De Rose appeal — Full Court

De Rose v South Australia [2003] FCAFC 286

Wilcox ACJ, Sackville and Merkel JJ, 16 December 2003

Issue

Essentially, the issue before the Full Court of the Federal Court in these appeal proceedings was whether or not the appellants, as a native title claim group, held rights and interests in relation to land and waters over the claim area under the traditional laws acknowledged and the traditional customs observed by them—see s. 223(1)(a) and (b) of the *Native Title Act 1993* (Cwlth) (NTA).

Background

The area concerned is in the far north-west of South Australia, within the eastern extremity of a large area of land described by the early ethnographers as the Western Desert region. At first instance, the application was dismissed on the basis that native title had ceased to exist because the claimants did not establish that they had a connection to the area covered by the application (the application area) as required by s. 223(1)(b) of the NTA—see *De Rose v South Australia* [2002] FCA 1342, Justice O'Loughlin. The background to this appeal and the findings at first instance are summarised in *Native Title Hot Spots* Issue 4.

Grounds of appeal

An appeal against the decision at first instance was filed by the claimants, in which it was argued that O'Loughlin J erred in concluding that they lacked the requisite connection with the claim area. Essentially the grounds were that his Honour:

- placed undue emphasis on the need for the appellants to demonstrate a physical connection with the application area and erroneously regarded physical absence for a period of time as being inconsistent with continuing connection;
- erroneously inquired into the reasonableness or otherwise of the 'excuses' offered by the claimants for not maintaining closer contact with the application area;
- failed to identify clearly the rights and responsibilities of *Ngururitja* (traditional owners) under the traditional laws and customs of the Western Desert Bloc in relation to the claim area and nearby lands, which led to erroneous assumptions such as that the relevant traditional laws and customs required *Ngururitja* to care for sites in order to maintain the requisite connection with the application area;
- erroneously imposed a requirement on the claimants not found in the traditional laws and customs of the Western Desert Bloc, namely that the appellants be part of a social, communal or political organisation that undertook activities amounting to an observance of traditional customs;
- overlooked or paid insufficient regard to evidence concerning both physical contact by the appellants with the claim area after 1978, including hunting visits, and complaints about threats to the integrity of particular sites—at [179].

The appellants submitted that the correct approach to determine whether they, or some of them, had the necessary connection for the purposes of s. 223(1)(b) of the NTA was as follows:

- the connection had to be established by the traditional laws acknowledged and the traditional customs observed by the claimants;
- if a person is *Ngururaritja* for particular land by virtue of the traditional laws and customs of the Western Desert Bloc and they, as *Ngururaritja*, have responsibilities for the land, the connection was established;
- the connection remained unless, by the relevant traditional laws and customs, it had been lost by virtue of the person's lack of contact with the land—at [180].

The appellants contended that:

- some of the findings of primary fact were sufficient to satisfy the statutory test of connection specified in s. 223(1)(b) of the NTA;
- as long as any one of the claimants was *Ngururaritja* in conformity with the traditional laws and customs of the Western Desert people, and that person maintained a sufficient connection with the claim area pursuant to those traditional laws and customs, they were entitled to succeed;
- given O'Loughlin J's findings that those recognised as *Ngururaritja* enjoyed exclusive possession and use of the claim area in the early twentieth century, the correct approach to the question of connection led to the conclusion that the appellants had established the necessary connection with the application area—at [181].

From these contentions, Acting Chief Justice Wilcox and Justices Sackville and Merkel identified the preliminary issues as being whether or not O'Loughlin J:

- erred in attributing importance to the absence of evidence of a cohesive community or group on or near the claim area; and
- erred in concluding that the appellants had failed to prove the necessary connection to the claim area for the purposes of s. 223(1)(b) of the NTA.

If O'Loughlin J did make such an error, the questions then were:

- should the Full Court undertake its own evaluation of the evidence relating to the question of 'connection'? and
- should O'Loughlin J's decision be upheld on the ground that, on his Honour's findings, the appellants failed to establish that they acknowledged traditional laws or observed traditional customs and, therefore, did not satisfy s. 223(1)(a) of the NTA?—at [272].

The state submitted that:

- OiLoughlin J's findings of fact required the appeal to be dismissed;
- his Honour had taken an approach more favourable to the claimants than that required by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (*Yorta Yorta*, summarised in *Native Title Hot Spots* Issue 3) because his Honour had been prepared to accept that laws and customs could be traditional without evidence of continual observance;

- moreover, he was prepared to allow for the evolution of laws and customs due to the interaction with European presence;
- the appellants could only succeed if they could establish that the laws and customs observed today owed their origins to those in existence at sovereignty, that those laws and customs had been continually observed since that time and that the connection of the claimant group had continued substantially uninterrupted;
- while an Aboriginal society had once lived in the claim area, there was no biological connection between the appellant and those who inhabited the area pre-sovereignty.

