Miriuwung and Gajerrong — High Court appeal

Western Australia v Ward [2002] HCA 28

Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 8 August 2002

Issues and background

The following summary of some of the major points arising out of this decision is drawn from the joint judgment of Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne. The fifth member of the majority, Justice Kirby, concurred generally with their Honours' decision but, in separate reasons for judgment, went on to record some reservations about their findings in relation to the recognition of native title rights and interests and extinguishment. This summary does not include any reference to either Kirby J's comments or to the findings of Justices McHugh and Callinan. Further, owing to the length of the decision and the short time frame for publication, what follows is an indication of the outcome on some major points.

The outcome

By a 5:2 majority, the High Court:

- upheld all four appeals (one each by State of Western Australia, the Northern Territory Government, the Miriuwung and Gajerrong people from Western Australia and the Miriuwung groups in the Northern Territory); and
- set aside:
    - most of the orders made by the majority of the Full Court, including the order made on 3 March 2000 setting aside His Honour Justice Lee's determination at first instance;
    - the whole of the native title determination made by the majority of the Full Federal Court on 11 May 2000—see [469].

The effect of the orders appears to be that Justice Lee's original determination is now on foot, subject to the matters finally determined by the majority of the High Court, until the remaining matters are finalised by the Full Court of the Federal Court and a further approved determination of native title is settled—see ss. 13(3), 13(6), 13(7), 68 and 225 of the *Native Title Act 1993* (Cwlth) (NTA). The remittal proceedings are listed for hearing before Justices Beaumont, von Doussa and North on 10 February 2003.

Federal Court should have applied the law at the time of the appeal

The reason for upholding all of the appeals was that the Full Federal Court did not apply the new Act and the associated State and Territory legislation as required. In particular, Gleeson CJ, Gaudron, Gummow and Hayne JJ found that:

- the Full Court, when hearing an appeal, must apply the law as it exists at the time of hearing i.e. the amended NTA and the relevant State and Territory native title legislation;
- the Full Court erred in concluding that it could not take into account changes to Western Australian and Northern Territory native title legislation that became effective prior to the hearing of the appeal;
- the High Court could not make a final decision about the operation of those laws on all the matters raised in the appeals because there had been no finding of certain relevant facts in the Court below. Where, as in this case, the intermediate appellate court has not fully dealt with the case, the High Court generally remits the matter to that appellate court to complete the hearing and determine the appeal to it—at [71] to [72].

The matters remitted to the Full Court of the Federal Court for further consideration include:

- the final determination of the effect of the grant of pastoral leases in Western Australia and the Northern Territory;
- the final determination of the effect of the grant of a mining lease under the *Mining Act 1978* (WA) on native title; and
- determination of the effect of various historical dealings over parts of the Ord irrigation project buffer zone, an area that appears to be currently unallocated Crown land (UCL).

Bundle of rights and partial extinguishment

It was held that:

- it is a mistake to take the view that the term 'native title rights and interests' as used in the NTA refers to a single set of rights analogous to an estate in fee simple;
- the NTA, in allowing for either complete extinguishment or extinguishment only to the extent of any inconsistency with non-native title rights, treats native title as a bundle of rights and allows for it to be partially extinguished, e.g. s. 23G(1)(b)(i);
- native title rights and interests that are inconsistent with other, non-native title rights and interests will be permanently extinguished to the extent of the inconsistency and no question of suspension of native title arises unless the NTA otherwise provides. (The non-extinguishment principle, as defined in s. 238, is an example of where the NTA 'otherwise provides'. For applications of this principle, see the provisions in relation to the effect of category C and D past acts in ss. 15(1)(d) and 47, 47A and 47B. The last three sections of the NTA also provide that any prior extinguishment over the area concerned must be ignored for all purposes under the NTA);
- there are no degrees of inconsistency of rights required (e.g. total, fundamental or absolute inconsistency);
- any two rights are either inconsistent or they are not and this is an objective test that requires the identification of, and a comparison between, the two sets of rights (i.e. native title and non-native title);
- The basic inquiry is about inconsistency of rights, not inconsistency of use;
- evidence of use of the land may be relevant where it suggests or demonstrates that inconsistent rights have been created or asserted—at [78], [82] and [215].

