The High Court offers more certainty

Two important decisions were handed down by the High Court of Australia on 8 August 2002 – *WA v Ward* and *Wilson v Anderson*. AAR Partner Tony Wassaf assesses their implications and says there is now more certainty for all parties involved in land grants or native title negotiations, in terms of what native title covers and the range of titles and circumstances which might extinguish it.

### 1. General importance

The Ward case is an important contribution by the High Court to the body of native title case law, and the majority judgment analysis of the *Native Title Act 1973* (Cth) (*NTA*) will provide the guiding approach to extinguishment issues going forward.

A clear majority of the High Court has delivered a joint judgment, making it easier to extract its reasoning. These decisions provide guidelines but also highlight the complexity of native title law and the close consideration that must be given to statutory provisions.

The decisions are complex and cover a wide range of governmental actions and grants of title, including resumptions, reserves, perpetual leases, pastoral leases, mining leases, special purpose leases, and permits to occupy. This means that there are few simple or global answers and advice for clients about particular projects and titles is still very much a case-by-case assessment.

Some issues have been clarified, while others remain unresolved. However, for all parties, negotiated outcomes through indigenous land-use agreements or other agreements continue to be the best way forward. Resources projects over perpetual pastoral leases in the western division of New South Wales will not now be subject to negotiations, as native title over areas covered by those leases has been totally extinguished.

These two decisions, coupled with the Wik decision, contain an analysis of Crown
land legislation as they relate to pastoral leases in Queensland, Western Australia, Northern Territory and New South Wales and, as a result, there is increased certainty concerning the impact that pastoral leases have on native title in those states and the Northern Territory. It has also been held that the grant of a WA mining lease before 31 October 1975 does not necessarily extinguish native title. Importantly, pastoral and mining rights prevail over any coexisting native title rights of a residual kind.

There has also been, in effect, a determination that legislation vesting minerals or petroleum in the Crown extinguished any native title rights in the minerals or petroleum. This makes it less likely that native title rights to minerals can be claimed as part of native title determinations.

2. Fundamental issues

Minerals and petroleum
The WA mining and petroleum legislation, which declared minerals and petroleum in the ground to be the property of the Crown, has now been held to extinguish all native title rights that may have existed over them.

This conclusion was not actually necessary because the evidence presented in the case did not establish any native title rights in minerals and petroleum in WA or the Northern Territory. However, it is clear that this conclusion will be relied upon in future decisions and negotiations. There is similar legislation in most other Australian states and territories.

The Ward case did not rule out the possibility that there can be traditional Aboriginal law custom or use relating to minerals or petroleum, but, if the legislation has the same effect as the WA legislation, then those rights will have been extinguished. The date of 31 October 1975, the day on which the Racial Discrimination Act (RDA) commenced, was confirmed as a critical date for the NTA.

Where the legislation was passed before 31 October 1975 (which is the case for most legislation), no compensation will be payable for that extinguishment. Where the legislation was passed after 31 October 1975, compensation will be payable for that extinguishment by the relevant government.

Native title definition
Native title protected by the NTA is defined in s223 of the NTA. A native title claim will be valid only if it satisfies the three elements of the definition:

1. that the rights are possessed under the traditional laws acknowledged and traditional customs observed by the relevant peoples;
2. those peoples have a connection with the land or waters in question by those traditional laws and customs; and
3. those rights are recognised by the common law. Point 1 is a question of fact to be determined on the facts of each case.

As to point 2, the absence of evidence of recent or continued use of the land or waters does not of itself mean that there can be no relevant connection. While it was acknowledged that the connection which aboriginal peoples have with ‘country’ is essentially spiritual, no view was expressed on whether a spiritual connection with the land will be sufficient for this purpose and this issue remains outstanding.

As to point 3, the question of recognition by the common law remains to be determined in subsequent cases.

It was acknowledged that a core native title right is the right to ‘speak for country’ – i.e. to control access to the land, but that native title rights can comprise a bundle of different kinds of rights.

The High Court was critical of the lower courts in their lack of precision in describing native title rights in the determination of native title. It said rights should be expressed by reference to the activities that may be conducted on the land. This point becomes critical where partial extinguishment is involved, so that surviving rights can be identified.

The High Court is consistent in signalling to industry and government since Wik that questions of extinguishment really require detailed evidence and analysis of both the particular native title rights claimed and the particular governmental action or commercial title in question. Otherwise, it is difficult to determine with any certainty the extent of any inconsistency and what kinds of residual native title rights might remain.

Partial extinguishment possible
It is possible for there to be extinguishment of some of the native title rights but not all of those rights.

