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

and

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

Second Respondent

SECOND RESPONDENTS' SUBMISSIONS

PART I: FORM OF SUBMISSIONS

1. It is certified that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The Second Respondents agree with the Appellant's statement of the issues.

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3. The issue in the appeal is whether the Mt Goldsworthy leases extinguished native title rights and interests over the area of the leases and in particular:

   (a) whether the Mt Goldsworthy leases conferred on the holder of the leases exclusive possession such that all native title rights and interests in the lease areas were wholly extinguished; and

   (b) alternatively, if the Mt Goldsworthy leases did not confer on their holders exclusive possession, whether the rights conferred by the leases were inconsistent with all or any of the native title rights that existed in the lease areas such that those rights were extinguished.

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

4. It is certified that the Second Respondents have considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and have decided it is not necessary to do so because no constitutional law issues are raised by any of the parties.

PART IV: MATERIAL FACTS

5. The Second Respondents agree with the material facts set out in the Appellant's narrative of facts at Part V of its submissions.

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PART V: LEGISLATION

6. The Second Respondents submit that the applicable statutes for determining the issues in the appeal are:

   (a) *Native Title Act 1993* (Cth);

   (b) *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA);

   (c) *Mining Act 1904* (WA) (repealed);

   (d) *Mining Regulations under the Mining Act 1904* (WA) (repealed);

   (e) *Mining Act 1978* (WA); and

   (f) *Mining Regulations 1981* (WA).

PART VI: ARGUMENT

SUMMARY OF THE SECOND RESPONDENTS' POSITION ON THE ISSUES TO BE DETERMINED

7. The Second Respondents submit that the appeal should be allowed on the basis that all native title rights and interests were extinguished by the grant of Mineral Leases (Special Agreement) 235SA and 249SA (**Mt Goldsworthy leases**).

8. In particular, the Second Respondents submit that the Mt Goldsworthy leases are a true *demise* at common law, granting a right of exclusive possession on the holders of the leases. The Mt Goldsworthy leases are, in that way, entirely different from the statutory "leases" such as pastoral leases and mining leases under the *Mining Act 1978* considered in *Wik Peoples v Queensland*[1] (***Wik***) and *Western Australia v Ward (**Ward**)*[2].

9. Alternatively, if the Mt Goldsworthy leases did not confer on their holders exclusive possession, the Second Respondents submit that the rights conferred on the leaseholders by the Mt Goldsworthy leases are inconsistent with the relevant native title rights[3], such that those rights were wholly extinguished upon the grant of the leases. In particular, the relevant native title rights could not be exercised without abrogating the rights of the leaseholders, and *vice versa*[4].

10. In relation to both alternative submissions, the relevant analysis is to be carried out by reference to the rights conferred by the grant of the Mt Goldsworthy leases at the time of their grant and not by reference to activities later carried out by the leaseholders. In relation to the Mt Goldsworthy leases, it is not strictly necessary to determine the correctness of the notion of "potential inconsistency" in the decision of the Full Court of the Federal Court in *De Rose v South Australia (No 2)*[5]. However, insofar as *De Rose (No. 2)*, or the reasoning behind it, might result in a different conclusion, the Second Respondents submit that it was wrongly decided.

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1 *Wik Peoples v Queensland* (1996) 187 CLR 1.

2 *Ward v Western Australia* (2002) 213 CLR 1.

3 Being the non-exclusive rights to: access, and to camp on, the land and waters; take flora, fauna, fish, water and other traditional resources (excluding minerals) from the land and waters; engage in ritual and ceremony; and care for, maintain and protect from physical harm particular sites and areas of significance: *Brown (on behalf of the Ngarla People) v Western Australia No 2* [2010] FCA 498 (***Brown (No. 2)***) at [2] (Bennett J).

4 *Akiba v Commonwealth* (2013) 300 ALR 1 at [31] (French CJ and Crennan J), citing Gummow J in *Wik Peoples v Queensland* at 185.

5 *De Rose v South Australia (No 2)* (2005) 145 FCR 290 (***De Rose (No. 2)***).

11. The Second Respondents adopt the submission of the Appellant (at paragraphs 9 – 14), accepted by all members of the Full Court[6], that the extinguishing effect of the Mt Goldsworthy leases is to be determined in accordance with the common law, or under the "general law".

ISSUE 1: DO THE MT GOLDSWORTHY LEASES CONFER RIGHTS OF EXCLUSIVE POSSESSION?

