IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P49 of 2013

BETWEEN:

STATE OF WESTERN AUSTRALIA
Appellant

and

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ALEXANDER BROWN, JEFFREY BROWN, CLINTON COOK AND CHARLIE COPPIN
First Respondent

BHP BILLITON MINERALS PTY LTD, ITOCHU MINERALS & ENERGY OF AUSTRALIA PTY LTD AND MITSUI IRON ORE CORPORATION PTY LTD
Second Respondent

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PROPOSED INTERVENER'S SUBMISSIONS

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis for intervention

2. The Attorney-General for the State of South Australia (**South Australia**) seeks leave to intervene and be heard as *amicus curiae*.

Part III: Leave to intervene

3. Leave to intervene should be granted because:

    a. the Attorney-General has portfolio responsibility for the *Native Title (South Australia) Act 1994* (SA) (**NTSA**) and all native title related issues arising under the *Native Title Act 1993* (Cth) (**NTA**) which impact on South Australia such as native title determination applications;

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b. the Attorney-General is responsible for the State's management and negotiation of native title determination and compensation applications filed under s 61 of the NTA. The Attorney-General also provides advice to the South Australian Cabinet on the application of the "future act" provisions of the NTA and related provisions in the NTSA;

c. as described in the affidavit of Peter David Tonkin affirmed on 31 October 2013,[1] the determination of the appeal will directly affect the interests of South Australia in 15 current native title determination applications involving pastoral leases and seven native title compensation applications; and

d. the submissions made by South Australia, which are confined to ground (2) of the appeal and limited to matters of principle are independent of and differ from the submissions of the parties, who seek to confine or avoid the reasoning of the Full Court of the Federal Court's decision in *De Rose v South Australia (No 2)*[2] (***De Rose (No 2)***).

Part IV: Applicable legislative and constitutional provisions

4. South Australia adopts the Appellant's statement of the applicable legislative provisions.

Part V: Submissions

5. South Australia's submissions are limited to ground (2) in the notice of appeal. Accordingly, the submissions address the correct interpretation, and application of, the inconsistency of incidents test as identified in *Western Australia v Ward*[3] (***Ward***). Further, these submissions are directed to matters of principle arising out of this Court's reasoning in *Ward*.

6. The application of the "inconsistency of incidents" test by the Full Court of the Federal Court in this case,[4] and the separate decisions of Greenwood J[5] and Barker J[6] not to follow the decision in *De Rose (No 2)*, along with Mansfield J's application of *De Rose (No 2)* reasoning to effect extinguishment over specific parts of a lease, provides a focal point for consideration of the appropriate interpretation of *Ward* in cases concerning extinguishment at common law arising

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[1] Affidavit of Peter David Tonkin, affirmed and filed on 31 October 2013 at [6]-[7].
[2] *De Rose v South Australia (No 2)* (2005) 145 FCR 290.
[3] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[4] *Brown v Western Australia* (2012) 208 FCR 505 at [431] (Greenwood J) and [479] (Barker J).
[5] *Brown v Western Australia* (2012) 208 FCR 505 at [431] (Greenwood J).
[6] *Brown v Western Australia* (2012) 208 FCR 505 at [479] (Barker J).

from leasehold interests (which are "non-exclusive possession acts" for the purposes of ss 23F and 23G(1)(b)(i)[7] of the NTA) generally.

7. In summary, South Australia submits:

   a. the majority[8] in the Full Court below erred in its interpretation of the inconsistency of incidents test in *Ward*;

   b. the inconsistency of incidents test identified in *Ward* at [78][9] has not been altered by *Akiba v Commonwealth*.[10] Further, *Ward* at [308][11] does not modify the test at [78] such that the latter has any different application in relation to mining leases (or by implication, pastoral leases);

   c. the application of the inconsistency of incidents test by Mansfield J in the judgment below[12] was correct: where the rights of a lessee are inconsistent with native title rights, native title rights are extinguished, not suspended;

   d. where inconsistent rights are exercised under a lease, the extinguishing act is to be taken to occur as at the time of the grant of the *right*, not at the time of the *exercise* of the right;

   e. where inconsistent rights are exercised under a lease, consequential extinguishment is restricted to the site at which the right was exercised;[13]

   f. following (d) and (e), the application of the inconsistency of incidents test in *De Rose (No 2)* is supported by *Ward*; and

   g. in light of the above, if a right conferred on a lessee is valid and no compensation was payable (because the grant occurred lawfully prior to the enactment of the *Racial Discrimination Act 1975* (Cth) (**RDA**)), the later exercise of the right will not attract compensation.

