Determination of native title – *De Rose*

De Rose v South Australia (No 2) [2005] FCFCA 110

Wilcox, Sackville and Merkel JJ, 8 June 2005

Issue

The issue before the Full Court of the Federal Court was whether or not the claimants had native title as defined in s. 223(1) of the *Native Title Act 1993* (Cwlth) (NTA) to the area covered by their application.

In a joint judgment, Justices Wilcox, Sackville and Merkel found that native title existed. The decision is of significance for the findings on the interpretation of s. 223(1), in particular those relating to:

- the sufficiency of a 'spiritual' connection;
- the ability for the court to recognise native title even where those claiming it have been 'virtually' absent from the area covered by their application for a period of time; and
- the extinguishing effect of certain improvements on a pastoral lease.

Background

This case concerns a claimant application made in 1994 over three perpetual pastoral leases, collectively known as De Rose Hill Station (De Rose Hill), in north-west South Australia. The 12 people who made the application for a determination of native title did so on behalf of themselves and others who are *Ngururitja* for De Rose Hill, i.e. people who belong to, or are traditional owners and custodians of, the area covered by the application.

At first instance, Justice O'Loughlin dismissed the application on the ground that the claimants had not satisfied s. 223(1)(b). On appeal, in a joint judgment, Justices Wilcox, Sackville and Merkel set aside that decision with the result that questions remained about whether both ss. 223(1)(a) and (b) were satisfied. *Native Title Hot Spots* Issue 3 and Issue 8 provide further background to this matter and, respectively, the findings at first instance and on appeal.

Since O'Loughlin J had retired by the time the appeal was determined, the Full Court decided to hear further argument on the outstanding issues rather than refer the matter to a single judge. The parties to the 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).

Common ground on ss. 223(1)(a) and (b)

Given that the Full Court's findings on appeal in *De Rose v South Australia* (2003) 133 FCR 325; [2003] FCAFC 286 were binding on them, for the purpose of these proceedings the state and the Fullers accepted that:

- the claim was to be assessed by reference to the traditional laws and traditional customs of what is known as the Western Desert Bloc which had, respectively, been acknowledged and observed by the Aboriginal people of the Western Desert region without any substantial interruption since sovereignty was asserted;
- under those laws and customs, there is no rule that failure by *Ngguraritja* for a particular site or *Tjukurpa* (dreaming) to discharge custodial responsibilities led to loss of *Ngguraritja* status or the rights and interests that flow from that status;
- it was only necessary for one of the seven remaining people who made the application (or one of the persons on whose behalf the claim was made) to show they satisfied s. 223(1)(a) and (b). That being the case, the Full Court concentrated on Peter De Rose, the 'principal' claimant—at [21] to [24].

Issues dealt with in this case

The main issues dealt with were:

- whether the claim should be classified as one for 'communal', 'group' or 'individual' native title rights and interests—see s. 223(1);
- whether the claimants had to establish that they acknowledged and observed the particular normative rules relating to their status as *Ngguraritja* in order to succeed in a claim arising from that status (a 'narrow' reading of s. 223(1)(a) suggested by the Fullers' counsel);
- the relationship between responsibility under traditional law and custom for an area and connection to that area;
- assuming ss. 223(1)(a) and (b) were satisfied:
    - the effect of certain 'improvements' to parts of the area subject to the pastoral leases, such as the construction of an airstrip, homestead or dam, on native title rights and interests;
    - whether a native title right to control access and use of the leased area by other Aboriginal people could be recognised—at [9] to [21], [52] and [127].

Communal, group or individual rights and interests

The Fullers submitted that this was a claim to 'individual' rights because the claimants were 'a collection of individuals' united only by their claim to have native title by virtue of their status as *Ngguraritja*. The claimants submitted it was a claim to group, but not communal, rights and interests. The state did not think it necessary to pursue the question.

