Compulsory acquisition – radioactive waste

South Australia v Honourable Peter Slipper MP [2004] FCAFC 164

Branson, Finn and Finkelstein JJ, 24 June 2004

Issue

This decision concerns the validity of:

- the issue of a certificate by the Commonwealth Minister for Finance and Administration under s. 24 *Lands Acquisition Act 1989* (Cwlth) (LAA); and
- the subsequent compulsory acquisition of land under s. 41(1) of the LAA for a national repository for disposal of low level radioactive waste by the Commonwealth of Australia.

The Full Court unanimously found that the compulsory acquisition should be set aside on grounds related to the proper interpretation of the LAA.

This summary relates only to the interpretation of s. 26(1) of the *Native Title Act 1993* (Cwlth) (NTA), which deals with compulsory acquisitions affecting native title (i.e. that are future acts) and whether or not the right to negotiate is attracted to particular acquisitions. Of particular interest is the meaning given to 'infrastructure facility' as used in s. 26(1)(c)(iii)(B). It may mean that some future acts previously thought to be excluded from the right to negotiate regime (Subdivision P of Division 3 of the NTA) must now be seen to be acts that attract the right to negotiate.

Background

This decision deals with appeals made by the State of South Australia and Mark McKenzie (the applicant in a native title claim made on behalf of the Kuyani People) against the decision of Justice Selway in *South Australia v Slipper* [2003] FCA 1414 and *McKenzie v Slipper* [2003] FCA 1416, both summarised in *Native Title Hot Spots* Issue 8. The Honourable Peter Slipper MP was the first respondent to these appeals in his capacity as Parliamentary Secretary to the Commonwealth Minister for Finance and Administration.

The proceedings relate to the purported compulsory acquisition by the Commonwealth of a radioactive waste repository site and access corridor near Woomera in South Australia (the site) under the LAA. At first instance, Selway J dismissed applications brought by the state and Mr McKenzie challenging the validity of the certificate given under s. 24 of the LAA for the compulsory acquisition of all the interests in the site, on the basis of 'urgent necessity for the acquisition'. It was accepted that the right to negotiate process under Subdivision P of Division 3 of Part 2 of the NTA had not been complied with.

Making of the statement — s. 26(1)(c)(iii)(A)

Section 26(1)(c)(iii)(A) of the NTA has the effect of excluding from the operation of Subdivision P (the right to negotiate regime) a compulsory acquisition of native title

rights and interests in circumstances where the purpose of the acquisition is to confer rights and interests in relation to the land on the 'government party', defined in s. 26(1)(b) to be the Commonwealth, a state or a territory), and the government party 'makes a statement in writing to that effect before the acquisition takes place'. Note that in such cases, the procedural rights available to native title parties are found under s. 24MD(6A).

The Commonwealth contended that s. 26(1)(c)(iii)(A) applied to exclude the right to negotiate because:

- the relevant statements were incorporated in both the certificate given under s. 24 and the declaration of acquisition under s. 41 of the LAA; and
- the purpose of the acquisition was to confer rights on the Commonwealth.

Mr McKenzie argued that the statements were not made within the meaning of s. 26(1)(c)(iii)(A) because they were not communicated to him until after the compulsory acquisition had been effected.

The court found that:

- Selway J had rightly concluded that the word 'statement' in s. 26(1)(c)(iii)(A) meant 'something stated' and did not imply communication 'in a compendious sense'; and
- the meaning Mr McKenzie contended for would result in a delay before a compulsory acquisition could be effected anomalous with the existence of an urgent necessity to acquire—at [74] to [76] and [137].

Therefore, the right to negotiate did not apply to the acquisition in question because s. 26(1)(c)(iii)(A) applied.

Infrastructure facility

Although nothing turned on it in this case, the court went on to consider the Commonwealth's alternative contention that the primary judge should have found that the purpose of the acquisition of the site was to provide an 'infrastructure facility' within the meaning of s. 26(1)(c)(iii)(B) of the NTA, which excludes from the operation of Subdivision P the compulsory acquisition of native title rights and interests where the purpose of the acquisition is to provide an 'infrastructure facility'.

The main distinction between ss. 26(1)(c)(iii)(A) and (B) is that subparagraph (B) covers situations where the purpose of the compulsory acquisition is to confer rights on someone other than a 'government party' but only if the purpose of the acquisition is to provide an 'infrastructure facility', a phrase which is found in s. 253 of the NTA.

Justice Branson noted that section 253 contains a number of 'definitions' as that term is ordinarily understood, i.e. unless a contrary intention appears, it provides that certain words or phrases have the meaning set out in s. 253 or other identified provisions—at [78].

However, sometimes rather than defining a word or phrase, s. 253 provides that the word or phrase includes specified things i.e. it includes those specified things in addition to whatever the ordinary meaning of that word or phrase might be—see [78].

This is the case with 'infrastructure facility'. Section 253 states that the term 'infrastructure facility includes any of the following' specific categories of things. The last category of things is: 'any other thing that is similar to any or all of the things mentioned in' the preceding eight paragraphs, provided that the Commonwealth minister has determined in writing that the 'thing' in question is an infrastructure facility for the purposes of the definition found in s. 253.

After considering the 'ordinary meaning' of the word 'infrastructure' as defined in the *Oxford English Dictionary* and the *Macquarie Dictionary*, and noting that the issue was not 'free from doubt', Branson J (with Justice Finn at [88] and Justice Finkelstein at [148] agreeing) concluded that the better view was that the definition of 'infrastructure facility' found in s. 253 had been drafted on the basis of the ordinary meaning and the term 'infrastructure facility' was relatively narrow.

Branson J found that:

> It is ... in accordance with [that relatively narrow] ordinary usage for 'infrastructure facility' to be used to describe a subordinate part of a particular undertaking or a facility intended to serve or support a particular undertaking. If this view is the correct view, a national radioactive waste repository not designed as a subordinate part of any particular undertaking or facility would not be an 'infrastructure facility'.
>
> I would reject the [Commonwealth's] contention that the primary judge should have found that the purpose of the acquisition was to provide an infrastructure facility within the meaning of s. 26 of the Native Title Act—at [84] to [85].

In so finding, the court:

- presumed the purpose behind s. 26(1)(c)(iii)(B) to be to exclude the right to negotiate where the acquisition is to provide a facility for the economic benefit of the nation or a region of the nation; and
- noted that the ordinary meaning of the term 'infrastructure facility' was too narrow to achieve that purpose, which may explain why the specific non-exhaustive list of things it was to include was inserted into s. 253.

Therefore, according to thecourt, had s. 26(1)(c)(iii)(A) not applied, the right to negotiate would have applied to the acquisition, since the nuclear waste repository did not constitute an 'infrastructure facility' as required by s. 26(1)(c)(iii)(B) and so would not have been excluded from Subdivision P. Nothing turns on it in this case, because the matter was decided on the basis of the Full Court's reading of the LAA and s. 26(1)(c)(iii)(A) of the NTA.

Decision

Their Honours allowed the appeal and ordered:

- the orders of Selway J be replaced with orders in the nature of certiorari quashing the relevant certificates and declarations under the LAA; and
- the Commonwealth pay both the state's and Mr McKenzie's costs at first instance and on appeal.