WESTERN AUSTRALIA*

LEGISLATION[1]

On 30 March 1995, the Western Australian government introduced into Parliament the Titles Validation Bill 1995. This Bill is intended as complementary legislation to the *Native Title Act* and will validate titles (which would otherwise be invalid by reason of native title) issued by the State up to 31 December 1993 (when the *Native Title Act* commenced).

HIGH COURT DECISION

WESTERN AUSTRALIA v COMMONWEALTH; WOROORA PEOPLES v WESTERN AUSTRALIA; TEDDY BILJABU v WESTERN AUSTRALIA[2] (unreported, High Court, 16 March 1995)

The High Court's decision was unanimous. The result was, as most lawyers have predicted for more than a year, namely the principal provisions of the Commonwealth's *Native Title Act* 1993 (NTA) are valid and Western Australia's *Land (Titles and Traditional Usage) Act* 1993 (LTTUA) is invalid.

In summary, the court decided that:

1. All the provisions of the NTA which were challenged by Western Australia are valid except for s 12 (and that section is of no practical importance to resources companies).
2. The LTTUA is invalid, as it is inconsistent with the *Racial Discrimination Act* 1975 (RDA). The court did not need to decide whether it was also inconsistent with the NTA but clearly it is.
3. None of the events which has occurred in Western Australia's constitutional or legislative history has operated as a blanket extinguishment of native title.
4. The NTA is operative within Western Australia.

There are two judgments covering 110 pages. The first judgment is by six of the judges and the second is by Dawson J who was the only judge in *Mabo (No 2)* to reject the common law concept of native title. The judgment of Dawson J is brief and simply indicates that he will now follow the decisions of the majority in *Mabo (No 1)* and *Mabo (No 2)* "in order to achieve maximum certainty with the least possible disruption". He then agreed with the decisions of the other six judges (as set out above).

It should be noted that the High Court made it clear that its finding of validity only related to those parts of the NTA subjected to specific challenge by Western Australia, pointing out that those parts dealing with the National Native Title Tribunal, the Register of Native Title Claims and the National Native Title Register had not been considered. Therefore, the issue of the enforceability of Tribunal determinations, about which some uncertainty exists following the recent decision in *Brandy v Human Rights and Equal Opportunity Commission* (unreported, Fed Ct, 95/006, 23/2/95) remains unresolved.

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1. This summary was contributed by Michael Hunt.
2. This case note was contributed by Michael Hunt and Doug Young.

No Ruling on whether the Grant of a Pastoral Lease has Extinguished Native Title

The court confined itself to deciding the specific questions it was asked and did not use the opportunity to further expound on the principles first enunciated in *Mabo (No 2)*.

Notwithstanding that the issue of the extinguishing effect (if any) of leases was mentioned in argument, the court did not deal with it in its judgment. Of course, this issue is of critical concern to mining and petroleum companies operating in Western Australia where pastoral leases cover 38 per cent of the land mass of the State. However, it is also an important issue in other States and the Northern Territory, especially Queensland as demonstrated in the recent National Native Title Tribunal decision refusing to accept a native title claim over the Century zinc deposit because the area was once the subject of a pastoral lease.

Unfortunately the court has provided no guidance which could assist in resolving the vital question of whether a pastoral lease (with or without reservations for Aboriginal use) extinguished native title, other than commenting that "native title . . . existed in Western Australia in respect of land where the continuing right of Aborigines to enjoy their native title was inconsistent neither with the valid grant of an interest nor with a valid appropriation of the land for the use of the Crown". Thus the court has repeated the majority pronouncements in *Mabo (No 2)* that native title can be extinguished to the extent of inconsistency but chose not to throw light on the debate over which type of grant is wholly inconsistent with native title and which type is only partly inconsistent.

