Compulsory acquisition – Timber Creek

Minister for Lands, Planning and Environment (NT) v Griffiths [2004] NTCA 5

Martin (BR)CJ, Mildren and Riley JJ, 10 May 2004

Issue

This was an appeal the Northern Territory Court of Appeal against a decision that certain notices of compulsory acquisition of native title issued by Minister for Lands, Planning and Environment of the Northern Territory were invalid (see *Griffiths v Lands & Mining Tribunal* [2003] NTSC 86, summarised in *Native Title Hot Spots* Issue 6). The Full Court unanimously allowed the appeal and found that the notices were valid.

Background

A number of notices of proposed acquisition of unalienated Crown land, unaffected by any interest or tenure derived from the Crown, in Timber Creek in the Northern Territory, including acquisition of any native title interests, were issued under the *Lands Acquisition Act 1978* (NT) (LAA). The purposes for which the land was being acquired identified in the notices were, essentially, in order to grant term leases for pastoral, agricultural or commercial purposes, some of which could later be surrendered in exchange for a grant of freehold.

Native title claims were filed (and subsequently registered), together with notices of objection to the acquisitions lodged under the LAA. This decision deals with an appeal by the minister to the Court of Appeal of the Northern Territory against the findings of the primary judge in relation to the validity of those notices.

The primary judge found that:

- if the minister intended to acquire the native title interests in land, the notices had to be drawn so as to compulsorily acquire those interests and not the Crown's interest as well; and
- the notices had been ineffective to acquire interests in unalienated Crown land.

Decision

The appeal was allowed unanimously. Justice Riley agreed with the reasoning of Justice Mildren, as did Chief Justice Martin subject to one qualification which the Chief Justice set out in separate reasons for decision. That qualification is briefly set out below. Otherwise, what follows is a summary of Mildren J's reasons.

Mildren J disagreed with the primary judge and found that:

- on a true construction of the notices, the minister only intended to acquire all interests, including the native title interests, other than the interests which the Crown itself already had; and

- the notices were not rendered invalid simply because they purported to acquire that which the Crown already had—at [55].

Does the LAA apply where the fee simple interest is not acquired?
His Honour held that the argument put by the native title party that the LAA does not apply in circumstances where the interest to be acquired is not the land itself could not be sustained because:

- the LAA specifically envisages the acquisition of any interest in land including, in particular, native title interests; and
- therefore the Parliament intended that the minister had the power to acquire an interest in land under the LAA without, at the same, time acquiring the fee simple title to the land—at [60] to [71].

Does the NTA preclude an acquisition where only native title interests acquired?
One of the arguments put forward by the native title party rested upon the interpretation of s. 24MD(2) of the *Native Title Act 1993* (Cwlth) *(*NTA). It provides that a compulsory acquisition will have the effect of extinguishing native title rights and interests if:

- the act is a compulsory acquisition of the whole or part of any native title rights and interests under a law of the Commonwealth, a state or a territory that permits the compulsory acquisition of both native title and non-native title rights and interests; and
- the whole, or the equivalent part of, of all non-native title rights and interests, in relation to the land or waters to which the native title rights and interests that are compulsorily acquired relate, is also acquired (whether compulsorily or otherwise) in connection with the compulsory acquisition of the native title rights and interests; and
- the practices and procedures adopted in acquiring the native title rights and interests are not such as to cause the native title holders any greater disadvantage than is caused to the holders of non-native title rights and interests when their rights and interests are acquired.

The matter before the court turned on the second requirement i.e. s. 24MD(2)(b).

The native title party's argument was that:

- where there are no non-native title rights in the land in question (as in this case), any notice of acquisition will not have the effect of extinguishing the whole or part of the native title rights and interests attempted to be acquired; and
- therefore, the notices of acquisition given under the LAA in this case were ineffective—at [72] and [73].

This was primarily because, under s. 46(1) of the LAA, upon publication in the Gazette of a notice of acquisition:

> [T]he land described in the notice vests in the Territory freed and discharged from all interests, trusts, restrictions, dedications, reservations, obligations, encumbrances, contracts, licences, charges and rates of any kind...and any interest that a person had in

the acquired land is divested, modified or affected to the extent necessary to give effect to this subsection.

