsistency of the kind referred to in the examples in *Ward* 166 [308], which prevented the exercise of the native title rights for so long as the rights are *held*: FFC 586-587 [426]-[431]. With respect, the correct application of *Ward* 166 [308] would not have identified an inconsistency of rights here, nor regarded an inconsistency of rights situation as one of merely preventing the exercise of native title rights

over the whole of the lease area for so long as the holder "carries on that activity": contra AS 22-23, SAS 27-29.

55. It is submitted that the correct approach is that of Barker J in the court below, namely that *De Rose (No.2)* is plainly wrong: FFC 595 [471]. The correct application of the inconsistency of rights test accepts that extinguishment occurs on and from the moment the rights take effect and is co-extensive with the whole area over which the rights overlap; and that the notion of extinguishment 'to the extent of the inconsistency' mentioned at *Ward* 213 CLR at 91 [82] must refer to extinguishment of one or more but not all of the native title rights; not to extinguishment over part of the area or extinguishment upon the happening of a particular exercise of a granted right: see also FFC 585 [419] per Greenwood J .

56. The comparison in AS 99 is merely an assertion of inconsistency rather than a comparison of rights. So far as any comparison is involved, it appears to rely on the appellant's 'logical test' or 'common sense' approach and proceed on the basis that because the rights extend to the whole area, there is inconsistency over the *whole* area if the rights cannot be exercised at the same time on the same *part* of the area. The 2nd argument in 100 and the argument at 101 proceeds on the same basis. Only if a non-exclusive right of access is inconsistent with another non-exclusive right of access would the argument be correct. Rights to access and camp on the lease area were exercisable at all times somewhere on the lease area without interfering with, and in particular without abrogating, the lease rights to construct services, a town site, a mine and mining facilities – therefore lawfully and without triggering any conditional entitlement to exclude provided by sec 4 of the Government Act: see also 1RS 34-36 above. The first argument in AS 100 assumes the right of access is extinguished.

57. Reliance at AS 102-103 on *Ward* 179-180 [354]-[356] concerning a special lease granted under Part VII of the *Land Act 1933* (WA) in this context is misplaced. The conclusion of extinguishment there proceeded from a finding that the special lease granted the lessee a right of exclusive possession, not from a comparison otherwise of the two sets of rights: *Ward* 180 [357].

58. Contrary to the approach taken in AS 95-103, a comparison of rights which correctly applies the principles reiterated in *Ward* must proceed from identification of the *rights* respectively comprising the lease rights and the native title rights, not the *activities* by which the rights have been *exercised* or the areas over which activities have been done: *Akiba* 87 ALJR 926 [35] per French CJ and Crennan J.

59. The native title rights are identified in the determination of native title made by the court below in *Brown (on behalf of the Ngarla People) v Western Australia (No.2)* [2013]

FCAFC 18 ("**DNT**"): DNT para 4. They are "non-exclusive": DNT par 4. They do not confer a right of exclusive possession or a right to control access to the determination area: DNT para 6. They are only exercisable in accordance the laws of the State including the common law: DNT subpara 5(a). Though not a qualification on the rights, the relationship of the rights with the "other interests" that (co-)exist in the determination area (which includes the rights comprised in or conferred under the State Agreement: DNT, Schedule Four item 3 is that the native title rights have no effect on the lease rights, their exercise does not prevent the exercise of the lease rights; and that the exercise of the lease rights prevails over the exercise of the native title rights: DNT para 9. The lease rights can be fully enjoyed.

60. Thus, and contrary to AS 101, even the right to care for, maintain and protect from physical harm, particular sites and areas of significance to the native title holders is 'non-exclusive', must be exercised in accordance with the laws of the State and does not prevent the exercise of the lease rights: DNT, subparas 4(d), 5(a), par 9. It can be exercised on the lease area where the exercise of the lease rights does not prevent it. If a native title holder is able to prevent an activity authorised by the leases from harming a sacred site at all, it will not be on the basis of the native title right but on the basis of the lessees voluntarily behaviour or on the basis of heritage protection legislation.

61. The lease rights are essentially use rights – sole rights to use the lease area for particular purposes so as to enable the overall conduct of a significant mining development operation. While the rights subsist over the entire lease area, none of the uses, or the uses in aggregate, necessarily requires utilisation of, or control of access over, the entire lease area at all times. A detailed account of the provisions of the agreement, the applicable Mining Acts, the leases and the *Government Agreements Act 1979* (WA) are provided in the reasons for judgment of Greenwood J: FFC 531-544 [126]-[202]. If it be relevant, activities done in exercise of the rights in aggregate affected only about one-third of the lease area before the mine was closed in 1982 and the town was closed in 1992: FC [16]-[18] FFC 544 [205].

