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NATIVE TITLE TEAM

## Improvements On Pastoral Stations - Still Room For Extinguishment? *De Rose v State of South Australia* [2002] FCA 1342

In the first decision on native title in South Australia since the High Court handed down *Western Australia v Ward* [2002] HCA 28 (*Ward*) in August, a single judge of the Federal Court has confirmed that native title may continue to exist on pastoral leases where claimants can prove ongoing connection to that country.

However, Justice O'Loughlin found that the Yankunytjatjara people in the north-west of South Australia had lost their physical and spiritual connection to the 1,865km<sup>2</sup> claim area of De Rose Hill Station. He held that there was a break down in the observance of traditional laws and customs which precluded a finding of native title in the area.

The High Court in *Ward* had earlier held that native title is able to coexist with pastoral leases. As such, native title rights that are not inconsistent with the rights of a pastoral lessee may be exercised on a pastoral lease, provided that they do not interfere with pastoral activities. Where the exercise of native title rights does interfere with pastoral activities then the exercise of those native title rights must not take place until such time as they no longer interfere.

### Proving Connection to the Land Claimed

The Applicants claimed individual native title rights as *Nguraritja*, or traditional owners for the area of De Rose Hill Station.

O'Loughlin heeded the High Court's call for greater specificity in findings of fact at first instance and provided a lengthy analysis of the evidence given by each Aboriginal and expert witness during the proceedings.

His Honour considered that because native title can give significant rights in land, the maintenance of continuity of connection with the claim area must be substantial and not merely trifling in nature. As

such, the degree of connection remained important and was to be ascertained as a question of fact by assessing the connection of the members of the claim group individually and then assessing their connection as a whole.

Although he confirmed the High Court's view that absence of physical presence in a claim area is not in itself fatal to a native title claim, he held that the Applicants had also abandoned any spiritual connection to the area. He found that the Applicants had not shown that they had maintained any attachment to the land as "the physical activities that would have been tangible evidence of a spiritual connection to the claim area occurred long ago". He found that "save for some occasional hunting trips, not one witness... has attended to any religious cultural or traditional ceremony or duty on De Rose Hill in almost twenty years."

The lack of evidence given by the claimants concerning the presence of a social, communal or political organisation on or near the claim area or of communal or group acknowledgment of traditional laws, of meeting responsibilities to care for country and of an intention to resume the observance of traditional laws and customs were all factors identified by O'Loughlin J which contributed to the claimants' lack of connection with the claim area. Further, the receding traditions of knowledge of secret and sacred places, the marked change in traditional laws in a short space of time and the lack of a distinct conception of their own country such as to locate a finite boundary of the claim area necessitated a finding that there was no native title in the area claimed.

His Honour also commented that, in his view, the Applicants had not been forcibly removed from the land, but had chosen to do so voluntarily, not on the basis of traditional law, but for reasons associated with work, education and living arrangements.

O'Loughlin J. voiced concerns over evidence that had not been led by the Applicants, where this lack of

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evidence was not made up for by expert witnesses. He held that the onus was upon the claimants to give evidence to establish their right to a determination of native title. He further held that the 20 years absence from the claim area demonstrated a failure by the Applicants to observe the law and custom that connected them to that area that was a necessary grounding for their native title.

### **Extinguishment – Improvements and “Buffer Zones”**

In finding that the Applicants had not proved connection to the area, Justice O’Loughlin was not strictly required to consider extinguishment principles. However, he made some significant findings in relation to extinguishment of native title by improvements on pastoral leases.

He confirmed the High Court’s decision in *Ward* that extinguishment of native title is limited to the extent of any inconsistency with the grant of a pastoral lease. The extent of inconsistency to be determined by comparing the native title rights claimed with pastoral legislation under which the grant is made, the terms and conditions of the grant of the pastoral lease and evidence of the nature and scope of improvements made on the lease.

He held that whilst the conditions in pastoral leases requiring the future construction of various improvements may not of themselves extinguish native title, the subsequent construction of those improvements may do so.

Consequently, Justice O’Loughlin considered that the manner in which a pastoral lease is used remains important in determining the nature and extent of extinguishment of native title. He found that the construction of improvements (such as dams, fences, airstrips etc) pursuant to a pastoral lease may partially or fully extinguish native title and that this remained a question of fact.

Although there remains little guidance as to what constitutes an “improvement” and whether there is and if so, the size of any “buffer zone” around such improvements, His Honour considered that on the basis of an objective inquiry, homesteads, sheds and outbuildings, man-made dams, bores and watering points and airstrips essentially confer exclusive

possession of the area on the pastoral lessee and thereby wholly extinguish native title on those areas.

Furthermore, consistent with the *Pastoral Land Management and Conservation Act 1989* (SA), he allowed buffer zones around each of these improvements on which native title was also extinguished. The buffer zones specified were a 1 km radius around homesteads, sheds and outbuildings and a 500m radius around watering points and airstrips. His Honour found that it was unlikely that fences and roads extinguished native title as they are capable of joint use.

O’Loughlin J further confirmed that where native title is not extinguished on pastoral leases and where there is conflict with the exercise of native title rights and pastoral lessee rights, the pastoralists’ rights prevail. This extended to his finding that native title holders cannot exercise control over any third person invited onto the station by the lessee. He also found that the lessee may refuse entry onto the station by an Aboriginal person invited on by native title holders.

### **Alternative Decision**

Justice O’Loughlin provided a suggested determination, had connection been found. This determination allowed for access to the area by native title holders to exercise non-exclusive and subsidiary rights to hunt, gather, use water and natural resources, and the right to engage in cultural activities in the claim area (including holding meetings and religious ceremonies).

### **Conclusion**

De Rose Hill demonstrates that native title claimants now face a heavy burden in proving the nature and extent of their ongoing connection with the area claimed.

With *Ward* promoting a general doctrine of co-existence, the nature and extent of any extinguishment of native title on pastoral leases remained limited and uncertain. However, O’Loughlin J has provided specific categories of activities on pastoral leases that are operationally inconsistent with the exercise of any native title rights so as to wholly extinguish those native title rights to the area on and around those activities.

We note that the Yankunytjatjara people have lodged an appeal of this decision to the Full Bench of the Federal Court.