- Independent consultants will be engaged to undertake the Claims Resolution Review and the Review will involve appropriate consultations with native title stakeholders
- The Government will undertake consultation on the functions and governance model of PBCs with a range of stakeholders including existing PBCs, NTRBs, State and Territory governments and industry bodies. The consultations will be facilitated by a steering committee comprising the Office of Indigenous Policy Coordination, the Office of the Registrar of Aboriginal Corporations, and the Attorney-General's Department
- The Attorney-General convened a meeting of all State and Territory ministers with responsibility for native title on 16 September 2005 and promoted the benefits of positive and transparent behaviours by other jurisdictions. In addition the Native Title Consultative Forum, convened by the AGD three times a year, will continue to give all stakeholders an opportunity to share experiences and discuss challenges and opportunities for the native title system.

(Information about the Consultation Process from "Practical reforms to deliver better outcomes in native title", AGD, 7 Sep 2005).

For more information, the Attorney-General's media release and briefing document can be found by visiting the Attorney-General's Department website at http://www.ag.gov.au/nativetitlesystemreform

FEATURE

De Rose v State of South Australia (no 2) [2005] FCACF 110

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Backgound

The full Court of the Federal Court, comprising Wilcox Sackville and Merkel J handed down a determination in the De Rose Hill native title claim on 8 June 2005 in which non-exclusive native title was found to exist except in the area of improvements.

The claim by senior traditional owner Peter De Rose and others was over the De Rose Hill pastoral station in the far north of SA which consists of three separate pastoral leases. The respondent parties were the State of SA and the Fullers (and their private company) as holders of the pastoral leases.

The original decision by O'Loughlin J dismissed the claim after a trial lasting 68 days. The traditional owners had all left the station property, the last to leave being Mr Peter De Rose in 1978. The evidence of the Traditional Owners was that they were in effect forced off the station, sometimes at gunpoint, by Mr Fuller and that the traditional owners were scared to go back to the station. It was this loss of physical connection leading to a failure to live up to the responsibilities under traditional law and custom of a *Ngurarityja* (traditional custodian with respect to certain sites) that was focused on by the trial judge.

The Federal Court found that the trial judge had made errors of law and allowed the appeal on 16 December 2003 (De Rose appeal #1). A sad fact noted in the judgement was that of the twelve original applicants, two died before the trial and three more died after the judgement on appeal in December 2003. As O'Loughlin J had retired and the appeal court invited further submissions from the parties and proceeded to deliver the decision rather than send the matter back to the trial judge. During this process the native title applicants and the State had agreed what the determination should be assuming the Court was satisfied that Native Title did exist. With one exception this was also agreed by the respondent pastoralist.

The Court looked at all the evidence given at trial and the findings of fact made by the trial judge. Some findings could not stand as the trial judge had looked at the wrong question while some findings contradicted others. The trial judge was found to have made two fundamental errors:

1 1) In finding that the TO's were not part of social communal or political organisation on or near the claim area and making this a reason to dismiss the claim. The appeal court ruled that it was clear that it was the applicants' claim that the normative society they relied upon was the Western Desert Bloc. There was ample evidence of the continuity of this society since sovereignty and the adherence by that society to traditional laws and customs; and

2) In failing to ask whether the applicants had retained a connection to the area by the traditional laws and customs of the Western Desert Bloc. The judge placed too much weight on the failure (as he saw it) of the applicants to discharge their obligations under traditional law and custom and had failed to consider the effect of such failure *under the traditional laws and customs of the Western Desert Bloc.*

Arguments over the requirement of section 223(1)(a) NTA

Section 223(1) of the NTA provides:
The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters;

The applicants argued that all they needed to show was that at least one of them had acknowledged and observed the traditional laws and customs of the Western Desert Bloc. That is that they acknowledged and observed the "right conferring rules" i.e. the rules that determine and identify who from time to time were *Ngururaitja.*

The respondent pastoralists argued this was not enough and that it needed to be shown that at least one of the applicants had actually discharged the duties and responsibilities of the traditional laws and customs of *Ngururaitja.*

The Court said that :

s 223(1)(a) of the NTA requires a native title claimant community or group to establish that they have rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by that community or group. This proposition does not mean, however, that a claim to communal or group native title rights and interests can succeed only if every member of the claimant community or group has acknowledged and observed the relevant traditional laws and customs. It is a question of fact and degree as to whether the definition of native title rights and interest in s 223(1) is satisfied.