62. AS 53, 54 refer to provisions of the State agreement under which the lessees may seek the grant of other tenures. Such tenures could be sought as reasonably required and in accordance with approved proposals: paras 8(2)(b) and (c) of the State agreement: FC [144] FFC 515 [39] per Mansfield J, 532 [138], 538 [166], 538 [168], 578 [379] per Greenwood J. Tenures provided for include fee simple and other tenures which, if granted, might include a right of exclusive possession. However, no separate titles have been applied for. A special lease for the railway is excluded from the claim area: FC [151]. Tenures not granted cannot affect native title unless and until granted and effective and then questions of extinguishment

would be determined by reference to the particular dealings concerned: see consideration of the Ord River Irrigation project in relation to which it was said by the majority in *Ward* 213 CLR at 112 [143]:

> However, resolution of the issues in the present litigation turns upon the legal effect of particular dealings with land. It follows that attention must be directed to those dealings rather than to the geographical and economic entity suggested by use of the term "Project".

63. **Partial extinguishment and *De Rose (No.2)*.** At AS 81 the appellant suggests that the principles in *Ward* have posed a conundrum for subsequent cases. The conundrum posited is illustrated by the rhetorical question: how can a right to dig a massive open pit anywhere on a lease area at any time within the lease term not be inconsistent with and not have extinguished a native title right over the whole area? The application of the inconsistency of rights principles produces no such conundrum. Unless the right to dig the pit (which will only occur at the site of the ore body) is accompanied by a right to exclude native title holders from the lease area generally the rights themselves are not necessarily inconsistent because the native title rights could be *exercised* at other times on other parts of the lease area without preventing the digging of the pit, including at the pit site before mining. The construction of the pit merely prevents the *exercise* of the native title right so far as necessary to avoid interference with the right to dig. Extinguishment is not necessary.

64. Having erected the false conundrum at AS 80, 81, the appellant turned to the finding of geographical partial extinguishment in *De Rose (No.2)* to resolve it. Later the appellant seeks to distinguish the decision in relation to mining leases but also rely on it in the alternative: AS 82-84, 93, 104-107, see also SAS which generally supports the decision.

65. Contrary to AS 104-106, there is no principled basis for confining the reasoning of *De Rose (No.2)* to pastoral leases. Any difference between infrastructure authorised by the leases and infrastructure authorised by a pastoral lease is a matter of degree only; there is no qualitative difference.

66. The first respondent contends that *De Rose (No.2)* was wrongly decided and should not be followed. It is difficult to reconcile with *Ward* 213 CLR at 165-6 [308]: see FC [173], FFC 511 [21] per Mansfield J. The determination made by the Court below does not follow it. The developed areas are included in the areas where native title exists: DNT Schedule 1 and shown in Schedule 2 FFC, 584-585 [418] per Greenwood J, 595 [471] per Barker J, see also 526 [97] per Mansfield J.

67. The reasons of the primary judge and Mansfield J in the court below rested on the proposition that the rights in question were not necessarily inconsistent over the whole of the

lease area but *when exercised* were so extensive as to be inconsistent with the continued existence of the native title rights over those parts of the lease areas where the development activities were in fact undertaken: FC [208] FFC 523 [83], 526 [92]. Such reasoning rests on an understanding of necessary inconsistency of rights that can only be satisfied over the whole of the lease area but only produce extinguishment over part of it. Mansfield J noted there was much to be said for the conclusion reached by the majority in the court below but that he felt constrained by the decision of the full court in *De Rose (No.2)*: FFC 526 [97].

68. The statement of Greenwood J that there is no proper foundation for a finding of inconsistency of rights that gives to extinguishment where the mining and related activities occurred but not elsewhere on the lease involves reliance on *Ward* to support disagreement with the reasoning in *De Rose (No.2)*: FFC 585 [420], [421].

69. Making particular reference to the reasoning in *Ward* 165 [306], 174 [331]-[333] and the actual findings in *Wik* and *Ward*, Barker J regarded the decision in *De Rose (No.2)* as not according with the joint judgment in *Ward* and as therefore plainly wrong: FFC 594-5 [469], [471]. He considered it was not open to conclude from *Ward* that the improvement clauses of pastoral leases and mining leases should be treated as conditions precedent for the purpose of identifying rights which extinguish native title when improvements are actually carried out: FFC 594-5 [469]. This is clearly correct.