Introduction - the meaning of the expression "exclusive possession"

12. The notion of "exclusive possession", reflected in both common law principles in relation to interests in land and in the *Native Title Act 1993*[7], serves as touchstone to identify the nature of an interest *in land* conferred on a lessee which authorises the exclusion of others. It is that interest which distinguishes a lessee from a mere licensee. See *Wik* at 194 – 195 (Gummow J):

> [A]t 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[8]. As Windeyer J put it, a tenant cannot be deprived of the rights of a tenant by being called a licensee[9].

13. Accordingly, a common law lease, conferring such an interest in land, will necessarily be inconsistent with any native title rights and thereby extinguish those rights[10]. As the passage above recognises, however, certain reservations of rights of entry to other persons for specific purposes will not necessarily be inconsistent with the notion of "exclusive possession", understood as a general right to exclude others. So much is clear from *Wilson v Anderson*[11], where the majority (Kirby J dissenting) concluded that the relevant leases conferred "exclusive possession" and indeed "what in substance was a freehold", notwithstanding reservations in the leases allowing access by various persons for various purposes.

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6 *Brown (on behalf of the Ngarla People) v Western Australia* [2012] FCAFC 154 (***Brown (FC)***) at [26] – [27] (Mansfield J), at [251] (Greenwood J) and at [441] (Barker J).

7 *Wilson v Anderson* (2002) 213 CLR 401.

8 *Radaich v Smith* (1959) 101 CLR 209 at 222; *Street v Mountford* [1985] AC 809 at 827.

9 *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 90.

10 See *Wilson v Anderson* (2002) 213 CLR 401 at [14] (Gleeson CJ): "A majority of the Court in *Wik* accepted that if, as a matter of construction, the leases there in question conferred a right of exclusive possession, native title was extinguished.".

11 *Wilson v Anderson* (2002) 213 CLR 401 at [21] (Gleeson CJ), at [114] – [118] (Gaudron, Gummow and Hayne JJ) at [114]-[118] and at [203] (Callinan J).

14. It is submitted accordingly, that the application by Mansfield J in *Brown (FC)* at [49] of a definition of "exclusive possession" (from the dissenting judgement of Kirby J in *Wilson v Anderson*) as "possession exclusive of *all* third parties" (emphasis added) was too absolute and, it is submitted, in error.

15. Outside of the common law context, where the terms "lease" and "exclusive possession" are used in statutory provisions, those terms may be used in a limited sense only. In particular they may be used simply to identify "rights and obligations which subsist only by virtue of the legislation and are unknown at common law"[12]. Such is the case, for example, in the case of the pastoral "leases" considered in *Wik* and the mining "leases" under the *Mining Act 1978* considered in *Ward*.

16. In those instances, the notion of "exclusive possession" may also have a limited meaning. "Exclusive" may be used in the sense that no person other than the leaseholder has the right to carry out the activities that may be carried out by the leaseholder, *albeit* that the leaseholder does not have the general right to exclude others from the land.

17. It is in this sense, and it is submitted, in this sense only, that the majority in *Ward* at [308] referred to "exclusive possession for mining purposes" in the context of leases under the *Mining Act 1978*. The statutory context of the *Mining Act 1978* is such that the term "lease" is used simply to identify those rights and interests that subsist only by virtue of the legislation itself (which, depending upon the circumstances may, or may not, be inconsistent with native title).

18. As submitted below, the rights under the Mt Goldsworthy leases have a different source, and a different character.

The nature of the Mt Goldsworthy leases

A true demise

19. As was recognised by the members of the Full Court[13], the Mt Goldsworthy leases were not leases granted pursuant to the *Mining Act 1904* (the relevant legislation in force at the time of the grant and the predecessor to the *Mining Act* 1978).

20. Rather, the Mt Goldsworthy leases were granted by the State pursuant to contract, and in particular the *Iron Ore (Mount Goldsworthy) Agreement* (***Mount Goldsworthy Agreement***). Importantly, while the *Mount Goldsworthy Agreement* is approved by the *Iron Ore (Mount Goldsworthy) Agreement Act*

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12 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 196 (Gummow J).

13 See Mansfield J at [38] and Greenwood J at [153].

1964, the Agreement itself is not given the force of law, nor is it a statute[14] (*albeit* that certain provisions are given effect "as though" they were included within the Act[15]).

21. The Mt Goldsworthy leases are, therefore, not creatures of statute but, in form and substance, *demises* of the land the subject of the leases at common law.

22. This is reflected in the form of the lease instruments, which provide, for example in Mineral Lease 235SA:

> [WE] DO BY THESE PRESENTS GRANT AND DEMISE unto the JOINT VENTURERS as tenants in common in equal shares subject to the said provisions ALL THAT piece or parcel of land comprised in Mining Area "A" and situated in the PILBARA GOLDFIELD [having an area of approximately 10,235 acres as delineated on the relevant plan] and all those mines, veins, seams, lodes and deposits of iron ore in on or under the said land (hereinafter called "the said mine").