The court noted (among other things) that:

- the 'starting point' is s. 223(1) of the NTA;
- the fact that the 'chapeau' (the 'hat' or opening lines) to s. 223(1) and paragraphs (a) and (b) are based on what was said in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 could be taken into account but could not control the interpretation of s. 223(1);
- the reference to 'communal, group or individual rights and interests' in the chapeau recognised that native title may include group or individual rights or interests, provided they are 'in relation to land or waters';
- classification of what is claimed 'depends on the body of normative rules of the relevant society which gives rise to rights and interests in land or waters';

- it is 'hardly likely' that a traditional system would use classifications like 'communal', 'group' or 'individual' and, as such, any such classification is a statutory construct;
- in this case, the claimants 'disavowed' any claim to communal title, describing themselves as 'individuals who fulfil the criteria of *Ngururaritja* according to traditional law and custom'—at [27] to [34], referring to *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*Yorta Yorta*) at [28] to [40], summarised in *Native Title Hot Spots* Issue 3.

It was held that, if it was necessary to classify the rights and interests claimed, then they were 'best regarded' as group rights and interests:

> [T]he appellants claim to be *Ngururaritja* 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 (although not necessarily in relation to precisely the same sites or tracks)—at [44].

Given that finding, it was not necessary to decide how a claim to 'individual rights' should be approached. However, their Honours identified three reasons why it might be important to do so in another case:

- it may be necessary to decide whether each and every claimant satisfied s. 223(1) if 'individual' rights are claimed;
- 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 (presumably only 'arguable' because s. 225(a) requires the determination to specify who holds the 'common or group' rights comprising the native title and does not mention 'individual' rights);
- authorisation of those named as the applicant was required by 'the native title claim group'—see s. 61(1). (In this case, the court held that the question of authorisation did not arise because the application was made under the old Act, i.e. the NTA as it stood before amendment in 1998, when no authorisation by a native title claim group was required)—at [48] and [50].

Comment

On the issue of whether an old Act application is required to be authorised, the three cases the court referred to deal with applications for strike out or summary dismissal. While it is true that s. 84C cannot be used as a basis for striking out an old Act application for failure to comply with (among other things) s. 61(1) of the new Act, the application considered in this case is taken to have been made to the Federal Court. Therefore, it is to be 'treated as if it were made to the Federal Court under the relevant provisions of the new Act': sub-item 36(a), Schedule 5, *Native Title Amendment Act 1998* (Cwlth) (the transitional provisions), emphasis added and see item 21 in relation to strike out under s. 84C of the new Act. Therefore, it would seem that in all cases other than an application for strike out under s. 84C, the 'relevant' provisions of the new Act do apply to old Act applications. However, in this context, perhaps it can be said that s. 61(1) is not a 'relevant' provision.

Effect of interruption to use and enjoyment of area claimed

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, e.g. as a result of an absence from country for a period of time. Their Honours noted what was said in *Yorta Yorta* at [84] to [85]:

- the exercise of native title rights or interests may 'constitute powerful evidence' of both the existence of native title rights and their content;
- evidence that at some time since sovereignty, some of the people who claim native title (or those they claim through) did not exercise the rights or interests claimed does not 'inevitably' answer the statutory questions, which are directed both to possession, (not exercise) of rights or interests and to the existence of a 'relevant' connection between the claimants and the area in question;
- the fact that both ss. 223(1)(a) and (b) are in the present tense is relevant but that is not to say that the continuity of the chain of possession of rights and interests and the continuity of the relevant connection is irrelevant—at [59].

What must be established— s. 223(1)(a)

After rehearsing the various arguments put to it, the court held that:

- references to 'Aboriginal peoples' in s. 223(1) are references to 'Aboriginal peoples who have a connection to the [relevant] land or waters by the traditional laws and customs that those peoples have acknowledged and observed';
- s. 223(1)(a) requires those making a native title claim to establish they have rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by that community or group;
- it may not be necessary to prove every member of the relevant 'claimant community or group' has acknowledged and observed the relevant traditional laws and customs (this is a question of fact and degree) and it is 'likely' that some claims will succeed even if not all members of the 'community or group' have acknowledged and observed traditional laws and customs';
- in these cases, the question is likely to be whether the claimant 'community or group, as a whole, has *sufficiently* acknowledged and observed the relevant traditional laws and customs' (emphasis added)—at [55] to [56] and [58].

However:

- if none of the members of the native title claim group have ever acknowledged traditional laws or observed traditional customs, they could not succeed in a native title claim, even in a case where there were traditional law and customs that identified them as 'possessing' rights and interests in particular land or waters;
- given that to hold otherwise would allow for the recognition of native title being held by people who not only had no physical connection to the land or waters, but have never acknowledged or observed traditional laws or customs. The same could be said where a native title claim is made by one or more individuals 'who do not assert a communal or group claim'—at [57].

