WHAT'S NEXT FOR NATIVE TITLE COMPENSATION: THE *DE ROSE* DECISION AND THE ASSESSMENT OF NATIVE TITLE RIGHTS AND INTERESTS

by Wanjie Song

INTRODUCTION

On 1 October 2013, the Federal Court of Australia delivered an important judgment in *De Rose v South Australia* [2013] FCA 988 ('*De Rose*'), being the first time a court has ordered payment of compensation for the extinguishment or impairment of native title rights and interests. However, being a consent determination, *De Rose* did not give any guidance as to the difficult question of how native title compensation is to be valued.

The *Native Title Act 1993* (Cth) ('NTA') provides that compensation for the extinguishment or impairment of native title must be on 'just terms'. How compensation on 'just terms' is to be calculated has been considered and discussed by a number of commentators. But without a judicial decision, the assessment of native title compensation remains largely unclear in Australia—creating uncertainty for native title groups considering making a claim for compensation.

THE *DE ROSE* DECISION

The Federal Court decision in *De Rose* is the only time a court has ordered a payment of compensation for the extinguishment or impairment of native title rights and interests, since the introduction of the NTA in 1993.

In 2005, it was determined that the De Rose Hill Nguraritja People held native title over parts of the De Rose Hill pastoral lease.[1] The De Rose Hill Nguraritja People then made a compensation application in relation to three separate areas of land that were excluded from the determination area, as native title had been extinguished by the creation of a highway, a car park and a freehold lot.

The Federal Court in *De Rose* decided that compensation was payable, as the De Rose Hill Nguraritja People would have held native title over those areas, if that extinguishment had not occurred.[2] However, *De Rose* is a consent determination, in which the actual amount of compensation paid to the De Rose Hill Nguraritja People was decided by agreement between the parties, and the Federal Court simply endorsed that agreement. The judgment did not consider the relevant principles of valuing compensation for the extinguishment or impairment of native title rights and interests. Hence, the case did not provide assistance as to how native title compensation should be assessed.

WHEN NATIVE TITLE COMPENSATION IS PAYABLE

Compensation is payable when native title rights and interests over a certain area have been extinguished or impaired, which usually requires an existing native title determination over that area. It is also possible to claim compensation over areas which native title determinations have not been made, although the party claiming compensation will need to first satisfy the court that they held native title rights and interests over the area at the time the relevant acts were done.[3] As more native title determinations are made, it is likely that cases involving compensation for the extinguishment or impairment of native title rights and interests will become more frequent.

COMPENSATION UNDER THE *NATIVE TITLE ACT*

The NTA allows an application to be made to the Federal Court by native title holders for compensation for any loss, diminution, impairment or other effect on native title.[4] However, the Native Title Act does not state how that compensation is to be calculated. The NTA indicates in section 51A that compensation is to be capped at the amount that would be payable for the compulsory acquisition of the land in freehold. However, section 53 of the NTA qualifies this by stating that the acquisition of native title rights and interests must be on 'just terms', which is a reference to the constitutional guarantee of 'just terms' compensation for the acquisition of property, pursuant to section 51(xxxi) of the Commonwealth Constitution.[5]

Some have expressed the view that the freehold cap under section 51A of the NTA is subject to the requirement that the compensation be on 'just terms', and that therefore the cap can be exceeded if freehold value is not considered sufficient to satisfy the 'just terms' criterion.[6] Commentators point to the attitude of the High Court to the protection of the fundamental rights in the Constitution,

including 'just terms', as the source of this view.[7] Comments in the reasons for decision in *De Rose* now give support to this view: the Federal Court noted that section 51A of the NTA limits the compensation payable to the freehold amount, unless this limit infringes the requirement for compensation to be on 'just terms'.[8]

Section 51(xxxi) of the Constitution provides a constitutional guarantee that in the case of acquisition of property by the Crown, compensation must be made on 'just terms', which aims at putting the holder into the same position as if the rights had not been extinguished or impaired by the taking. As native title rights and interests are qualitatively different from the rights and interests associated with holding freehold title, it is possible that in order to place the holder of native title rights and interests in the same or similar position as if their rights and interests had not been extinguished or impaired, the amount required may be higher than the freehold equivalent value of the property. Therefore, the only real guidance that the NTA gives to the assessment of native title compensation is that it must be on 'just terms'.

