Extinguishment - mineral lease

Brown (on behalf of the Ngarla People) v Western Australia (No 2) [2010] FCA 498

Bennett J, 21 May 2010

Issue

The questions before the Federal Court were, essentially, whether mineral leases granted pursuant to an agreement ratified by statute conferred a right of exclusive possession and, if not, the extent (if any) to which those leases extinguished non-exclusive native title rights and interests. It was found that the leases did not confer a right of exclusive possession. However, native title was found to be wholly extinguished over the mined areas and areas where infrastructure and a town had been constructed.

Background

The area subject to the mineral leases (the Mt Goldsworthy leases) is covered by a claimant application made under the *Native Title Act 1993* (Cwlth) (NTA). The Mt Goldsworthy leases were granted pursuant to an agreement ratified by the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA). The leases are associated with the Mt Goldsworthy iron ore project in the Pilbara region of Western Australia and permit a far greater range of activities than an ordinary mining lease. The first (Lease 235) was granted on 17 February 1966 and commenced on 5 August 1965. The second (Lease 249) was granted on 21 August 1973 and commenced on 8 May 1974. Both leases remain on foot and, following a further renewal, will expire in August 2028. There was no dispute as to the validity of the Mt Goldsworthy leases.

The parties agreed that, unless they had been extinguished, non-exclusive native title existed over the leased area, consisting of 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 to the common law holders (the non-exclusive native title rights).

By consent, the court ordered pursuant to O 29 r 2 of the Federal Court Rules that the separate questions, essentially concerning extinguishment, be decided. There was a statement of agreed relevant facts. In summary:

- BHP Billiton Minerals Pty Ltd, Itochu Minerals & Energy of Australia Pty Ltd and Mitsui Iron Ore Corporation Pty Ltd (the current 'joint venturers' under the Agreement) currently hold the Mt Goldsworthy leases;
- in February 1962, the State of Western Australia and the original joint venturers executed an agreement for the mining, transport and shipment of the iron deposits at Goldsworthy;

- under the agreement, the state was required (among other things) to grant to the original joint venturers a temporary reserve under the *Mining Act 1904* (WA) in respect of an identified 'mining area' and to grant mineral leases over the mining area in terms of the lease scheduled to the agreement;
- in 1964, a new agreement was executed (the Agreement) and ratified by the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) (the State Agreement Act) that repealed earlier Acts ratifying or varying the earlier agreement;
- the 1964 agreement was varied three times and each variation was ratified by statute;
- the Mt Goldsworthy leases were granted pursuant to obligations under the Agreement;
- as required under the Agreement, various proposals concerning mining, services, townships, railway, ore handling and a harbour were submitted to the state by the joint venturers and, following negotiation and amendment, approved in September 1971;
- the joint venturers then fully funded construction of the relevant facilities in accordance with the approved proposals.

Nature of the project

Construction began in 1965. The infrastructure included a railway, roads and a power station. The town of Goldsworthy, at its peak, included over 200 houses and associated facilities. The maximum population was 1400 in 1977. In 1991, when it was decided to start closing the town, work began to remove houses. The town was officially closed in July 1992. The mine at Goldsworthy closed in December 1982. The total area of the Goldsworthy mine and township was about one-third of the area subject to Lease 235. There was no evidence of any significant construction on the remainder of the leased area.

When open pit mining started in 1965, Mt Goldsworthy was 132 metres above sea level. When it ended in 1982, the pit was approximately 135 metres below sea level. From late 1974, the mine operated 24 hours a day, 7 days a week and access was controlled. After mining operations ceased in 1982, the Goldsworthy power station continued to operate and provided power to operations at Shay Gap. In 1989 a power line was constructed that connected Goldsworthy with a Pilbara power grid, following which the Goldsworthy power station closed.

NTA extinguishment provisions not relevant

As her Honour noted, s. 228 of the NTA relevantly defines a 'past act' as an act that took place before 1 January 1994 which is *invalid* by reason of the operation of the *Racial Discrimination Act 1975* (Cwlth) (RDA). In this case, the Mt Goldsworthy leases were granted before the RDA commenced on 31 October 1975 and no party disputed the validity of the grants. Therefore, the past act provisions of the NTA had no application. Nor did Pt 2 Div 2B, which deals with (among other things) extinguishment by a 'previous exclusive possession act', because the Mt Goldsworthy leases were 'mining leases' as defined in s. 245 and so (unless dissected, discussed below) were excluded from the definition of 'previous exclusive possession act'. Further, a mining lease cannot be a 'previous non-exclusive

possession act' for the purposes of Pt 2 Div 2B. However, as was noted, an act that does not fall within any of these provisions 'may still extinguish native title' because the NTA 'does not constitute a comprehensive code of extinguishment'. All parties agreed that the question of extinguishment in this case was to be addressed by reference to the common law—at [59] to [62] and [66].

