

Jurisdiction of a tribunal - extinguishment

De Lacey v Juunyujuwarra People [2004] QCA 297

Davies JA, Mackenzie and Mullins JJ, 13 August 2004

Issue

The main issue before the court was whether the Land and Resources Tribunal (LRT) established under the *Mineral Resources Act 1989* (Qld) (the Act) had jurisdiction to determine whether the *Starcke Pastoral Holdings Acquisition Act 1994* (Qld) extinguished native title in relation to an area the subject of a claimant application.

Background

In December 2003, Ralph De Lacey, an applicant for a 'high impact' exploration permit, applied to the LRT for a determination as to whether or not it had jurisdiction to decide that native title has been extinguished by the Act. On 27 February 2004, the LRT decided that it did have jurisdiction to determine that question and that it would be determined as a preliminary issue. An appeal against that decision was filed in the Supreme Court of Queensland by the State of Queensland.

Decision

Davies JA (with MacKenzie and Mullins JJ agreeing) held that:

- there was no provision in the Act that contemplated an application to the LRT as was made in December 2003 or any decision by the LRT of the question stated in that application;
- the LRT plainly saw that its jurisdiction to make the decision which it did make, was found in, or implied by, s. 669 of the Act, which governed the making of a 'native title issues decision' by the LRT.

Where, in a proceeding otherwise properly instituted in a tribunal, there remains a condition upon the fulfilment or existence of which the jurisdiction of the tribunal exists (here, non-extinguishment of native title), the fulfilment or existence of that condition remains an outstanding question until it has been decided by a court competent to decide it: *Parisiennne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 359 at 391.

His Honour went on to say that, although such a tribunal cannot make a decision on that question which is binding on the parties, it may 'decide it' in order to consider whether it should proceed with an application before it which presumes fulfilment or existence of that condition. In this limited way, the LRT had power to 'decide' the question because the non-extinguishment of native title was a jurisdictional pre-condition to the exercise of power under s. 669 to make a 'native title issues decision'.

His Honour considered that a 'native title issues decision' was a decision that assumed the existence of native title. It determines, among other things, the effect of

the grant of the proposed high impact exploration permit on the enjoyment by the registered native title parties of their registered native title rights and interests.

Other issues

His Honour took issue with the LRT's approach to s. 81 of the NTA. The LRT had rejected the contention that s. 81 conferred exclusive jurisdiction on the Federal Court to decide whether extinguishment of native title had occurred, stating that:

[L]ike Levine J [in *Wilson v Anderson* (1999) 156 FLR 77], we do not see anything in the NTA which expressly or impliedly ousts a State court's (or tribunal's) jurisdiction to determine whether extinguishment occurred.

His Honour found that, in this passage, the LRT likened itself to a superior court of general jurisdiction and did not, therefore, embark on a 'decision' in the limited sense required. Rather, it embarked upon a decision binding on the parties which it could not make because it was merely a statutory tribunal with only the jurisdiction conferred on it by statute. It did not have jurisdiction to decide the question in a way that had legal effect.

The remaining question was whether there would be any point in the LRT 'deciding' this question in order to decide whether it should proceed to make a 'native title issues decision'. His Honour found that it should not be permitted to take that course because:

- the LRT did not have jurisdiction to decide that question and it would be an 'odd result' if the court, having concluded that the LRT had no jurisdiction to decide the question, permitted it to do so even in a tentative, non-binding sense;
- the question would be decided in the native title proceedings by the Federal Court, which is both empowered and competent to decide that question;
- while it might be appropriate for the LRT to 'decide' the existence or fulfilment of a condition precedent to its jurisdiction where that question may be easily resolved or the consequences of not deciding it would result in some injustice or even substantial inconvenience to a party, neither was the case here;
- the question was potentially complex and may depend upon a conclusion as to the nature of any native title rights otherwise established;
- if the LRT did not decide the question, it would proceed to decide the native title issues as the legislature intended it should, pending the determination of that question by the Federal Court—at [24] to [26].

Decision

The appeal was allowed and the decision of the LRT set aside. In lieu, the application to the LRT was dismissed.

Comment

This decision sits somewhat uncomfortably with the decision in *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467 at 472 to 474, where Carr J found that if the jurisdiction or authority of the National Native Title Tribunal, acting as the arbitral body in right to negotiate proceedings, was challenged, the Tribunal is under a duty to inquire into whether or not it has jurisdiction and authority even where

deciding that question would involve consideration of complex matters of fact and law. See also *Walley v WA* (1996) 67 FCR 366 and *Risk v Williamson* (1998) 87 FCR 202.