23. Following *Wik*, the use of the term "demise" cannot be *conclusive* evidence of the grant of an estate in land conferring exclusive possession,[16] particularly where the particular instrument is a *sui generis* statutory title such as a pastoral lease. The use of that language, historically associated with the conferral of a right of exclusive possession,[17] is nevertheless *relevant*, particularly where, as in the case of the Mt Goldsworthy leases, the leases are granted over Crown land pursuant to a contract to do so.

24. It is also significant that the demise under the Mt Goldsworthy leases is "of ALL THAT piece or parcel of land"; that is, it is the land itself that is demised (in addition to all those mines, veins, seams, lodes and deposits of iron ore).

25. In this context, it is submitted, the nature of the various mineral leases under the *Mining Act 1904*, and a comparison with mining leases under the *Mining Act 1978*, is instructive.

26. Pursuant to the *Mining Act 1904*, separate statutory regimes, and distinct types of "mineral leases", applied to mining on Crown land and private land respectively. In relation to mining on Crown land, section 48 of the *Mining Act 1904* made specific provision for the lease of Crown land, which included a "demise unto the lessee all that piece or parcel of land"[18] (*in addition to* all those mines, veins, seams, lodes, or deposits of the relevant mineral).

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14 See *Re Michael; Ex parte WMC Resources Ltd* [2003] WASCA 288 at [21] – [26] (Parker J, Templeman and Miller JJ agreeing), applying *Sankey v Whitlam* (1978) 142 CLR 1.

15 See *Iron Ore (Mount Goldsworthy) Agreement Act 1964*, section 4(2); *Mount Goldsworthy Agreement*, clause 3(2).

16 Cf *Western Australia v Ward* (2002) 213 CLR 1 at [482] – [500] (McHugh J).

17 *Wilson v Anderson* (2002) 213 CLR 401 at [21] (Gleeson CJ).

18 *Mining Regulations* under the *Mining Act 1904*, Lease Form 3.

27. By contrast, a mineral lease in relation to private land was made under Part VII (and in particular section 153) of the *Mining Act 1904*. The holder of such leases was subject to various statutory provisions making clear that the relevant rights might not include "exclusive possession" where there was another owner or occupier of the relevant land[19]. In addition, and by way of contrast with leases over Crown land (and the Mt Goldsworthy leases), mineral leases over private land did not include a demise of the land itself but *only* of "all such mines, veins, seams, lodes or deposits of" the relevant mineral at or below a certain surface[20].

28. The distinction between the mineral leases under the *Mining Act 1904* on Crown land and private land, respectively, reflected the reality of the capacity of the Crown to grant "exclusive possession" over the land itself. Where, as in the case of private land, that could not practically occur, the demise was so limited. However, in the case of Crown land, the rights conferred could be, and were, more extensive. The fact of a demise of the *land*, as opposed to simply the "mines, veins, seams, lodes and deposits" of the relevant mineral, reinforces that leases over Crown land (and the Mt Goldsworthy leases) were intended to be a true demise.

29. The *Mining Act 1978* operates differently. While leases may be granted over both Crown land and private land under that Act, the relevant statutory title is the same; namely, a lease granted under section 75. Being applicable to both Crown land and private land (including freehold), such a lease does not include a demise *at all*[21], but rather confers the specific statutory rights that are set out in section 85 of the Act. The expression "lease" in this context is, as submitted above, truly used to identify "rights and obligations which subsist only by virtue of the legislation"[22].

30. Particularly in light of the fact that those mining leases must necessarily be applied to freehold, and other private land, it may be expected that the exclusive rights conferred by such a lease will not necessarily be inconsistent with other rights of use or occupation, including (depending upon their particular incidents) native title rights and interests.

31. By contrast, while the rights conferred on the leaseholder under the Mt Goldsworthy leases expressly include those rights belonging to a lessee of a mineral lease under the *Mining Act 1904*, those rights are conferred by the instrument themselves and not by the Act, and are *in addition to* the rights conferred by the demise of the land. The content (or incidents) of the rights conferred by the Mt Goldsworthy leases must necessarily come from the general

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19 See, for example, *Mining Act 1904*, sections 160 – 163.

20 *Mining Regulations* under the *Mining Act 1904*, Lease Form 4.

21 *Mining Regulations 1981* (WA), regulation 26, form 8.

22 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 196 (Gummow J).

law effect of the demise. There is no other possible source for that content (or those incidents).

32. In this respect, the Mt Goldsworthy leases may be likened to the perpetual leases under the *Western Lands Act 1901* (NSW) considered by the Court in *Wilson v Anderson*. Those leases, while statutory in nature, nevertheless "include the incidents of a lease as provided by the common law"[23], including the right of exclusive possession. The same result, it is submitted, follows in relation to the bespoke leases granted pursuant to the *Mount Goldsworthy Agreement*.