Examples of partial extinguishment include where there is a grant of a pastoral lease or a mining lease in WA - the native title right to control access to land or to control the use to be made of the land may have been extinguished but other native title rights may have
continued. The rights of the holder of the pastoral lease and mining lease prevail over the surviving native title rights. Attention will need to be paid to whether there are any surviving native title rights and whether their continuation is inconsistent with the granted rights by parties in subsequent cases.

The focus is clearly on the rights claimed by native title claimants and whether those specific rights are inconsistent with prior grants.

Extinguishment

The majority confirmed that comparison is needed between the legal nature and incidence of the right granted or asserted and the native title rights asserted to determine whether native title rights have been extinguished by a grant of rights to third parties or by an assertion of rights by government.

The actual use of land as a determining factor for extinguishment was rejected, as were approaches based on adverse dominion. The legal effect of the rights granted by the Crown is paramount in determining the subsequent effect on native title.

Crown to Crown grants before 31 October 1975

Crown grants made before 31 October 1975 and expressed as freehold grants to the Minister or other statutory body extinguished all native title rights. Those grants are in a different category to Crown to Crown grants made after that date, where they are past acts or intermediate period acts. For those grants, the non-extinguishment principle applies and native title claims can be made over the grant areas.

Past acts

The Court stressed that grants made after 31 October 1975 and before 1 January 1994 were past acts only if they were invalid because of the existence of native title (principally because of the RDA). The RDA applies to state and Northern Territory laws.

Invalidity will not arise in all cases and, by way of example, it is only where a state law extinguishes only native title and leaves other titles intact that such law will be invalid. Unless the act falls into this category, the act would remain valid and if that act confers the right of exclusive possession, then native title will have been extinguished. A right of compensation may arise in this instance.

It would be fair to say that this is one of the most complex and uncertain areas of native title law.

Cultural knowledge partly protected

As mentioned, for native title to be protected by the NTA, the native title rights must fall within the definition in s223 of the NTA. There must be a connection with the land or waters in question. The NTA will not protect the right to maintain, protect and prevent misuse of cultural knowledge not connected to the land or waters. If such knowledge is to be protected, it will require the application of other laws such as those that protect intellectual property or cultural heritage.

The High Court refused to create a new intellectual property area to protect ‘cultural knowledge’. This covers such matters as the inappropriate viewing, hearing or reproduction of secret ceremonies, artworks, song cycles and sacred narratives, and may or may not be in connection with the land. Those matters connected with land could include access to sites where artworks or ceremonies are performed under traditional laws and customs.

Right to negotiate procedure alive

An Aboriginal group will have available to it the right to negotiate procedure in the NTA, so long as it has a registered native title claim. Partial extinguishment of some native title rights means that other native title rights continue and they can form the basis of a registered native title claim. In those circumstances, the right to negotiate procedure will still need to be followed before a mining lease or exploration licence can be granted, unless a previous title or action has completely extinguished native title.

The use of an indigenous land-use agreement as an alternative continues to be an important issue for parties to consider. Whether the issues to be negotiated for limited surviving native title rights (including amounts to be paid) will be any different to the issues currently negotiated in such an agreement remains to be determined in practice.

If it is possible to draft mining or exploration rights in such a way that the surviving native title rights are not really affected and can still be enjoyed, then the right to negotiate procedure may not apply. However, the difficulty will be in identifying with precision the surviving native title rights and any potential disturbance of the land from mining in circumstances where a court has not made a determination of native title rights.

NSW pastoral leases

In Wilson v Anderson, the Court held that a perpetual lease granted under the Western Lands Act (NSW)
confers a right of exclusive possession and the grant of that lease extinguished all native title rights in relation to the land.

Consequently, the grant of mining leases and exploration licences over Western Lands Act perpetual leases should no longer attract the right to negotiate procedure.

There may, however, be registered native title claimants over such land and it will be necessary for the NSW Government or project proponents interested in obtaining mining leases and exploration licences over those areas immediately to remove the registered claims. This may require a strike-out application to the Federal Court.

Fishing rights
The High Court confirmed that there is no exclusive native title right to fish in tidal waters. A non-exclusive right may still exist.

3. Specific acts

WA mining tenements potential invalidity
If WA mining tenements have been granted over areas covered by pastoral leases, where the right to negotiate procedure was not followed prior to their grant, then they could be invalid if native title rights are established over those areas.

WA pastoral leases
WA pastoral leases were held not to grant the holder of the lease the right to exclude native title holders from the land. The pastoral leases were ‘non-exclusive pastoral leases’ and have ‘previous non-exclusive possession acts’ attributable to the State of Western Australia. It was said that sections 12M(1)(a) and (b)(i) of the Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA) therefore probably applied. The limited findings of facts did not permit a definitive answer and the matter is to be remitted to the lower Court to make appropriate findings.

