Mining leases as category C past acts

James v Western Australia [2010] FCAFC 77

Sundberg, Stone and Barker JJ, 29 June 2010

Issue

The National Native Title Tribunal referred a question of law to the Federal Court which was, essentially, whether the grants of certain mining leases were 'past acts' as defined in the *Native Title Act 1993* (Cwlth) (NTA). This involved determining whether the leases were invalid to some extent but would have been valid to that extent if native title did not exist at the time of the grants. It was agreed that, at the time of each grant, the leases affected areas otherwise subject to a native title right to exclusive possession.

The question was reserved to the Full Court, which found the leases were category C past acts to which the non-extinguishment principle found in s. 238 of the NTA applies. One of the critical factors leading to this finding was that the right to control access (which is intrinsic to the right to exclusive possession) was 'wholly extinguished in the hands of native title holders' but 'merely regulated or qualified by a grant of a mining lease over the land of other title holders'—at [55].

The extent to which the decision in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*) on the effect of post-RDA mining leases could be distinguished was at the heart of the question referred. In *Ward*, the mining leases considered were not category C past acts. However, all of those leases affected areas where 'excusive' native title had already been extinguished before the RDA commenced. Justice Sundberg, Stone and Barker were of the view that what was said in *Ward* merely raised a 'hypothetical scenario' about what might happen had this not been the case but the High Court 'did not return' to consider that question. Therefore, *Ward* could be distinguished—at [48].

Background

Tribunal mediation of the Martu People's claimant application began in 1996. In September 2002, a determination was made by consent in *James v Western Australia* [2002] FCA 1208 (*James No 1*) recognising the Martu People as native title holders in relation to a large part of the area covered by their application. The leases in question affected parts of the area covered by the remainder of the application. All but one of the leases was granted under the *Mining Act 1978* (WA) (Mining Act) and all were granted on or after the *Racial Discrimination Act 1975* (Cwth) (RDA) commenced but before the NTA commenced, i.e. after 30 October 1975 but before 1 January 1994. The parties could not reach agreement as to the effect of these grants on native title. Therefore, resolution of that question was relevant to the resolution of the Martu People's application.

Referral

The Tribunal referred the question to the court pursuant to s. 136D of the NTA. Section 86D empowered the court to determine the question and enabled it to adopt any agreement on facts reached between the parties during the mediation in doing so. The referral was contained in a special case, as required by O 78 r 16 of the Federal Court Rules, and the State of Western Australia had carriage. Following a request from the parties, the question was reserved to a Full Court pursuant to s. 25(6) of the *Federal Court of Australia Act 1976* (Cwlth)—see *James v Western Australia* [2009] FCA 1262, summarised in *Native Title Hot Spots* Issue 31.

The 'referral area' was so much of the area subject to the Martu People's application that is (or was) subject to the grant of a mining or general purpose lease on or after the RDA commenced but before the NTA commenced under either the Mining Act or the *Western Mining Corporation Limited (Throssell Range) Agreement Act 1985* (WA). The question of law posed in relation to each lease was:

- is it a 'past act' as defined in s. 228 for the purposes of Pt 2 of the *Titles (Validation) and the Native Title (Effect of Past Acts) Act 1995* (WA) (TVA)?
- if so, into which of the four categories (from A to D) of 'past act', as defined in ss. 229 to 232 of the NTA for the purposes of Pt 2 of the TVA, does it fall?

In the referral (putting to one side the effect of the grant of the leases), the parties agreed that:

- the Martu People, as defined in the determination made in *James No 1*, hold native title to the referral area;
- native title is comprised of the right to possess, occupy, use and enjoy the referral area to the exclusion of all others (i.e. the right to exclusive possession);
- there has been no prior extinguishment of the native title;
- any question as to the validity of the leases arose only because of the existence of native title at the time of the relevant grant.

Subsequent to the referral, amendments to the NTA made by the *Native Title Amendment Act 2009* (Cwlth) repealed s. 136D and replaced it with s. 94H, which was in substantially the same terms. The parties agreed that the referral should be treated as if it were made under s 94H.

