De Rose v State of South Australia

Overview

On 9 December 1994, a group of 12 Yankunytatjara and Pitjantjatjara or Antikirinya people made application to the Federal Court of Australia for a determination of native title on behalf of themselves and others who are Nguraritja people. The native title claim was over 1865 square kilometres of land which was subject to three perpetual pastoral leases granted at various times and collectively known as De Rose Hill Station. De Rose Hill is adjacent to the Anangu Pitjantjatjara Aboriginal freehold lands in the far north west of South Australia. The traditional owners had all left the station property, the last to leave being Mr Peter De Rose in 1978. The parties to the case and the subsequent appeal were the native title claimants (the claimants), the State of South Australia (the state) and the proprietary limited company that held the leases (the Fullers).

Cases

De Rose v State of South Australia (No 2) [2005] FCAFC 110; (2005) 145 FCR 290

De Rose v State of South Australia (No 1) [2003] FCAFC 286; 133 FCR 325

De Rose v State of South Australia [2002] FCA 1342

Fuller & Anor v De Rose & Anors [2006] HCA Trans 49 (10 September February 2006)

Legislation

Native Title Act 1993 (Cth)

The Decisions

The claim was first registered with the National Native Title Tribunal on 9 December 1994. An application was filed in the Federal Court on 1 November 1996 and the trial took place over 68 hearing days between June 2001 and February 2002. The case at first instance was heard by a single judge of the Federal Court of Australia, O'Loughlin J. On 1 November 2002, Justice O'Loughlin delivered his judgment finding that the claimants had failed to prove they had maintained a connection to the area, by the traditional laws and customs acknowledged and observed by them. His Honour observed that while some claimants once had a relevant connection with the claim area they had abandoned that connection.

An appeal by the claimants was heard by the full Court of the Federal Court of Australia in May 2003 and in a judgment delivered on 16 December 2003 the appeal was allowed.

Normally the full Court would have remitted the case to the primary Judge. However since the primary Judge had retired, the Full Court considered the appropriate course was for the parties to identify the remaining issues in dispute and for the Court to hold a further hearing to allow these issues to be fully argued. The issue for determination by the full Court was whether the claimants could establish that they continued to acknowledge and observe the traditional laws and customs of the Western Desert Bloc and that they possess rights and interests under those laws and customs.

The full Court considered in particular the evidence of Peter de Rose, one of the claimants.

The members of the full Court, Justices Wilcox, Sackville and Merkel, strongly criticized the decision of Justice O'Loughlin. Their criticisms included:

- His Honour's conclusions about the failure of individual applicants to maintain their responsibilities under traditional law and custom and the extent to which 'non aboriginal factors' such as employment had influenced decisions about residence away from the claim area;
- His Honour's presumption to make judgments about the individual entitlements of the claimants under traditional law and custom, a matter properly internal to the Western Desert law system; and
- His Honour's decision that in very recent history the physical or spiritual connection to the land had been abandoned and the observance of traditional law and custom had broken down. The full Court suggested the primary Judge accorded undue weight to the claimants' failure to physically discharge their obligations under traditional laws and customs and over-emphasised the claimants' lack of physical contact with the claim area since 1978.[1]

The full Court noted instead:

- The claimants' broader observance of the laws and customs of the Western Desert and the specific knowledge of law in relation to the claim area;
- The relatively and recent short absence of the claimants from the area;
- The claimants' active protection of sites under heritage laws; and
- The existence of intimidatory exclusion from the area by coexisting pastoral lease holders.[2]

Significant issues considered by the full Court in this case included:

Whether the claim is group, communal or individual

One issue for consideration was whether the claim should be satisfied as one for 'communal', 'group' or 'individual' native title rights and interests. The full Court held that 'if it is necessary' to classify the rights and interests claimed, they are best regarded as group rights and interests.

The full Court recognised that the applicants formed a small group within the much larger Western Desert Cultural Bloc who share the same law and customs. The applicants did not assert and were not required to show that they constituted a discrete society. The Western Desert Bloc was the normative system upon which the claim could successfully be founded. It existed at the time of sovereignty and continued substantially uninterrupted throughout the period – at [90].

[T]he appellants claim to be Nguraritja for the claim area and, by virtue of that status, they have common rights and responsibilities under the laws and customs of the Western Desert Bloc in relation to the claim area. (De Rose v State of South Australia (No 2) [2005] FCAFC 110, 44)

Their Honours identified three reasons why it might be important in another case to classify rights as individual, group or communal. First, it may be necessary to decide whether each and every claimant satisfied s.223(1) if 'individual ' rights are claimed. Secondly, it is arguable that a determination that native title exists made under s.225 must specify whether the rights and interests are communal, group or individual and because under s.61(1) authorization of those named as the applicant was required by the 'native title claimant group'. Whether individual or group rights can be claimed Thirdly, the requirement of the NTA as amended by the Native Title Amendment Act 1998, that the person or persons making a native title determination application be authorized to do so by the 'native title claim group' - at [45] – [48].

The full Court concluded, on the basis of the NTA and the common law established in Mabo, that the decision whether native title can be claimed or held by an individual or group must be reached by reference to the body of laws and customs or the normative rules of the society that confers rights and interests in the land – at [31].

Interpretation of s.223(1) in relation to interruption in the use and enjoyment of the area

One of the factual issues that arose in this case was the significance of an interruption in the use and enjoyment of the area covered by the application. The full Court favored a broad construction of s.223(1) in relation to this issue – at [98].