S12M(1)(b)(i) provides that if the act extinguishes a native title right, that right is extinguished. In this instance, the native title right to say who could, or who could not, come onto the land was denied to the native title holder by the rights conferred by the pastoral lease and, as a result, that native title right was extinguished by s12M(1)(b)(i). A similar position applies to a native title right to burn-off land.

On the other hand, the native title right to hunt or gather traditional food on the land may not be inconsistent with the rights conferred by the pastoral lease and they may survive under s12M(1)(a), but the pastoral lease rights would prevail by force of that section.

WA mining leases
The mining leases granted under the WA Mining Act fall within the definition of mining lease in the NTA. Those mining leases do not necessarily extinguish all native title rights, but they do extinguish the native title right to control access to the land.

It was said that, although the lessee could prevent anyone else seeking to use the land for mining purposes, it does not follow that all others were necessarily excluded from all parts of the lease area. The RDA would not invalidate mining leases granted after 31 October 1975 if they extinguished any native title rights.

If native title holders are not entitled to compensation under s123 of the Mining Act as owners or occupiers, then the effect of s10(1) of the RDA and s45 of the NTA would be to create a statutory right to just terms compensation, payable by the holder of the mining leases.

As the mining lease is not invalidated by the RDA, the mining lease cannot be a Category C past act and the non-extinguishment principle does not apply.

The Argyle mining lease was in this category and therefore was valid.

WA non-vesting reserves
The designation of land as a reserve (which did not vest that land in a third party) before 31 October 1975 did not, without more, extinguish native title rights. However, if the creation occurred after 31 October 1975, division 2 of part 2 NTA needs to be considered.

The creation of the reserve over vacant Crown land is an act that affects the native title right to control use of, or access to, the land and would extinguish that right. The RDA invalidates that reserve. This makes the creation of the reserve a Category D past act that is validated by the WA validation legislation, with the non-extinguishment principle applying.

WA vesting reserves
Reserves vested in some person or body under s33 of the WA Land Act 1933 are a vesting in fee simple which extinguished native title where the vesting occurred before 31 October 1975.
After that date, the vesting of a reserve would be valid (and not a past act) and the RDA would supply to native title holders a right of compensation for what is lost upon vesting. If the vesting took place on, or before, 23 December 1996, it will be a previous exclusive possession act if still in force on 23 December 1996 and all native title rights would be extinguished.

If the reserve was not in force on 23 December 1996, the vesting still had the effect of extinguishing native title rights under the general law because the right of exclusive possession was conferred by the vesting.

Given the proliferation of reserves across Australia, the method of creation or vesting of a reserve requires close analysis to ascertain the effect on native title.

Works
The question of whether vacant Crown land used as a buffer zone and expansion areas constituted 'works' under the WA Rights in Water and Irrigation Act was considered, and it was concluded that it did not on the facts as found by the Full Court.

Land resumptions under WA Public Works Act 1902
The resumption of land in December 1975 had the effect of vesting the land in the Crown for an estate in fee simple in possession freed and discharged of all interests. It extinguished native title. The resumption was a previous exclusive possession act.

Permit to occupy
A permit to occupy under s16 of the WA Land Act 1818 granted before 31 October 1975 conferred a right to exclusive possession, and extinguished native title.

Special leases
Special lease SL 3116/3010 granted under s116 of the WA Land Act 1933 for the purpose of grazing in 1962 conferred a right to exclusive possession and extinguished native title. Its grant was an exclusive pastoral lease and hence a previous exclusive possession act.

NT pastoral leases
Pastoral leases granted under the Northern Territory Crown Lands Act 1890 (SA) contained reservations in favour of Aboriginal persons. They did not confer a right of exclusive possession. They were non-exclusive pastoral leases and sections 9L and 9M of the NT Validation (Native Title) Act 1994 applied.

NT special leases
Special leases granted under the NT Special Leases Act 1953 in 1980 to the Conservation Land Corporation and the Crown Lease Perpetual granted under the NT Crown Lands Act 1931 in 1987 to that Corporation conferred a right of exclusive possession and extinguished native title subject to the operation of the RDA. The RDA invalidated those grants. They were past acts and were validated by the NT Validation (Native Title) Act.

As the corporation was regarded as a statutory authority of the Crown, the grants were Category D past acts and the non-extinguishment principle applied. The leases would have been previous exclusive possession acts, except that paragraph 5 of the definition of that term denied the grants that character, because the grants were for the purpose of preserving the natural environment of the area.