Treatment of mining leases under the NTA not relevant

Putting to one side the question of the dissection of a mining lease, the NTA 'does not evince any intention that mining leases extinguish native title'. In fact, such leases are generally 'specifically excluded from having such an effect'. The applicant submitted this should be taken into account. However, her Honour found that the principle that common law rules could be affected by statute did not apply in this case because (among other things) the definition of 'native title' in the NTA incorporates the concept of common law extinguishment. In other words, to be native title rights for the purposes of the NTA, the rights must be recognised by the common law of Australia and recognition 'may cease if those rights have been extinguished under the common law'—at [65].

As was noted at [64], s. 245(3) of the NTA permits a mining lease to be 'dissected into separate leases in relation to those parts' and then, pursuant to s. 23B(2)(c)(vii), part of the area so dissected is a 'previous exclusive possession act' that extinguishes native title. However, none of the parties submitted these provisions applied.

Common law extinguishment

Her Honour referred to Chief Justice Brennan in *Wik Peoples v Queensland* (1996) 187 CLR 1 (*Wik*) at 84 to 85 for the proposition that, under the common law of Australia, native title may be extinguished in three ways:

- by laws or executive acts which simply extinguish native title;
- by laws or acts which create rights in third parties which are inconsistent with the continued right to enjoy native title; and
- by laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title—at [68].

According to Brennan CJ in *Wik* at 85 to 86:

- no rights inconsistent with native title are created by the first kind of law or act but it must have the clear intention, objectively ascertained, of extinguishing native title;
- the second kind creates rights that are inconsistent with the continued enjoyment of native title, irrespective of whether or not there was an actual intention to extinguish native title and whether or not there was any reference to the existence of native title;
- the third occurs as a result of the acquisition of native title under statutory authority or where the Crown, without statutory authority, acquires beneficial ownership by appropriating land in which no interest has been alienated by the Crown.

Bennett J went on to identify the principles emerging from 'the key authorities on common law extinguishment', which were:

- *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*);
- *Yanner v Eaton* (1999) 201 CLR 351 (*Yanner v Eaton*);
- *Fejo v Northern Territory* (1998) 195 CLR 96;
- *De Rose v South Australia (No 2)* (2005) 145 FCR 290 (*De Rose*);
- *Daniel v Western Australia* [2003] FCA 666;
- *Daniel v Western of Australia* [2003] FCA 1425;
- *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442 (*Alyawarr*); and
- *King v Northern Territory* (2007) 162 FCR 89.

Her Honour's analysis of these cases is not summarised here. Readers are directed to the reasons for judgment at [74] to [110].

Inconsistency

On this issue, it was noted (among other things) that at common law:

- the relevant test for extinguishment is an 'inconsistency of incidents' between the relevant legislation or grant and the asserted native title rights and this involves comparing the legal nature and incidents of the existing native title right and the statutory right;
- two rights are either inconsistent or they are not;
- where inconsistency is established between 'the particular rights created by the statutory grant and the particular native title rights or interests, the latter will have been extinguished by the grant of the former';
- the basic inquiry is about the inconsistency of rights, not inconsistency of use, but actual use of the area concerned may suggest or demonstrate the nature of those rights;
- once native title is extinguished, it cannot be revived;
- a grant that confers a right to exclusive possession wholly extinguishes native title—at [112] and [114] to [115], [117] and [165].

In this case, the comparison to be made was 'between the rights granted under the Mt Goldsworthy Leases' pursuant to the Agreement and the non-exclusive native title rights and interests. It was noted that, at common law, if the grant of the Mt Goldsworthy leases did extinguish native title over a particular area, the fact that the tenement holders were no longer exercising their rights over that area, or that it had been returned to its natural state as a result of post-mining rehabilitation, did not revive the native title rights—at [113] and [165].

