NATIVE TITLE BRIEFING

***Ben Ward (on behalf of the Miriuwung-Gajerrong People) v Western Australia and others*, High Court of Australia, August 8 2002**

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This appeal from the decision of the Full Federal Court of Australia in 2000 is likely to be the most significant decision on native title, for at least the natural resources industries, since the *Wik case* in 1996.

Assuming that the High Court finds that the Miriuwung-Gajerrong People have retained their connection with the land claimed so that they have not lost their native title, the Court will have to rule on whether their native title might nevertheless have been extinguished by certain acts of Government.

The way the Court rules on these issues will be of considerable significance for the mining and resources sector in particular. And because one of the claims of the Miriuwung-Gajerrong is for native title rights over sub-surface minerals, the outcome of that claim may affect the States' right to royalties on minerals. If the Miriuwung-Gajerrong were to succeed on that issue, there could be serious effects on the finances of WA and Queensland in particular, leading to a crisis in Commonwealth/State revenue arrangements (although we think it unlikely that the High Court would decide in that way).

The High Court will also either confirm or overrule the Full Federal Court's findings that native title has been permanently extinguished on lands where mining leases have been granted, on lands where large-scale industrial development like the Ord River Project has occurred, and on pastoral leases where the leases have been fenced or otherwise enclosed by pastoralists. This will clarify the law, and will also be likely to give new impetus to negotiations between native title claimants, mining companies and others, for negotiated outcomes to native title issues.

The issues that the High Court will be ruling on, and the likely effects of the Court's decisions, may be summarised as follows:

1. CAN NATIVE TITLE BE PARTIALLY EXTINGUISHED BY GOVERNMENT ACTIONS?

The Miriuwung-Gajerrong People have argued that native title cannot be partially extinguished by Government actions such as the granting of leases, etc—that native title is not made up of a *'bundle of rights'*, some of which may be extinguished by Government actions. Rather, they say, native title is a special form of title, and that even if a lease has been validly created by a Government over land where native title exists, when the lease expires the full native title over the land is restored.

WA and the Northern Territory, the *'respondents'* before the High Court, have argued the contrary position, saying that where a Government has created a valid lease on lands where native title existed, the native title was automatically extinguished in part, by the creation of the lease, and this extinguishment is permanent. They argued that native title is really no more than a *'bundle of rights'* and that if some of those rights are extinguished permanently by acts of Government like the grant of leases, the remaining rights continue unaffected, and exist side-by-side with the rights of the lease holder.

Although this issue may seem like a dry legal argument, it is of considerable importance for the resources industries. Much of the remote areas of Australia where mineral exploration and development occurs is covered by pastoral leases granted by Governments in the 19th and early 20th centuries. If the Miriuwung-Gajerrong position is accepted by the High Court, vast tracts of Australia will be found to have

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native title underlying the pastoral leases. And any time a Government wants to take action over those lands—for example, where a Government wishes to issue an exploration licence or a mining lease—the Government would have to assume that the original native title of the Aboriginal inhabitants of the land had not been affected by the grant of the pastoral lease. This would have significant implications for the compensation liability passed on by Governments to the mining and resources companies.

The High Court proceedings are the result of an appeal from the Federal Court. When the matter was first heard by the Federal Court, Justice Lee upheld the arguments of the Miriuwung-Gajerrong people on this issue. However, when Western Australia and the Northern Territory appealed to the Full Bench of the Federal Court, the Full Bench reversed Justice Lee's decision. The Miriuwung-Gajerrong people have now appealed to the High Court on this issue.

For the High Court to find in favour of the Miriuwung-Gajerrong people on this issue, the Court would be revisiting its own decision in the 1996 *Wik case*. In that case, the High Court found that pastoral leases and native title can exist side-by-side, and that to the extent the rights of the pastoral lease holder are inconsistent with the rights of the native title holders, the native title holder's rights yield to the pastoral lease holder's rights.

HAVE ANY NATIVE TITLE RIGHTS SURVIVED ON THE ENCLOSED LANDS WITHIN PASTORAL LEASES?