Past acts

Generally speaking, 'past acts' are certain acts which took place before 1 January 1994 that would be invalid because of the existence of native title had there not been intervention via Pt 2, Div 2 of the NTA to validate those attributable to the Commonwealth and allow a state or a territory to validate those attributable to that state or territory. The effect the validation of a past act attributable to the Commonwealth on native title is set out in s. 15. It varies depending on which of the four categories the act falls within (i.e. Category A to D as defined in ss. 228 to 232). In this case, 'the only category relevant ... is "category C past act", which is a past act consisting of the grant of a mining lease'. Section 19 provides for legislation to the same effect for past acts attributable to a state or territory which, in this case, was the TVA—at [5] and [8].

Pursuant to s. 15(1)(d), the non-extinguishment principle found in s. 238 applies to a category C past act attributable to the Commonwealth. As the court noted at [7], s. 238(2) gives the grant of a mining lease that confers exclusive possession which is a Category C past act as an example of its application:

> In such a case the native title rights and interests will continue to exist but will have no effect in relation to the lease while it is in force. However, after the lease concerned expires ..., the rights and interests again have full effect.

In this case, the only relevant part of the 'elaborate definition' of a 'past act' was s. 228(2), which provides (among other things) that an act is a past act 'in relation to' the land or waters in question if:

- at any time before 1 January 1994 when native title existed in relation to particular land or waters, an act took place that was not the making, amendment or repeal of legislation; and
- 'apart from' the NTA, that act was invalid to any extent but would have been valid to that extent if native title did not exist.

As was noted, each of the leases in question was granted before 1 January 1994 and was an 'act' as defined in s. 226 of the NTA. Therefore, the only issue in this case was whether the leases were invalid to any extent because of the existence of native title 'apart from' the NTA (or, in this case, the TVA). As the court noted: 'It is only if that prima facie invalidity is established that the effect, if any, on native title of the TVA is considered'—at [10] to [11], referring to *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 469 to 470.

Effect of RDA

The parties agreed that s. 10(1) of the RDA provided the only possible reason for invalidity in this case. As was noted, s. 10(1) 'operates in two kinds of cases' involving state laws—at [13].

The first case (a *Gerhardy* 1 case) is where a state law 'omits to make the enjoyment of rights universal', in which case the RDA operates to confer that right on 'persons of a particular race, colour or national or ethnic origin' who would otherwise not enjoy that right. In these cases, the law is not invalidated. Rather, s. 10(1) confers a right 'which is complementary to the right created by the ... law'—at [13].

The second case (a *Gerhardy* 2 case) is where the state law:

> [I]mposes a prohibition forbidding the enjoyment of a human right or fundamental freedom enjoyed by persons of another race, or deprives those persons of a right or freedom previously enjoyed by all regardless of race—at [13].

Here, s. 10(1) confers a right on those persons which 'necessarily' results in an inconsistency between s. 10 of the RDA and the state law. In these cases, s. 109 of the Constitution 'operates to invalidate' the state law 'to the extent of the inconsistency'. As was noted, it is only in the second case that the validation provisions of the NTA

past act regime operate, bringing with them the consequences of validation. The non-extinguishment principle applies to the grant of a category C past act, the only category relevant in this case—at [13] to [14], referring to *Gerhardy v Brown* (1985) 159 CLR 70 at 98 and *Ward* at [106] to [108].

If the leases were not category C past acts, then extinguishment would be determined by applying the inconsistency of incidents test and native title would be permanently extinguished to the extent of any inconsistency. This issue was considered in *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* [2010] FCA 498 (summarised in *Native Title Hot Spots* Issue 32).

Submissions

In brief and among other things, the state submitted that:

- assuming the Martu People were 'owners' or 'occupiers' as defined in s. 123 of the Mining Act (the state law), they were entitled to compensation under that Act and so the RDA had no operation, the leases were valid and were not past acts;
- if the Martu People were not 'owners' or 'occupiers' under the state law, then there was unequal enjoyment of the human right to be compensated for deprivation of property and, as a *Gerhardy* 1 case, s. 10 of the RDA would confer that right, the leases would be valid and so not past acts;
- alternatively, since all land is open for mining under the state law, any right to control the use and access for mining purposes was removed from any interest holder and so the state law did not treat native title and non-native title holders differently.

Again, in brief and among other things, the applicant submitted that:

- the human right of the Martu People affected by the grant of the mining leases was not the right to be compensated for the deprivation of property but the right to own and inherit property;
- the practical effect of the Mining Act was that native title was extinguished to some extent, leaving other titles intact, which meant this was a *Gerhardy* 2 case.