Nature of the rights granted

The operative mining legislation at the date of the State Agreement Act, and at the date of the grant of the Mt Goldsworthy leases, was the *Mining Act 1904*. By the transitional and saving provisions of the *Mining Act 1978*, nothing in that Act affected the provisions of the State Agreement Act. The Agreement was brought into force as the operative schedule to the State Agreement Act and was a 'government agreement' for the purposes of the *Government Agreements Act 1979* (WA) (GA Act).

A 'government agreement' operates, and takes effect, from inception according to its terms notwithstanding any other Act or law. The whole of the area relevant to this case is 'subject land' for the purposes of the GA Act. A person who remains on 'subject land' without lawful authority, having been warned to leave, or who prevents, obstructs or hinders any activity carried on pursuant to a government agreement commits an offence.

Under the Agreement (among other things):

- the state was (subject to certain pre-conditions being met) obliged to 'cause to be granted' to the joint venturers and to them alone 'rights of occupancy for the purposes of this Agreement (including the sole right to search and prospect for iron ore)' and to 'cause to be granted' successive renewals of such rights 'as may be necessary';
- 'as soon as convenient' after the commencement date, the joint venturers 'may apply' and the state 'shall cause to be granted a mineral lease of any part or parts of the relevant area to the joint venturers 'in form of the Schedule hereto' for 21 years subject to rental payment and performance and observance by the obligations under the mineral lease, with the right to successive renewals of 21 years.

Bennett J noted that the rights exercisable under the Mt Goldsworthy leases allowed the joint venturers 'to do what was needed under the Agreement' and that what was done pursuant to the leases and the Agreement was extensive: 'The scale of the work at Mt Goldsworthy was ... to 'transform a mountain into a deep gorge by extracting tens of millions of tonnes of material from an area'—at [150].

Further, as was noted in *Western Australia v Ward* (2002) 213 CLR 1 at [147], the State Agreement Act was 'bespoke legislation' that gave statutory force to the Agreement and 'specifically modified a range of general legislation so as to vest the land and mineral interests necessary for the particular project'. For example, the Goldsworthy town site was built pursuant to Lease 235, i.e. no special lease or other separate provision was required.

No conferral of a right of exclusive possession

It was found that the right to occupy granted by the Agreement for the purposes of the Agreement did not amount to a right of exclusive possession. Further, it was found that the Mt Goldsworthy leases did not confer such a right because:

- while a mining lease 'of its nature' granted a right to exclude other miners from exercising mining rights, it did not 'necessarily entail a right to exclude all others';
- even if there were a right to prevent persons without lawful authority remaining on the land, that could not 'apply to people exercising native title rights and interests' if those rights had not been extinguished;
- it could not have been the intention that the tenement holders would exert their rights over the whole of the leased area, which was borne out by the fact that a significant part of the leased area had not been subject to the exercise of those rights;

- it could not have been intended (and it was not 'feasible') to 'assume a grant ... of exclusive possession of the whole of the leased area'—at [182] and [184] to [185] and [187].

Her Honour drew support for the last point from the Agreement, which provided for 'third party rights of access which do not interfere with the operations' of the joint venturers. This 'recognition' that these operations would not 'encompass the whole of the leased area' was, according to Bennett J:

> [C]onsistent with the recognition that those parts of the leased area that are not part of the mining operations and associated development are accessible to third parties ... . There is no good reason ... to presuppose that it was intended that the Joint Venturers had the right to exclude access by native title holders ... over those parts of the leased area that were left untouched by the Joint Venturers—at [185].

Her Honour rejected the tenement holders' submission that renewal of the leases in 2007 wholly extinguished native title pursuant to s. 24IB of the NTA, essentially because:

- as the state submitted, s. 24IB did not apply to the renewal of grants of exclusive possession leases because the NTA assumed such grants had already extinguished native title and, therefore, that the renewal of such a lease would not affect native title and so was not a future act;
- in any case, based on the finding that the grant of the Mt Goldsworthy leases did not confer a right of exclusive possession, the renewal of those leases would 'likewise not have conferred a right of exclusive possession' for the purposes of s. 24ID of the NTA— at [187] and [188].