No Ruling on whether Mining Tenements or Petroleum Titles Issued after 1975 Affecting Native Title are Invalid

A disappointing, although not unexpected, aspect of the decision is that the court has not elaborated on the other very important issue to mining and petroleum companies concerning the validity of titles granted between 31 October 1975 (when the RDA commenced operation) and 1 January 1994 (when the NTA commenced operation). Most of the current mining tenements and petroleum titles in Western Australia will fall into this category. The effect of the RDA on such tenements and titles granted during this period is still uncertain. Essentially the proposition is that the RDA could invalidate such tenements and titles. Alternatively, they may be valid but the native companies concerning the validity of titles granted between 31 October 1975 (when the RDA commenced operation) and 1 January 1994 (when the NTA commenced operation). Most of the current mining tenements and petroleum titles in Western Australia will fall into this category. The effect of the RDA on such tenements and titles granted during this period is still uncertain. Essentially the proposition is that the RDA could invalidate such tenements and titles. Alternatively, they may be valid but the native title holders might be entitled to compensation for the interference with their rights, such compensation being payable by the State. Unfortunately the issue remains unresolved because the High Court declined to rule on it, saying only:

> The courts have not determined the effect of the *Racial Discrimination Act* on the validity of the State laws authorising the doing of executive acts which purportedly extinguished or impaired native title after the *Racial Discrimination Act* came into operation. And it is unnecessary to determine that question now.

Obviously the High Court regards the issue as arguable. Indeed the reasoning it gave in invalidating the LTTUA could be used (or applied) to hold that any titles the grant of which impact on native title holders in any way differently from the holders of conventional titles are invalid. It is significant to note that the court did not even consider the compensation argument arising under the RDA, preferring to hold the LTTUA as inconsistent and thus invalid.

Proposal for Validating Legislation for pre-1994 Titles

If the end result is that a mining tenement is invalid, this invalidity can be cured by the Western Australian Parliament enacting validating legislation in accordance with the principles of the NTA (as has already occurred in the other States and the Northern Territory).

There is no constitutional or legal obstacle which would prevent the Western Australian government from doing this. Indeed on 30 March 1995 the government introduced a Bill into Parliament which conforms with the validation principles of the NTA. This legislation, the Titles Validation Bill will confirm the validity of all those mining tenements, petroleum titles and *Land Act* titles which would otherwise be invalid by reason of native title issued by the State up to 1 January 1994.

Validity of 1994-1995 Titles

A further matter which is of concern to resource companies in Western Australia is the validity of any mining tenement or onshore petroleum title which issued between 1 January 1994 and 16 March 1995. Many companies will have some mining tenements or petroleum titles in this category. It is possible that any such tenements or titles will be invalid if they have been granted (as has been the case in Western Australia to date) without observing the NTA's "right to negotiate" procedures. If native title existed at the time the grant was made, any such tenement or title may be invalid.

The Minister for Mines has stated that any title holders wishing to ascertain the existence of native title which might affect their titles may do so by lodging with the Native Title Tribunal non-claimant applications for determination of native title under the NTA. This is not a realistic solution, and need not decide the issue. Indeed, non-claimant determinations are those most likely to be rendered ineffective by the *Brandy* decision.

The Minister has indicated that if any particular title is shown to be defective because of the existence of native title and the operations of the NTA, the government will ensure the protection of the title holder's rights and interests by not determining any new applications for the subject area from parties other than the original title holder (preventing "claim jumping") and if necessary, issuing a replacement title to the original title holder in compliance with the NTA.

The Minister has also said that if the issue of an existing or replacement title results in a successful claim for compensation because of the existence of native title, the government will, where determined, accept liability for compensation.

The Western Australian government apparently proposes another Bill to resolve the problem of validity of titles issued between 1 January 1994 and 16 March 1995. It is doubtful that this type of legislation will be effective.

What is really required is a political accommodation between the Prime Minister and the Premier under which the NTA is amended so as to allow validation of all titles issued up to 16 March 1995.

In addition to their mining titles, (under the mining or petroleum legislation) mining and petroleum companies may use non-mining titles (under the land legislation) for some purposes of their projects. The validity scenario for land legislation titles is different from mining titles. Under the NTA any freehold and non-mining leasehold titles which have been granted over native title land in 1994-1995 will definitely be invalid, as they are impermissible future acts. Onshore mining tenements (including petroleum titles) will only be invalid if they "affect" native title and the "right to negotiate" procedures were not invoked prior to their grant. Offshore tenements and titles should be valid.