The Full Bench of the Federal Court found that some native title rights were likely to have survived the creation by the State of Western Australia of pastoral leases in that State, so that the rights of the pastoral lease holder would run side-by-side with the remaining native title rights. However, the Full Bench found that where the holder of the pastoral lease, in exercise of the powers in the lease, has enclosed or improved parts of the pastoral lease, the remaining rights of the native title holders have been extinguished because the native title holders are legally excluded from the land from then on.

The Miriuwung-Gajerrong people have appealed to the High Court against this decision, saying that their native title rights cannot have been extinguished by the mere fencing of land within pastoral leases.

Depending on how the High Court decides this issue, there are potentially large tracts of land within pastoral leases in Western Australia where native title could be found to have been totally extinguished. Such a finding by the High Court could be seen to qualify the Court's own ruling in *Wik* (although the WA pastoral leases being considered in the *Ward case* are quite different to the Queensland pastoral leases which were considered in *Wik*), and remove native title impediments to mining and exploration on all areas within pastoral leases in Western Australia which are, or have at some stage been, fenced or improved.

HAS NATIVE TITLE SURVIVED ON MINING LEASES?

The Full Bench of the Federal Court decided that mining leases granted under the 1978 *Mining Act* in Western Australia have permanently extinguished all native title over the land in those leases, because they give to the mining lease holder the right of exclusive possession to the land, even if only for a limited range of purposes (mining and associated activities).

The Federal Court did not consider whether *exploration licences* (as

opposed to mining leases) have extinguished native title—the High Court had already said in the *Mabo case* in 1992 that exploration leases and authorities to prospect do not extinguish native title.

The Miriuwung-Gajerrong people have appealed on this point to the High Court. Their argument is that the true character of a mining lease is that it is not really a lease at all—it is more like a licence to occupy the land coupled with a right to take away minerals extracted from the land. They have argued that a mining lease does not give a right of exclusive possession—just like the pastoral leases in the *Wik case*, the term *'mining lease'* is something of a misnomer.

If the arguments of the Miriuwung-Gajerrong people are accepted, the rights of the mining lease holder will effectively be *'carved out'* of the native title rights, and the native title rights will exist side-by-side with the rights of the mining lease holder.

Depending on how the High Court decides this issue, native title might be found no longer to exist on any area of land which is now, or ever has been in the past, held under mining lease. The implications of this are not necessarily confined to Western Australia. If mining leases in other States and Territories are expressed to give the mining company the right of exclusive possession of the land, then they might have also extinguished native title for all time.

Relatively little of the Australian landmass will be affected by such a decision, but such a decision would have significant impact in areas which have been previously worked for mining (eg, the Eastern Goldfields region in Western Australia and Bendigo and Ballarat in Victoria).

HAVE ANY NATIVE TITLE RIGHTS TO MINERALS SURVIVED?

All the States and Territories have passed laws declaring that the Crown (ie, the States and Territories themselves) owns the surface and sub-surface minerals, petroleum, gas, etc. Under Australian law, the States and Territories give leases to mining companies allowing them to mine the minerals; when the minerals are extracted, the mining companies must pay to the States and Territories royalties on what has been mined.

Until the High Court's decision in *Mabo* in 1992, there had never been any serious challenge to the proposition that this appropriation by the States and Territories of the mineral wealth of the country was effective.

The Full Bench of the Federal Court considered this issue. They decided that any native title rights to minerals and petroleum that might have existed in WA had been permanently extinguished when the WA Parliament passed the law vesting ownership of minerals and petroleum in the Crown.

The Miriuwung-Gajerrong people have appealed to the High Court against this decision, arguing that the High Court's decision in the *Murandoo Yanner case* in 2000 meant that the passing of these laws by the States and Territories did not give them absolute ownership of the minerals concerned, but rather the mere *power to control the exploitation* of these resources.

It is on this point that potentially the greatest impact of the High Court's decision could be felt. If the Miriuwung-Gajerrong people succeed in their argument, it is possible that native title to minerals might have survived the passing of the State and Territory laws declaring that the Crown owns the minerals. That could mean that native title claimants might lodge massive compensation claims against State and Territory Governments based on royalties paid to (and retained by) the States and Territories rather than the native title holders.

Perhaps because such a finding would have such far-reaching consequences, it seems unlikely that the High Court would decide the matter in this way. In any event, it would seem a somewhat strained interpretation of the earlier case law.