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[7] The equivalent statutory provision in South Australia is s 36I of the *Native Title (South Australia) Act 1994* (SA).
[8] *Brown v Western Australia* (2012) 208 FCR 505 at [431] (Greenwood J) and [479] (Barker J).
[9] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[10] *Akiba v Commonwealth* (2013) 87 ALJR 916 at [35] (French CJ and Crennan J), [61]-[62] (Hayne, Kiefel and Bell JJ).
[11] *Western Australia v Ward* (2002) 213 CLR 1 at [308] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[12] *Brown v Western Australia* (2012) 208 FCR 505 at [92] (Mansfield J).
[13] *Western Australia v Ward* (2002) 213 CLR 1 at [78], [215] (Gleeson CJ, Gaudron, Gummow and Hayne JJ); *Brown v Western Australia* (2012) 208 FCR 505 at [87] (Mansfield J); *Brown v State of Western Australia (No 2)* (2010) 268 ALR 149 at [205] (Bennett J); *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [157] (the Court).

(a) Inconsistency of incidents test

8. There is no dispute that the relevant mining leases did not fall within the mechanisms for statutory extinguishment of native title under Pt 2 Divs 2, 2A or 2B of the NTA.[14] The express terms of the NTA presuppose that extinguishment may occur apart from the operation of the NTA[15] and in that event, the principles applicable to extinguishment of native title at common law determine the outcome.

9. The critical issue on the second aspect of this case turns on the characterisation and application of the inconsistency of incidents test as stated in *Ward*. As Mansfield J correctly observed, the difficulty with the test lies not with the principle underlying it (a comparison of *rights* rather than *uses*) but in its practical application in any given case. That difficulty was foreshadowed in *Wik Peoples v Queensland*,[16] is articulated by Mansfield J in the judgment below,[17] and is evident in the outcome in *De Rose (No 2)*.[18]

10. The inconsistency of incidents test originated in *Mabo v Queensland (No 2)*,[19] was developed further in *Wik*[20] and was stated decisively in *Ward*[21] as follows:

> ...where, pursuant to a statute, be it Commonwealth, State or Territory, there has been a grant of rights to third parties, the question is whether the rights are inconsistent with the alleged native title rights and interests. That is an objective inquiry which requires identification of and comparison between the two sets of rights. Reference to activities on land or how land has been used is relevant only to the extent that it focuses attention upon the right pursuant to which the land is used. Any particular use of land is lawful or not lawful. If lawful, the question is what is the right which the user has.

11. The statement in *Ward* has been affirmed in *Akiba v Commonwealth*,[22] where it was observed that inconsistency is the pre-eminent test of extinguishment,[23] and where the question of extinguishment arises in the context of a grant of rights to third parties, a comparison between

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[14] *Brown v Western Australia* (2012) 208 FCR 505 at [23]-[27] (Mansfield J), [242]-[251] (Greenwood J), [440]-[441] (Barker J).
[15] See eg, s 23G(1)(b)(i) NTA.
[16] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 166 (Gaudron J) and 203 (Gummow J).
[17] *Brown v Western Australia* (2012) 208 FCR 505 at [19]-[22] (Mansfield J).
[18] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [157].
[19] *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 68 (Brennan J), 110 (Deane and Gaudron JJ), 195-196 (Toohey J).
[20] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 (Gummow J).
[21] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[22] *Akiba v Commonwealth* (2013) 87 ALJR 916 at [35] (French CJ and Crennan J), [61]-[62] (Hayne, Kiefel and Bell JJ).
[23] *Akiba v Commonwealth* (2013) 87 ALJR 916 at [35] (French CJ and Crennan J).

the legal nature and incidents[24] of the right granted or asserted and the native title asserted is required.[25] Accordingly, in the context of a case concerning the grant of rights under a statutory lease or similar instrument, the issue of extinguishment is to be decided on the basis of the test set out in *Ward* above.