Definition of native title under the NTA

Their Honours found that:

- satisfying the definition of native title in s. 223(1) involves two inquiries: one into the rights and interests possessed under traditional laws and customs under s. 223(1)(a); and the other, for connection with land or waters by those laws and customs under s. 223(1)(b);
- the requirement of s. 223(1)(a) gives rise to a question of fact, which is answered by identifying: – the laws and customs said to be traditional laws and customs; – the particular rights and interests in relation to land or waters that are possessed under those laws or customs;
- the evidence used to establish connection as required by s. 223(1)(b) may also be relevant for the purposes of paragraph (a) i.e. a connection with the land or waters 'by those laws and customs';
- the statutory definition indicates that it is from the traditional laws and customs that native title rights and interests derive, not the common law;
- as required by s. 223(1)(c), the native title rights and interests must be capable of being recognised by the common law of Australia—see at [18] and [20] to [21].

Comments on requirements for a determination that native title exists

There are a number of comments in the joint judgment that indicate that a higher degree of specificity than has been seen to date is required where anything less than the right to possession, occupation, use and enjoyment as against the whole world (exclusive possession) is recognised in a determination of native title. The relevant comments include the following:

- while acknowledging that it is difficult to express a relationship between a community or group of Indigenous Australians and their country in terms of rights and interests, the judges were of the view that this is what the NTA requires i.e. that the spiritual or religious is translated into the legal;
- using general terms in a determination, such as recognising a non-exclusive right to use and enjoy the area, makes it more difficult to make specific findings in relation to extinguishment, particularly where native title may be partially extinguished;
- without the right, as against the whole world, to possession of land, it is doubtful that there is any right to control access to land or make binding decisions about the use to which it is put;
- where exclusive possession is not found, it is preferable to express the rights by reference to the activities that may be conducted, as of right, on or in relation to the land or waters e.g. hunting, fishing etc.;
- where native title rights and interests do not amount to a right, as against the whole world, to possession, occupation, use and enjoyment of the determination area, it will seldom be appropriate, or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms;
- the court must identify the nature and location of the intersection of traditional laws and customs with the common law;

- this requires careful attention to the content of traditional law and custom and to the way in which rights and interests existing under that regime find reflection in the statutory and common law;
- the expression 'possession, occupation, use and enjoyment to the exclusion of all others' is a composite expression;
- breaking it into its constituent elements (e.g. use, occupation or possession as separate rights) is apt to mislead;
- the relevant task is to identify how rights and interests possessed under traditional law and custom can properly find expression in common law terms—at [14], [29], [51] to [52], [86], [89] and [94].

Their Honours seem to indicate that, in relation to proving native title rights to natural resources (leaving aside the question of those covered by the mining and petroleum legislation), evidence was required to show traditional law and custom relating to, or traditional use of, those resources—at [382].

Both these comments and those made with respect to the definition of native title in s. 223 are likely to impact upon the application of various aspects of the registration test (e.g. s. 190B(5, which deals with sufficient factual basis, s. 190B(6), which deals with the rights that can be registered) and on the form of a consent determination. These, and other potential impacts on the Tribunal's work, are under consideration.

Limits on recognition and protection of cultural knowledge under the NTA
In the joint judgment, their Honours took the view that what was asserted in this case was something approaching an incorporeal right akin to a new species of intellectual property to be recognised by the common law, a right that would extend beyond denial or control of access to land held under native title—at [59].

After noting that the term 'cultural knowledge' had not been given any specific content at trial, their Honours opined that it appeared to involve, for example, the restraint of visual or auditory reproductions of what is found or takes place at various places in the claim area (e.g. photographs or video recordings of artwork or ceremonies). This was found to be a 'fatal' difficulty because the scope of the right claimed did not come within the scope of s. 223(1)(b), i.e. it 'went beyond denial or control of access to land held under native title'—at [58] to [60].

It was noted that aspects of the cultural knowledge of Indigenous Australians may be protected by other laws e.g. those relating to confidential information, copyright, fiduciary duty and moral rights—at [61].