The court went on to note that:

- paragraph s. 223(1)(a) contemplates a link between the rights and interests in relation to land or waters said to be possessed by those claiming native title and the traditional laws and customs they claim to have acknowledged and observed;
- acknowledgement and observance of traditional laws and customs that are unconnected with the possession of rights and interests in land or waters may not be enough;
- given the centrality of the relationship between Aboriginal people and their country, it may be difficult to establish any dichotomy between traditional laws and customs that are connected with rights and interests possessed in land and waters and those that are not. (Although not noted, the finding by the majority in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward*) at [60] in relation to preventing misuse of cultural knowledge falls into the latter category and, in this decision, their Honours later say at [91] that rules about kinship and marriage may also fall into that category);
- if there are traditional laws and customs that are unconnected with the possession of rights and interests in relation to land and waters, it will perhaps be unusual for members of Aboriginal groups or communities to acknowledge and observe only those laws and customs—at [60] to [61].

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].

Comment
It is worth noting that the ordinary English meaning of 'acknowledge' and 'observe' as used in s. 223(1)(a) are, respectively:

- to admit to be real or true; recognise the existence, truth or fact of, as in *to acknowledge belief in God*; to own as binding or of legal force;
- to keep or maintain in one's actions, conduct, etc., as in *you must observe the formalities*; to obey, comply with, conform to, as in to observe a law; to show regard for by some appropriate procedure, ceremonies etc., as in to *observe a holiday;* to perform duly, or solemnise (ceremonies, rites, etc.)—*Macquarie Dictionary*, 2nd ed).

This may explain their later emphasis on the genuineness of the evidence of Aboriginal witnesses when determining whether there has been a substantially uninterrupted acknowledgement of traditional law and observance of traditional custom as required by s. 223(1)(a).

What must be established— s. 223(1)(b)
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 land or water, the 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;
- however, 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;
- given that s. 223(1)(a) and (b) involve questions of fact, 'everything will depend on the circumstances';
- the community or group claiming native title must show it has acknowledged and observed those traditional laws and customs that recognise them as possessing rights and interests in relation to the area covered by their application—at [62] to [63].

Recapping the findings on appeal

The court identified findings at first instance that supported the claimants' case and evidence that was either accepted or not doubted by O'Loughlin J.

Their Honours also noted (among other things):

- O'Loughlin J gave considerable weight to Mr De Rose's 'virtual' absence from De Rose Hill station after 1978 but little weight to his spiritual links;
- the Full Court in *Western Australia v Ward* (2000) 99 FCR 316 at 243 said that acknowledgement of law and observance of custom may be proved by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings that underlie traditional laws and customs, continues to be maintained and passed down from generation to generation;
- Peter De Rose 'plainly' had detailed knowledge of the concept of both *Ngura*ritja and the *Tjukurpa* and had participated in the ritual ceremonies, stories, dances and songs that showed (as O'Loughlin J found) the participants 'once had a religious or spiritual connection' with the relevant sites;
- making the native title determination application in 1994 involved asserting rights to the application area and, after the application was lodged, Mr De Rose was involved in a dispute with the Fullers about disturbance of sites, which showed he asserted his rights and discharged his responsibilities in relation to sites of special significance at that time;
- the fact that, when he could, Mr De Rose was involved in establishing a homeland very close to De Rose Hill because it was close to 'his country' was significant and it was 'difficult' to see this as anything other than 'strong evidence' of a 'spiritual' connection;
- there was no finding that Peter De Rose's spiritual connection with places of importance on his country was not genuine—at [68] to [71].

Additional matters showing acknowledgement and observance

Additional submissions made by the claimants drawing on evidence accepted or not rejected at the trial (all of which the Full Court appears to have accepted) included:

- Mr De Rose's 'detailed' evidence about his passage through the various ceremonial stages of life under Western Desert law and custom, so that he was now *wati pulka* (a senior initiated man) and evidence from others that they were also *wati pulka*;
- evidence as to the significance of particular areas, the rituals, ceremonies and other activities that must be carried out with respect to them, the cultural restrictions that applied to each and O'Loughlin J's findings that all of this would once have demonstrated the requisite connection. (In rejecting the Fullers' submission that this showed knowledge but did not demonstrate acknowledgement and observance, the court noted that findings and evidence from the trial pointed 'strongly' to a number of the claimants, including Mr De Rose, 'genuinely believing in the *Tjukurpa* and in the sacredness of particular sites';
- evidence showing the claimants acknowledged and observed Western Desert Bloc restrictions on disseminating secret knowledge and observed prohibitions on women and children visiting certain men's sites (and vice versa) and that breaking gender-restriction could lead to sanctions;
- evidence as to the importance of cultural practices such as 'smoking' a new-born baby. The witnesses giving this evidence were older and there was little evidence that it had recently been practised but 'the evidence suggests that the belief in the efficacy of the smoking ceremony has not died'. Also of note was the practice of using *kunmanara* to refer to another person with the same name as a recently deceased person and evidence of laws and customs about preparing and eating 'bush tucker', which were said to be 'closely connected with the laws and customs governing who may hunt on and collect food from particular country', i.e. who has rights and interests 'in relation to' that country;
- the fact that the concept of *Ngguraritja* was recognised by the Indigenous witnesses as 'central to the rights and responsibilities of people under the laws and customs of the Western Desert Bloc' and that the trial judge found there could be 'no doubt that Peter De Rose...regarded himself as *Ngguraritja* for the claim area and accepted that, as such, he had certain rights and responsibilities in relation to the land';
- evidence demonstrating that the appellants observed rules relating to kinship and social organisation of the Western Desert, including avoidance relationships and marriage arrangements. However, note that it 'may be' that observance of rules of this kind only is *not* sufficient to prove acknowledgement and observance of traditional laws and customs connected with the possession of rights and interests *in relation to land and waters*, as required by the chapeau to s. 223(1). Rather, they form part of 'the network of relationships...sourced in the traditional laws and customs of the Western Desert Bloc' the observance of which 'lends support to the contention that the traditional laws and customs *more directly linked* with the possession of rights and interests *in land*' were also observed (emphasis added);
- evidence of recognition and adherence to the authority of senior men;
- evidence that 'clearly established' a number of the claimants had been taught traditional laws and customs by those who, under those laws and customs, were responsible for imparting that knowledge—at [77] to [96].

Effect of failure to discharge responsibilities

The court rejected the Fullers' submission that s. 223(1)(a) required claimants to prove they had continuously discharged their responsibilities as *Ngururaritja* under traditional laws and traditional customs, noting that:

- under the relevant traditional laws and customs of the group, it may be that native title holders do lose their rights and interests if they fail to discharge their responsibilities but proof of uninterrupted discharge of obligations is not otherwise a requirement of s. 223(1)(a);
- proof that obligations have been 'faithfully performed' provides 'powerful support' for a claim to possession of native title rights and interests but evidence that members of the claimant group have not faithfully met their responsibilities will not necessarily be fatal to their claim;
- it is a matter of fact and degree as to whether a group has acknowledged and observed the traditional laws and traditional customs on which it relies to establish possession of native title rights and interests—at [63] to [64].

It was held that, in this case, the evidence of the claimants at first instance was that *Ngururaritja* were the traditional owners and had rights and responsibilities in relation to that land. It was 'true' that O'Loughlin J found that the claimants had not discharged their responsibilities for a number of years.

However, in a statement of some significance, their Honours said that:

> [I]t is one thing to find that a person had not lived up to his or her religious or ethnical [sic] responsibilities. It is another to find that the person does not regard himself or herself as *bound by the rules* imposing and defining those responsibilities. There are very many people in the Australian community who do not live up to what they *genuinely* consider and acknowledge to be their responsibilities. Their 'default' may continue for a long time, yet they may continue to *acknowledge* and *accept* the *binding force of the rules* imposing the unfulfilled responsibilities—at [89], emphasis added.

The court was of the view the O'Loughlin J's findings must be understood as accepting:

- that Mr De Rose and other claimants acknowledged and regarded themselves as bound at all times by the rules for determining *Ngururaritja* for particular country;
- the claimants observed the *Ngururaritja* recognition rules, which were founded in the traditional laws and customs of the Western Desert Bloc, a society that has existed since sovereignty by acknowledging and recognising particular individuals as *Ngururaritja* and by acknowledging and recognising that each such person had particular rights and responsibilities in relation to the application area—at [90].

