This paper identifies the main issues relating to the nature of native title and extinguishment which arose in the *Ward* case, indicates the apparent judicial inclination at the High Court hearing and suggests some possible outcomes. It appears likely to be sent back to the Federal Court for further consideration of some issues. The appeals on the extinguishment issues are considered likely to be more successful than those on proof of native title.

Ward involves many of the fundamental issues of native title. That it does so is hardly surprising since it was the first contested mainland native title claim to be heard by the Federal Court and taken on appeal to the High Court. Unfortunately, it is not at all clear that the High Court will resolve the multitude of contested issues, though hopefully guidance as to their resolution will be provided. The demeanour of the High Court at the appeal did not suggest an enthusiasm for the task of resolving all the issues. Indeed, it is anticipated that the case will be sent back to the Federal Court on some issues at least.

The Miriuwung Gajerrong before the High Court sought the restoration of the judgment of the trial judge Lee J, and of the dissenting judgement of North J in the full Federal Court.

Nature of native title

A bundle of rights and partial extinguishment

The concept of partial extinguishment entails the notion that native title may be extinguished incrementally over time. The concept is founded on the idea of native title as a mere bundle of rights. It was submitted by the Miriuwung Gajerrong that, in truth, native title was an underlying right to the land itself, incidents of which might be suspended by inconsistent acts or laws, but that the right itself must be totally denied in order for extinguishment to occur.

Some of the members of the High Court did not seem enthusiastic with respect to the submission.

Content of native title

It was submitted by the Miriuwung Gajerrong that native title was a community right equivalent to ownership. Traditional laws and customs were only relevant in the sense of denoting the existence of the community or society and were not necessary to the proof of every particular right. The argument was critical to the question of rights to mineral resources.

Members of the High Court did not indicate any particular inclination.

Proof of native title

Western Australia submitted that proof of native title required that each right, for example hunting or exclusive occupation, had to be proven to exist by particular evidence with respect to every area of land and that no inferences could be drawn as to the

nature of use or occupation of, or connection to land in general; further that native title should be restricted to the area proven to exist on behalf of each estate group; that any composite Miriuwung Gajerrong group should be rejected; and that spiritual connection could not of its own suffice to maintain a continuing connection.

The Miriuwung Gajerrong challenged each of the submissions in law and by reference to the evidence before the Court.

The Court did not seem enthusiastic with respect to the submissions of Western Australia.

Extinguishment

Clear and plain intention

The importance of the requirement of a clear and plain intention founded on universal principles for the protection of property seemed to be accepted by some members of the High Court but not by others.

It is unclear how far the principles will inform the consideration of High Court.

"The importance of the requirement of a clear and plain intention founded on universal principles for the protection of property was accepted by some members but not by others."

The impossibility of coexistence

Impossibility of coexistence as the criterion of inconsistency was relied upon in the context of the extinguishment by actual use of land in the Ord River project area and the consideration of the rights conferred under permits to occupy, and leases for mining, grazing and restricted purpose, and conditional purchase.

During the course of the hearing members of the Court seemed to become increasingly favourable to the submissions of Miriuwung Gajerong that extinguishment had not occurred in the Ord project area except to the limited extent found by the trial judge. The Court seemed less favourable to the submissions of the Miriuwung Gajerong with respect to non-extinguishment by the permit to occupy and various leases, and showed a lack of enthusiasm for exploring the circumstances and legislative structures associated with each disposition.

Suspension and mining leases

A grant of a disposition for a temporary period would seem not to manifest a clear and plain intention to permanently extinguish and such was submitted by the Miriuwung Gajerong in relation to leases and the permit to occupy.

Some members of the Court had some difficulty with the submission, but others appeared interested if not necessarily favourably inclined.

A clearer inclination to favour was manifested towards the submission that the Mining Act indicated that mining leases in Western Australia were never intended to extinguish any interest, let alone native title.

The loss of exclusivity

It was submitted that loss of exclusivity of native title entailed regulation not extinguishment, especially in the case of environmental controls and the public right to fish.

Some of the Court appeared unenthusiastic, perhaps reflecting the long argument on the point already conducted before them in the Croker case. But it may be that the Court accepted the point, but were not sure how it could be framed in a determination.

The pastoral leases

The Full Court held that the provision for Aboriginal access to unenclosed or unimproved areas in Western Australian pastoral leases manifested a clear and plain intention to extinguish native title in enclosed or improved areas. That conclusion was submitted by the Miriuwung Gajerrong to be fundamentally at odds with the rationale and requirement of a clear and plain intention to extinguish.

It was not evident what the inclination of the members of the Court was on this issue.

Expropriation of native title rights to minerals

The issue of expropriation of native title rights to minerals by the operation of the Mining Act of Western Australia was the subject of extensive written submissions by the Miriuwung Gajerrong and Argyll Mines. Time however precluded oral argument by Counsel for either side.

The court had little opportunity to indicate its inclination but seemed familiar with the nature of the issue.

Racial Discrimination Act and past acts under the Native Title Act (NTA)

The Full Court had failed to hold that mining leases granted and a resumption of land undertaken after 31 October 1975 when the Racial Discrimination Act came into effect were past acts within the NTA, apparently because they were not considered to entail violations of the Racial Discrimination Act. It was submitted by the Miriuwung Gajerrong that the grants and resumption were made without any regard to native title and clearly denied equality before the law to native title holders.