Connection
It was found that:
- the definition of native title found in s. 223 of the NTA is not directed to how Aboriginal peoples use or occupy land or waters;
- what is required is consideration of whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a connection with the land or waters;

- there may be cases where the way in which land or waters are used will reveal something about the kind of connection that exists under traditional law or custom between Indigenous Australians and the land or waters concerned;
- however, the absence of evidence of some recent use of the land or waters does not, of itself, require the conclusion that there can be no relevant connection—at [64].

As a result of the way in which the question on this point was put to the High Court, it was not necessary for the judges to express any view on the nature of the connection that must be shown to exist. In particular, the Court expressed no view on whether a spiritual connection alone (i.e. any form of asserted connection without evidence of continuing use or physical presence) would suffice—at [64].

Confirmation and validation

Under the NTA, acts (such as the grant of a mining tenement) are either valid or validated. Where invalid acts fall within the definitions set out in past or intermediate period act provisions of the NTA and they are attributable to the Commonwealth, they are validated under the NTA. Generally speaking, invalid acts attributable to states and territories that fall into those same categories are validated by relevant state or territory native title legislation, in this case, the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA) (as it was by the time of the High Court hearing) and *Validation (Native Title) Act 1994* (NT).

Affected native title holders may have a right to compensation, even where the act in question was always valid. This is, for the most part, dependent upon when the act in question was done and, in some cases, the effect of the application of certain provisions of the *Racial Discrimination Act 1975* (Cwlth) (RDA).

The 1998 amendments to the NTA introduced the confirmation of extinguishment provisions, which prescribe the effect of acts defined as either previous exclusive possession acts (PEPAs) or previous non-exclusive possession acts (PNEPAs). These acts have to be either valid or validated. This means they were either:

- valid at the time they were done, whether before or after the commencement of the RDA. An example of the latter is a valid future act. (The findings in the joint judgment at [253] in relation to the effect of the vesting of a Crown reserve provide a further example. For the definition of 'valid', see s. 253); or
- invalid to some extent because of the existence of native title at the time but validated either under the NTA and equivalent State and Territory provisions (as past or intermediate period acts) or under a registered Indigenous Land Use Agreement. (For example, in relation to past acts, see ss. 14, s. 19 and ss. 228 to 232 of the NTA.)

If an act is validated by the NTA provisions (and, in relation to acts attributable to a state or territory, the relevant state or territory legislation), then the affected native title holders have a compensation entitlement that arises under the NTA.

If the act in question was always valid, then no compensation entitlement arises under NTA. However, where the act was done after the RDA commenced on 31 October 1975, those affected may have an entitlement to compensation that arises because of the effect of the RDA (see, for example, the findings noted below in relation to the vesting of Crown reserves at [253]). Native title holders may also have a right to compensation that arises under state or territory legislation—see, for example, the comments at [316] to [319] in relation to *Mining Act 1978* (WA).

The application of the RDA

After noting that, in accordance with earlier High Court authority, native title cannot be treated differently from other forms of title because native title has different characteristics from those other forms of title and derives from a different source, the judges went on to consider s. 9 and s. 10 of the RDA—see [122]ff.

Gleeson CJ, Gaudron, Gummow and Hayne JJ came to the conclusion that s. 9 did not apply to the matters before them (see [100] to [103]) and that:

> The appropriate provision is ... in s10(1)... [which is directed at]... the *enjoyment* of rights by some but not by others or to a more limited extent by others; [or where] there is an unequal enjoyment of rights that are or should be conferred irrespective of race, colour or national or ethnic origin—at [105], emphasis in original.

Their Honours relied upon the decision of Mason J in *Gerhardy v Brown* (1985) 159 CLR 70 at 98 to 99 to find that s. 10(1) operates in two ways, depending on whether the State legislation under consideration:

- merely omits to make enjoyment of the right in question universal e.g. by failing to provide that persons of a particular race were entitled to compensation for the loss of their rights when people of another race were so entitled (scenario 1); or
- prohibits or forbids persons of a particular race from enjoying a human right or fundamental freedom that is enjoyed by persons of another race or deprives persons of a particular race of a right or freedom previously enjoyed by all regardless of race (scenario 2)—at [107] to [108].