Situation of Current Tenement or Title Applications

The final area of concern to resources companies relates to current tenement or title applications. The Minister has announced procedures under which:

- mining tenement or petroleum title applications will be assessed by the Department of Minerals and Energy for possible existence of native title interests based on current and historical tenure;
- applications not in conflict with possible native title interests will be determined in accordance with the normal procedures;
- applications which include a small overlap with possible native title interests will, subject to the applicant's agreement, be determined with the area of the overlap excised;
- in cases of substantial overlap or coincidence with possible native title interests, the application will be progressed under the future act regime as prescribed under the NTA.

However, what is actually happening is that very few tenements or titles are being granted. Only tenement or title applications over freehold are being granted (and there are very few of these in Western Australia). No tenement or title applications over pastoral leases are being granted pending resolution of the critical issue of whether the grants of pastoral leases have extinguished native title. The Premier has written to the Prime Minister asking for this to be clarified. The Prime Minister's previous response to this request has been to allow the courts to determine it (and presumably this will continue to be his attitude). That will take some time. It would be better for the NTA to be amended to make it clear but we doubt that is a politically achievable situation. In the interim, we imagine that the grants of tenement applications on pastoral leases will be suspended as are applications on vacant Crown land. In summary, the grant of mining tenements and petroleum titles in Western Australia has virtually ground to a halt.

WARDEN'S COURT DECISIONS

RGC MINERAL SANDS LTD v BRIAN KIMBERLEY LEWIS and JANET HAZEL LEWIS[3]
(unreported, Perth Warden's Court, 30 November 1994)

3. This case note was contributed by Chris Foley.

The plaintiff is the holder of a mining lease over private land owned by the defendants. The mining lease was granted pursuant to a *State Agreement Act*. As a result of the inability of the parties to agree the amount of compensation, if any, that the plaintiff was required to pay to the defendants, the plaintiff commenced an action for the Warden to determine the amount of compensation payable pursuant to s 35(1) of the *Mining Act*.

The defendants argued that the Warden did not have authority under s 35(1) to assess compensation.

The defendants first argued that the provisions of the Act enabling the Warden to assess compensation were, by virtue of the mining lease, applicable to the mining lease subject to the terms of the State Agreement. They argued that the agreement required compensation to be the subject of a written agreement and that, in the absence of a written agreement, it is not open to the warden to assess the amount of compensation which should be paid. The Warden commented that the logical response to the defendants' argument was that it could not be correct because it could result in a large government approved project being stopped dead in its tracks by the landowner who refused to enter into a written compensation agreement. The defendants responded that the State Agreement provided the State with power to resume any land required for the purposes of the agreement and then to pay the costs of the land resumed.

In rejecting this argument, the Warden said that the provisions of the State Agreement allowing for the resumption of land had no specific relationship with the provisions of the agreement requiring the parties to enter into a written compensation agreement. If a relationship had been intended, the Warden said one would expect some indication that such a relationship existed such as a statement that failing a compensation agreement being negotiated, then the provisions of the resumption clause would apply.

The Warden also rejected the applicability of the principle that, where legislation includes provisions relating to similar matters in different terms, there is a deliberate intention to deal with them differently. In rejecting this argument the Warden accepted the plaintiff's argument that the provisions of the State Agreement requiring a written compensation agreement incorporated the provisions of the *Mining Act* unless they are excluded by the State Agreement. The Warden said ss 35 and 123 of the *Mining Act* empowering the Warden to determine compensation were not excluded by the State Agreement.

Finally, the Warden rejected the applicability of the principle that where there is a general provision which, if applied in its entirety would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision and the general provision, in so far as it is inconsistent with the special provision, must be deemed not to apply. The defendants argued that ss 35 and 123 of the *Mining Act* were general provisions and the provisions of the State Agreement requiring a written compensation agreement, were special provisions. In so far as ss 35 and 123 were inconsistent with the provisions of the State Agreement, the defendants argued ss 35 and 123 did not apply. The Warden did not think it correct to characterise ss 35 and 123 as general provisions and commented that, in fact, they appeared to have the character of a special provision. Similarly, the Warden said it was not correct to characterise the provisions of the State Agreement as special provisions.

The Warden ruled that he did have jurisdiction to determine compensation to be paid by the plaintiff to the defendants.