"It was submitted that loss of exclusivity of native title entailed regulation not extinguishment."

Some members of the Court clearly favoured the submission and were hostile to contrary submissions.

The Titles Validation) *and Native Title* (*Effects of past acts*) *Amendment Act 1999* (*WA*)

In May 1999 the *Titles Validation Amendment Act 1999 (WA)* (WA Act) came into effect, but only partially implemented the deeming confirmation extinguishment provisions of the *Native Title Amendment Act 1998*. The May 1999 WA Act generally required that a disposition would only extinguish native title if it was in effect on 23 December 1996. The *Ward* case was argued before the full Federal Court in July and August 1999. Since many of the dispositions concerned were historic in nature and no longer in effect on 23 December 1996 the WA Act was not overly emphasised. But on 19 December 1999, just before Christmas, the WA Act was amended to introduce the full deeming extinguishment effect empowered by the *Native Title Amendment Act 1998*.

The Act was obviously of much greater relevance to the dispositions inthe *Ward* case than had appeared previously. The Full Court handed down its decision on 3 March 2000, but no further submissions had been placed before the Court and none were called for relating to the amendments to the WA Act.

The High Court early in the hearing raised the question of the application of the amended WA Act. The Court clearly seemed inclined to send several of the questions relating to the application of the Act back to the Federal Court. Indeed there were some suggestion that they were inclined to do so at the start of the hearing without hearing the full arguments.

"The Court clearly seemed inclined to send several of the questions relating to the application of the Act back the to the Federal Court."

Likely outcome

Impressions of judicial attitudes to submissions are not a reliable indicator of likely outcomes to appeals before the High Court. But speculating as to outcomes is of course a highly engaging activity and one which can also be said to measure a lawyer's skills in predicting what the law is and may become. In that context a guide to possible outcomes is as follows:

Nature of native title

- Proof of the existence of native title does not require particular evidence, such as traditional laws and customs, as to every area of land and as to every right asserted.
- Native Title is not confined to estate groups.
- Spiritual connection can suffice to sustain a continuing connection in the context of other containing associations with traditional land.
- Native Title may not be partially extinguished.
- Native title of Miriuwung Gajerong extends to mineral resources.

Extinguishment

- The grant of mining leases and resumption of land undertaken after October 31st 1975 are past acts within the meaning of the Native Title Act.
- Extinguishment with respect to some Crown dispositions will be referred back to the Federal Court for consideration of the application of the *WA Act* as amended.
- The requirement of a clear and plain intention to extinguish will be affirmed but with no great enthusiasm.
- The Ord River project did not extinguish native title in toto. Extinguishment was confined to the area of actual use .
- The Aboriginal access provision in Western Australia pastoral leases did not manifest a clear and plain intention to extinguish and thereby extinguish native title.
- Mining leases and short-term leases did not extinguish native title but rather suspended native title.
- The loss of exclusivity of native title entails regulation and suspension not extinguishment.

- Native title to minerals was not extinguished by the *Mining Act* of Western Australia.

It is considered that the appeals by Miriuwung Gajerong with respect to extinguishment are likely to have more success than the appeals of the state of Western Australia with respect to the proof of native title.

Richard Bartlett
Professor of Law, University of Western Australia

The Goldfields Regional Heritage Protection Protocol

An historic agreement between the Government of Western Australia, major mining and prospecting industry organisations and the Goldfields Land and Sea Council (GLSC), on how to better protect Aboriginal heritage in the Goldfields region, was signed on August 15, 2001. The agreement (protocol), known as the Goldfields Regional Heritage Protection Protocol, was signed by the WA Chamber of Minerals and Energy, Association of Mining and Exploration Companies and the Amalgamated Prospectors and Leaseholders Association. The State's Deputy Premier, Eric Ripper, who has responsibility for native title, also endorsed the protocol on behalf of the WA Government. It is the first time that the State government and Western Australian industry-wide representative associations have entered into an agreement of this kind.

By signing the voluntary protocol they have all acknowledged that:

- Protection of Aboriginal heritage is very important to Aboriginal people and requires the cooperation and respect from all persons who want access to land;
- Aboriginal heritage and the traditional laws and customs of Aboriginal people are cornerstones of native title. Heritage protection can therefore not be separated from the recognition of native title; and
- Friendly and productive long-term relationships with traditional owners and their representative body (the GLSC), based on trust, goodwill and mutual respect, are the best relationships for everyone to have.

The protocol sets out the principles by which this goal will be achieved. The protocol was drawn up by a special working group (Goldfields Native Title Liaison Council) chaired by the President of the National Native Title Tribunal, Mr Greame Neate.

The working group, convened by the NNTT in order to develop general principles to regulate land access and protection of Aboriginal heritage, had members from peak bodies of pastoral and mining interests in the Goldfields, the State government and the GLSC. While the new protocol was based on existing heritage agreements between claimant groups and mining companies, this is the first time the concept has received support from the State government and peak mining bodies. The principles identified in the protocol will now be taken to the various claimant groups for further discussion and negotiation with mining companies and pastoral groups as part of determination proceedings. The protocol fills a gaping hole in the current WA Aboriginal Heritage Act, which only requires developers to 'protect and preserve' Aboriginal heritage. For example, under the Act there is no requirement for heritage surveys to be done to