The Court also noted that:

> *it would read too much into s 223(1)(a) to require the claimants to show a continuing physical connection to the land. 'Connection' is dealt with in s 223(1)(b) and, as the High Court made clear in Ward (HC), at [64], par (b) is not directed to how Aboriginal peoples use or occupy land or water. It is directed to whether the peoples have a connection to land or water by the traditional laws acknowledged and the traditional customs observed by them. It is possible for Aboriginal peoples to acknowledge and observe traditional laws and customs throughout periods during which…they have not maintained a physical connection with the claim area.*

The respondent pastoralists conceded that if section 223(1)(a) was satisfied so too was section 223(1)(b) which deals with connection. The Court agreed and noted that the rights and responsibilities of a *Ngururaitja* under traditional law specified by the trial judge were sufficient to show a connection to the claimed land.

As to the argument that because the applicants

had not for a period of time actually discharged the responsibilities of *Nguraritja* native title had been lost the Court said:

> *contrary to the Fullers' submissions, s 223(1)(a) does not necessarily require claimants to establish that they have continuously discharged their responsibilities, under traditional laws and customs, to safeguard land or waters. Of course, the traditional laws and customs may provide that the holders of native title lose their rights and interests if they fail to discharge particular responsibilities. But s 223(1)(a) does not impose an independent requirement to that effect.*

The Court compared the failure to fulfil traditional responsibility to lapses in the wider Australian community by persons holding certain religious beliefs and noted that their failure to live up to those beliefs did not necessarily mean those beliefs had been abandoned. The Court said:

> *it is one thing to find that a person had not lived up to his or her religious or ethnical 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.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.*

The appeal Court concluded that there was ample evidence to show that the Western Desert Bloc had a system of traditional laws and customs that remained acknowledged and that the failure to visit sacred or secret sites for a period of time, even a lengthy period was not sufficient to counteract the affirmative evidence of acknowledgement and observance of traditional laws and customs.

Extinguishment issues & comment

The Court found that the right to make improvements, granted under the terms of the pastoral leases, did extinguish native title but only once that right was exercised.

The Court determined that:

> *In the circumstances of the present case, the 'operation of a grant of (the right to conduct and use improvements)' should be regarded, in effect, as subject to a condition precedent. The grant of the right could become operative in relation to a particular area of the leasehold land only when the right was exercised. The grant of the right could have an extinguishing effect only when the right was exercised, since it was only then that the precise area or areas of land affected by the right could be identified.*

This produces a common sense result. However, a 'condition precedent' is something which must happen before the right comes into being. It is somewhat twisted logic to say that a condition that precedes the operation of a grant of a right is the exercise of that right.

10 June 05

WHAT'S NEW

Legislation

The Attorney-General has announced a series of proposed reforms to the Native Title Act. The reforms include: an overview of the native title system; a review of Native Title Representative Bodies; a review of assistance to respondents in native title claims; technical amendments to the native title act; a review of claims resolution processes; a review of Prescribed Bodies Corporate (PBCS) and consultation with State and Territory governments.

More information can be found by visiting the Attorney-General's Department website at http://www.ag.gov.au/nativetitlesystemreform

The High Court of Australia has adopted new procedural rules. The High Court Rules 2004 were notified in a Special Gazette on 14 October 2004 and comprise five chapters which are organised by subject matter. The Rules came into effect on 1 January 2005. Text of the new rules is available at: http://www.austlii.edu.au/au/legis/cth/consol_reg/hcr2004170/