33. The right of exclusive possession, in the sense of the right to exclude, arises by the grant of the Mt Goldsworthy leases themselves. It is not necessary to look to the penal provisions contained in the *Governments Agreement Act 1979* (WA), section 4, which, relevantly serve a different purpose and apply to all land the subject of Government agreements, whether held by titleholders pursuant to particular tenure or not[24].

Term and non-precarious nature of Mt Goldsworthy leases

34. Another feature of the Mt Goldsworthy leases that confirms that their incidents included a right of exclusive possession is their non-precarious nature and their longevity.

35. The "precarious" nature of pastoral leases, which would be determined upon reservation, sale or other disposal by the Crown, was referred to by the majority in *Ward*[25] as a feature relevant to the conclusion that they did not grant a right of exclusive possession. By contrast, in that case, Special Leases granted under section 116 of the *Land Act 1933* (WA), not being so precarious, were held to confer a right of exclusive possession[26].

36. The Mt Goldsworthy leases are even more secure. Indeed, in a number of respects, the rights conferred by those leases are more secure than that of a freehold title.

37. The Mt Goldsworthy leases themselves provide that the lease and any renewal thereof "shall not be determined or forfeited otherwise than under and in accordance with the provisions of" the *Mount Goldsworthy Agreement*. The Agreement itself makes no express provision for forfeiture of the leases. This is to be contrasted with mineral leases under the *Mining Act 1904*, which were

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23 *Wilson v Anderson* (2002) 213 CLR 401 at [19] (Gleeson CJ).

24 See *Western Australia v Ward* (2002) 213 CLR 1 at [182] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

25 See *Western Australia v Ward* (2002) 213 CLR 1 at [180] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

26 See *Western Australia v Ward* (2002) 213 CLR 1 at [355] – [357] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

liable to forfeiture for any non-payment of rent or breach of covenant[27] and Special Leases granted under section 116 of the *Land Act 1933*, which were liable to forfeiture for non-payment of rent or failure to use, hold or enjoy the land for the purpose specified therein[28].

38. By contrast, "determination" of the lease is referred to in the *Mount Goldsworthy Agreement* in clause 10(d) and (l) in the context of determination of the Agreement itself, which in the case of default by the Joint Venturers, may only occur following a reasonable time after notice of the default, and the submission of any dispute as to an alleged default to arbitration[29].

10 39. The security of the Mt Goldsworthy leases, however, goes further. Clause 8(5) of the *Mount Goldsworthy Agreement* conferred on the holders of the Mt Goldsworthy leases, a form of security of tenure denied even to the holder of a freehold title. In particular:

(a) by clause 8(5)(a), under the heading "**Non-interference with Joint Venturers' rights**", the State covenanted that it would not, during the currency of the Agreement, grant any lease or other mining tenement under the *Mining Act 1904* or otherwise any rights to mine or to take the natural resources, unless the Minister reasonably determined that it was not likely to unduly prejudice the operations of the Joint Venturers;

20 (b) by clause 8(5)(b), under the heading "**No resumption**", the State covenanted, *inter alia*, that it would not, during the currency of the Agreement, "resume nor suffer nor permit to be resumed by any State instrumentality or by any local or other authority of the said State ... any of the lands" the subject of leases under the Agreement.

40. These covenants of the State, which have the force of law[30], provide a security of tenure to the holders of the Mt Goldsworthy leases for the indefinite life of the *Mount Goldsworthy Agreement* and the Mt Goldsworthy leases, which are not afforded even to the holders of freehold title. As noted above, pursuant to the *Mining Act 1904*, all land, including freehold, could be the subject of a variety of
30 mining tenements.

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27 *Mining Regulations* under the *Mining Act* 1904, Lease Form 3.

28 *Land Act* 1933 (WA) (Repealed), section 116, schedule 21.

29 There is also provision made in clause 10(1) for a right to determine the Agreement where a Joint Venturer goes into liquidation and its interest is not acquired by the other Joint Venturers. Separate provision is also made for the termination of the Agreement in circumstances in which the Joint Venturers do not apply for mineral leases in respect of area "B" or where production falls to certain levels: clause 11(7).

30 Being two of the provisions given effect "as though" they were included within the *Act: Iron Ore (Mount Goldsworthy) Agreement Act 1964*, section 4(2); *Mount Goldsworthy Agreement*, clause 3(2).

41. Moreover, pursuant to the then existing provisions of the *Public Works Act 1902*[31], the State, any Minister or any local authority was empowered to take land required for the purpose of any public work[32], including land the subject of freehold or leasehold[33].

