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HIGH COURT RULES ON EXTINGUISHMENT OF NATIVE TITLE

Western Australia v Ward [2002] HCA 28

The High Court of Australia handed down its decision in the Miriuwung Gajerrong native title case on 8 August 2002.

The High Court decided an appeal from the Full Federal Court on a native title claim by the Miriuwung Gajerrong people over 7,900 km^2 of land and water in the east Kimberley area of Western Australia and part of the Nothern Territory, including the Keep River National Park, Lake Argyle and part of the Ord River Irrigation Scheme. The claim was lodged in 1994 and litigation was initiated in the Federal Court in 1995.

Native title as a "bundle of rights"

The High Court confirmed the approach of the Full Federal Court that native title rights and interests constitute a "bundle of rights" and as such, are capable of partial extinguishment. Individual native title rights and interests from the bundle may be extinguished whilst leaving others intact. The High Court held that native title is not analogous to a fee simple interest.

Proof of native title

The High Court reinforced the need for claimants to prove connection to the land, as the Native Title Act protects only those rights and interests in relation to land or waters, where the peoples have a connection with the land or waters by virtue of traditional laws and customs. Continued actual use of the land or waters was held not to be essential to establish sufficient connection. Claims as to the protection of cultural knowledge that go beyond denial or control of access to land and waters were held not to be rights protected under the NTA.

The High Court also reinforced the importance of sufficient proof of native title, before the question of extinguishment of native title rights can arise. The Court re-stated that the claimants must prove native title as recognised by the common law before their claim can be considered under the NTA. The High Court stressed the need to identify the specific content of the native title rights and interests according to traditional laws and customs acknowledged and observed by the claimants.

Land tenure and extinguishment

The Court ruled on several kinds of dealings with land, including pastoral leases, mining leases and other dealings under WA and NT legislation. The Court found that some dealings wholly extinguished native title rights and interests, whilst others did not.

- *Pastoral leases and mining leases – co-existence with native title-holders*

It was held that the grant of pastoral leases under WA legislation extinguished the claimant's native title right to control access to the land or to be asked for permission to use or have access to land.

The majority found that pastoral leases did not confer a right to exclusive possession on pastoral lessees and did not necessarily extinguish all native title rights and interests. The judgment provides that native title-holders and pastoralists can co-exist on the land subject to the pastoral lease.

The Court confirmed the application of the "inconsistency of incidents" test in relation to extinguishment, involving the identification and comparison of native title rights and interests with the legal nature and incidents of non-native title rights (eg rights granted under legislation such as pastoral leases). Native title rights and interests will be extinguished to the extent of any inconsistency with non-native title rights.

Specifically for pastoralists, to the extent that the rights and interests under the pastoral lease and the doing of any activity in giving effect to them are able to co-exist

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with native title rights and interests, the rights under the pastoral lease prevail. The question of precisely what native title rights and interests the Miriuwung Gajerrong people maintained which may co-exist with pastoral lease operations was remitted back to the Full Federal Court for further hearing.

A similar position was held to apply generally to mining leases. The High Court found that the grant of the Argyle mining lease did not wholly extinguish native title, although the majority indicated that native title over the area had been extinguished prior to the grant of that lease.

- *Minerals and petroleum*

The High Court found that the evidence did not establish any native title right or interest in any mineral or petroleum. The Court was not required to rule on whether, as a matter of law, native title exists in minerals or petroleum, although the majority indicated (obiter) that if the right had been found to exist in this case, it would have been extinguished by the *Mining Act 1904 (WA)* and the *Petroleum Act 1936 (WA)*.

- *Reserves*

The High Court held that the mere designation of a reserve does not, of itself, extinguish native title, although it is inconsistent with the native title right to be asked for permission to use or have access to the land. The Court found that where a reserve is vested in a body or person, an estate in fee simple is vested and native title is wholly extinguished.

The court declined to rule on the effect of the creation of the Ord River Scheme on native title rights and remitted the issue back to the Full Federal Court.

- *Fishing in tidal waters*

The High Court found that the exclusive native title right to fish in tidal waters had been extinguished.

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