THE GIBSON DESERT NATIVE TITLE COMPENSATION CLAIM:

Ward v State of Western Australia (No 3) [2015] FCA 658

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OBTAINING A SUCCESSFUL determination of compensation for the extinguishment of native title rights and interests under *Native Title Act 1993* (Cth) (NTA) has proven to be a difficult process. Over 38 compensation applications have been filed under the NTA with 6 active applications.[1] The *De Rose v State of South Australia* [2013] FCA 988 (*De Rose*) decision was the first successful compensation determination, with all others except for one having been withdrawn, discontinued or dismissed. The resolution of the compensation application on behalf of the traditional owners of the Gibson Desert Nature Reserve (GDNR), lodged in 2012, was consequently much anticipated.

The recent decision of *Ward v State of Western Australia (No 3)* [2015] FCA 658 (*Ward*), an interlocutory decision made in the GDNR application addressing a 'separate question' about the extinguishment of native title rights by historical tenure, has ultimately called further attention to unresolved issues surrounding compensation for extinguishment under the NTA.

The GDNR application covers 18,000 square kilometres and features rock-holes and rock formations of immense cultural and natural values.[2] The proceedings for the claim commenced in 2012 and the traditional owners argued that immediately prior to the creation of the GDNR in 1977, the claimants had exclusive possession native title rights to the claim area. This included the native title right to control use of and access to the whole of the claim area.

The Decision

The important issue in the case concerned the grant of an oil licence in 1921 and whether it extinguished any native title right to control use of and access to the claim area. If this were the case, any native title at the time of the creation of the GDNR would have been of a non-exclusive nature for the purposes of the compensation claim. The decision turned upon the question of whether the oil licence regulated native title rights and interests or whether they were wholly extinguished. The claimant's submissions characterised the oil licence as a transitory and limited right to enter the land to prospect, operating temporarily to regulate the right to control access. Their argument relied on the recent High Court decision in *Akiba v Commonwealth of Australia* (2013) 250 CLR 209 (*Akiba*). Following *Akiba*, the claimants argued that the NTA contemplates that an act may interfere with the enjoyment or exercise of native title, without extinguishing those rights and interests. On the other hand, the State and Commonwealth endorsed the application of the inconsistency of rights test as set out in *Western Australia v Ward* [2002] HCA 8 (*Ward HC*) which states;

> *Two rights are inconsistent or they are not. If they are inconsistent, there will be extinguishment to the extent of the inconsistency; if they are not, there will not be extinguishment*.[3]

Barker J then considered the relevant jurisprudence; in particular his Honour examined the various approaches of the bench in the High Court's decision in *Queensland v Congoo* [2015] HCA 17. His Honour ultimately decided that that the inconsistency of rights test was the applicable test. This was because the rights granted to the licensee by the oil license were no different from the grants of the pastoral leases considered in *Ward HC*. The licences did not create exclusive possession rights in the licensee, but at the very least they did extinguish the exclusive native title right to control the use of and access to the claim area.

His Honour rejected the claimant's reliance on *Akiba* to argue that the oil licence merely regulated the native title rights in question. *Akiba* was distinguished from the current

case in its application to the native title right to take resources with respect to state fishing legislation and not to the right to control access to land. In the present case, the oil licence gave the licensee the right to do things which were plainly inconsistent with the native title holders' pre-existing right to control access. Therefore his Honour declared that the oil licence was validly granted by the State in 1921, and that it had extinguished any native title right to control the use of and access to the claim area.

Accordingly, his Honour declared that the claimants' remaining (non-exclusive) native title rights were validly extinguished by the vesting of the GDNR. This meant that any native title rights extinguished by the creation of the Gibson Desert in 1977 were non-exclusive rights. Additionally, compensation for the earlier extinguishment of those exclusive rights by the 1921 oil licence was not available to the claimants.[4]

Compensation for extinguishment under the NTA

Under the NTA, compensation arises when the Commonwealth or State of Territory validates a past, intermediate period or future act which extinguishes native title. This is because the validation of these acts would otherwise be invalid by virtue of the *Racial Discrimination Act 1975* (Cth) (RDA) which protects Aboriginal and Torres Strait Islander peoples from the discriminatory impairment of their native title rights. As such, compensation is only payable for extinguishing acts that occurred after 1975 when the RDA was introduced. Interestingly, the vast majority of acts which extinguish native title occurred prior to 1975, meaning that in such instances there is no entitlement to compensation. In the *Ward* case, the initial extinguishing act took place in 1921, well before the introduction of the RDA.

In any compensation determination, the claimants must overcome the threshold test of proving they actually possessed native title rights and interests over the relevant land, subject to the extinguishing act. Indeed, the recent *Ward* decision, along with its predecessors demonstrates the obstacles faced by claimants in making a successful compensation claim. Ultimately a claimant group must prove;

- they held native title rights and interests prior to the acts of compensation occurring
- that those rights and interests have not been extinguished by non-compensable acts before the compensation acts were done
- that the compensation acts had extinguished native title rights and interests and
- the amount of compensation that they are entitled to as a result of the compensation.

A failure to establish any one of these elements will defeat the claim. In *Jango* (see AIATSIS case note in the May/June 2006 Newsletter, http://aiatsis.gov.au/sites/default/files/products/native_title_newsletter/mayjun06.pdf) the claimant's claim for compensation was rejected as it failed on the threshold issue of proving the existence of native title rights at the time the compensation acts occurred. These acts included the development of the town of Yulara, Connellan airport and other public works. The crux of the issue was whether there was continuity of the society of traditional laws and customs until the compensation acts occurred. Sackville J found that the claimants could not demonstrate the existence of a body of laws and customs relating to rights and interests in land, therefore the compensation could not be claimed.