Native title wholly extinguished over 'developed areas'

The state and the tenement holders submitted (among other things) that all of the granted rights pursuant to the leases and the Agreement were inconsistent with the determined native title rights and so extinguished all of those rights and interests (with this being illustrated via evidence of what had actually happened in relation to the leased area). The applicant submitted (among other things) that:

- no clear and plain intention to extinguish existed in the relevant legislation, i.e. the State Agreement Act and the *Mining Act 1904* (WA);
- it was important to distinguish between inconsistency that extinguishes native title from the inconsistent operation of co-existing rights, whereby the non-native title rights prevail but native title is not extinguished;
- the latter is not a case of 'legal inconsistency' but a matter of the rights of the tenure holder having priority over those of the native title holder when it comes to 'incompatible exercise';
- there was scope for the non-exclusive native title rights to be exercised at a distance from the mining works and also over the mining footprint area before mining commenced and after it ceased;
- *De Rose* was distinguishable because mining leases are intended to provide for the mining of a finite resource and so were temporary in nature, which militated against finding extinguishment.

Her Honour found that:

> [T]he granted rights to construct the mine and the town site, together with the associated infrastructure, and to work and utilise those entities and the land on which they stand, were inconsistent with the continued existence of any of determined native title rights within the areas on which the mines, town sites and associated infrastructure have been constructed (the developed areas)—at [202].

According to Bennett J, the rights exercised within the developed areas were 'analogous to rights of exclusive possession', which was illustrated by the fact that there was no need for a special lease to construct the town of Goldsworthy on the leased area—at [202].

Her Honour drew a distinction between the leases in this case and non-exclusive pastoral leases:

> 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, ... , assists in demonstrating the extent of those granted rights. It is, for example, inconceivable how the ... rights to excavate an open pit mine which has so dramatically changed the landscape, and to control access to the mining area, are consistent with the native [title] holders having a right to camp, take flora and fauna, or engage in ritual and ceremony on the mining area—at [203].

The finite nature of the mine and the fact that the developed areas were returned to their natural state was not relevant:

> In the developed areas ... , it is their [the tenement holders] **rights** which cannot co-exist with the determined native title rights. Once such inconsistency occurs so as to extinguish the native title rights, it is not relevant that the resources being mined are finite or that the mine and the town are later abandoned—at [207], emphasis in original.

Native title survived over undeveloped areas

Her Honour, relying on *De Rose*, found that the rights granted by the Mt Goldsworthy leases were not inconsistent with the continued existence of the non-exclusive native title rights and interests in that part of the leased area that was not developed:

> [T]he fact that the Joint Venturers have a choice about where on the leased area to exercise their rights does not mean that such rights are necessarily inconsistent with the existence of the ... [non-exclusive] native title rights over the whole of the leased area. As in *De Rose*, the grant of the rights under the Mt Goldsworthy Leases became operative to extinguish native title rights on particular parts of the leased area when the granted rights were exercised, because it was only then that the precise areas of land affected by the right could be identified—at [209].

Future developments

It was found that the tenement holders continue to have the rights (arising from the Agreement) to 'explore and ascertain appropriate sites for new mines and infrastructure' on the leased area. According to Bennett J: 'If such development

occurs, native title will have been extinguished once the land on which that development occurs is identified'—at [210].

There was also evidence that the tenement holders have identified potential sites for future mining and development on the leased area via the exercise of the right to explore. It was found that the work done to identify possible future mine sites did not extinguish the non-exclusive native title rights. However:

> If the decision is made to proceed with those new mines and is permitted under the terms of the Agreement, ... [t]o the extent that infrastructure similar to that described in relation to the Goldsworthy project is constructed, the ... [non-exclusive] native title rights would be extinguished—at [210].

Later, her Honour rejected a submission by the state that a fresh determination of native title would be required each time the right to develop new mines and infrastructure was exercised. However, it was noted that there might be rights exercised by the tenement holders over a previously undeveloped part of the leases that could co-exist with some or all of the non-exclusive native title rights. According to her Honour: 'If that question arises and a fresh determination must be made, it is a consequence of the reasoning in *Ward* and *De Rose*'—at [217].

Comment on future developments

If and when there is an 'approved determination of native title' in this case and if a fresh determination is later required, s. 68 will prevent the court from conducting 'any proceedings relating to an application for another determination of native title' or making 'any other determination of native title' in relation to the determination area unless those proceedings involve a review or appeal of the determination or an application to revoke or vary it. In this case, review or appeal proceedings would not appear to be appropriate. As to a variation or revocation, s. 61(1) will not allow the tenement holders to bring such an application. It would have to be brought by the relevant State or Commonwealth minister, the registered native title body corporate or the Tribunal's Native Title Registrar.

