SOUTH AUSTRALIA*

***De Rose and Others v The State of South Australia and Ors* [2002] FCA 1342**

De Rose and Ors v The State of South Australia and Ors was the first determination of a native title claim in South Australia. O'Loughlin J of the Federal Court found that the claim failed principally because the claimants had no continuing connection with the claimed land. The decision is subject to an appeal to the Full Federal Court.

The decision is important as it considers the inter-relationship between pastoral leases granted in South Australia and the rights of Aboriginal persons under section 47 of the *Pastoral Management and Conservation Act* 1989 (SA) ("the *Pastoral Act*") which is quoted below. O'Loughlin J also made certain evidential rulings in favour of the claimants which are also relevant to other native title determinations.

Facts

The claim covered a cattle station known as De Rose Hill Station ("the Station") in far north-western South Australia. The Station was held pursuant to three pastoral leases. The first respondent was the State of South Australia and the other respondents were the present Station owners known as the Fullers. The claim was at various times described as a claim on behalf of the Yankunytjatjara people and at other times on behalf of a group in the Western Desert Bloc. The claimants argued that there is a group within the Western Desert Bloc who are connected by language, myth and their environment.

The Station was originally leased as a sheep station in the 1930s. From that time a group of Aboriginals assisted in working the Station. When the homestead was built in the early 1940s, a group of Aboriginals and their children camped near the homestead.

The number of Aboriginal people camping at the station began to decline in the late 1960s as they moved to work on other stations and settled at Indulkna, a township set up just south of the Station. The last Aboriginals who were part of the claim group left the station in 1978. The claimants alleged that the Fullers had forced them off the Station by threats of violence and by killing their dogs. This allegation was not accepted by the Court.

*Ngura*ritja was the Yankunytjatjara expression for persons who could speak for the land or were the traditional owners of the land. A person could become *Ngura*ritja by various means. The first and principal means was if a person was born on the land. Also, if the person lived on the land for a long time and became aware of the Dreaming for the land, then he or she could become *Ngura*ritja.

A great portion of the judgment concerns an examination of the evidence of the Aboriginal witnesses. A substantial part of this evidence was evidence of what they were told as to their birth place by deceased persons and where their parents were born and raised. This evidence is

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normally regarded as hearsay but O'Loughlin J decided that such evidence needs to be received in native title claims otherwise it would be impossible to prove continuing connection with the land. His Honour admitted this type of evidence, as to the truth of the statements, under the exception of section 82 of the *Native Title Act* which provides that the Court is to apply the rules of evidence "except to the extent that the Court otherwise orders" [271].

Pastoral leases

O'Loughlin J held that the pastoral leases were non-exclusive pastoral leases [5] as all of the leases were originally issued with a reservation of rights in favour of the Aboriginal people. When those rights were removed by the introduction of the 1989 *Pastoral Act* they were immediately replaced with the statutory rights under section 47 of the Act which provided:-

"(1) Despite this Act or any pastoral lease granted under this Act or the repealed Act, but subject to subsection (2), an Aborigine may enter, travel across or stay on pastoral land for the purpose of following the traditional pursuits of the Aboriginal people.

(2) Subsection (1) does not give an Aborigine a right to camp –

(a) within a radius of 1km of any house, shed or other outbuilding on pastoral land; or

(b) within a radius of 500m of a dam or any other constructed stock watering point."

The claimants sought native title rights greater than section 47. However, due to his Honour's finding of no continuing connection this issue wasn't examined further.

Extinguishment

O'Loughlin J held that the non-exclusive pastoral leases did not wholly extinguish native title and only partially extinguished native title. He also confirmed that the native title claimants did not have the right to control access to the land, following the High Court in *Western Australia v Ward*[1] [534 and 541].

Operational inconsistency

The Fullers argued that improvements to the Station such as roads, cattleyards and fences created an operational inconsistency such as that discussed by Gummow J in *The Wik Peoples v The State of Queensland*[2] at 203 and Gaudron J at 166.

In *Ward*, the High Court limited the concept of operational inconsistency and commented that it "will not suffice to extinguish native title" [151].

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1 (2002) 191 ALR 1.

2 (1996) 187 CLR 1.

Despite these comments of the High Court in *Ward* and the fact that *Ward* says the critical issue is inconsistency of rights and not use, O'Loughlin J still considered that inconsistency of use was important and relevant as it may demonstrate "that such rights have been created or asserted" [534-5]. His Honour held that native title had been extinguished in regard to improvement such as the homestead, sheds, watering facilities and airstrips and a buffer zone around them consistent with section 47 of the *Pastoral Act*. The extinguishment held to have occurred in this case in relation to the airstrips may be at odds with *Ward*.