Further reference is made to the parties' submissions only where this is necessary to explain the court's reasoning. However, note that the court comprehensively summarised them at [15] to [38].

Unequal treatment – *Gerhardy* 2 case

Before answering the referred question, the court noted that:

- the grant of a mining lease under the Mining Act, if valid, extinguished any native title right to control access to the area concerned because such a right is inconsistent with the right of access 'arising under the lease';
- however, the grant of such a lease did not extinguish the rights of any non-native title landholders to any extent because it was not 'a true common law lease' but, rather, 'a liberty granted to a person, for a specific length of time, to enter upon land, search for things and take them away', a point 'reflected' in s. 113 of the Mining Act which provides that the owner may 'resume possession' of the area concerned on 'the expiration or earlier termination of the lease';

- a native title holder with a right to exclusive possession 'cannot enjoy the right conferred' by s. 113 because the native title right to control access is inconsistent with, and so permanently extinguished by, the grant of the lease—at [39] to [40], referring to *Ward* at [285] and [309], *Gowan v Christie* (1873) LR 2 Sc&Div 273 at 284 and s. 237A of the NTA

As was noted, determining the question raised by s. 10(1) of the RDA required a comparison between 'the security of possession and enjoyment of native title rights by the native title holders with the security of possession and enjoyment of other forms of title by the holders thereof'. According to their Honours:

> On that comparison, the practical operation and effect of the *Mining Act* on the grant of a mining lease is that native title holders do not enjoy their right to own and inherit property (including the right to be immune from the arbitrary deprivation of property) equally with other title holders. We have described the "right" in question in that composite form because that is how it was described by Brennan, Toohey and Gaudron JJ in *Mabo v Queensland [No 1]* ... (1988) 166 CLR 186 at 217. However nothing turns on whether it is more accurately rendered as a right to own and inherit property or a right to be immune from the arbitrary deprivation of property—at [41].

It was found that this was a *Gerhady* 2 case because:
- the effect of s. 10(1) of the RDA is to confer on native title holders the right to own and inherit property (including the right to be immune from the arbitrary deprivation of property) 'to the same extent as enjoyed by any other landholder';
- that right 'cannot exist so long as the *Mining Act* has its extinguishing effect' and so the two 'are inconsistent'—at [42].

Decision - leases were category C past acts

Given the findings noted above, the court held that the leases in question were past acts because:
- this is 'the third situation posited' in *Ward* at [108], i.e. the Mining Act 'extinguishes only native title and leaves other titles intact';
- the 'discriminatory burden of extinguishment' is removed 'because the operation' of the state law 'is rendered invalid' to that extent by s. 109 of the Constitution;
- therefore ('apart from' the TVA), the grant of each mining lease was invalid to that extent by operation of s. 10(1) of the RDA;
- accordingly, each mining lease is a 'past act'—at [42] to [43].

Since the answer to the first referred question was 'yes', it was common ground that the answer to the second question was that the leases were category C past acts as defined in s. 231 of the NTA—at [43].

***Ward* on vesting of reserves**

The court went on to explain in more detail why it did not accept the state's submissions, including those in relation to the effect of vesting nature reserves in *Ward* at [250], where it was said that:

> On its face, the Land Act 1933 does not single out native title rights and interests for different treatment. And leaving aside the question of compensation, there is nothing to

> suggest that, so far as concerns the vesting of reserves, the practical operation of the Land Act 1933 resulted in the different treatment of native title rights and interests and non-native title rights and interests.

The practical effect of the scheme for vesting of reserves was that all interests in land (i.e. native title and non-native title) were brought to an end by the vesting but with no compensation payable to native title holders when it was payable to others. Therefore, the High Court concluded that the vesting of a reserve was a *Gerhardy* 1 case, i.e. the vesting was valid but s. 10(1) of the RDA provided with a right of compensation to native title holders—at [46].

***Ward* on mining leases**

Among other things, the court considered the comments in *Ward* at [319] that:

- if the native title holders were 'occupiers' under the Mining Act, they were entitled to compensation under s. 123 of that Act, the RDA would not be engaged, there would be no invalidity in respect of the mining leases and, 'to the extent that the grant of those mining leases extinguished native title', it would 'remain extinguished';
- if there were not 'occupiers', s. 10 of the RDA would confer the right to compensation to the same extent as the Mining Act conferred that right upon 'occupiers'.