LYNTON JAMES DOWNE v CENTAUR MINING & EXPLORATION LTD[4]
(unreported, Coolgardie Warden's Court, 10 January 1995)

The plaintiff sought forfeiture of a mining lease held by the defendant for non-compliance with expenditure conditions under s 89 of the *Mining Act*. The defendant did not attend the hearing.

At the commencement of the hearing the plaintiff tendered a certified search indicating that no expenditure report had been lodged for the most recent expenditure year or for the previous expenditure year. The plaintiff also gave evidence that he was a prospector with other interests in the area and had not seen evidence of any activity on the tenement for several years.

The Warden decided on the balance of probabilities that the defendant had failed to comply with the expenditure requirements and that the land was not being worked. He accepted that the defendant's breach was of such gravity that forfeiture should be recommended and ordered accordingly.

ROBERT JOHN COLLINS v MARYMIA EXPLORATION NL[5]
(unreported, Perth Warden's Court, 10 March 1995)

The defendant held exploration licence E53/308 (issued before the present graticular system) and had located prospective orebodies within the land subject to that licence. It sought to surrender half of the land subject to the licence in accordance with s 65 of the *Mining Act*. The boundaries of the retained land were clearly delineated to retain the prospective orebodies. The resulting retained area was not rectangular but consisted of 15 straight line sides. Three sides were at right angles to each other but the rest followed a granite outcrop which the defendant sought to exclude from the retained area.

The plaintiff argued that the defendant had failed to comply with the provisions of the *Mining Act* and *Mining Regulations*, in particular ss 65 and 95 and regs 44 and 92. The plaintiff argued that the shape of the retained tenement was unjustifiably too far removed from the requirements of regs 44 and 92, such that s 65(4) resulted in the whole of the area being deemed to be surrendered and the exploration licence ceasing to apply to it.

After analysing these sections and regulations, the Warden observed that the Act and regulations gave no guidance as to what factors should be taken into account in deciding whether the shape of a tenement remaining after surrender is as near to the shape prescribed by reg 92 as is practicable. There was no indication in the legislation that "natural features" are to be restricted to hills or riverbeds and there appears to be no reason to exclude identified mineral reserves from the category of "natural features". There was also no reason to exclude a tenement holder's "subjective" assessment of a natural feature or mineral deposit just because it is a subjective as distinct from an objective assessment.

The Warden agreed with the defendant's submissions that the purpose of the Act is to maximise exploitation of mineral resources and that holders of exploration licences should identify prospective areas and shed other areas. The primary objective behind s 65 is to force the holders of exploration licences to retain only those areas of geological interest and not force them to retain a

4. This case note was contributed by Chris Foley.
5. This case note was contributed by Michael Tucak.

rectangular area. He stated that if the geology makes it desirable to depart from a rectangle, then they may vary the shape of the area. He concluded that it would make little sense and create an injustice if along with the tenement holder's obligation to give up 50 per cent of the tenement, the tenement holder was also obliged to ensure the remaining area was a rectangle and as a consequence be forced to surrender part of a prospective orebody located by its efforts and money.

The Warden dismissed the complaint.

NATIVE TITLE ACT HELD VALID

*THE HIGH COURT'S DECISION AND ITS CONSEQUENCES**

In an important decision handed down on 16 March 1995, the High Court ruled valid the Commonwealth *Native Title Act* 1993, and ruled invalid Western Australia's legislative response to the 1992 *Mabo* case — the *Land (Titles and Traditional Usage) Act* 1993 (the WA Act).

The High Court was asked to rule on three main questions:

(a) was native title extinguished when the British Crown acquired sovereignty over Western Australia;

(b) was the WA Act valid; and

(c) was the Commonwealth *Native Title Act* 1993 valid?

Was Native Title Extinguished on the Establishment of Western Australia?

Western Australia argued that native title in that State had been extinguished once and for all when the British Crown acquired sovereignty over Western Australia. The argument ran that the historical circumstances of European settlement of Western Australia differed from those in New South Wales. The High Court, however, rejected this argument. The court accepted (as indeed it had in *Mabo*) that a sovereign power can in law extinguish native title when it acquires sovereignty. But the common law presumed that no such extinguishment was intended, and the court could find in the history of the establishment of Western Australia nothing to rebut the presumption. This was not to deny that some native title had been extinguished since colonisation; but this extinguishment had occurred parcel by parcel as the colony spread outwards, as the Crown granted land or appropriated it to itself. It had not occurred at the outset, when the colony was founded.