(b) The error in the Full Court

12. The majority below read the inconsistency of incidents test in *Ward* as being subject to, or qualified by, the temporal nature of the interest granted under the relevant statute. It is respectfully submitted that the reasoning underlying the approaches of Greenwood and Barker JJ display the very problem a majority of this Court identified recently in *Comcare v PVYW*[26], where the Court cautioned about construing the terms of a judgment and its application as if they were words of a statute. South Australia submits that the reliance on *Ward* at [308] by Greenwood and Barker JJ represents a literal reading of particular words in a manner which mistakenly departs from the point of principle underlying the reasoning of the Court in that case.

13. As Greenwood J observed:[27]

> The grant of rights to the joint venturers for the purposes of the Agreement of exclusive possession of the land with which the Ngarla People have a demonstrated connection of the spiritual kind inherent in traditional custom and law has a temporal element to the grant. Although the term of the grant is 21 years and the right to successive renewal is in the nature of an indefinite right of renewal, the renewal of the leases might not be exercised.

14. After identifying the various circumstances in which a grant may come to an end, his Honour noted:[28]

> It follows that although there is inconsistency in the two sets of rights, the inconsistency is such that, as contemplated at [308] in *Ward*, the grantee as holder of the right to exclusive possession for the purposes of the Agreement may exercise the granted rights in a way that would prevent the exercise of each of the native title rights and interests for so long as the grantee carries on the activities contemplated by the Agreement and the leases (that is, exercises the rights conferred by the grant). Once the joint venturers cease to engage with the rights the subject of the grant (in the broadest sense of the notion of "exercise", "engage" or "carry on"), the decisive preventative factor no longer subsists and each of the native title rights and interests which continue to subsist, might then be exercised by the Ngarla People.

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[24] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 185 (Gummow J).
[25] *Akiba v Commonwealth* (2013) 87 ALJR 916 at [61] (Hayne, Kiefel and Bell JJ).
[26] *Comcare v PVYW* [2013] HCA 41 at [15]-[16] (French CJ, Hayne, Crennan and Kiefel JJ).
[27] *Brown v Western Australia* (2012) 208 FCR 505 at [426] (Greenwood J).
[28] *Brown v Western Australia* (2012) 208 FCR 505 at [427] (Greenwood J).

15. In effect, Greenwood J elevates the relevant statement in *Ward* as authority for the proposition that rights exercised under a lease for a term can suppress native title rights but not extinguish it. That proposition cannot stand alongside the point of principle identified in *Ward* at [78] and relied upon subsequently.[29]

16. In a similar vein, Barker J reasoned[30] that the underlying rationale of *Ward* at [308] emanates from the majority view in *Wik* which was encapsulated in the postscript to the reasons of Toohey J, who stated[31]:

> So far as the extinguishment of native title rights is concerned, the answer given is that there was no necessary extinguishment of those rights by reason of the grant of pastoral leases under the Acts in question. Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees. Once the conclusion is reached that there is no necessary extinguishment by reason of the grants, the possibility of the existence of concurrent rights precludes any further question arising in the appeals as to the suspension of any native title rights during the currency of the grants.

17. For Barker J, it was the use of the word "yield" that indicated the non-extinguishment of native title rights even where such rights are in conflict with the exercise of statutory rights under a pastoral lease. His Honour observed:[32]

> The language employed by the four judges in the majority in *Wik* is that the native title rights must "yield" where there is conflict in their exercise with the exercise of the statutory rights under the pastoral lease. This is not the language of extinguishment; rather it is the language of prevention during any period of inconsistency.