Mildren J found that:

- if s. 24MD(2)(b) applies only where there is an acquisition of all interests other than the Crown's interests in land, and cannot apply where the only interest in land other than the Crown's interest is a native title interest (as in this case), that does not invalidate the notice of acquisition; and
- in those circumstances the non-extinguishment principle would apply—at [74] and see ss. 24MD(3) and 238 of the NTA.

According to his Honour, this meant that:

- the procedural rights available to native title parties as a result of s. 24MD(6A) of the NTA would still apply; and so
- the LAA would apply, since s. 5(1)(a) provides that the LAA applies in relation to an acquisition of native title rights and interests that is an act to which the consequences in section 24MD(6A) or (6B) of the NTA apply. [Note that the consequences of s. 24MD(6B) would also seem to apply in this case, since the purposes of the acquisitions in question was to confer rights on persons other than the Territory]—at [74].

Mildren J concluded that the effect of these provisions was to suppress the native title rights until such time as the acquisition or it effects were later wholly or partly removed, or wholly or partly cease to operate—at [74], referring to s. 238 of the NTA.

According to his Honour, there was nothing in any provision of the LAA, apart from s. 46(1), which suggested that an acquisition to which the non-extinguishment principle applied was not contemplated by the LAA. Therefore, his Honour found that:

- subsection 46(1) of the LAA should be read down to the extent that it was in conflict with the NTA;
- therefore, the notices were valid; and
- where the only interest acquired was a native title interest (because, as in this case, there were no other interests in the land in question), it was not necessary to decide whether or not the compulsory acquisition would extinguish the native title rights in terms of ss. 24MD(2)(b) and (c) of the NTA—at [75].

Validity of notices—improper purpose

Subparagraph 43(1)(b) of the LAA provides that 'subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever'. It was argued by the native title party that:

- the words 'any purpose' should be limited to purposes which are the purposes of the Territory or public purposes; and
- accordingly, the acquisition of native title interests for the purpose of issuing a Crown lease to a third party fell outside the acquisition power contained in s. 43 of the LAA—at [76] and [77].

Mildren J considered various cases regarding compulsory acquisitions and decided that, in the circumstances of this case, the acquisition was for a legitimate Territory purpose in that it was

> [V]ery much the business of government to promote industry in or around towns by providing land for the use of industry, whether the industry be manufacturing, tourist businesses or goat farming—at [85].

It was noted that the LAA contains a mechanism to ensure that the minister's power to acquire land was not abused because:

- the LAA provides for objection and review by an independent tribunal and that tribunal's decision is subject to appeal;
- the minister's decision is subject to a statutory right of judicial review; and
- in the case of the compulsory acquisition of native title rights and interests, where the independent tribunal recommends those rights and interests must not be compulsorily acquired, the minister is obliged to comply with the recommendation unless certain conditions are satisfied—at [86] and ss. 45 and 45A of the LAA.

Racial Discrimination Act

His Honour noted that s. 24MD(6B)(a) of the NTA specifically contemplated:

> [T]he compulsory acquisition of native title rights and interests for the purposes of conferring rights and interests in relation to the land or waters concerned on persons other than the Commonwealth, the State or the Territory to which the act is attributable.

Therefore, it was held that: 'As what is in contemplation by the Minister is specifically authorised by the NTA, there is no breach of the Racial Discrimination Act'—at [89].

Martin (BR) CJ

His Honour Chief Justice Martin agreed with Mildren J subject to some qualifications about the interpretation of s. 43 of the LAA, which (as noted above) provides that: 'Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever.' After reviewing the legislative history of s. 43 and the relevant authorities, the Chief Justice found that:

> [T]he executive power conferred by that provision was restricted to compulsory acquisitions for a purpose related to the need for, or proposed use of, the land; and it did not extend to a compulsory acquisition merely for the purpose of giving the land of one citizen to another for a purpose totally unrelated to a need for, or proposed use of, the land—at [36].

Nonetheless, Martin CJ found that the purposes for which the land was acquired in this case (commercial, agricultural and tourism development) were purposes related to the need for, or proposed use of, the land and therefore agreed that the appeal should be allowed—at [41].