As the amount of compensation was kept confidential in *De Rose,* it is unclear how the parties valued the native title rights and interests. The Court outlined the negotiation process between the parties, and stated that the proposed calculations from each party had 'vastly varying results'.[9] Ultimately, the parties agreed on a figure within the range of valuations that had been obtained.[10]

The *De Rose* decision is the only time a court has ordered a payment of compensation for the extinguishment or impairment of native title rights.

ASSESSMENT OF COMPENSATION — FREEHOLD VALUE

The freehold value of the land is calculated typically by ascertaining the market value of the freehold title, which is the sum that a willing buyer would pay a willing seller for the freehold title.[11] In *De Rose,* the State did not accept that the freehold value of the land was necessarily relevant to the value of the native title rights and interests lost.[12] In any case, the parties were not able to agree on a freehold value of the land in question.[13] However, the parties agreed that the issue of freehold value is relevant for the purposes of the limit imposed in section 51A of the NTA.[14]

The problem with limiting the assessment of native title compensation to the freehold value of the land is that many areas subject to native title determinations are remote and there is no pattern of current freehold grants in the surrounding area (and therefore no history of open-market transactions in similarly located freehold land). Hence, it may be difficult to establish an agreed freehold value, a difficulty which arose in *De Rose*.[15] Furthermore, in many cases native title rights and interests may be stronger in remote areas which (typically) have a lower freehold value. It would be inequitable to assess native title compensation based solely on the freehold value of the land, without consideration of other relevant principles which are unique to the native title context.

ASSESSMENT OF COMPENSATION — LOSS OF THE 'RIGHT TO NEGOTIATE'

Native title holders and registered native title claimants have what is called the 'right to negotiate' under the NTA, in relation to 'future acts' which will affect native title, such as grants of land titles or mining tenements.[16] The 'right to negotiate' process requires the native title party, the government proposing to do the act (eg to grant the relevant title) and the proponent (eg the proposed grantee of the title) to negotiate 'in good faith' about the effect of the 'future act' on native title, with a view to obtaining an agreement. Such agreements usually contain benefits for the native title party.

However, the 'right to negotiate' ceases to exist where native title rights and interests have been extinguished. The assessment of native title compensation should take into account the potential loss of income and other benefits that would otherwise be generated for the native title party in reaching an agreement under the 'right to negotiate' process.

The strength of a native title holder's 'right to negotiate' should be taken into account when assessing the value of native title compensation. For example, if native title is held over an area which is subject to great demand by non-native title interests (such as mining and petroleum interests), then the value of the 'right to negotiate' lost by the extinguishment of native title may be assessed as being higher than native title held over an area unlikely to be the subject of 'future act' applications.

ASSESSMENT OF COMPENSATION — NON-ECONOMIC LOSS

The difficulty with assessing compensation for the extinguishment or impairment of native title is that a value must be placed on those native title rights and interests which have been lost. The inherent problem with this exercise is that there is no actual market for native title rights, in the same way that there is a market for freehold property rights. Compensation for loss of native title rights and interests should therefore not only focus on the economic losses described above, but also the non-economic loss, in order

to satisfy the requirement that the native title holders have been compensated on 'just terms'. The types of non-economic loss have been discussed widely, and include loss of cultural practices and knowledge, loss of place and community, and the insult associated with the loss of these places without consent.[17] Critics have also considered that the NTA provides scope for creative methods of calculating compensation for non-economic loss, which can be drawn from existing areas of the law including the tort of personal injury, the loss of amenities of life, and injury to home.[18]

The strength of the native title holder's rights and interests in a particular area should also be taken into account when assessing the value of native title compensation. The Court in *De Rose* noted that some of the arguments of the De Rose Hill Nguraritja included acknowledging that the areas concerned were subject to *Tjukurpa* (dreaming) stories and sacred sites, including a site of importance for members of the wider Western Desert Bloc cultural community[19], as well as a *kurulpa* (traditional gravesite).[20] These stories and sites have now been adversely affected. For example, the extinguishment of native title impacted on the De Rose Hill Nguraritja's ability to teach the *Tjukurpa* story to the younger generation, and the De Rose Hill Nguraritja gave evidence that they are looked down by the wider traditional community for having failed to protect important sites.[21] The view that significant areas may affect the amount of compensation awarded was also articulated in the case of *Jango v Northern Territory* [2007] 159 FCR 531, where Sackville J stated that a particular site of significance 'bears on the quantum of compensation payable'.[22]

NATIVE TITLE COMPENSATION UNDER OTHER REGIMES

There is also scope to claim native title compensation under the various state and territory statutes for compulsory acquisition, which focus on finding the market value of the land taken,[23] and which set out specific heads of compensation which can be claimed.