18. Barker J approached the "postscript" in Toohey J's reasons in *Wik* as authority for the view that the majority in *Wik*:

> ...treated the performance of conditions requiring improvements no differently from the other terms of the pastoral leases that enabled or permitted the pastoral lease holder to carry out improvements in a discretionary way. Where exercised and where a conflict with indigenous rights arises, the statutory rights so exercised will prevail over the indigenous rights, and the indigenous rights to that extent "must yield", though as a matter of law they

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[29] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [157]. In *Northern Territory v Alyawarr* (2005) 145 FCR 442, the Full Court of the Federal Court applied the inconsistency of incidents test in *Ward* to resolve asserted inconsistency between a pastoral lease and the native title right to "live" on the land and to erect permanent structures. The Full Court resolved that there was no necessary inconsistency between the two rights because the pastoralist's rights could be exercised in a manner that prevailed over the native title right: at [131] (the Court).

[30] *Brown v Western Australia* (2012) 208 FCR 505 at [455]-[470] (Barker J).

[31] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 132-133 (Toohey J).

[32] *Brown v Western Australia* (2012) 208 FCR 505 at [456] (Barker J).

> continue to subsist. If, later, conflict is removed by the cessation of the exercise of the statutory right under the pastoral lease, the native title right may be exercised again without inhibition.[33]

19. Having construed Toohey J's analysis as authority for the proposition that the exercise of statutory rights under a pastoral lease, though in conflict with native title rights and thus prevailing to the extent of inconsistency, as not extinguishing such rights, his Honour proceeded to read that same proposition into the statement in *Ward* at [308].[34] According to Barker J, the reasons of the majority in *Wik* and *Ward* thus stand as authority for the proposition that statutory rights may suspend but not extinguish native title. In so doing, his Honour expressly rejects[35] the approach adopted by the Full Court of the Federal Court in *De Rose (No 2)*.[36]

20. Just as the reasoning of Greenwood J cannot stand with the principle underlying extinguishment at common law identified in *Ward*,[37] nor can the reasoning of Barker J. The reliance on *Ward* by the majority in *Brown*[38] misconstrues the relationship between the inconsistency of incidents test and the exercise of rights granted under a statutory lease.

(c) Inconsistency and the exercise of rights

21. *Ward* establishes that inconsistency of rights is not determined by a test of "operational inconsistency".[39] Nevertheless, the Court recognised that "[g]enerally, it will only be possible to determine the inconsistency said to have arisen between the rights of the native title holders and the third party grantee once the legal content of both sets of rights said to conflict has been established."[40] That is to say, the legal content of asserted rights may not be sufficiently illuminated by a prospective consideration of their exercise, but will become apparent upon such exercise. Once the legal character of the right is discerned, the nature or the "incidents" of the right can be properly assessed in light of the incidents of the asserted native title right. The legal character of the right, discerned in the context in which it is exercised, will be lawful or not,[41] determined by an objective process of statutory construction.[42] The fundamental proposition

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[33] *Brown v Western Australia* (2012) 208 FCR 505 at [457] (Barker J).
[34] *Brown v Western Australia* (2012) 208 FCR 505 at [458] (Barker J).
[35] *Brown v Western Australia* (2012) 208 FCR 505 at [469] (Barker J).
[36] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [156] (the Court).
[37] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[38] *Brown v Western Australia* (2012) 208 FCR 505 at [427] (Greenwood J) and [470] (Barker J).
[39] *Western Australia v Ward* (2002) 213 CLR 1 at [148]-[149] and [215] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[40] *Western Australia v Ward* (2002) 213 CLR 1 at [149] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[41] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[42] *Akiba v Commonwealth* (2013) 87 ALJR 916 at [32], [35] (French CJ and Crennan J) [61]-[62] (Hayne, Kiefel and Bell JJ); *Western Australia v Ward* (2002) 213 CLR 1 at [78].

underlying the principles of common law extinguishment of native title rights is that where rights are inconsistent they are extinguished and not suppressed.[43]