42. The holders of the Mt Goldsworthy leases, therefore, have an immunity from resumption not generally available to any other titleholder[34].

"Reservations"

43. Justice Greenwood, who found (correctly, it is submitted) that, but for what his Honour described as "reservations" on the leases, in relation to the Mt Goldsworthy leases (*Brown (FC)* at [374]):

> the State conferred on the joint venturers a grant of an estate or interest in the whole of the leased areas of exclusive possession to the exclusion of others as a facilitative grant to enable the iron ore export project and the suite of integrated activities to be undertaken with the time frames contemplated by the Agreement and in a way engaging a commitment by the joint venturers to the substantial activities already described at the minimum levels of significant capital costs recited in the Agreement.

44. The "reservations" relied upon by His Honour for concluding that the Mt Goldsworthy leases "fall short of a grant of exclusive possession" ([412]) included the covenant of "Non Interference" contained in clause 8(5)(a). His Honour reasoned that, although it was "a qualification upon what is otherwise a prohibition upon the State", the clause "does not exclude the possibility of a grant of a claim, lease or mining tenement to a third party" within the Mt Goldsworthy leases (*Brown (FC)* at [408]).

45. His Honour's treatment of clause 8(5)(a) as a "reservation" on the Joint Venturers' title was, with respect, in error. In particular, it fails to recognise that, under the *Mining Act 1904*, statutory rights to mine might be granted over any land, including freehold land. The potential for those grants was not limited by the "no undue prejudice" requirement that appears in clause 8(5)(a).

46. The effect of clause 8(5)(a) was therefore wholly to circumscribe what would otherwise be the potential for the exercise of statutory powers that were

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31 The relevant powers of resumption are now contained Part 9 of the *Land Administration Act 1997* (WA).

32 *Public Works Act 1902* (WA), section 10 (repealed).

33 See, for example, *Public Works Act 1902*, section 23 (repealed).

34 This immunity from resumption is a common feature of other State Agreements, which, in each case, reflects the degree of security of tenure required in relation to projects of the size and duration contemplated by those Agreements: see, for example, *Iron Ore (Mount Newman) Agreement Act 1964*, clause 8(4) of the First Schedule; *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972*, clause 14 of Schedule One.

applicable to all land in the State. It could not properly be described as a reservation.

47. The other "reservation" relied upon by Greenwood J (*Brown (FC)* at [410]) and Mansfield J (*Brown (FC)* at [42] and [60]) was a reservation of "rights of access in and through the leased area", contained in clause 9(2) of the *Mount Goldsworthy Agreement*. Those provisions, relevantly, are:

(a) to allow the public to use roads (to the extent reasonable and practicable to do so) constructed or upgraded under clause 9, provided such use does not unduly prejudice the operations of the Joint Venturers (clause 9(2)(b)); and

(b) to allow the State and third parties to have access over the mineral lease by separate route road or railway, provided such access does not unduly prejudice the operations of the Joint Venturers (clause 9(2)(g)).

48. As to the first item, the public use of roads, this is a reference to roads constructed or upgraded under clause 9 (in particular clause 9(1)(d)). That provision, however, relates to roads "in or over Crown lands or reserves available for the purpose". In context, it is a reference, not to the mineral lease (cf clause 9(1)(a)), but to the roads passing through districts from the mine to the wharf.

49. In relation to the second item, the only access contemplated by clause 9(2)(g) is access *through* the mineral lease by road or railway (see the heading "**Access through mining areas**"). The nature of the access is at best akin to a limited easement. In that sense the "reservation" is not relevantly more extensive than the rights of access considered in *Wilson v Anderson*[35], and in no way detracts from the exclusive possession granted by the lease.

50. Even more fundamentally, however, properly construed clause 9(2)(g) does not create a right of access to third parties *at all*. Clause 9(2)(g) is not a limitation on the title conferred by the Mt Goldsworthy leases and it does not confer a right on third parties. Rather it is, as the opening words of clause 9(2) make clear, a covenant by the Joint Venturers to the State, potentially enforceable by the State as a matter of contract, but creating no enforceable right attaching to the land in any third party.

51. It is significant that while by section 4(2)(b) of the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* certain provisions of the *Mount Goldsworthy Agreement* are given effect "as though" they were included within the *Act*[36], clause 9(2)(g) is **not** one of them. It only operates as a covenant between the parties to the *Mount Goldsworthy Agreement*.

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35 *Wilson v Anderson* (2002) 213 CLR 401 at [21] (Gleeson CJ), at [114] – [118] (Gaudron, Gummow and Hayne JJ) and at [203] (Callinan J).