It should also be noted that s. 11(1) provides that 'native title is not able to be extinguished contrary to' the NTA. It may be that, since the extinguishment occurs at common law, the NTA has no application and so that extinguishment is not 'contrary to' the NTA. On the other hand, s. 226(f), 227 and 233, which define 'act', 'act affecting native title' and 'future act' respectively, may mean that the exercise of the extinguishing 'right to develop' is a future act. Questions may then arise as to which of the provisions of the future act regime apply, what is the effect of the act on native title (i.e. does the non-extinguishment principle in s. 238 apply) and what, if any, procedural rights do the native title holders have in relation to that act? In this context, note that s. 23G(1)(c) apparently avoids this issue in relation to most pastoral improvements because the extinguishment is deemed to have occurred when the non-exclusive pastoral lease was granted, i.e. it seems from *De Rose* at [157] that the 'act' is the grant of the lease, not the exercise of the right to improve. There is no equivalent provision for mining leases.

Area where native title wholly extinguished

The applicant submitted extinguishment should be confined to improvements intended to be significant, permanent or at least longstanding and should not extend to improvements capable of being used by native title holders once the tenement ceased. These submissions were rejected:

> As I consider that the granted rights are inconsistent with and therefore extinguished the determined native title rights over the developed areas, it is not relevant whether the constructions were permanent or that they could be used by the native title holders after the mining tenements cease—at [226].

Instead, it was found that:

> [N]ative title has been extinguished over the whole of the area of mines and any area on which infrastructure and town sites have been constructed, together with any buffer zones over which exclusive use is necessary for or incidental to the operation or enjoyment of the improvements—at [227].

Conclusion

The answers to the questions were:

- the Mt Goldsworthy Leases did not confer a right of exclusive possession;
- the rights granted pursuant to the leases and the Agreement are inconsistent with the continued existence of any of the non-exclusive native title rights in the developed areas;
- all of the non-exclusive native title rights are wholly extinguished in respect of the developed areas;
- native title is wholly extinguished to part of the area of the leases through the rights as exercised under the leases and the Agreement;
- native title been wholly extinguished in the areas of the mine, the town sites and associated infrastructure known as the Goldsworthy Area of Interest.

Comment – revisiting *De Rose*

It is acknowledged that her Honour was bound by *De Rose* to the extent it was relevant. It is also clear from her comments in rejecting the applicant's submissions on inconsistency v 'prevailing over but not inconsistent' that she agreed with the Full Court's approach:

> It is important to note that the fundamental question is whether the granted rights and the native title rights are inconsistent and not whether one can prevail over another. A reverse analysis may result in every possibility of inconsistency between two sets of rights being answered by the fact that the granted rights can merely prevail over the native title rights—at [206].

However, with respect, it might be the converse is true. Following *De Rose*, 'every possibility' of any conflict in exercise between any right found in either of the 'bundles' (i.e. third party rights v native title rights) appears to lead inevitably to a finding of inconsistency, rather than co-existence, with all the serious consequences that has for native title holders.

In addressing the issue of the exercise of rights under a mining lease, the plurality in *Ward* said at [308] that:

> The holder of a mining lease having the right to exclude for the specified purposes, may exercise that right in a way which would prevent the exercise of some relevant native title right or interests for so long as the holder of the mining lease carries on that activity. Just as the erection by a pastoral lease holder of some shed or other structure on the land may prevent native title holders gathering certain foods in that place, so too the use of land for mining purposes may prevent the exercise of native title rights and interests on some parts (even, in some cases, perhaps the whole) of the leased area. That is not to say, however, that the grant of the mining lease is necessarily inconsistent with all native title.

The Full Court in *De Rose* thought this 'may appear difficult to reconcile' with the High Court's 'emphasis on inconsistency of rights (as opposed to use) and its rejection of the suspension of native title under common law'. Their Honours reconciled this apparent difficulty by finding (among other things) that:

- the right to construct improvements on a non-exclusive pastoral lease was, when exercised, 'clearly inconsistent with all native title rights insofar as they relate to' the improved area;
- it was only after construction of the improvement that the precise area affected by the right to construct the improvement could be ascertained;
- extinguishment occurred at the time of exercise of the right (although, as noted earlier, it seems that s. 23G(1)(c) deems extinguishment to have occurred when the lease was granted)—at [170] to [173].