It was also noted that Mr De Rose gave evidence that he intended to teach his grandchildren, who were *Ngururaritja* for his country, the *Tjukurpa*, which suggested he acknowledged the obligations he had failed to discharge in the past but 'intended in the future to comply with them'—at [95].

Their Honours concluded that:

> The fact that...*Ngararitja* were, for a time (*even a long time*) less than diligent in discharging their responsibilities does not detract from these conclusions—at [90], emphasis added.

The Fullers' submissions on failure to fulfil the requirements of s. 223(1)(a) (all of which were rejected) were based on findings at first instance that:

- the claimants had not maintained a physical connection with the land for a period of at least twenty years where they were not forcibly dispossessed or 'locked out';
- the claimants had not visited or tended to sites outside De Rose Hill during the period they claimed to have been locked out;
- the evidence did not 'establish, as a matter of probability, that a particular individual still maintained a spiritual connection to the claim area' and a number of general findings that there were 'substantial gaps in the evidence about communal and social life and religious, social and ritualistic activities'.

In relation to the first, it was said that:

- an ongoing physical connection with the land is not essential to either ss. 223(1)(a) or (b);
- at least some of the claimants continued to acknowledge the traditional laws and customs of the Western Desert Bloc relating to rights and interests in land, especially the rules governing *Ngararitja* for the area;
- the evidence went 'substantially' beyond merely demonstrating knowledge of traditional laws and customs and provided 'powerful support' for the view that the claimants acknowledged and observed those laws and customs;
- it could not be disputed that virtually all the claimants 'genuinely believed the stories of the *Tjukurpa* and acknowledged the sacredness of particular sites in the claim area';
- failure to maintain regular physical connection with the application area was due in part to a fear of the likely response from the pastoralists, particularly Doug Fuller, whose conduct 'provided a solid enough objective basis' for their apprehension—at [99] to [101].

As to the second, it was said that, while this was a significant finding that must be given due weight:

- the court needed to consider *all* O'Loughlin J's findings *and* any evidence not inconsistent with those findings;
- the failure to visit sites outside the application area was only one factor to take into account in making the 'evaluative judgment' required by s. 223(1)(a);
- a number of his Honour's findings and a 'good deal' of the evidence not rejected by him *supported* the claim that acknowledgement and observance of important aspects of the claimants traditional laws and customs continued;
- the failure to visit sites 'for a period of time, *even a lengthy period*, is not sufficient to counteract the affirmative evidence of acknowledgement and observance of traditional laws and customs'—at [103], emphasis added.

Interestingly, their Honours were critical of O'Loughlin J for not making more of the lodging of the claimant application in 1994 and the claimants' subsequent dispute

with the pastoralists over alleged damage to sites as attempts by the claimants to assert rights and discharge responsibilities in relation to the claim area:

> In the absence of any finding that those actions were contrived or otherwise not genuine...they should...be taken into account [and]...(assuming their actions genuinely reflected their beliefs) [the dispute] is of particular significance because...s 223(1)(a)...is cast in the present tense—at [103], emphasis added.

It was said that the findings noted in the third issue raised by the Fullers also reflected an 'evaluative judgment' by O'Loughlin J of evidence about the practices, beliefs and conduct of the Aboriginal witnesses and that:

- they did not turn on an assessment of the credit or demeanour of the witnesses and were made in the context of satisfaction of s. 223(1)(b) rather than s. 223(1)(a);
- the conclusion that no claimant maintained a spiritual connection to the claim area rested largely on the lack of continued physical connection after 1978 and did not take into account that a number of the claimants 'showed the strength of their continued spiritual attachment to particular sites and tracks on the land';
- Mr De Rose's knowledge of the concept of *Ngura*ritja and of his own *Tjukurpa* led to a finding that he was *Ngura*ritja for a track on De Rose Hill and;
- Mr De Rose's choice of a homeland near De Rose Hill 'because he wanted to be close to his country' provided 'powerful evidence of his spiritual connection with that country';
- no finding was made that the claimants' beliefs were not genuinely held and any such finding 'would have been very difficult to reconcile with the evidence'—at [104] to [106].

As to the fourth, the general findings were influenced by an erroneous view and the court now had to reassess the evidence as a whole—at [107].