70. The argument of the appellant at AS 83 that the construction of improvements "crystallises extinguishment" or that extinguishment can be inchoate until actually exercised is wrong; and see also SAS 7f, 31, 32. On the principles of inconsistency of rights reiterated in *Ward* and bearing in mind the distinction already mentioned and emphasised in *Akiba* between the exercise of rights and the rights themselves, there is no room for extinguishment that is inchoate until a right is actually exercised. The exercise of a right is not, in any sense, a precondition for its existence. The right to undertake development activities exists over the whole of the lease area from the moment the grant is effective, even if were never exercised: contra SAS 27. Thus, for the right to be necessarily inconsistent with native title, it would have to be patently impossible to exercise the native title by any means at any place on the lease area at any time during the currency of the lease without abrogating that right.

71. Two *rights* are inconsistent or they are not: *Ward* 213 CLR 91 [82]. If there is inconsistency, it is ascertainable and effective from the moment the granted right takes effect; it does not depend upon any exercise of the right; as the example of the Mitchelton lease in *Wik* demonstrates: and see AS 28. The lessee did not take possession under the lease and it was forfeited (see *Wik* 187 CLR at 106.9 per Dawson J) yet the granted right to take

possession was effective to extinguish the inconsistent native title right to control access in relation the area. The grant of rights to undertake development activities similarly take effect and exist independently of any manner in which they may be exercised; but they do not extinguish other non-exclusive rights. They are non-exclusive and there is no inconsistency that requires the extinguishment of the native title: contra AS 29.

72. The first respondent accepts as a consequence of the principles in *Ward*, that inconsistency of rights cannot involve less than the area overlapped by the two rights in question. By the same reasoning, any other question of 'inconsistency' arising between the two rights holders involving less than the overlapping area generally will not, and here do not, involve inconsistency of the rights themselves, though activities and the exercise the rights may be involved – the remedy for which inconsistency is not extinguishment but the prevention of the exercise of the native title: see also 1RS 80-82 below, contra SAS 31.

73. It is on these points that the decision in *De Rose (No.2)* departed from principles established in this Court. The court in *De Rose (No.2)* considered, even appears to have accepted, but misunderstood the inconsistency of rights principles in *Ward*: *De Rose (No.2)* 330 [145], 331-332 [149]. The comparison undertaken by the court in *De Rose (No.2)* went beyond a comparison of the rights themselves and their existence; into consideration of conflicting activities at particular parts of the land during the exercise of rights. This is clear enough from the following statement of the court: *De Rose (No.2)* 331-332 [149]:

> The right to construct, and implicitly to use, improvements on the leasehold land, such as a dwelling house or storage sheds, *when exercised*, is clearly inconsistent with the native title rights and interests identified in the draft determination, *insofar as they relate to the particular land on which the dwelling house and storage sheds are constructed*. For example, it is hard to see how the native title holders' right to gain access to the land or to hunt *anywhere on the land* in a traditional manner, could co-exist with the lessees' rights to construct and reside in the dwelling house or construct and use the storage sheds. [Italics added]

The reference to "anywhere on the land" incorporates into the inconsistency of rights comparison consideration of *every* possibility for exercise of the right rather than *any* possibility. Because a right is to undertake a particular activity, while it can be exercised *somewhere* it is not abrogated and need effect no abrogation. It is not necessary for its existence that it be exercisable everywhere it exists, or at all times. If it were otherwise, the extinguishment of the native title right would be inevitable and co-existence not a possibility (contrary to *Wik*) because two different activities (or even the same activity undertaken by different people) generally cannot be undertaken on the same part of the land at the same time though they may readily do so on different parts or at different times.

74. The reasoning in *De Rose (No.2)* thus far ignores that the existence of the native title right can continue on the lease area without interfering with the lease or abrogating the lease right to construct the dwelling or other infrastructure. The court went on to acknowledge that the joint judgment in *Ward* emphasised that the critical question is whether two sets of rights are inconsistent and that actual use of the land may be relevant only to focus attention upon the right: *De Rose (No.2)* 332 [150]. However, the court further exposed an erroneous focus on the exercise of the right rather than the right itself in the statement:

> Yet unless attention is paid to the actual use of land, how is the Court to ascertain the precise sites over which native title holders might seek to exercise their traditional rights?

The precise location of the exercise of a right is self-evidently about the manner of exercise of the right not the legal content, or the existence, of the right itself; as is "use" and "exercise". See also the statement at *De Rose (No.2)* 333 [155] referring to the statutory right to erect improvements as "*potentially* inconsistent, to a *greater or lesser extent*, with native title..." These are not words apt to compel a conclusion of inconsistency of rights.