These findings turned on the interpretation placed on what was said in *Ward* at [149] to [150]. In those paragraphs, their Honours pointed out that, in most cases, 'it will only be possible to determine ... inconsistency ... once *the legal content* of both sets of rights said to conflict *has been established*' (emphasis added). Their Honours went on to say that 'the *operation of a grant of rights* may be *subjected to conditions precedent or subsequent*'. This passage was crucial to the findings in *De Rose*. At [156] of *De Rose*, the court said the operation of a grant of the right to construct and use improvements 'should be regarded, *in effect*, as subject to a condition precedent' because the *grant* of the right to improve 'could *become operative ... only when the right was exercised*' (emphasis added).

With respect, this seems to place a strained construction on *Ward*. The High Court referred to 'a grant of rights'. In *De Rose*, it was the 'grant of rights' that constituted the pastoral lease, which included the right to improve. The *operation* of the *grant* of rights was not subject to any conditions, subsequent or precedent (and the right to improve was 'operative' when the lease was granted). Nor, it seems, were the rights under that grant 'incapable of identification *in law* without the performance of a further act or the taking of some further step *beyond that otherwise said to constitute the grant*' because the right to improve was included as part of the grant of rights from the outset—see *Ward* at [150], emphasis added.

What is said at [149] of *Ward*, where their Honours where discussing the notion of 'operational inconsistency', is also of note in this context. As Bennett J states at [173], this was rejected 'as a test of extinguishment'. (In particular, the High Court was rejecting the way in which the court below had employed this notion in considering the Ord Irrigation scheme as a single 'project' when it was not.)

The High Court acknowledged that the term 'operational inconsistency' may 'provide some assistance by way of analogy in this field'. Before cautioning against taking it too far, their Honours referred to Justice Gummow in *Yanner v Eaton* at [110] to [112] as, apparently, an indication of when 'operational inconsistency' provides a useful analogy. In that case, Gummow J was considering (obiter) the issue of the effect of performance of conditions in a non-exclusive pastoral lease. After noting native title was not 'abrogated by the mere existence of unperformed conditions', his Honour went on to say that if and when there was performance, questions would arise 'respecting operational inconsistency between the performed condition and the continued exercise of native title rights'. It was at this point that his Honour drew what the plurality in *Ward* appears to have thought was the 'useful analogy' with the circumstances that arose in *Commonwealth v Western Australia* (1999) 196 CLR 392, where the court was considering whether there was 'operational inconsistency' under s. 109 of the Constitution between Commonwealth legislation and the *Mining Act 1978* (WA). In such a case, if was found, the question is whether inconsistency is 'inevitable' or not—see *Yanner v Eaton* at [112].

Applying an 'inevitability' test would not change the question, i.e. are the two rights inconsistent or are they not? It may not even change the outcome in some cases. However, it would appear to provide a more principled test for inconsistency between the rights of third parties, such as pastoralists or mining tenement holders, and the rights of native title holders. Bennett J made no reference to Gummow J's comments in *Yanner v Eaton*. In *De Rose*, the Full Court referred to them in passing without examining what was said despite the fact it was relevant to the issue before the court.

Finally, there seems to be a logical tension between the *De Rose* decision and the decision *Alyawarr* at [131], where the Full Court concluded that:

> [N]either the *native title right of permanent settlement* nor the *right to erect a permanent structure* was *inconsistent with* pastoral leaseholders' rights. The existence of a structure did not preclude a pastoralist's *right to require removal* in the event that it conflicted with a proposed *exercise by the pastoralist of a right under the lease*. The Full Court was of the view that it was *not inevitable* that such a conflict would arise. Accordingly there was *no inconsistency of rights giving rise to extinguishment of the native title rights to live* on the land and to erect permanent structures (emphasis added).

If there is no inconsistency between a native title right to build a home and make permanent improvements to an area subject to a non-exclusive lease, why is there an inconsistency when the leaseholder makes improvements of the same kind? In the first case, there is acknowledgement that the lessee's rights prevail. Why is this not so in the second case? Does only one give way to the other?

Hopefully, that there will be an opportunity in the near future for the High Court to address the application of the inconsistency of incidents test as expounded in *Ward* to clarify some of the issues raised by subsequent cases.