36 *Iron Ore (Mount Goldsworthy) Agreement Act* 1964, section 4(2); *Mount Goldsworthy Agreement*, clause 3(2).

52. This may be contrasted with the "reservations" in pastoral leases discussed in *Ward*, some of which are referred to by Greenwood J in *Brown (FC)* at [410]. Those reservations, which permitted entry for "many different circumstances and for many different purposes", were rights referred to in the leases themselves[37] and therefore "carved out" of the interest obtained by the holder or, in some cases, rights conferred on third parties by statute[38].

53. The limited contractual covenant to permit access, it is submitted, confirms, rather than detracts from Greenwood J's otherwise correct conclusion that the Mt Goldsworthy leases conferred a right of exclusive possession[39].

The rights conferred by the Mt Goldsworthy leases extend to all of the land the subject of the leases

54. Related to the conclusions of Greenwood J and Mansfield J in relation to the "reservations" in clause 9 is the conclusion, reached by Mansfield J in the Full Court (*Brown (FC)* at [59]) and Bennett J at first instance (*Brown (No. 2)* at [183]), that "while it was the intention that the second respondents could decide where in the leased area they would locate mines and associated infrastructure, it could not have been the intention that they would exert their rights over the whole of the leased area". This was said to be "borne out" by the fact that only one third of the leased area has, so far, been the subject of the exercise of those rights (*Brown (No. 2)* at [183]).

55. This focus by their Honours on the *exercise* of the Second Respondents' rights, and the intention in that regard, was such, it is submitted, to lead their Honours into error. That error in approach is, it is submitted, ultimately the result of a confusion between rights, on one hand, and the circumstances of their exercise, on the other, that is found in the Full Court decision in *De Rose (No. 2)*[40].

56. *De Rose (No. 2)* dealt with the effect upon native title of improvements constructed, as of right, by the holders of pastoral leases, which the Court had earlier concluded did not extinguish all native title[41]. Having concluded that the right to construct, for example, a dwelling house, when exercised, was inconsistent with native title rights and interests, the Court in that case concluded (at [155]):

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37 *Western Australia v Ward* (2002) 213 CLR 1 at [178] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

38 *Western Australia v Ward* (2002) 213 CLR 1 at [406] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

39 *Goldsworthy Mining Ltd v Commissioner of Taxation* (1973) 128 CLR 199 at 212 – 213 (Mason J).

40 *De Rose v South Australia (No 2)* (2005) 145 FCR 290.

41 In *De Rose v South Australia* (2003) 133 FCR 325.

> Each lease in the present case granted the lessee the right to erect improvements on the leasehold land. From the outset, this right was potentially inconsistent, to a greater or lesser extent, with native title rights and interests in respect of the land. For example, when the right to construct a dwelling house on part of the land was exercised, the right was necessarily inconsistent with all native title rights and interests in respect of the land on which the dwelling house was constructed. However, it was only after the construction of the dwelling house that the precise area of land affected by the lessees' right to construct a dwelling house could be ascertained.

10 57. As the Court in *De Rose (No. 2)* was bound by the rejection of the majority in *Ward* of the notion of "operational inconsistency"[42], it was compelled to find that the *grant* of the leases operated to effect the relevant extinguishment, notwithstanding that it was the *exercise of* the right that enabled the location of that extinguishment to be ascertained.

58. A similar approach is reflected in Mansfield J and Bennett J's analysis of the Mt Goldsworthy leases. In that regard, their Honours' conclusions as to the intention of whether the rights might be exercised by the leaseholders, led directly to the conclusion that the Mt Goldsworthy leases did not confer a right of exclusive possession[43].

20 59. This approach, and the approach of the Full Court in *De Rose (No. 2)*, it is submitted, is inconsistent with the fundamental principle, established *inter alia* by *Ward*, that extinguishment of native title rights by grants to third parties occurs by reason of the inconsistency of the *rights* and that activities carried out in the exercise of those rights are only relevant to focus attention upon the *right* pursuant to which the land is used[44]. The notion, from *De Rose (No. 2)*, of "potential inconsistency", realisable upon exercise, is, it is submitted, logically indistinguishable from the notion of "operational inconsistency" rejected in *Ward*[45].

60. Justice Mansfield and Bennett J's focus on the "intention" as to whether, and
30 over how much of the land, the leaseholders would exercise their rights, also, it is submitted, suffers, with respect, from the misunderstanding in relation to "intention" identified by the majority in *Ward* at [78]. The majority there made clear that the subjective thought processes of those whose acts are alleged to have extinguished native title are irrelevant and that, in the case of grants to third parties, the only enquiry is as to the inconsistency of the rights.