Their Honours repeated their earlier observation, i.e. that the court in *Ward* was concerned with 'occupiers' because, on the facts *Ward*, the native title holders were not 'owners' because their right to control access had been extinguished prior to the commencement of the RDA, i.e. in *Ward*, the court was dealing with at *Gerhardy 1* case—at [49] to [50] and [52].

The determination of native title made at first instance in *Ward* was so general that it was impossible for the High Court either to determine which other native title rights and interests that had been extinguished or to identify those that subsisted. In that context, Sundberg, Stone and Barker JJ agreed with the applicants' submission that the references in *Ward* to 'extinguished native title' should be understood as:

> [R]eferring to the extinguishing effects, if any, which were themselves non-discriminatory; to circumstances in which there was no inequality in the enjoyment of the right to own property other than the absence of compensation'—at [51].

In this case, the state was trying to 'attract the assistance of *Ward* by pigeonholing' this as a *Gerhardy 1* case. However, apart from general introductory material in *Ward* at [106] to [109], where the two *Gerhardy* cases were identified, the only place where a *Gehardy 1* case was posed in *Ward* was at [309], where it was said that: 'This would raise the issue of invalidity of the grant by operation of the RDA and subsequent validation by the NTA' and the TVA. The court was of the view that *Ward* indicated that, if this issue did arise, it 'would be resolved in favour of invalidity, and validation' by the NTA and the TVA—at [53].

The court rejected the state's alternative case that, under the Mining Act, no interest holder had a right to be asked permission to use or have access to land for mining purposes and so the RDA was not attracted because (among other things):

- it ignored the fact that the right to control access was 'wholly extinguished in the hands of native title holders' but 'merely regulated or qualified by a grant of a mining lease over the land of other title holders', something made clear by s. 113 of the Mining Act; and
- it did not accommodate the mandatory comparison between 'the security of possession and enjoyment of native title rights ... and the security of possession and enjoyment of other forms of title'—at [55].

Mining Act – no compensation for extinguishment of underlying title

The court had asked the parties to make submissions on the effect of the compensation provisions of the Mining Act but it was not necessary to refer to them to answer the question referred. However, some of the submissions were dealt with, including those relating to the compensation provisions of the Mining Act.

After determining which of the various versions of s. 123 of the Mining Act applied at the time of each grant, the court considered whether that provision (in any of its relevant incarnations) extended to providing compensation for extinguishment of an underlying title. It was found that it did not because (among other things), there was no discernible legislative intention that 'extinguishment of title would flow from the grant of a mining tenement'—at [57] to [69] and [75] to [76].

This was not inconsistent with the fact that native title was partially extinguished by the grant of a mining lease because:

> The inconsistency that results from the comparison between the legal nature and incidents of rights granted by the leases and the native title right to control access is not the result of any intention on the part of those who drafted the *Mining Act* in 1978. It results from the inconsistency of incidents test mandated by *Ward*. In determining whether compensation is payable for extinguishment of title, it is ... appropriate to inquire whether extinguishment was in contemplation at all. That turns on the provisions of the *Mining Act*—at [70].

No decision on whether Martu People occupiers or owners under the Mining Act

While it was not necessary to determine this issue, the court gave it some consideration. It was noted that native title holders cannot satisfy the definition of 'occupiers' for the purposes of the Mining Act as persons 'in actual occupation under any lawful title granted by or derived from the owner of the land' because:

- the Crown 'is not apt to be described' as the 'owner' of land the subject of native title; and
- in any case, native title is not 'granted or derived from the Crown'—at [78].

However, this did not answer the question because 'occupier' is defined in the Mining Act in an inclusive, rather than exhaustive, way. Therefore, findings of fact may be required and the time at which the question is asked may also be relevant. Either way, whether or not the Martu People were 'occupiers' for the purposes of the

Mining Act was a question that could not be answered on the facts contained in the special case—at [78] to [79].

As to whether the Martu people are entitled to compensation as 'owners', the court indicated they are either 'owners' as defined in s. 8(c) of the Mining Act (i.e. the person who, for the time being, 'has the lawful control and management' of the area concerned, 'whether on trust or otherwise') or, if not, s. 10 of the RDA 'requires compensation to be provided' because it is a *Gerhardy 1* case—at [81].