Was the WA Act Valid?

Whether the WA Act was valid turned on whether it was inconsistent with the *Racial Discrimination Act* 1975, a Commonwealth Act which came into operation on 31 October 1975. In particular, did the WA Act discriminate against Aboriginal native title holders in the enjoyment of the right to own property and the right to inherit property, rights protected by the *Racial Discrimination Act* and the International Convention of the Elimination of All Forms of Racial Discrimination?

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The WA Act had both a retrospective and a prospective operation. In its retrospective operation, it confirmed titles granted since the *Racial Discrimination Act* came into operation. In its prospective operation, it extinguished all subsisting native title, as from 2 December 1993. In place of the extinguished title, s 7 of the Act gave the (former) native titleholders "rights of traditional usage in relation to the land".

The argument centred on s 10(1) of the *Racial Discrimination Act*:

> 10(1) If, by reason of . . . a law of the Commonwealth or of a State or Territory, persons of a particular race . . . do not enjoy a right that is enjoyed by persons of another race . . . or enjoy a right to a more limited extent than persons of another race . . . then, notwithstanding anything in that law, [those persons] . . . shall, by force of this section, enjoy that right to the same extent as persons of that other race . . .

The High Court ruled that this section ensured that native title holders had the same security in the enjoyment of their title as holders of titles granted by the Crown (which for convenience we might call "normal" titles).

To test whether the WA Act was inconsistent with s 10(1), the High Court compared the position of Aborigines holding s 7 rights with the position of holders of normal title. The court concluded that the holders of s 7 rights were discriminated against compared to holders of normal title. For example, the WA Act gave normal title priority over s 7 rights. Section 7 rights could not be exercised inconsistently with the rights of normal title holders (s 8), nor so as to impair the exercise of the rights of normal title holders (s 20). Further, the WA Act allowed s 7 rights to be extinguished on a number of grounds, including by any "legislative or executive action" that clearly and plainly intended to extinguish those rights. This made the prospective operation of the WA Act inconsistent with the *Racial Discrimination Act*.

The court found that other Western Australian Acts similarly discriminated against holders of s 7 rights (compared to the holders of normal titles). These Acts were the *Lands Act*, which authorises the Governor to dispose of Crown Land, including land over which s 7 rights exist; the *Mining Act*, which regulates the grant of mining licences, permits, mining leases, and the like; the *Petroleum Act* and the *Public Works Act*. All denied holders of s 7 rights the same protection that normal title holders enjoyed against impairment and extinguishment of their title.

The High Court also ruled ineffective the retrospective operation of the WA Act. Confirming existing titles involved native title being extinguished. In the High Court's view, either this extinguishment was inconsistent with s 10 of the *Racial Discrimination Act*; or, if the extinguishment was consistent with the *Racial Discrimination Act*, then native title had been validly extinguished, leaving the provision confirming existing titles with no scope for operation. On either ground, the purported confirmation was ineffective.

In the result, the whole of the WA Act was ineffective. It had no legal operation.

Was the Native Title Act Constitutionally Valid?

The High Court ruled that the *Native Title Act* was a constitutionally valid Act of the Commonwealth Parliament. The *Native Title Act* had three main areas of operation:

(a) the recognition and protection of native title;

(b) the confirmation of past acts (titles) which the existence of native title had invalidated because of the operation of the *Racial Discrimination Act*; and

(c) the regulation of "future acts" over land subject to native title. The court ruled that all three areas of operation were valid under the "races power" in s 51(xxvi) of the Commonwealth Constitution.

The races power gives the Commonwealth power to legislate with respect to:

(xxvi) The people of any race for whom it is deemed necessary to make special laws.

In the court's view (following its earlier decision in the *Tasmanian Dams Case* (1983)), the races power was a general power to pass laws benefiting the people of any race. The *Native Title Act* was a "special" law, in that it conferred uniquely on Aboriginal and Torres Strait Island holders of native title ("the people of any race") a benefit "protective of their native title". Whether the *Native Title Act* was "necessary" was a matter for Parliament to decide, not the courts. (The conclusion on the races power made it unnecessary for the court to consider whether the *Native Title Act* was also supported by the external affairs power.)