22. Paragraph [308] of *Ward* contemplates the existence of some rights which are not necessarily inconsistent, such as the right of an aboriginal person to access, or temporarily camp on, a pastoral lease and a lessee's rights under such a lease. However, that paragraph needs to be understood in its proper context. At that part of the judgment, the plurality were considering inconsistency between the relevant mining lease and the asserted native title rights on the principles set out earlier in the judgment.[44] What was articulated at [308] was not a new or separate principle to be applied when applying the inconsistency of incidents test to mining (or other) leases. Rather, the plurality were acknowledging two matters. The first, as noted above, was the fact that rights may not, as matter of law, necessarily be inconsistent. But secondly, and relevantly for the case in front of the Court in *Ward*, the asserted rights may not be sufficiently certain at the time of the grant to determine questions of inconsistency. The reference to the exercise of a right under a lease as precluding the exercise of a native title right or interest "*for so long as* the holder of the mining lease *carries on that activity*"[45] reflected both matters. That is, the relevant passage highlighted no more than the logical proposition that not all rights will necessarily be in conflict and a deficiency in information about the asserted rights renders the inconsistency of incidents test ineffective. As the plurality made plain, it was the generality of the determination respecting the asserted native title rights which, with one exception,[46] precluded the application of the inconsistency of incidents test in that case.[47] Indeed, the exception identified by the plurality identifies the conceptual flaw in the reasoning of the majority below in this case.

23. The exception identified in *Ward* concerned the native title right to control access to land. That right was held to be inconsistent with the rights of access granted to the lessees under the mining lease. Thus, the conferral of the right under the lease extinguished the native title right. Being extinguished, it could not be revived. If the interpretation given to *Ward* by Greenwood and Barker JJ is correct, the right to control access could not have been held to have extinguished the

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[43] *Akiba v Commonwealth* (2013) 87 ALJR 916 at [32], [35] (French CJ and Crennan J), [61]-[62] (Hayne, Kiefel and Bell JJ).
[44] *Western Australia v Ward* (2002) 213 CLR 1 at [78], read with [149] and [215] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[45] *Western Australia v Ward* (2002) 213 CLR 1 at [308] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[46] The one exception was the native title right to control access to land, which the plurality held to be inconsistent with the rights of access under the mining leases: *Western Australia v Ward* (2002) 213 CLR 1 at [309] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[47] *Western Australia v Ward* (2002) 213 CLR 1 at [308] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

relevant native title right. Rather, adopting the analysis of Greenwood and Barker JJ, the right to control access would have been suspended, and the leaseholder's right would have been held to prevail "for so long as" the mining lease remained in operation. That the majority in *Ward* did not reason in such a manner demonstrates the conceptual error of the analysis that was adopted below. The essential point underlying the reasoning in *Ward* is that the assessment of inconsistency of rights cannot always be determined by an analysis of the rights in abstract. Some rights are not able to be properly assessed for inconsistency until they are exercised. Upon the exercise of a right, its nature and extent is revealed in a concrete context. As revealed, the lessee's right must then be examined in light of any asserted native title right, the latter of which too must be sufficiently detailed to enable the inconsistency of incidents test to be properly performed. An example of this reasoning, applying *Ward*, is evident in *De Rose (No 2)*.[48]

(d) ***De Rose (No 2)***

24. In *De Rose (No 2)*, the "inconsistency of incidents test" test arose in the context of three pastoral leases[49] granted prior to the enactment of the RDA. The critical issue in this aspect of the case was the application of the inconsistency of incidents test to the right to make improvements on the pastoral leases such as the construction of buildings, dams, airstrips and the like. In dealing with this issue, the Court addressed[50] directly the critical passage in *Ward* relied on in *Brown* ([308]). The Court observed[51]:

> The emphasised words in the last passage suggest that a mining lessee might exercise a right to exclude from land in a way which prevents the exercise of a native title right or interest for a limited period. This is, perhaps, not altogether easy to reconcile with the insistence in *Ward (HC)* on the comparison between two sets of rights being the test for inconsistency and therefore for determining whether native title rights and interests have been extinguished. Nor is it easy to reconcile with the High Court's rejection, in the case of inconsistency of rights, of the concept of suspension of native title rights and interests, except where mandated by statute. It may be that their Honours were referring in the quoted passage to situations where the rights in question are not necessarily inconsistent rights.