Paragraph 223(1)(a) satisfied

Since the parties agreed that the claimants would succeed if any one of them satisfied the 'acknowledgement and observance test', it was held that Mr De Rose 'possesses rights and interests in relation to the claim area under the traditional laws of the Western Desert Bloc acknowledged and the traditional customs of the Western Desert Bloc observed by him'. Therefore, s. 223(1)(a) was satisfied.

Paragraph 223(1)(b) — connection

It was recognised that, if the claimants satisfied s. 223(1)(a), it was likely that they would also satisfy s. 223(1)(b). The 'key' to s. 223(1)(b) is whether, by the traditional laws acknowledged and the traditional customs observed by the peoples concerned, they have a 'connection' with the land or waters which requires:

- an identification of the content of traditional laws and customs; and
- the characterisation of the effect of those laws and customs as constituting a 'connection' of the peoples with the land or waters in question—at [109] to [110], citing Ward at [64].

The court noted that, while the way land or waters are used may reveal something about the kind of connection that exists, absence of evidence of recent use does not,

of itself, require the conclusion that there is no relevant connection because this depends upon the content of traditional law and custom and what is meant by 'connection' by those laws and customs—at [109] to [110] citing *Ward* at [64].

Their Honours started by finding that:

- Mr De Rose (and probably others) had acknowledged and observed the traditional laws and customs of the Western Desert Bloc by which a person becomes *Ngura*ritja for country and, under those laws and customs, he is *Ngura*ritja for the claim area;
- as such, he has defined rights and responsibilities for that area—at [111].

Those rights and responsibilities, as found by O'Loughlin J, included:

- the right to live on country, collect food, water and other resources, hunt and travel where they want to go so long as they did not offend the *Tjukurpa*;
- the right to erect shelters on the land, to gather shrubs and bushes for medicinal purposes, to use timber to make traditional implements;
- the right to instruct any Anangu (Aboriginal) visitor as to where they could go and where water and food may be obtained;
- the right to impose sanctions on a visitor who violates the rules;
- obligations to teach young people about country, 'clean' sites, learn the *Tjukurpa* for country and perform the appropriate ceremonies—at [112].

Their Honours concluded that:

> In view of these findings as to the content of the traditional laws and customs of the Western Desert Bloc, the effect of those laws and customs is...plainly to constitute a 'connection' between Peter De Rose (and any others who are *Ngura*ritja for the claim area) and the claim area. The traditional laws and customs confer rights and responsibilities on Peter De Rose over the claim area...[and] establish...he is inextricably linked to his country...The 'connection' required to satisfy s. 223(1)(b)...is present—at [113].

Extinguishment

The remaining questions about extinguishment revolved around the effect improvements on the three pastoral leases that make up the station, which were granted between 13 August 1953 and 27 February 1975, i.e. prior to the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA) on 31 October 1975.

Their Honours canvassed the relevant legislation and rehearsed the parties' submissions. It was then held that the grant of each lease was a 'previous non-exclusive possession act' (PNEPA) for the purposes of s. 36I of the *Native Title Act (South Australia) 1994* (SA) (SANTA), the state analogue to s. 23F(2) of the NTA, because:

- it was valid when granted (there being no issue of invalidity by reason of the operation of the RDA);
- it was granted prior to 24 December 1996; and
- the lease was a non-exclusive pastoral lease within s. 248B of the NTA—at [140].

Section 36I of the SANTA was the relevant provision because the grants of the leases were acts attributable to South Australia—at [141] and see ss. 23I and 239 of the NTA.

Since the leases were entered into before the RDA commenced, it was noted that Div 2 of Part 2 of the NTA (the past act provisions) and analogous provisions of the SANTA were irrelevant in assessing the effect of the leases on native title rights and interests—at [140].

Section 36I of the SANTA

The court noted that both s. 36I of the SANTA and s. 23G of the NTA deal with two situations:

- those where the relevant act involves the grant of rights and interests that are **not** *inconsistent* with native title rights and interests in relation to the land covered by the lease, in which case the rights and interests granted and the doing of any activity in giving effect to them prevail over the native title rights and interests, but do not extinguish them (option 1);
- those where the relevant act involves the grant of rights and interests that are *inconsistent* with native title rights and interests in relation to the land or waters covered by the lease, in which case the act extinguishes the native title rights and interests if that would also be the case 'apart from' the SANTA. In any other case, the native title rights and interests are suspended while the lease remains in force (option 2).