In cases where scenario 1 applies, the relevant State law is unaffected but the RDA confers a complementary right to that created by the State law upon the persons deprived of it by that law—at [106].

For an example of the application of this scenario, see the findings at [253] in relation to the vesting of certain Crown reserves under the Land Act 1933 (WA). It was found that the act of vesting was valid, and the empowering legislation was fully operative, but that s. 10 of the RDA gave the affected native title holders a compensation entitlement equal to that available to non-native title holders. That entitlement, although arising under the RDA, must be dealt with under NTA—see s. 45 of the NTA.

If scenario 2 applies, then s. 10 of the RDA confers the right prohibited by the State law in question on the persons of that race so that they enjoy the human right or fundamental freedom on an equal footing with the persons of the other race. The

second scenario 'necessarily results in an inconsistency between s.10 and the prohibition contained in the State law' and, by virtue of s. 109 of the Commonwealth Constitution, the State law is inoperative to the extent of that inconsistency—at [107] to [108].

In relation to the Northern Territory, after considering the Constitutional arrangements, the judges concluded that s.10 of the RDA continues to speak in respect of Territory laws—at [127] to [133].

Pastoral leases

Valid or validated pastoral leases granted in Western Australia and the Northern Territory on or before 23 December 1996 are previous non-exclusive possession acts as defined under s. 23F of the NTA—at [187] to [190] and [419] to [424] respectively.

The grant of a pastoral lease is not necessarily inconsistent with the continued existence of all native title rights and interests—at [194] and [417].

Any native title rights and interests that are inconsistent with the pastoral lessee's rights are extinguished by the grant under s. 23G(1)(b)(i), rather than suspended under s. 23G(1)(b)(ii), unless the NTA provides that the non-extinguishment principle applies i.e. as in the case of a category D past act. Such extinguishment is confirmed under the provisions of the relevant State or Territory native title legislation, equivalent to s. 23G(1)(b)(i) of the NTA — see [192], [418], [422] and [423].

It appears that their Honours found that the grant of a pastoral lease was inconsistent with native title rights to control: access to the land; the use made of the land. It was also noted that a native title right to burn country might be inconsistent with the pastoralist's rights. If so, it will be extinguished. On the other hand, they were of the view that 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 them—at [192], [194] and [422].

Apart from the right to control access to and use of the land, 'many other native title rights to use the land the subject of the pastoral leases probably continued unaffected'—at [194].

To the extent that the lessee's rights and interests are not inconsistent with native title rights and interests, they prevail over the native title rights and interests but do not extinguish them—at [425].

The leases in question, with one exception, were all granted before the RDA commenced. Therefore, all were valid when granted and the past act provisions had no application. The lease granted after the RDA was not on foot on 1 January 1994, as required in order to be a category A past act. If it was invalid to any extent when granted, the judges noted that it had been validated as a category D past act—see at [418] and [422].

The Federal Court may, when it reconsiders this issue, find that other native title rights and interests are inconsistent with the lessee's rights. Therefore, the High Court's findings are not yet definitive of the effect of the grant of a pastoral lease in Western Australia or the Northern Territory on native title.

Effect of inclusion of a reservation in favour of Aboriginal people

The reservations in favour of Aboriginal people to which the pastoral leases in question were subject did not define or confine the rights that native title holders could exercise in relation to the lease area. The grant of the lease did not give the pastoralist the right to exclude native title holders from the land. Such reservations are directed at giving rights of access for other Aboriginal people (although, of course, native title holders are also entitled to the benefit of the reservation)—see, for example, at [184] to [187] and [417].

The absence of a reservation in favour of Aboriginal people is not necessarily fatal to the survival of native title but the inclusion of such a reservation may be relevant in determining whether or not the lease in question confers a right of exclusive possession—at [186] and [414] to [415].

Enclosure (e.g. by fencing) or improvement of parts of a Western Australian pastoral lease did not totally extinguish native title or limit native title rights and interests to those found in the reservation or prevent native title holders from entering those areas and exercising their native title rights over those areas—at [186].

Minerals and petroleum

Even if the native title claimants had given evidence to establish rights to these resources (it was said they had not), it was found that those rights would have been extinguished by provisions of the WA and NT legislative regimes that vested property in those resources in the Crown—at [383].