25. The Full Court reconciled any apparent tension within *Ward* by holding that the operation of the grant under the pastoral leases in *De Rose (No 2)* was subject to a "condition precedent".[52] Once the right to construct the relevant improvements had been exercised, the operation of the grant could be ascertained and its effect on native title rights assessed. As the Court noted, "the grant

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[48] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [149] and [157] (the Court).
[49] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [153]-[154] (the Court).
[50] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [153]-[154] (the Court).
[51] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [154] (the Court).
[52] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [156] (the Court) relying on *Western Australia v Ward* (2002) 213 CLR 1 at [150] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

of the right could become operative in relation to a particular area of the leasehold land only when the right was exercised."[53] That resolution was consistent with the observations of the majority in *Ward* where it was noted:[54]

> The operation of a grant of rights may be subjected to conditions precedent or subsequent. The rights themselves may be incapable of identification in law without the performance of a further act or the taking of some further step beyond that otherwise said to constitute the grant.

26. Accordingly, in *De Rose (No 2)* the Court held that the improvements carried out on the pastoral lease "extinguished in relation to the specific areas of land on which the improvements authorised by the leases have been constructed"[55] the native title rights in the draft determination. Restricting the application of the inconsistency of incidents test to geographical areas within the leasehold area where the rights conferred by the grant of the leasehold had been exercised was consistent with the observation that the *operation* of the grant was subject to a condition precedent, the construction of the improvement. So understood, Greenwood J was mistaken in *Brown* in asserting that there was no foundation in *Ward* for the approach to extinguishment in *De Rose (No 2)*. Greenwood J's analysis mistakenly equates the relationship between conditions attaching to rights and the concept of partial inconsistency. His Honour stated:[56]

> There is no sound foundation for "bits" of extinguishment at particular places where rights inconsistent with native title rights might find particular physical expression on the mineral lease but as to other parts of the lease the inconsistency does not give rise to extinguishment.
>
> There may be "partial inconsistency" in the sense that some but not *all* of the native title rights and interests comprising the bundle of rights and interests are extinguished by the particular grant of rights in the exercise of executive and legislative power.

27. His Honour correctly observes that partial inconsistency arises where some but not all rights of the relevant bundle of rights are extinguished. But the application of the inconsistency of incidents test to leasehold estates must operate by reference to the appropriate characterisation of the grant of the estate and the rights which flow with it; the concept of partial inconsistency is inapt in this context. If the grant is subject to conditions, the conditions themselves identify the nature of the extinguishment. That was the point being made in the joint judgment in *Ward* when their Honours made reference to the concept of a grant being subject to a "condition

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[53] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [156] (the Court).
[54] *Western Australia v Ward* (2002) 213 CLR 1 at [150] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[55] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [157] (the Court).
[56] *Brown v Western Australia* (2012) 208 FCR 505 at [418]-[419] (Greenwood J) (original emphasis).

precedent".[57] That is to say, their Honours were emphasising that the mere reference to a grant of a lease does not expose the true nature of the rights conferred under the grant; some rights may not be identifiable until a further step is taken, such as the erection of a dwelling, the construction of an airstrip, or the digging of an open pit mine. For the purposes of extinguishment involving the conferral of rights on third parties, the inquiry must always be focused on what was granted, not the fact of a grant in or by itself. To this extent, the exercise of rights under a grant and the effect thereof on native title are symbiotic.

28. There are then, two steps involved in the application of the inconsistency of incidents test. The first step, as this Court observed in *Ward*,[58] must always be to focus on the right conferred under the lease, which necessitates the accurate identification of the nature of the grant.[59] The second step involves an inquiry into any inconsistency with the asserted or determined native title rights.[60]

29. At one level, the first step may be straightforward: the focus is on the terms of the statute and the instrument of the grant. As Toohey J observed[61] in *Wik*, "the language of the statute authorising the grant and the terms of the grant are all important". The terms of the grant, construed objectively, will provide the basis for answering the critical question: what does the right lawfully permit or require? However, the answer to that question may sometimes be impossible to discern in the absence of its exercise. The grant of a non-exclusive possession lease for a defined purpose which carries with it a right to construct improvements over the area of the lease may not reveal, in terms sufficient to determine inconsistency at the second step, the substantive nature or extent of the right and its incidents until the right is exercised. In some circumstances, only when the right is exercised will it be possible to satisfactorily resolve both steps of the inquiry, "where the question is whether the rights [conferred on the third party] are inconsistent with the alleged native title rights and interests."[62]