75. The erroneous application of the inconsistency of rights test resulted in the finding that the right to construct infrastructure was inconsistent with the native title rights, and in the difficulty expressed at *De Rose (No.2)* 333 [154] of reconciling the conclusion of inconsistency and the rejection in *Ward* 213 CLR at 91 [82] of the concept of suspension of rights *in the case of inconsistency of rights*. It then became necessary to avoid the consequence of total extinguishment over the whole area of the pastoral lease because *Wik* had established that non-exclusive native title rights and rights under a pastoral lease co-exist. The conclusion was partial extinguishment confined to the geographic extent of the exercise of the particular granted right. That conclusion involves error because it is contrary to *Ward*. There are no degrees of inconsistency of rights; two rights cannot be partially inconsistent; and there cannot be partial extinguishment as between two rights because either they are inconsistent or they are not: *Ward* 91 [82].

76. Particularly when read with the rejection in *Ward* 213 CLR at 91 [82] of any notion of temporary extinguishment for inconsistency of rights, statements at *Ward* 165-166 [308] concerning geographically or temporally limited instances of the *prevention of exercise* of a native title right can only be taken to refer to situations where the granted rights are not extinguished: FC [165]. The court in *De Rose (No.2)* failed to act on that understanding of *Ward*: see *De Rose (No.2)* 333 [154].

77. The references in *Ward* 114-115 [149], [150] to conditions precedent or subsequent

provided no basis for the result in *De Rose (No.2):* contra *De Rose (No.2)* 332 [152], 333 [156]. That reference in *Ward* was to avoid any confusion about the term "grant" and make clear that a statutory right does not extinguish native title if it never takes effect. Thus the legal content of a 'granted' right may not be established without taking account of the happening of conditions precedent or subsequent. The construction of a dwelling pursuant to an existing and ongoing right is clearly a matter concerning the exercise of the right, not its existence. It is in no sense a condition of the kind mentioned in *Ward*: contra SAS 25.

78. The correct result in *De Rose (No.2)* would have been a finding of no inconsistency of rights but the native title right must yield (in its exercise, not its existence) to the statutory right to the extent necessary to enable the full enjoyment of the statutory right.

79. Because development activity comes and goes at the discretion of the statutory rights holder and other exigencies and (as in this case and on pastoral leases), may leave no physical trace or record of its existence when gone and may be done at locations not known to the native titleholders before it is done, establishing *De Rose (No.2)* as a correct principle would be unsatisfactory: contra SAS 7d, 32. It would be unsatisfactory because of the attendant uncertainty as to the locations at which native title exists. It would be unsatisfactory as not only creating the practical difficulty of an historically accumulative 'Swiss cheese' effect on the map of a native title area, but also because native title holders could be left acting at their peril exposed to any civil or criminal law consequences which may turn on the precise location of the existence of a native title right.

80. 'Inconsistency' remedied by prevailing and yielding rights. The established proposition which is inseparable from the inconsistency of rights principles, is that a statutory right may *prevail* over a native title right, which must *yield* to a statutory right: *Ward* 160-161 [291], 165-166 [308], AS 24, 25. The application of this proposition results in *extinguishment* of the native title right where there is necessary inconsistency between *rights*; questions of suspension of one set of rights in favour of the other do not arise: *Ward* 91 [82]. Otherwise, the application of the proposition is that the *rights themselves* co-exist but the native title right cannot be *exercised* in any way that will interfere with the exercise and full enjoyment of the statutory right.

81. A particular use of a native title right can be restricted or prohibited without the right itself being extinguished: *Akiba* 87 ALJR at 924 [26], 925 [29] per French CJ and Crennan J, [68] per Hayne, Keifel and Bell JJ, and see also *Wik* 187 CLR at 238.3 per Kirby J.

82. A native title right to live permanently on and erect a permanent structure on a pastoral lease does not involve inconsistency of rights so as to extinguish the native title right, but the

pastoralist may require its removal in the event that it conflicts with the proposed exercise by the pastoralist of a right under the lease: *Northern Territory v Alywarr* (2005) 145 FCR 442, 481 [131] per Wilcox, French and Weinberg JJ, see also 1RS 72 above. It would be remarkable if the converse situation (the case of a statutory right to erect permanent structures) is considered to involve inconsistency that extinguishes the native title right, rather than similarly providing an instance of the statutory right prevailing and preventing the exercise of the native title right.

83. After rejecting the *De Rose (No.2)* analysis Barker J correctly said {FFC 594-595 [469], [470]}:

> Rather, 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.

84. It does not appear in this case that the lease could be enjoyed only with the abrogation of any or all of the native title rights: see *Wik* 203.1 per Gummow J.

PART VIII: TIME ESTIMATE FOR PRESENTATION OF ORAL ARGUMENT

85. It is estimated that the presentation of the First Respondent's oral argument will take 2 hours.

21st November 2013

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