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42 *Western Australia v Ward* (2002) 213 CLR 1 at [394] and [468] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

43 *Brown (FC)* at [60] (Mansfield J) and *Brown (No 2)* at [184] (Bennett J).

44 *Western Australia v Ward* (2002) 213 CLR 1 at [78] – [79] and [149] – [151] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

45 Save for those circumstances where it may properly be concluded that there is no "right" in existence until the satisfaction of some condition precedent or subsequent: see *Ward* at [150].

61. In relation to the Mt Goldsworthy leases, the relevant question is: "what rights do the leases create?"; not "where might the leaseholders be expected to exercise those rights?". Having regard to the leases themselves the answer the relevant question can only be: "ALL THAT piece or parcel of land ... and all those mines, veins, seams, lodes and deposits of iron ore in on or under the said land".

62. In any event, there is no basis, from the *Mount Goldsworthy Agreement* or the Mt Goldsworthy leases, for their Honours' conclusion that "it was not the intention that [the leaseholders] would exert their rights over the whole of the leased area". On the contrary, the Mt Goldsworthy leases are, subject to compliance with their terms, able to be renewed, for successive 21 year terms, indefinitely. The very nature and scale of the *Mount Goldsworthy Agreement* – including the unusual security of tenure referred to above – leads rather to a construction of the Mt Goldsworthy leases whereby potentially *all* of the area covered by them could be the subject of mining or associated infrastructure, including towns and industry.

63. For the above reasons, it is submitted, the Mt Goldsworthy leases granted a right of exclusive possession on the holders of the leases. The Full Court was, respectfully, in error in holding otherwise.

ISSUE 2: INCONSISTENCY OF INCIDENTS?

64. Regardless of the precise characterisation of the rights conferred by the Mt Goldsworthy leases as "exclusive possession" or otherwise, comparison of those rights with the native title rights of the First Respondents reveals that those native title rights could not be exercised without abrogating the rights of the leaseholders, and *vice versa*[46].

65. Inconsistency of incidents in this sense, relevantly, may take two forms.

66. First, one right (e.g. the right pursuant to a grant) may be such that its exercise directly prohibits the exercise of the other (e.g. relevant native title right). The clearest example of such a case is the right of the grant-holder to exclude the native title holder from the land the subject of the grant (as in the case of freehold[47]). In the same way, a native title right to control access would prevent the exercise of *any* permission or right of access pursuant to a third party grant and, for that reason, would be extinguished[48].

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[46] *Akiba v Commonwealth* (2013) 300 ALR 1 at [31] (French CJ and Crennan J), citing Gummow J in *Wik Peoples v Queensland* at 185.

[47] See *Fejo v Northern Territory* (1998) 195 CLR 96 at [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[48] *Western Australia v Ward* (2002) 213 CLR 1 at [192] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

67. Secondly, the inconsistency may be less direct. This occurs where the exercise of one right, while not prohibiting the exercise of the other, would be such as to render, in a practical way, the other right wholly incapable of exercise. Such an approach can be seen in the discussion, in *Ward* at [194], of the effect of pastoral leases:

> For example, the native title right to hunt or gather traditional food on the land would not be inconsistent with the rights of the pastoral leaseholder although ... the rights of the pastoral leaseholder would "prevail over" the native title rights and interests in question. On the other hand, for the native title holders to burn off the land probably would have been inconsistent with the rights granted to the pastoral leaseholder, so as to bring about extinguishment ...

68. In the latter example in this passage, it is the practical effect of the exercise of a right "to burn off the land" as rendering incapable the use of the land for pastoral purposes which brings about the relevant extinguishment of the native title right. It is the right to transform the nature of the land in a manner inconsistent with the effective exercise of the competing right that is inconsistent with that right in the relevant sense and which brings about the extinguishment.

69. As this example illustrates, while there is no such thing as "degrees of inconsistency" (i.e. "Two rights are inconsistent or they are not"[49]), there may nevertheless be questions of degree, in a particular case, in determining whether the competing rights are indeed inconsistent, including the extent of the impact that the exercise of one right might have on the other. This explains, for example, why a right to hunt and gather traditional food on a pastoral lease may be consistent with a right to run cattle over the same area of land (notwithstanding that the competing rights might not be able to be exercised on precisely the same portion of land at the same time).

70. A comparison of the relevant rights in the present case, it is submitted, reveals inconsistency in both senses identified above.

71. First, even were the contractual covenant to permit access through the Mt Goldsworthy leases in clause 9(2)(g) of the *Mount Goldsworthy Agreement* such as to deny the Mt Goldsworthy leases the characterisation "exclusive possession", access under that covenant is not such as to contemplate or allow the exercise of the relevant native title rights. That is, the relevant covenant requires the leaseholders to allow access through the mineral lease by road or railway (and even then only to the extent that it does not unduly prejudice or interfere with their operations). The leaseholders' control over the land is otherwise unconfined.