Counsel for the respondent pastoralists pointed out that the appellants' case focussed on O'Loughlin J's finding that they lacked a current connection, both physical and spiritual, with the application area. They argued, however, that there was an anterior question raised by their notice of contention, namely whether the appellants ever held or possessed native title rights and interests. The question arose because the appellants' cohort had migrated to the country of the claim area in the early part of the twentieth century—at [191].

The post-sovereignty 'usurpation' hypothesis

The court noted that O'Loughlin J found there were historical 'migratory movements' of Western Desert Aboriginal people to and from the claim area and its environs. Their Honours rejected the submission of the pastoralists that the forebears of the claimants were newcomers who supplanted the original inhabitants and brought with them new sets of norms governing their society. While such a 'usurpation' argument would carry weight if it were supported by the facts, this was not the case—at [213] to [217].

Their Honours noted the 'usurpation' thesis carried with it overtones of the 'Eurocentric' notion of occupation and that, since the term 'occupation' is not found in s. 223 of the NTA, its use in relation to the Aboriginal people of the Western Desert Bloc is apt to mislead:

> [A]s the evidence in the present case makes clear, the Western Desert peoples were comparatively few in number and led a lifestyle that required adaptation to the extraordinarily harsh conditions of the land. The relationship between them and the sites or tracks of spiritual significance to them is not readily captured by the familiar language of Anglo-Australian property law—at [219].

Continuity with original inhabitants

Most of the claimants came to the application area from country to the west by reason of drought, the search for food or shelter or because of marriage. For those few who were born on or near the application area, at least some of their forebears came from the west earlier in the twentieth century. The court noted that the approach taken by the traditional laws and customs of the Western Desert Bloc to population shifts, and the extent to which those laws and customs recognised 'newcomers' or their descendants as *Nguraritja* for sites or tracks on the application area, were essential to any finding of native title.

Their Honours concluded O'Loughlin J *did* find that the population shifts took place in accordance with traditional laws and customs of the Western Desert Bloc and that newcomers to the claim area could become *Ngguraritja* for the claim area under their traditional laws and customs and that the evidence supported such a finding —at [241] and [243] to [258].

Satisfying s.223(1)(a)

To satisfy s.223(1)(a) of the NTA, it was not enough to show that the appellants simply acknowledged or observed the traditional laws and customs of the Western Desert Bloc because 'usurpers' and those attempting to 'revive the lost culture of their ancestors' could do that much. In the court's opinion, it was necessary for the claims to show that, under the traditional laws and customs of the Western Desert Bloc, the claimants possessed rights and interests in relation to the claim area—at [233].

This was the 'critical question'. Similarly, the appellants would fail if their claim to be *Ngguraritja* for the application area was founded on rules or norms developed since sovereignty that never formed part of, nor were recognised by, the traditional laws and customs of the Western Desert Bloc—at [233] to [237].

The Full Court was of the view that it was not necessary either that the appellants' claim be founded on traditional laws and customs unique to the Aboriginal people occupying the application area at sovereignty or that they had biological or other links with the particular group of Aboriginal people who held native title over the claim area at sovereignty, other than those required by traditional laws and customs to establish that a person had acquired the status of *Ngguraritja* for the area concerned. It was enough if, by those traditional laws and customs, the appellants had sufficient links to the original native title holders so as to acquire the status of *Ngguraritja* for the application area, provided that they retained, by those laws and customs, a connection with the claim area—at [231] to [237].

Crucial to their Honours finding was the unqualified acceptance that:

- the Western Desert Bloc society had not ceased to exist at any time between European settlement and the present;
- the appellants themselves, whether or not they constituted a discrete social, communal or political group, were members of that society; and
- the traditional laws and customs asserted by the appellants were essentially the same as those that existed throughout the Western Desert region—at [236].

Inferences

Much of the connection evidence before O'Loughlin J was provided by the appellants. As to the acceptability of oral tradition, their Honours noted that, in *Yorta Yorta* at [59], the majority of the High Court endorsed the view that:

> [D]ifficulties inherent in proving facts in relation to a time when for the most part the only record of events is oral tradition passed down from one generation to another, cannot be overstated.