30. Identifying the nature of the inquiry that must be performed at the second step of the test identifies the correctness of the approach adopted by Mansfield J in the Full Court,[63] Bennett J at first instance,[64] and the Court in *De Rose (No 2)*.[65] The second step is focused on a comparison of

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[57] *Western Australia v Ward* (2002) 213 CLR 1 at [150] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[58] *Western Australia v Ward* (2002) 213 CLR 1 at [186] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[59] *Western Australia v Ward* (2002) 213 CLR 1 at [186] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[60] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[61] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 108 (Toohey J).
[62] *Western Australia v Ward* (2002) 213 CLR 1 at [78] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
[63] *Brown v Western Australia* (2012) 208 FCR 505 at [75]-[93] (Mansfield J).
[64] *Brown v State of Western Australia (No 2)* (2010) 268 ALR 149 at [205]-[210] (Bennett J).

the third party's rights and the asserted native title rights. In cases where the rights being compared are between rights to erect improvements and rights to hunt and camp for instance, the inconsistency can only be determined by an examination of the way the right operates on the native title right. The right to erect a dwelling has a specific and direct impact on the ability to hunt and camp at that place. The right to erect a dwelling at a place is not, however, inconsistent with the right to hunt and camp at another place within the leasehold: the rights are inconsistent only where they cannot be reconciled. The inquiry remains rights-focused, but the comparative exercise required by the inconsistency test requires sufficient particularity for its operation. In cases dealing with rights to make improvements or undertake development the test will take its cue from the way the right has been operationalised.

31. In light of the above, to the extent that *De Rose (No 2)* applied the inconsistency of incidents test in *Ward* but limited extinguishment to specific geographical areas within the lease where the right had been exercised, it is supported by *Ward* and correctly identified the scope of the validation effected by s 23G(1)(b)(i) of the NTA and s 36I(1)(b)(i) of the NTSA.

32. Accepting the analysis underlying the inconsistency of incidents test in *Ward*, the improvements to the pastoral leases in *De Rose (No 2)* extinguished native title at the time the *right* to make the improvement was conferred, not from the time the improvement occurred. That is, the right giving rise to the extinguishment is not the erection of the improvement, it is the grant or conferral of the right, albeit a right the operation of which is subject to a condition precedent. So understood, the reasons of Mansfield J below[66] and the judgment of Bennett J at first instance[67] with respect to extinguishment arising from the application of the inconsistency of incidents test are correct.

33. So understood, the statutory consequences flowing from the application of the NTA applicable to the extinguishment are to be assessed as at the conferral of the grant, not the exercise of the right. In the context of a lease granted prior to the application of the RDA, the lease would be a "non-exclusive possession act"[68] which conferred rights which by operation ss 23I and 23G(1)(b)(i) of the NTA[69] would be taken to extinguish native title rights. It follows that the

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[65] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [156] (the Court).
[66] *Brown v Western Australia* (2012) 208 FCR 505 at [75]-[93] (Mansfield J).
[67] *Brown v State of Western Australia (No 2)* (2010) 268 ALR 149 at [205]-[210] (Bennett J).
[68] *De Rose v South Australia (No 2)* (2005) 145 FCR 290 at [157] (the Court).
[69] In South Australia, the equivalent statutory consequence is produced by s 36I(1)(b)(i) of the *Native Title (South Australia) Act 1994* (SA).

same statutory consequences would follow in the case of subsequent improvements as such improvements were authorised by the grant of the right.

(e) Conclusion

34. The reasoning of the majority in *Brown* with respect to the inconsistency of incidents test is inconsistent with the reasoning of this Court in *Ward* and should be reversed. In cases involving extinguishment at common law, where third parties are granted rights which by their terms and effect are inconsistent with native title rights and interests, the latter are extinguished, not suppressed. The extinguishment is effected as at the conferral of the right.

Part VI: Oral argument

10 35. South Australia estimates it will require 20 minutes for presentation of its oral argument.

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