The High Court also rejected a number of Western Australia's subsidiary arguments. Western Australia had argued that the *Native Title Act* was an impermissible Commonwealth intrusion into Western Australia's functions as a State, and that it impermissibly discriminated against Western Australia. The court dismissed these arguments, ruling that the Act was within Commonwealth power. The court acknowledged that the Act might produce a more substantial effect on Western Australia than on any other part of the Commonwealth. This was because (the High Court said) "history and geography have combined in creating in Western Australia a greater area and proportion of land which might be subject to native title". The difference in effect was of practical importance, but it did not indicate impermissible discrimination against Western Australia in the application of the *Native Title Act*.

Western Australia did succeed, however, in one of its arguments, namely that s 12 of the *Native Title Act* was constitutionally invalid. That section provides that the "common law of Australia in respect of native title" has the "force of a law of the Commonwealth". The court ruled that this was an attempt to confer legislative power upon the judicial branch of government. That was not permissible under the Australian Constitution. Western Australia's victory here was pyrrhic, because the invalidity of s 12 did not affect the validity of the rest of the *Native Title Act*.

The Consequences: Where to Now?

In affirming the validity of the *Native Title Act*, the High Court has signalled that native title is here to stay. The States and Territories which had held back from declaring operative their respective native title legislation in anticipation of the High Court decision, will now move to do so. These statutes for the most part mirror the *Native Title Act*, and validate the titles granted by their respective governments (their "past acts").

Frameworks will now be established in each State and Territory (to the extent to which they are not yet established) to handle future land grants and native title consistently with the regime laid down in the *Native Title Act*.

The significant exception to a co-ordinated Commonwealth/State regime for the resolution of native title issues is, of course, Western Australia. The consequences of the striking down of the WA Act are significant, and can be summarised as follows:

Titles granted since 1 January 1994

All mining titles granted by the Western Australian government since 1 January 1994 are potentially invalid. This is because the procedures (including the negotiation procedure) required by the *Native Title Act* were not followed before the mining titles were granted. Of course, these titles can only be invalid if they "affect" native title in some way. They are not invalid if no native title exists over the land in question.

All other titles to previously vacant Crown land granted by the Western Australian government since 1 January 1994 may be invalid for failure to follow the procedures required by the *Native Title Act*. These procedures include rights to compensation and rights to negotiate.

Titles granted between 1975-1994

Mining titles granted by the Western Australian government between 31 October 1975 and 1 January 1994 may be invalid if they were granted over areas in which native title subsists, and if the grant impairs the enjoyment of that native title. These mining titles can be validated by the Western Australian government, but only by the passage of new legislation consistent with the *Racial Discrimination Act*, as the WA Act has been declared inoperative. If the Western Australian government does validate those mining titles, it must pay compensation to affected native title holders.

Freehold and leasehold titles granted by the Western Australian government between 31 October 1975 and 1 January 1994 may be invalid if they were granted over areas where native title subsists. The Western Australian government can validate these titles, but only by passing new legislation consistent with the *Racial Discrimination Act*. Here also the Western Australian government must pay compensation to affected native title holders.

Titles granted before 1975

All titles granted before 1975 which are inconsistent with native title will have extinguished that native title. This includes all freehold land and leasehold interests which gave exclusive possession to the lessee.

Future action of the Western Australian Government

The Western Australian government is likely to move quickly to pass legislation to validate its "past acts" (that is, to confirm grants of title which took place between 31 October 1975 and 1 January 1994). That legislation will depend for its validity upon consistency with the *Racial Discrimination Act*. In order to be consistent, it must provide for compensation to be payable by the Western Australian government to all native title parties who can establish that their rights were either extinguished or impaired by past acts of the Western Australian government.

The position with regard to the validation of titles granted by the Western Australian government since 1 January 1994 is problematic. These titles cannot be retrospectively validated by following the *Native Title Act* procedures for validating "past acts", because they are not "past acts" (for example, acts which took place between 31 October 1975 and 1 January 1994). The only certain way in which these titles can be validated is by a regrant of title, this time following the procedures required by the *Native Title Act*. As mentioned above, these procedures include rights to compensation and rights to negotiate.