The Full Court went on to say that:

> For obvious reasons, the Aboriginal witnesses could not give direct evidence of the way in which pre-sovereignty population shifts were viewed by the traditional laws and customs of the Western Desert Bloc. The primary Judge was therefore forced to rely on inferences from necessarily incomplete evidence. Bearing that in mind, in our view, the evidence was sufficient to support the inference he drew, namely that population shifts to and from the claim area that occurred in the twentieth century were consistent with and recognised by the traditional laws and customs of the Western Desert Bloc, in the sense that, under those laws and customs, the newcomers could acquire the status of *Ngura*ritja in relation to sites or tracks on or near the claim area—at [259].

Change and adaptation

Their Honours further noted that O'Loughlin J explicitly found that the four methods by which a person could become *Ngura*ritja for particular country were recognised by the traditional laws and customs of the Western Desert Bloc, namely that the person had:

- been born of the claim area;
- a long-term physical association with the claim area;
- ancestors that had been born on the claim area; or
- a geographical and religious knowledge of the claim area; and
- been recognised as *Ngura*ritja for the claim area by the other *Ngura*ritja—at [260].

Furthermore, his Honour acknowledged the rules had changed over time and spoke of 'evolutionary traditional law'. In other words, O'Loughlin J saw the post-sovereignty adaptation of the *Ngura*ritja rules as being contemplated by the traditional laws and customs of the Western Desert Bloc and found population shifts to and from the vicinity of the claim area to be consistent with the traditional laws and customs of the Western Desert Bloc. In their Honours view, these findings were consistent with the approach taken in the joint judgment of the majority in *Yorta Yorta*—at [268].

A distinct group

One of the questions posed by s. 223(1) of the NTA is whether the appellants possess rights and interests in relation to land and waters under the traditional laws acknowledged and customs observed by them. If the traditional laws and customs of the Western Desert Bloc allowed *Ngura*ritja to possess rights and interests in relation to land only if the *Ngura*ritja for a particular area constituted a discrete social group or community, the appellants would doubtless have had to show that they formed part of such a group or community.

The trial judge rejected that thesis on the ground that it was inconsistent with the evidence of the Aboriginal witnesses. Therefore, it followed that O'Loughlin J's findings to the effect that the appellants did not constitute or were not part of a social, communal or political organisation on or near the application area could not adversely affect their claim to a determination of native title. The Full Court said that, to the extent that his Honour thought otherwise, he was in error—at [283].

Connection — wrong question asked

Their Honours analysed in depth both the evidence of Peter De Rose (the 'dominant figure' in the presentation of the appellants' case), and the trial judge's findings in applying the principles in s. 223(1)(b).

In the light of the analysis of s. 223 in the joint judgment in *Western Australia v Ward* [2002] HCA 28 (*Ward (HC*, summarised in *Native Title Hot Spots* Issue 1) at [64], the Full Court found that:

- the finding made by O'Loughlin J that Mr De Rose abandoned his connection to the application area did not conform to the language of s. 223(1)(b) of the NTA;
- the question posed by that provision is not whether the appellants, or any of them, have abandoned their connection to the application area;
- it is whether the claimants, by the traditional laws they acknowledge and traditional customs they observe, have a connection with the claim area—at [303], [315] and [329].

Their Honours inferred that O'Loughlin J identified the traditional laws and customs relevant to the question of 'connection' as those of the Western Desert Bloc, but did not explicitly ask whether by those traditional laws and customs, the claimants retained a connection with the claim area. The court noted that such an inquiry would have required his Honour to ascertain the content of the traditional laws and customs, to characterise the effect of those laws and then to determine whether the characterisation constituted a connection between the claimants and the application area. It was suggested that O'Loughlin J, in deciding that the claimants had 'abandoned' their connection to the area by 'failing' for a considerable time to observe their responsibilities in relation to sites, was applying a standard that was not sourced in the traditional laws and customs of the Western Desert Bloc but was rather 'a construct of his own'—at [310] to [312], referring to *Ward HC* at [17], [18] and [64].

Their Honours found that:

- in addressing the wrong question in relation to s. 233(1)(b), O'Loughlin J also placed too much emphasis on the absence of physical contact with the claim area after 1978, despite the fact that physical presence is not essential in circumstances where it is no longer practicable or access to traditional lands is prevented or restricted by European settlers;
- the 'strong' evidence of Mr De Rose's spiritual links with the land had not been afforded the proper weight by the trial judge—at [316] to [320].