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[49] *Western Australia v Ward* (2002) 213 CLR 1 at [82] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

72. In those circumstances the leaseholders are not required to allow any person to camp on the land, to take flora, fauna, fish, water and other resources from the land or to otherwise conduct activities on the land. Insofar as a person may have otherwise had a native title right to do those things (as the First Respondents are agreed to have had), that right is inconsistent with the leaseholders' right to control access.

73. Secondly, the activities able to be conducted, as of right, on the Mt Goldsworthy leases by the leaseholders are so comprehensive that their exercise would abrogate all of the native title rights and interests and render them incapable of performance.

74. This was the conclusion of Bennett J, at first instance, and Mansfield and Greenwood JJ in the Full Court. Bennett J, for example, in *Brown (No 2)* at [202] concluded:

> It is not a question of possible co-existence as may be the case with a pastoral lease when comparing the right to hunt and the right to graze cattle, or the right to camp and the right to construct yards to contain stock, or the right to drive down a road. The work carried out on the Leases, accepted as lawful and within the rights granted under the Leases, assists in demonstrating the extent of those granted rights. It is, for example, inconceivable how the Joint Venturers' rights to excavate an open pit mine which has so dramatically changed the landscape, and to control access to the mining area, are consistent with the native holders having a right to camp, take flora and fauna, or engage in ritual and ceremony on the mining area.

75. Justice Mansfield agreed with this finding in *Brown (FC)* at [83]. In so concluding, it is submitted, their Honours were correct. The error, with respect, in their Honours' approach, on this point, was, in reliance upon *De Rose (No. 2)*, to then confine the extinguishing effect of those rights to those places where the rights had in fact been exercised, as opposed to where the rights existed.

76. Greenwood J, with respect, did not fall into the same error, holding correctly, in *Brown (FC)* at [424]:

> Having regard to the rights granted to the joint venturers in relation to the land in the context of the Agreement, the purposes of the Agreement, the way in which the leases are framed and the 1964 Act giving legislative force to the arrangements, it seems to me that each of the determined native title rights and interests set out at [107] of these reasons is necessarily inconsistent with those rights granted to the joint venturers over the *whole* of the land, subject to what follows.

77. It was the qualification which followed in Greenwood J's approach which, it is submitted, was erroneous. In that regard his Honour concluded that, while inconsistent, the existence of the rights may only exist temporarily, as the leases may come to an end or be surrendered (at [426]) and so would not be inconsistent for all time.

78. This approach, with respect, is contrary to the principles established by this Court. It would potentially deny the extinguishing effect of *any* interest in land or right in relation to land that was of limited duration, including Special Leases, pastoral leases and general mining leases, all of which have been held to result in at least partial extinguishment of native title rights and interests. His Honour's approach, if correct, would result, in substance, in the revival of native title at common law, a concept rejected by the Court in *Fejo v Northern Territory*[50].

79. Justice Greenwood's conclusion, in this regard, it is submitted, follows from a misreading of the discussion by the majority of leases under the *Mining Act 1978* in *Ward* at [308]. The temporal limitation of the prevailing (or preventing) effect of certain statutory rights discussed in that passage by their Honours was concerned (and only concerned) with rights that were **not** inconsistent with native title rights. The passage simply involved the recognition that, even in relation to rights that are not inconsistent with native title rights, there may nevertheless be circumstances where the former right prevails over the other (for a time).

80. The passage is not, however, authority for the proposition that where the competing rights **are** inconsistent that they might lose their extinguishing effect because they are limited in time.

81. This is made clear in *Ward* at [308] where their Honours conclude that "[t]hat is not to say, however, that the grant of a mining lease is *necessarily* inconsistent with all native title" (emphasis added). Of course, in a particular case the rights conferred by a mining lease, when compared with the relevant native title rights, may well be inconsistent with the native title rights in the relevant sense. In *Ward*, due to the generality of the determination, it was not possible to undertake that comparison.

82. In any event, as is apparent from the terms of the Mt Goldsworthy leases, and the activities carried on as of right pursuant to them, the rights conferred by the Mt Goldsworthy leases go well beyond statutory rights to mine. Rather, those rights were, and are, such as to authorise the "transformation of the landscape" both by the extent of the mining operations and the establishment of the entirety of the infrastructure associated with a regional Australian town.

PART VII: ESTIMATE OF TIME

83. It is estimated that 1.5 hours will be required for the presentation of the Second Respondents' oral argument.

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[50] *Fejo v Northern Territory* (1998) 195 CLR 96 at [58] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

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10

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