This was said to reflect a legislative intention to allow the courts to determine the effect of a PNEPA 'by reference to the position at common law', an intention 'recorded in the Supplementary Explanatory Memorandum to Government Amendments [to the NTA] Moved in July 1998'—at [143] to [144].

The application of option 2 has been resolved by the High Court:

- the first limb contemplates that a PNEPA may grant rights and interests that are inconsistent with native title rights and interests and, if it does, it extinguishes the latter to the extent of the inconsistency and no question of suspension of native title arises;
- the second limb addresses the case where there is an inconsistent grant of rights which, apart from the NTA and its state or territory analogue, would not extinguish native title rights and interests (e.g. a post-1975 grant which, by operation of the RDA, was ineffective to extinguish native title rights and interests)—see *Ward* at [192] and [82].

In this case, the native title rights and interests had already been identified in a draft determination. To determine the rights and interests granted by the leases to facilitate a comparison between the two sets of rights and determine the extent of any inconsistency, the court referred to their terms (which were substantially the same).

Extinguishing effect of improvements

Each pastoral lease:

- required the lessee to spend a minimum amount on unspecified 'improvements';
- expressly permitted the lessee to grow produce on the land 'solely for consumption on the... land';
- reserved to the Minister and all persons authorised by the Minister the right to undertake various activities on the land but, in two of the leases, not 'within one mile' of any improvement consisting of a well, reservoir, dam, dwelling house, factory or building of the value of £100 or more.

The court noted that:

- the leases conferred on the lessees 'the right and, to some extent, the obligation, to construct improvements on the leasehold land';
- two of the leases expressly envisaged that improvements could include a dwelling house, dams, reservoirs, factories or other buildings and the third referred to bores, dams, reservoirs and sheds and clearly contemplated the land being used for domestic purposes;
- all three 'plainly' conferred a right to construct an airstrip if that improvement was considered incidental to pastoral activities—at [148].

Their Honours went on to find that:

> The right to construct, and implicitly to use, improvements on the leasehold land, such as a dwelling house or storage sheds, when exercised, is clearly inconsistent with the native title rights and interests identified in the draft determination, insofar as they relate to the particular land on which the dwelling house and storage sheds are constructed—at [149], emphasis added.

While noting the 'problem' that the precise location of the improvements would not be known until the lessee exercised the right to erect improvements, the court relied in the joint judgment in Ward 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].

It was found that:

- each lease granted the lessee the right to conduct and use improvements on the leasehold land, a right that, from the date of the grant, was 'potentially' inconsistent to some extent with native title rights and interests, e.g. when the right to build a house was exercised, the right was necessarily inconsistent with all native title rights and interests to the area on which the house was built;
- it was only after the improvement was made that the precise area of land affected by the exercise of the lessee's right could be ascertained;
- the operation of a grant of the right to conduct and use improvements should be regarded as subject to a condition precedent, i.e. the grant of the right becomes operative in relation to a particular area only when it is exercised and can only extinguish native title when exercised because 'it was only then that the precise area or areas of land affected by the right could be identified'—at [156].

The parties accepted that any house, shed, building, airstrip, dam or constructed stock watering point was an 'improvement' and the claimants 'did not contend that if their extinguishment contentions failed, any native title rights and interests in respect of the land on which the improvements were constructed would survive'—at [157].

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:

> The previous non-exclusive possession acts...gave the lessees rights which, when exercised, were inconsistent with native title rights and interests...When the lessees constructed the improvements in accordance with the leases, the precise areas of land affected by the lessees' rights could be identified. *At that point of time*, apart from the operation of the [SANTA]...the grant of the leases operated to extinguish the native title rights and interests in respect of those areas of land. Accordingly, s. 36I(1)(b)(i)...confirms the extinguishment of native title rights and interests over those same areas—at [157], emphasis added.

It was also held that, since the grant of a right to erect or construct improvements carries with it 'those rights necessary for its meaningful exercise', native title rights and interests were also wholly extinguished over 'any adjacent land the use of which is reasonably necessary for or incidental to the operation or enjoyment of the improvements'—at [166].