Intent

If continuity of acknowledgement and observance of traditional laws and customs has been interrupted, the reasons for the interruption are irrelevant. As the court noted in this case, the judgment in *Yorta Yorta* also indicates that the reasons why acknowledgement and observance has been affected might influence the fact-finder's decision as to whether there was an absence of continuity. So it is in relation to the question of connection. In determining whether there is a connection for the purposes of s. 223(1)(b) of the NTA, the reason why claimants have not sought to maintain a physical association with the land may be relevant.

As to a fear of the Fullers being a real factor in preventing the appellants from returning to the land after 1978, their Honours had difficulty reconciling O'Loughlin J's findings as to Doug Fuller's attitudes and behaviour with his Honour's ultimate finding that it was difficult to sustain the idea that Mr De Rose or any other Aboriginal people had any reason to be afraid to enter the property to hunt or carry on traditional activities because of the conduct of Doug or Rex Fuller—at [321] to [326].

Similarly, the court was of the view that the fact that the Aboriginal people's movement away from the application area may not have been associated with their Aboriginal lifestyle, traditions or customs, but rather governed by aspects of European social and work practices, did not necessarily deny the presence of a continuing connection with the application area. The evidence showed that movement from traditional lands in search of regular food or shelter is not a new phenomenon or one unknown to traditional laws and customs of the Western Desert Bloc—at [328].

For those reasons:

> The upshot is that ... the primary Judge did not address the correct question posed by s. 223(1)(b) of the NTA. His finding that Peter De Rose failed to satisfy s.223(1)(b) is therefore flawed. We think that the findings relating to the other appellants, even though their circumstances were each different, were also flawed for the same reason—at [329].

Additional evidence required

Their Honours were reluctant to make their own evaluation of the evidence relevant to the question of 'connection'. This was largely because they were not taken to any evidence bearing on the significance, under the traditional laws and customs of the Western Desert Bloc, of a failure by persons who, under these laws, are *Nguraritja* for land, to discharge their responsibilities in relation to that land. Therefore the court found it was not in a position to evaluate this issue without the benefit of detailed additional submissions. O'Loughlin J's ultimate findings could be upheld, notwithstanding the flaw identified in his Honour's reasoning. Alternatively, depending on the content of the traditional laws and customs of the Western Desert Bloc, the evidence may well be sufficient for a court to conclude that Mr De Rose did satisfy s. 223(1)(b) of the NTA. However, the court was not in a position to say—at [330] to [331].

Acknowledgment and observance of traditional laws and customs

The respondents contended that, even if O'Loughlin J had erred in his approach to s. 223(1)(b), the appellants' claim was bound to fail because his Honour had made findings indicating that they were unable to satisfy the requirements of s. 223(1)(a), in that they could not show that they had rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by them.

This submission was based on O'Loughlin J's observations that, because *Anangu* (Aboriginal) witnesses had not visited sacred sites in their country outside the boundaries of the application area, their 'adherence to (as distinct from knowledge

of) traditional laws and traditional customs has eroded away'. O'Loughlin J was also not convinced 'that they (the claimants) continue to acknowledge traditional laws and observe traditional customs in connection with the claim area'. And, after observing that there was no community that had a physical or spiritual connection with the claim area, his Honour found that there had been a breakdown in their acknowledgement and observance of traditional laws and customs. The state submitted that these findings were fatal to the appellants' ability to satisfy s. 223(1)(a).

The court had difficulty with aspects of this argument:

- O'Loughlin J made no express finding that the appellants had failed to satisfy s. 223(1)(a) and, at one point, appeared to accept that Peter De Rose and other claimants were able to satisfy s. 223(1)(a) by reason of their status as *Ngguraritja* under traditional laws acknowledged and traditional customs observed by them;
- there was no analysis at first instance of the statutory concept of 'traditional laws acknowledged and ... traditional customs observed' because O'Loughlin J did not make a finding that the appellants were unable to satisfy s. 223(1)(a).
- it was, therefore, difficult to determine the criteria applied by O'Loughlin J in making the general finding that there had been a breakdown in the acknowledgement of the traditional laws and in the observance of traditional customs;
- the sharp distinction drawn by O'Loughlin J between knowledge of traditional laws and traditional customs (which he accepted was present) and adherence to these laws and customs (which he thought had eroded away) difficult to reconcile;
- the conclusion about the breakdown in traditional laws and customs had been expressed in general terms, without relating that general finding to O'Loughlin J's examination of the position of each of the Aboriginal witnesses, undertaken 'for the purpose of determining whether the necessary connection [for the purposes of s. 223(1)(b)] exists';
- the findings made by O'Loughlin J in relation to the individual appellants did not necessarily support this conclusion, a point illustrated by reference to the findings concerning Peter De Rose—at [334] to [339].