The vesting of property in minerals and petroleum in the Crown under the legislative regime was not like the vesting of property in the fauna in the Crown under the legislation considered in *Yanner v Eaton* (1999) 201 CLR 351; [1999] HCA 53 (*Yanner*) because:

> The vesting of property in minerals [and petroleum] was no mere fiction expressing the importance of the power to preserve and exploit these resources [as was found in *Yanner*]...Vesting of property and [sic] minerals was the conversion of the radical title to land which was taken at sovereignty to full dominion over the substances in question no matter whether the substances were on or under alienated or unalienated land [i.e. it vested full beneficial ownership of the minerals and petroleum in the Crown]—at [384].

Mining and general purposes leases in WA

The grant of a mining lease or a general purpose lease under the Mining Act 1978 (WA) was not necessarily inconsistent with the continued existence of all native title rights and interests—at [296], [308] and [340].

The grant of a mining or general purpose lease would extinguish any native title rights and interests that were inconsistent with the lessee's rights unless the NTA provides otherwise—at [341]

The grant of a mining or general purpose lease under the Western Australian legislation was inconsistent with native title rights to control:

- access to the land;
- the use made of the land—at [309] and [341].

If the lease was granted after the commencement of the RDA, the judges were of the view that the grant was not invalid to any extent because of the existence of native title. In their view, the affected native title holders either had a right to compensation under the WA Mining Act or the effect of the application of s. 10 of the RDA was in accordance with scenario 1 i.e. s. 10 applied to give the affected native title holders a compensation entitlement rather than to invalidate the grant of the lease—at [321] and [342].

In either case, the grant of a mining or general purpose lease in Western Australia after the commencement of the RDA is not a category C past act and so the non-extinguishment principle does not apply. Therefore, inconsistent rights will be permanently extinguished rather than suspended for the duration of the lease as they would have been if the non-extinguishment principle applied—at [321] and [342].

As the Court could not identify any further native title rights and interests that were inconsistent because of the lack of specificity of the determination by the Full Federal Court, the question of whether there were any other inconsistent rights was remitted to the Federal Court. The judges commented that the use of the land for mining purposes may prevent the exercise of some native title rights over parts or even the whole of the lease—at [308] and [341].

As with pastoral leases, the Federal Court may, when it reconsiders this issue, find that other native title rights are inconsistent with the rights granted under the lease. Therefore, the High Court's findings are not yet definitive of the effect of the grant of a mining or general purpose lease in Western Australia on native title.

Argyle diamond mine lease

The judges were unable to determine the precise extinguishing effect of the grant of the Argyle mining lease. The part of the lease included in the claim was an area where native title was found to be extinguished for other reasons i.e. because it was a reserve vested under s. 33 of the *Land Act 1933* (WA) as discussed below—at [335].

The judges appear to accept that any native title to a 'designated area' was extinguished. Areas gazetted as such are subject to strict control for security reasons. There is no indication of how much of the lease area has been gazetted as a 'designated area' but it appears that native title is wholly extinguished over any such area—at [328].

Perpetual leases over Keep River National Park and leases to the Conservation Land Corporation in the Northern Territory
For various reasons, a special purpose and a conditional purchase lease granted after the RDA commenced were both found to be category D past acts to which the non-extinguishment principle applies—at [448].

Neither grant was a previous exclusive possession act (PEPA) because s. 23B(9A) and the territory equivalent expressly state that acts done for the purposes of preserving the natural environment are not PEPAs—at [453].

Fishing rights
If the evidence otherwise established that the claimants had, under traditional law and custom, an exclusive right to fish in tidal waters, that exclusivity was found to have been extinguished because it was fundamentally inconsistency with public rights of navigation over and fishing in those waters—at [386], referring to *Commonwealth v Yarmirr* (2001) 208 CLR 1; [2001] HCA 56 at [96] to [98].

Resumptions
In the 1960s and early 1970s, part of the area claimed in WA was resumed under s. 109 of the *Land Act 1933* (WA). In 1972 and 1975, additional lands were compulsorily acquired pursuant to the *Public Works Act 1902* (WA) and the *Rights in Water and Irrigation Act 1914* (WA).