Section 44H of the NTA

It was found that s. 44H was not intended to apply in a case such as this, i.e. where the rights granted under a lease extinguish the native title rights and interests which might otherwise be affected by the 'doing of any activity' in accordance with the lease because:

- if s. 44H applied in that situation, it would contradict s. 23G(1)(b)(i) of the NTA which confirms the extinguishment of native title rights and interests in the same circumstances;
- given the 'elaborate' scheme of Div 2B of Part 2 of the NTA and the analogous state legislation confirming extinguishment of native title by PNEPAs, it is hardly likely that a general provision such as s. 44H was intended to prevail over s. 23G(1)(b)(i).

Their Honours went on to note that:

- s. 44H is concerned with the non-extinguishment of native title rights and interests by reason of 'an activity' done in accordance with a lease or other instrument;
- the Explanatory Memorandum to the *Native Title Amendment Bill 1997* at [6.21] to [6.28] supported construing s. 44H to restrict its operation to 'activities' carried out in accordance with rights and interests granted under a lease and not to the rights and interests granted by the lease—at [159].

However, as the court found s. 44H did not apply to the rights in question in this case, no final view on the construction of s. 44H was given. Nor was it necessary to decide whether or not s. 44H applied to an activity done before the amendments to the NTA in 1998 that introduced s. 44H but 'the better view...would seem to be that s. 44H is not intended to be so limited'—at [160] to [165].

Right to make decisions about use and access of certain Aboriginal people
The Fullers had argued that a right of this kind might be inconsistent with rights of access granted to Aboriginal people by s. 47(1) of the *Pastoral Land Management and Conservation Act 1989* (SA), which provides that, subject to certain geographical limitations, an Aboriginal person may enter, travel across or stay on pastoral land 'for the purpose of following the traditional pursuits of the Aboriginal people'.

Their Honours found that:
- use of the pastoral land to follow traditional pursuits is not inconsistent with the native title rights proposed by the claimants, which 'ensures the use of the land is in accordance with traditional laws and customs'; and
- the limitation to 'traditional pursuits' indicated by s. 47(1) 'was not intended to extinguish any native title rights and interests that otherwise might exist'—at [170].

Therefore, the right to 'make decisions about the use and enjoyment of the determination area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by *Ngura*ritja was recognised in the determination of native title.

Costs
An order that both of the respondents pay the appellants' costs of the appeal will be made if written submissions on costs are not filed within 21 days of the date of this decision.

Summary of determination
It was found that native title exists in relation to De Rose Hill and is held by the Aboriginal persons who are *Ngura*ritja according to the relevant traditional laws and customs of the Western Desert Bloc people because:
- they were born there; or
- they have a long-term physical association with the area; or
- they possess an ancestral connection to the area; or
- they possess geographical and religious knowledge of the area: and
- they are recognised as *Ngura*ritja by the other *Ngura*ritja.

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 being rights to:
- access and move about;

- hunt, gather and use natural resources such as water, food, medicinal plants, wild tobacco, timber, stone and resin;
- live, camp and erect shelters and to cook and light fires for all purposes other than the clearance of vegetation;
- engage and participate in cultural activities, conduct ceremonies, hold meetings and teach the attributes of locations and sites on the determination area;
- the right to maintain and protect sites and places of significance to *Ngururaritja* under their traditional laws and customs;
- the right to be accompanied on the determination area by certain other people, e.g. those with rights in relation to the area according to the traditional laws and customs acknowledged by *Ngururaritja*;
- the right to make decisions about the use and enjoyment of the determination area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by *Ngururaritja*.

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 and interests 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 the exclusive use of which was necessary for the enjoyment of that 'improvement';
- in minerals as defined in s. 6 of the *Mining Act 1971* (SA) or petroleum as defined in s. 4 of the *Petroleum Act 2000* (SA).

The native title rights and interests are subject to and exercisable in accordance with the valid laws of the state and the Commonwealth, including the common law. The nature and extent of other interests to the determination area, such as three Crown Leases Pastoral and those of the Crown, were recognised in the determination. The relationship between the native title rights and interests and the other rights and interests is that:
- the other rights and interests co-exist with the native title rights and interests;
- the existence of the native title does not prevent the doing of any activity required or permitted to be done by or under the other rights and interests; and
- the other rights and interests and the doing of any activity required or permitted to be done by or under the other rights and interests prevail over the native title but do not extinguish them.

The native title is not to be held in trust and a proposed prescribed body corporate is to be nominated within 12 months of the order for the purposes s. 57(2) of the NTA.