

FEJO v NORTHERN TERRITORY

Overview

The Larrakia people, whose country includes areas in and around Darwin, Palmerston and Litchfield in the Northern Territory, sought a declaration of native title in the Federal Court. The native title claim was over an area of land which was once granted in fee simple but had later reverted to vacant Crown land. On appeal, the High Court considered whether native title could still exist over land which was once granted in fee simple but later reverted to vacant Crown land. The High Court held that native title was extinguished by freehold grants and that the extinguishment was permanent.

Legislation

Native Title Act 1993 (Cth)

Cases

Fejo and Mills v Northern Territory and Oilnet (NT) Pty Ltd [1998] HCA 58 (10 September 1998)

The Decision

Summary by Lisa Strelein, Manager, Native Title Research Unit.

In December 1997, the Larrakia people sought a declaration in the Federal Court that native title exists in relation to particular lands and that the Larrakia people are the native title holders in respect of those lands. This was in response to the granting of Crown leases, with an option to acquire freehold, over lands within the area subject to an application for a determination of native title. The area in dispute was once granted in fee simple, but later reverted to vacant Crown land. The Larrakia argued that the Northern Territory government was required by the *Native Title Act 1993 (Cth)* to either negotiate with the Larrakia or to compulsorily acquire their native title.

The High Court was asked to consider whether a grant of freehold or fee simple was effective to extinguish all native title rights and interests so that, upon the land being re-acquired by the Crown, no native title rights and interests could then be recognised by the common law. The case raises two important issues. The first issue is whether a grant of freehold extinguished native title so that no form of native title can co-exist with freehold title. The second question is whether extinguishment was permanent and absolute or whether there was potential for native title under the common law to be re-recognised or to 'revive' when the land returned to the Crown. The case also dealt with the issue of injunctive relief available outside the operation of the *Native Title Act 1993*.

Held

1. Native title is completely extinguished by the grant of a freehold estate. The rights granted under fee simple are inconsistent with the continued existence of any form of native title and no coexisting or concurrent rights can survive.
2. The grant of freehold extinguishes native title permanently regardless of the land being held by the Crown in the future.
3. While the existence of Indigenous law is necessary to establish native title, it is not sufficient to invite recognition under the common law.
4. Statutory rights under the *Native Title Act 1993 (Cth)* are valuable rights that may warrant protection by injunctions. General principles of injunctive relief apply. Acceptance by the Registrar establishes an arguable case, but some inquiry may be made into the case of the other parties.

Bibliography

Barnett, Katy 2000. 'Case notes: One step forward and two steps back: Native title and the bundle of rights analysis', *Melbourne University Law Review*, Vol. 24, No. 2, August, pp 462-477.

Devereux, Annamarie 1998. 'Native title: The Larrakia case', *Alternative Law Journal*, October, Vol. 23, No. 5, p 247-248.

Sheehan, John 1999. '[Valuing native title as a bundle of rights](#)', *Land Rights Queensland*, June, p 5.

Strelein, Lisa 1999. '[Extinguishment and the nature of native title: Fejo v Northern Territory](#)', *Land, Rights, Laws: Issues of Native Title*, February, Vol. 1, No. 27.

Strelein, Lisa 1999. '[Fiction over fact: Extinguishing native title in the Larrakia Case](#)'. Jim Fejo and David Mills on behalf of the Larrakia People v The Northern Territory and Oilent (NT) Pty Ltd. High Court of Australia', *Indigenous Law Bulletin*, Vol. 4, No. 18, Feb, pp 18-21.