It was found that:
- whether or not the act of resuming land extinguishes native title will depend on the effect of the resumption as set out in the Act under which it takes place;
- a resumption under s. 18 of the Public Works Act or s. 3 of the Rights in Water and Irrigation Act results in the vesting of an estate in fee simple in the Crown, thereby wholly extinguishing native title;
- resuming land under the Public Works Act after the commencement of the RDA was not an act that was invalid to any extent because of the existence of native title because native title and non-native title rights and interests were treated equally under the Public Works Act;
- The resumption under consideration was confirmed as extinguishing under the PEPA provisions;
- those whose native title was extinguished may have a right to compensation under the RDA (but it was noted, *obiter*, that unregistered non-native title interest holders are not entitled to compensation under the Public Works Act);
- resumption under s. 109 of the *Land Act 1933* (WA) 'did not give the Crown any larger title than the radical title acquired at sovereignty'—at [204], [208] and [278] to [280].

Creation of reserves
It was found that:
- reservation for a public purpose was inconsistent with any native title rights to decide how the land can be used and extinguishes that right but is not necessarily inconsistent with the native title holders continuing to use the land in whatever

way they had, according to their law and custom, been entitled to use it before it was reserved
- the designation of land as a reserve for certain purposes under Western Australian legislation does not, without more, create any right in the public or any section of the public that extinguishes native title rights and interests;
- where a reserve was created after the commencement of the RDA, it was a category D past act, to which the non-extinguishment principle applies—at [219], [221] and [223].

Vesting of reserve land under s. 33 of the *Land Act 1933*(WA)

It was found that the vesting of a reserve under s. 33 of the *Land Act 1933* (WA) (Land Act) created a public trust which vested the legal estate in fee simple in the person or body the land is vested in e.g. the shire—at [235] to [241].

Placing of a reserve under the control or management of a board of management under s. 34 of the Land Act does not have the same effect—at [239].

In this case, several reserves, including Mirima National Park, were vested under s. 33 in the National Parks and Nature Conservation Authority (NPNCA). Others were vested in the relevant shire, various state ministers and other agencies.

If the reserve was vested under s. 33 before the commencement of the RDA, then all native title is extinguished unless the NTA provides otherwise, the act of vesting was always valid and no right to compensation arises — at [249].

If a reserve was vested under s. 33 of the Land Act after the RDA commenced, the act of vesting was not invalid to any extent because of the existence of native title (i.e. it is not a past act) but the native title holders would have a right to compensation under the RDA—at [250] to [254].

The vesting of a reserve in the NPNCA was not previous exclusive possession act because s. 23B(9A) expressly states that acts done for the purposes of preserving the natural environment, such as those under consideration, were not PEPAs—at [258].

In the case of a reserve vested in the Crown or a statutory authority (apparently including, in this case, the local Shire), the act of vesting was confirmed as extinguishing under the PEPA provisions—at [259] to [261].

The Tribunal is currently making inquires to find out how many areas of reserved land in WA are vested under s. 33 of the Land Act. Note also that, although not considered by the court in this matter, s. 47, s. 47A or 47B may, in some circumstances, apply to areas currently or formally vested under s. 33, in which case all prior extinguishment must be ignored for all purposes under the NTA and the non-extinguishment principle applies.

Lease of a reserve under s. 32 of the *Land Act 1933* (WA)

Section 32 of the Land Act authorised the grant of a lease of a reserve 'for any purpose, at such rent and subject to such conditions as [the Governor] may think fit'. No particular form of lease was prescribed by that Act. Further, these were not leases of Crown land because they could only be granted over reserves which, by definition, were not areas of Crown land—at [366].

It was found that a lease granted pursuant to s. 32 was not a statutory interest in land:

> The features of the interest granted were not prescribed by the Act but were determined by the nature of the agreement reached and the grant made. The rights thus granted... were, therefore, rights as lessee of the land, as that term is understood in the general law... [and the lessee] was thus granted a right of exclusive possession of the land—at [369].

As a right of exclusive possession is wholly inconsistent with the continued existence of native title rights and interests, the latter were wholly extinguished when the lease was granted unless the NTA provides otherwise.