Conclusions on acknowledgment of traditional laws and observance of traditional customs

Their Honours were unable to uphold O'Loughlin J's orders on the basis that his findings justified concluding that the appellants had failed to satisfy s. 223(1)(a). The findings could not be regarded as credit-based findings of fact that are entitled to deference on appeal but, rather, as inferences drawn from other findings of fact that were 'flawed by...errors and omissions'. Consequently, they found that the question of whether the appellants, or some of them, acknowledged the traditional laws and observed the traditional customs of the Western Desert Bloc, required further consideration—at [341].

Extinguishment by grant of pastoral lease

The pastoralists argued that the combined effect of the NTA, the *Native Title (South Australia) Act 1994* (SA) (NTA (SA)) and the *Pastoral Land Management and*

Conservation Act 1989 (SA) (Pastoral Act 1989) was that native title to the application area was extinguished.

Their submission hinged on the effect of transitional provisions contained in Div 3 of the Schedule to the Pastoral Act 1989, which they argued had the effect (in substance if not in form) of granting a new statutory lease in place of each of the three pastoral leases over the application area that were in force at the commencement of the Pastoral Act 1989. That being so, they argued that the effect of s. 33 of the NTA (SA), was to extinguish any native title that otherwise may have existed over the application area. Section 33 provides that a pastoral lease that is a 'category A past act' as defined extinguishes native title.

It was common ground that the three original leases had been granted before the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA) and so none of the grants of these leases was a 'past act' within the meaning of s. 228 of the NTA or the NTA (SA).

Their Honours found that the Pastoral Act 1989 plainly contemplated that the existing leases would continue in force as pastoral leases: 'It would be a misuse of language to refer to an extension of the term of an existing lease, where the existing lease remains on foot, as the grant of a lease'—at [402].

As the court noted, the legislation did not say that the existing leases were to be terminated and new leases were to come into force in their stead. Nor did it say that the conditions and reservations of the existing lease would be incorporated in a lease granted or deemed to be granted under the Pastoral Act 1989. Rather, the conditions and reservations were 'not affected' by the conversion—at [309].

Proposed determination

The state accepted that, if the appeal was upheld and native title rights and interests were found to be held by the appellants, O'Loughlin J's draft determination should be made, subject to the following matters:

- the determination should provide that native title rights and interests did not exist in respect of improvements such as fences and roads;
- O'Loughlin J had erred in concluding that there was a separate right to control access and use by other Aboriginal people because this right was inconsistent with the statement in the joint judgment in *Ward (HC)* at [52], that: '[W]ithout a right of possession [against the whole world], it may greatly be doubted that there is any right to control access to land or make binding decisions about the use to which it is put'—at [408].

The court thought it preferable for these contentions to be addressed after a final conclusion has been reached as to whether or not the appellants, or any of them, had native title rights and interests over the application area—at [409].

Decision

Given the court's view that it did not have adequate submissions on the question of 'connection', particularly the significance of a failure by persons who are *Ngururitja* for the land to observe responsibilities to the land under the traditional laws and customs of the Western Desert Bloc, it was found that it could not come to a view as to whether or not the evidence supported the finding that the appellants had 'connection' to the claim area as required under s. 223(1)(b). Thus the issue of whether native title exists in the area was not resolved—at [330] to [331].

Since O'Loughlin J has now retired, it was not feasible to remit the proceedings to him (as the court would otherwise have been inclined to do), nor was it considered practical to remit the proceedings to another judge—at [410] to [411].

Instead, their Honours proposed that the parties, having considered the reasons for judgment, identify what issues, if any, remain in dispute and then submit further written submissions and, if necessary, oral argument on those issues. The court would then address and resolve any outstanding issues by reference to their reasons for judgment, O'Loughlin J's findings (so far as they are consistent with this judgment) and any additional evidence provided by the parties. To facilitate the finalisation of this process, their Honours made orders that (among other things) the parties attend a conference convened and conducted by a Registrar of the court for the purposes of considering:

- what issues remain for determination; and
- the findings and evidence upon which any of the parties wish to rely, that are relevant to such issues—at [412] to [413].

Therefore, O'Loughlin J's decision stands unless and until it is varied at some future time. This arguably means the appellants will, apparently, have no future act rights until the connection issue is decided (see s. 24FD of the NTA).