Continuing connection

The State of South Australia submitted that the Station was inhabited by the Antikirinya at the time of sovereignty, who were displaced by the Yankunytjatjara in the early 20th century. There was also some evidence that the Pitjantjatjara had moved the Yankunytjatjara people from the Musgrave Ranges and in turn pushed the Antikirinya people to the east of the state. Many of the parents of the witnesses were Pitjantjatjara people. The claimants argued that the Yankunytjatjara people and the Antikirinya were one people and had one language.

O'Loughlin J found that the evidence as to whether the Antikirinya people were a separate group was confusing and contradictory. He found they were two closely related aboriginal groups speaking the same language and dialect. He was however unable to make any finding that the Antikirinya people once inhabited the claim area but were dispossessed by the Yankunytjatjara people [144].

As to the proof of ancestral connection, O'Loughlin J was of the view that the claimants did not have to prove continuing connection back to the time of sovereignty [371] as His Honour was of the view that such an onus of proof would be oppressive upon native title claimants. He held that it was sufficient if the claimants could prove a continuing connection back to recorded time and then an inference would be made that the continuing connection existed back to the time of sovereignty [579].

His Honour accepted there was migration and inter-marriage between the Pitjantjatjara people and the Yankunytjatjara people and this was part of the history of the Western Desert Bloc. O'Loughlin J did not accept the evidence of the claimant's anthropologist Mr Craig Elliot, that the Yankunytjatjara, Pitjantjatjara and Antikirinya people were part of "one community within the boundaries of the Western Desert Bloc". Unfortunately, His Honour failed to make any firm finding in relation to the anthropological evidence.

O'Loughlin J recognised that in *Ward* the High Court said that the connection of a claimant group does not need to be physical. Despite this recognition His Honour thought a physical connection was very important [377]. His Honour assessed the evidence in great detail and held that there was no spiritual or physical connection to the land, and if there was any physical connection it ceased in 1978 when the last two Aboriginal Stockmen left the Station [905]. O'Loughlin J was of the view that adherence to traditional laws and traditional custom had eroded away [907]. There was no evidence that the traditional songs or dances had been performed in the last 20 years upon parts of their country other than De Rose Hill. Further he held that there had been a total failure to make any attempt to care for any of the secret sacred sites and that the occasional hunt for a kangaroo does not constitute any physical or spiritual activity [911].

His Honour stated obiter, that if he was wrong in his finding that there was a lack of continuing connection, he would have made a determination that entitled the claimants to follow the traditional pursuits of hunting, conducting ceremonies etc., as set out in paragraph 922 of his reasons. These rights were not to be expressed in an exclusive or non-exclusive manner as such terminology is inappropriate to native title [918-9]. Unfortunately O'Loughlin J omitted to discuss whether his hypothetical determination extended beyond the rights granted to Aboriginals under s.47 of the *Pastoral Act*.

Summary

No mining tenements are on the Station so the interaction between native title and mining rights in South Australia was not directly considered. However, as most mining tenements are on pastoral lease land the ruling that native titleholders do not have the right to control access to such land does clarify the law for the mining industry in South Australia.

Finally, the appeal will concern the factual finding of loss of connection and, like *Yorta Yorta*,[3] will be difficult to overturn.

TASMANIA

MINING AND GAS AMENDING LEGISLATION[*]

Mining (Strategic Prospectivity Zones) Amendment Act 2002

Three significant pieces of legislation were passed by the Tasmanian Parliament in the latter part of 2002.

The *Mining (Strategic Prospectivity Zones) Amendment Act* 2002 (Tas) commenced after receiving Royal Assent on 27 November 2002. The main purpose of the legislation is to amend the *Mining (Strategic Prospectivity Zones) Act* 1993 (Tas) by extending the Beaconsfield Strategic Prospectivity Zone to the west of Beaconsfield to include a further gold-bearing region and nickel-cobalt deposit area (see second reading speech, House of Assembly Hansard Wednesday 23 October 2002 - Part 2 - Pages 33 – 99).

Gas Infrastructure (Miscellaneous Amendments) Act 2002

The *Gas Infrastructure (Miscellaneous Amendments) Act* 2002 (Tas) also entered into force after receiving Royal Assent on 27 November 2002. This Act amends the *Gas Act* 2000, the *Gas Pipelines Act* 2000 and the *Local Government (Highways) Act* 1982. The Act provides for a number of amendments to this legislation to facilitate the installation of gas distribution infrastructure. In particular, it deals with general planning approvals for the installation of gas infrastructure, permits required for installation of gas pipelines under council-owned roads and conditions that can be attached to those planning approvals and permits (see second reading speech, House of Assembly Hansard, Tuesday 29 October 2002 - Part 2 - Pages 28 – 100).

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[3] [2002] HCA 58.

[*] Dianne Nicol.