The Court observed that s.223(1)(a) requires a native title claimant community or group to establish that they have rights and interests possessed under the traditional laws and customs acknowledged and observed by that community – at [57], but the section does not require claimants to establish that they have discharged their responsibilities under traditional laws and customs in relation to an area – at [63]. In addition, there are likely to be cases in which a claim by a community or group succeeds notwithstanding that not all members of the community or group have acknowledged or observed traditional laws and customs. In such cases, the question is likely to be whether the 'community or group', as a whole, has sufficiently acknowledged and observed the relevant traditional laws and customs' - at [58]. The full Court held that it is a question of fact and degree as to whether the definition of native title rights and interest in s.223(1) is satisfied – [58]. The full Court found that the traditional laws and customs of the claimants conferred rights and responsibilities on the claimant, Peter De Rose, linking him 'inextricably' with his country in a variety of ways, despite the fact that he had failed to discharge certain responsibilities in relation to sacred sites for a number of years.

Having noted that s.223(1)(b) is directed to whether Aboriginal peoples have a connection to land or water by the traditional laws acknowledged and the traditional customs observed by them, and not to how they use or occupy the land, the full Court found that it is possible that Aboriginal peoples continued to acknowledge and observe traditional laws and customs during periods when they did not maintain a physical connection with the claim area - at [109] to [110]. The length of the period of absence from country may have an important bearing on whether traditional laws and customs have been acknowledged and observed. The Court noted that given that s223(1)(a) and (b) involve questions of fact, everything will depend on the circumstances.

The full Court concluded that the primary Judge, in determining the issue of "connection" had placed undue weight on the claimants' physical absence and given little weight to Peter De Rose's spiritual links to the land – [70]. They acknowledged that even long absence and movement due to the need to access food or other changes in conditions is not a new or unknown phenomenon under the traditional laws and customs of the Western Desert Bloc. The court noted that it was 'reading too much into' s.223(1)(a) to require the claimants to show a continuing physical connection to the application area - at [62].

The effect of improvements to parts of the area

A further issue considered by the full Court was the effect of improvements to the three pastoral leases making up the station. The leases were granted between August 1953 and February 1975, prior to the commencement of the Racial Discrimination Act 1975 (Cth). The full Court noted that the leases conferred on the lessees 'the right and, to some extent, the obligation, to construct improvements on the leasehold land'. Improvements could include a dwelling house, dams, reservoirs, factories or other buildings, bores, dams, reservoirs, sheds or an airstrip. The Court relied on the joint judgment in Ward[3] – at [149] to [150] and [308] to support a conclusion that native title was wholly extinguished over the area where the improvement takes place - at [155]. In accordance with the joint judgment in Ward, in relation to extinguishment, the key issue is whether the rights granted under the lease are

inconsistent with the native title rights found to exist. Therefore native title rights and interests were held to be wholly extinguished over the areas of land where improvements authorised by the pastoral leases had been constructed. In the circumstances of the present case, the full Court decided that;

the operation of a grant of [the right to conduct and use improvements]' should be regarded, in effect, as subject to a condition precedent. The grant of the right could become operative in relation to a particular area of the leasehold land only when the right was exercised. The grant of the right could have an extinguishing effect only when the right was exercised, since it was only then that the precise area or areas of land affected by the right could be identified. (De Rose v State of South Australia (No 2) [2005] FCAFC 110, 156)

The full Court chose not to decide what might happen if an improvement was later removed, however, noted that s237A of the NTA deems extinguishment to be permanent.[4]

The extinguishment, as recorded in the Court's determination applied to improvements constructed "prior to the date hereof". Goodall notes that what the court did not expressly address was the issue of whether further extinguishment can continue into the future at those locations where further improvements are constructed. In addition, the court's rejection of the use of 'specific and readily understood "buffer zones"' carries with it a degree of uncertainty, from both the Aboriginal and pastoral perspectives. It leaves open to debate exactly where the native title rights and interests subsisting over the lease area can be physically exercised.[5]

Held

The full Federal Court determination was delivered on 8 June 2005. The full Court held that native title exists in relation to De Rose Hill and is held by the Aboriginal persons who are Nguraritja according to the relevant traditional laws and customs of the Western Desert Bloc people.

The native title rights and interests recognised in the determination area are non-exclusive rights to use and enjoy the land and waters in accordance with traditional law and custom. The right to hunt, gather and use the natural resources and water resources were specifically identified as being limited to traditional rights exercised in order to satisfy personal, domestic or communal needs, but do not include any commercial use of the determination area.

Native title rights were found not to exist over any area that was a house, shed or other building, an airstrip, a constructed dam or any other constructed stock watering point and any adjacent area, where exclusive use was necessary for the enjoyment of that improvement.

On February 10 2006, the High Court refused an application to appeal by Fuller & Anor on the grounds that there are insufficient prospects of success of the applicants disturbing the findings of the Full Court.

[1] De Rose v State of South Australia [No 1] (2003) 133 FCR 325, [316-7].
[2] Strelein, Lisa 2006. 'Compromised Jurisprudence: Native Title cases since Mabo'. At 127.
[3] Western Australia v Ward (2002) 213 CLR 1
[4] Strelein, Lisa 2006. 'Compromised Jurisprudence: Native Title cases since Mabo'. At 132 .
[5] Goodall, Carey, September 2005. "Extinguishment of native title by pastoral improvements – the position post De Rose Hill" Native Title News, Vol 7, Issue 4. At 61.

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