If granted after the RDA commenced and invalid to any extent because of the existence of native title at the time of the grant, then the leases in question had been validated as past acts—at [371].

Their Honours did not specify the category of past act that would apply should any of the leases in question be invalid to any extent. This would, of course, depend on the matters set out in ss. 229, 230 and 232 of the NTA, particularly whether or not the lease was in force on 1 January 1994 or not. However, if the grant of a lease under s. 32 after the RDA commenced was invalid to any extent, but the lease was not in existence on 1 January 1994 (i.e. it had expired or been forfeited), then it would appear to be a category D past act to which the non-extinguishment principle applies.

Where such a lease was in force on 23 December 1996 (as is required under the state's validating legislation), it was a previous exclusive possession act and confirmed as extinguishing native title—at [371] to [372].

Note also that, although not considered by the court, ss. 47, 47A or 47B may, in some circumstances, apply to areas currently or formally subject to a lease granted under s. 32, in which case all extinguishment by the creation of a prior interest, such as the lease, must be ignored for all purposes under the NTA and the non-extinguishment principle applies.

By-laws under the *Rights in Water and Irrigation Act 1914* (WA)

By-laws passed before the RDA commenced, which absolutely prohibited the taking of fauna or plants within half a mile of any reservoir within the Ord Irrigation District, were found to have extinguished native title rights to hunt and gather flora in those areas. As the prohibition was absolute, s. 211 has no operation—at [265].

Similar Shire by-laws were made after the RDA commenced covering public recreation areas vested in, or under the control of, the Shire. As the judges found that native title was wholly extinguished in relation to the first category by a vesting under s. 33 of the Land Act discussed above, the making of the by-laws could not have affected any native title to those areas—at [266] to [267].

Over areas under the control of the Shire, the making of these by-laws was found to be a category D past act to which the non-extinguishment principle applies—at [268].

Buffer zone around the Ord Irrigation Project
Their Honours rejected The project approach to extinguishment taken by Beaumont and von Doussa JJ in relation to this area—at [141]ff.

It was found that native title over some of the buffer zone had been extinguished by the vesting of a reserve in the Minister under s. 33 of the Land Act discussed above—at [274].

Over some other parts, native title was extinguished by resumption under the Public Works Act, as discussed above.

Determining the effect of the historical dealings over the remaining areas, including the effect of the application of the Rights in Water and Irrigation Act, was remitted to the Full Court to be scrutinised again in accordance with the guidance provided by the majority—at [269] to [277].

It was noted that s. 47B might apply to some of the UCL in the claim area but that was a matter for the Full Court on remitter—at [281].

Permit to occupy
A permit to occupy granted under s. 16 of the Land Act, which provided for a Crown grant to issue if certain payments were made and other conditions were met, was found to give the grantee a right of exclusive possession that was intended to be perpetual. Therefore, the grant of the permit was found to wholly extinguish native title. This was so even where the conditions were not fulfilled and no Crown grant issued—at [349].

The issue of this permit was, in their Honours' view, an instance where a clear and plain intention to extinguish native title could be discerned from the nature of the rights granted i.e. the right to obtain a Crown estate in perpetuity if certain conditions were met. Whether or not those rights are fully exercised is, apparently, irrelevant.

Special leases under s. 116 of the *Land Act 1933*(WA)
Their Honours distinguished a lease for grazing purposes issued under s. 116 of the Land Act from the pastoral leases considered earlier because:

- it was a less precarious interest; and

- some of the purposes for which a lease under s. 116 might be granted (e.g. tanneries, factories, sawmills, warehouses) indicated that the grant of a special lease gave the lessee a right to exclusive possession—at [355] to [357].

As a result of these factors, their Honours found that this was an 'exclusive pastoral lease' and, having been granted before the RDA commenced, was valid when granted. Accordingly, its extinguishing effect was confirmed under the PEPA provisions (referring to s. 23B(2)(c)(iv))—at [357].

Paragraph 12I(1)(b) of the State legislation relating to PEPAs requires that any such lease must be in force on 23 December 1996 in order to be confirmed as extinguishing under those provisions. It is not clear whether or not this lease was in force on that date.