Claims for compensation under state and territory compulsory acquisition legislation generally allow a small percentage of additional 'solatium' set out by the relevant legislation— typically up to 10 per cent of the base compensation. 'Solatium' is an amount to compensate for the injured feelings of being forcibly deprived of one's land.[24] Because native title compensation should include a greater portion of solatium compared to the freehold value of the land, it can be argued that state and territory compulsory acquisition regimes might not be suited to the idiosyncrasies of native title compensation. [25]

The practicality of the assessment of compensation under each regime is also relevant. A compensation claim under the NTA is commenced in the Federal Court. A claim made under state or territory legislation is heard by the relevant State Court or specialist Tribunal. It may be that the Federal Court is better placed to determine native title compensation, as it has the experience to take into account the factors which are unique in the native title context. It can also be argued that that the various state and territory compulsory acquisition regimes provide a restrictive framework which is not particularly suited to native title compensation claims. The NTA, on the other hand, accommodates a wider scope to claim native title compensation, with the express requirement that such compensation be on 'just terms'. However, until contested claims for native title compensation under the state and territory compulsory acquisition regime and the NTA have been heard, it is difficult to assess whether the NTA provides a better framework for commencing a claim for native title compensation.

CONCLUSION

Although *De Rose* was the first case to order a compensation payment for the extinguishment or impairment of native title rights and interests in Australia, it did not give any assistance as to the *assessment* of native title compensation. The question of how compensation payable for the extinguishment or impairment of native title rights and interests should be assessed is still largely unknown. However, the assessment of compensation *should* consider the freehold value of the land, the loss of the 'right to negotiate' and non-economic losses. Until a decision is made in favour of the claimants in a contested native title compensation determination, the only firm guidance available to the assessment of native title compensation arises from the general principle of 'just terms' under the NTA. The lack of clarity in the assessment of value of native title makes it difficult for native title groups considering a claim for compensation.

Wanjie Song is a legal practitioner with the Perth law firm Castledine Gregory, specialising in native title, mining and resources, planning law and local government. She is also an accredited mediator.

1 *De Rose v South Australia (No 2)* [2005] FCAFC 110.
2 *De Rose v South Australia* [2013] FCA 988 (1 October 2003) [4].
3 *Native Title Act 1993* (Cth) s 13(2).
4 Ibid ss 50(2), 61.
5 *Commonwealth of Australia Constitution Act 1900 (Imp)* s 51(xxxi).
6 John Sheehan, 'Compensation for the Taking of Indigenous Common Property: The Australian Experience' (Paper presented at the Eighth Biennial Conference for the International Association for the Study of Common Property: Constituting the Commons: Crafting Sustainable Commons in the New Millennium, Indiana University, Bloomington Indiana, United States, 6 June 2000) 16.
7 Ibid 16-17.
8 *De Rose v South Australia* [2013] FCA 988 (1 October 2003) [21].
9 Ibid [69].
10 Ibid.

11 Douglas Brown, *Land Acquisition,* (LexisNexis Butterworth, 6th ed, 2009) 122.
12 *De Rose v South Australia* [2013] FCA 988 (1 October 2003) [69].
13 Ibid [70].
14 Ibid [69].
15 Paul Burke, 'How Can Judges Calculate Native Title Compensation?' (Discussion paper, a research project commissioned by the Native Title Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 28.
16 *Native Title Act 1993* (Cth) s 26.
17 Stuart Kirsch, 'Lost Worlds: Environmental Disaster, "Culture Loss", and the Law' (2001) 42(2) *Current Anthropology* 167-198; Paul Burke, 'How Can Judges Calculate Native Title Compensation?' (Discussion paper, a research project commissioned by the Native Title Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 24-5.
18 John Litchfield, 'Compensation for Loss or Impairment on Native Title Rights and Interests' (1999) 18 *Australian Mining and Petroleum Law Journal* 259-60; Paul Burke, 'How Can Judges Calculate Native Title Compensation?' (Discussion paper, a research project commissioned by the Native Title Unit of the Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 24-5.
19 *De Rose v South Australia* [2013] FCA 988 (1 October 2003) [61].
20 Ibid [63]-[67].
21 Ibid [61].
22 *Jango v Northern Territory* [2007] 159 FCR 531.
23 Brown, above n 11, 3.
24 Ibid 175.
25 Burke, above n 15, 7-8.

Ancestors of Our Land, 2006
Bronwyn Bancroft
Linear Linkages
1500mm x 1500mm, Acrylic on canvas