



## What the Ward case (Mirriuwung Gajerrong) means

### Background

While the *Ward* judgement of the High Court (August 8, 2002) was to do with a native title claim in the East Kimberley region of WA, the judgement has also provided Aboriginal people in the Goldfields with a much better idea of how the courts will now approach native title claims in our area.

In making its *Ward* judgement (named after Mr Ben Ward, the principal claimant of the Mirriuwung Gajerrong people), the High Court has ruled on the relationship between the federal *Native Title Act (1993)* and various State laws, including laws governing pastoral leases and mining leases, which apply equally to the Kimberley or the Goldfields.

The decision contains some good and bad news, with clarity emerging on some points but not others. This Information Sheet is not intended to constitute legal advice but to provide a guide to understanding the decision's main elements. Some aspects of the decision require further analysis before the full meaning can be understood. The High Court itself was unable to decide some points and has ordered these go back to the Federal Court for determination of their exact scope and meaning.

### Key Findings

The main findings of the *Ward* judgement were:

- Some interests in land completely extinguish native title
- There can be partial extinguishment of native title
- Native title rights to minerals and petroleum are extinguished
- The absence of recent use of land by native title claimants does not, of itself, mean that they do not have relevant connection to the land for establishing native title

**Pastoral leases and mining leases** - The Court decided that the grant of these leases under Western Australian law:

- Does not give exclusive possession of the land to the leaseholder (ie. does not necessarily extinguish all native title rights and interests);
- Does extinguish the native title right to control either access to the land or what the land can be used for; and
- Does mean that the rights of pastoralists/miners to carry on their businesses, as laid out in the State laws, prevail over any native title rights that might be determined. However, where native title rights such as hunting or occupation do not conflict with lease activities they can be freely enjoyed.

### Explanations

1. Native title can be likened to a **'bundle of rights'** rather than a comprehensive right in property. Basically, this means that native title can be all of, some of, or any one of the many things that indigenous people have traditionally done on their land eg. hunt, camp, occupy, control who comes and goes, collect bush tucker, protect sites and so on.

The implication is that each of the rights that people claim has to be proven, one by one, in order to have the Court declare that they exist.

2. Since native title is a bundle of rights, it follows that the right to do some things in the bundle can be extinguished (permanent) or impaired (temporary) without the whole bundle of rights suffering. For example, the right to exclusive control of what happens on the land or who can go onto the land may be extinguished by the grant of a pastoral or mining lease, but that doesn't necessarily mean that the other native title rights of use and occupation are affected.



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The consequence is that some of these elements of native title can be eroded or extinguished over time by the creation of rights for other people over the same land. But on the other hand, extinguishment of some rights does not necessarily mean that all native title rights are lost.

**3. Pastoral leases (whether fenced or not)** and mining leases do not necessarily extinguish native title, in which case the miners/pastoralists' rights and the native title rights would have to coexist. These leases may impair or limit some of the native title rights but would not necessarily extinguish all rights.

If there is an irreconcilable conflict between pastoral rights and native title rights, the High Court said pastoral rights would prevail.

**4. Recent use and continued access to country is not required for proof of native title.** This means that in instances where Aboriginal people have been removed from their land or prevented from access to their land, native title could still be determined, provided they have maintained spiritual connection. 'Connection' to land therefore does not require actual physical connection.

**5. Native title does not extend to ownership of minerals or petroleum.** Their ownership remains with the State or businesses to whom the State has transferred ownership by grant of a mining lease.

While a mining lease would give a miner the right to mine, some native title rights such as access and use, may not be affected. This could have a bearing on future compensation claims. Calculation of compensation could take into account those elements of the bundle of rights that are impaired by the mining activity. This requires further investigation.

**6.** The same principles that apply to ownership of minerals also apply to **fishing rights**. Exclusive native title is extinguished by public rights to fish and to navigate.

**7.** Native title rights do not extend to the **protection of cultural knowledge**, but are limited to rights in relation to land and waters. While the *Native Title Act* does not provide indigenous people with the right to protect cultural knowledge, protection can be pursued through other legal means such as intellectual property law.

**8.** The reservation of Crown land for a public use (for example for recreation or conservation), on its own, does not extinguish native title. But when the next step of **vesting the reserve** in a person is taken (eg. the Conservation Commission for CALM lands), in accordance with the *WA Land Act*, native title is then extinguished.

This means that it may have been extinguished in relation to some land that may be vested in CALM, local governments and the Water Corporation. GLSC is further investigating tenure across the Goldfields and the implications of this ruling.

## Summary

While the Ward judgement has provided clarity to some key questions regarding native title, there is a sense of frustration amongst Aboriginal people that their traditional rights are the subject of so much litigation and dispute. It would seem as if the extent of their rights is continually diminished by the culture of litigation rather than negotiation and settlement.

Since the judgement was handed down the Goldfields Land and Sea Council has called on all respondent parties to all native title claims in the Goldfields to use the Ward decision as a catalyst for pursuing consent determination discussions. It is in the interests of all people of the Goldfields to show respect for each other and to recognise the place of Aboriginal people's legal rights in land as set out by the *Native Title Act (1993)* and the High Court.

For more information on the Ward case (Mirriuwung Gajerrong) contact the GLSC's Manager, Native Title, Dr Bertus de Villiers on **(08) 9218 9260**

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