The *De Rose* decision was in fact the first to make an order of compensation for the extinguishment of native title rights and interests. The Nguraritja people had previously overcome the threshold issue of proving the prior existence of native title over parcels of the De Rose Hill pastoral lease in the Western Desert region of South Australia. The determination excluded certain areas where native title had been extinguished which lead to an application for compensation. This was the first instance where the Federal Court was required to determine native title compensation. However under a Court-ordered mediation, the claimants and the state had arrived at a proposed settlement deed. As a result, the Court imported principles applied in consent determinations where a court will recognise a consensual agreement between the parties that native title exists over a certain area. This meant that the actual merits of the compensation claim were not addressed and the court merely sanctioned the proposed settlement.[5] The *De Rose* decision did not therefore elaborate on the rights to compensation under the NTA as may have been hoped.

Additionally, the value of the compensation amount was kept confidential in the *De Rose* decision. The NTA itself is also silent on the valuation of compensation of extinguishment. In most instances, the relevant legislation provides that

the amount of compensation must be on 'just terms', and must not exceed the amount that would have been payable if the extinguishing act had been the compulsory acquisition of freehold estate. Additionally, this 'freehold cap' itself is further subject to s 51(xxxi) of the Constitution which provides that Commonwealth's acquisition of property must also be on 'just terms'. How this Constitutional protection applies to native title rights and interests is uncertain although there are strong arguments for why it should. As Brennan argues;

> *There seems to be no persuasive grounds for excluding traditional rights in relation to land or waters of indigenous people from the constitutional category of 'property' and indeed a number of High Court judges have already indicated that they regard native title as property in the constitutional sense.*[6]

The National Native Title Tribunal (NNTT) however has affirmed that compensation should not necessarily be subject to the 'freehold cap' under s 53 NTA.[7] In the context of future act determinations, s 53 'just terms' principles may assist to set the maximum amount of compensation payable for a future act under s 51A(1) by reference to just terms which may exceed the freehold value.[8] Additionally, the NNTT has found that market value is an 'uncertain guide to the true value of a loss of native title rights and interest in the land, at best, the land value is a starting point, for want of a better yardstick.[9] Furthermore, considering the holistic nature of Aboriginal and Torres Strait Islander relationships to land, as well as the legacy of injustice which the NTA seeks to redeem, it is arguable that the value attributable to former native title rights and interests may well exceed the equivalent of 'just terms' valuation under s 51A.[10]

Compensation for extinguishment under legislation

Interestingly, the challenges of litigated determinations were recognised by the Western Australian state government which in 2007 introduced the *Indigenous Conservation Title (ICT) Bill in* recognition of the 'expensive and time-consuming exercise' of litigation.[11] The bill sought to acknowledge the aspirations of traditional owners in the GDNR, facilitate a transfer in the form of a unique title known as ICT and settle the state's compensation liability under the NTA. Unfortunately, the ICT Bill lapsed after the government lost office in September 2008 nullifying extensive negotiations in the lead up to the ICT Bill and leaving litigation as the only option to recognise the rights of traditional owners to manage and look after their country.

While the recent *Ward* decision does hold implications for compensation – particularly for the traditional owners affected – it is ultimately an extinguishment decision. *Ward* highlights the difficulty of getting a successful compensation application up other than by mediation or negotiation, and highlights the incredible injustice that can be perpetrated by the common law on extinguishment. Barker J essentially notes this injustice at [180] of his judgment where he identifies that the traditional owners' application was essentially undermined by a single piece of historical tenure which, on all accounts, was never accessed or used.

1. National Native Title Tribunal, 'Search native title applications, registration decisions and determinations' < http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx> accessed 10 August 2015. Given the growing number of determinations Central Desert has noted that compensation claims will continue to place pressure on the organisation in a manner similar to litigated determination applications: Central Desert Native Title Services ' Submission to the review of roles and functions of native title organisations' 2013 < http://www.deloitteaccesseconomics.com.au/uploads/File/Central%20Desert%20Native%20Title%20Services.pdf>
2. The GDNR is a class A nature reserve that is exempt from native title.
3. [82].
4. Compare this with the decisions of the majority of the Full Federal Court in *Congoo on behalf of the Bar-Barrum People #4 v State of Queensland* (2014) 218 FCR 358 [52], and discussion in *Queensland v Congoo* [2015] HCA 17 [27] which held that the native title rights had not been extinguished, and suggested that compensation may be available to the claimants for the interference with their rights under the *National Security Act 1939* (Cth).
5. [82].
6. Sean Brennan, 'Native Title and the Acquisition of Property under the Australian Constitution', (2004) 28 *Melbourne University Law* Review 29, 77 cited in Aboriginal & Torres Strait Islander Social Justice Commissioner, *Native Title Report* No 7, (2008) 170.
7. Tina Jowett and Kevin Williams, '*Jango:* Payment of Compensation for the Extinguishment of Native Title', 3 *Land, Rights, Laws: Issues of Native Title* 8 (2007), 10.
8. Ibid, citing *State of Western Australia v Leo Winston Thomas on behalf of the Waljan People* (1999) 164 FLR 12 (Honorable CJ Summer)
9. Jowett citing *Danggalaba Clan* [1998] NNTTA 11.
10. Ibid.
11. *Indigenous Conservation Title Bill 2007*, explanatory memorandum, 1.