Extinguishment - creation of a 'legally enforceable right'

Daniel v Western Australia [2004] FCA 1388

Nicholson J, 29 October 2004

Issue

The main issue in this case was whether the grant of a lease in April 2002 was either a past or future act, by reference to s. 228 or Subdivision I of Division 3, Part 2 of the *Native Title Act* 1993 (Cwlth) (NTA). This was of significance because the answer to the question would decide whether or not that lease should be included in a determination of native title as an act that wholly extinguished native title. This is the first case to deal with these provisions in detail.

Background

In the reasons for judgment in *Daniel v Western Australia* (2004) 208 ALR 51; [2004] FCA 849 at [66] to [69], summarised in *Native Title Hot Spots* Issue 11, leave was granted to reopen questions about the extinguishment of native title over certain areas in order to settle the terms of a determination of native title — see *Daniel v Western Australia* [2003] FCA 666, summarised in *Native Title Hot Spots* Issue 6.

The applicant in the Ngarluma and Yinjibarndi Peoples' native title claimant application (the applicant), the State of Western Australia and the North West Shelf Joint Venturers & Woodside Offshore Petroleum Pty Ltd (Joint Venturers) made submissions on the areas of contention, namely:

- the creation and dedication of several roads; and
- the granting of a lease (accommodation lease) in April 2002 under the Land Administration Act 1997 (WA), where the grant arose out of an agreement (the agreement) made in November 1979 which was ratified by the *North West Gas Development (Woodside) Agreement Act 1979* (WA) (agreement Act).

Roads

The applicant alleged that there was not enough evidence to prove that the roads existed or had been properly dedicated so as to extinguish native title. While accepting it bore an evidentiary burden in relation to extinguishment, the state:

- relied on the presumption of regularity arguing it had discharged that onus and that the dedication and creation of the roads in question wholly extinguished native title;
- pointed to copies of the Government Gazette, cancelled public plans and a deposited plan that were before the court and relied upon various legislative provisions;
- noted that the onus was on the applicant to prove native title had not been extinguished—at [7].

His Honour Justice RD Nicholson held that the dedication of roads extinguished native title, consistent with his findings in *Daniel v Western Australia* [2003] FCA 666 at [642] to [643].

Terms of the agreement

Subclause 19(1) of the agreement provided that:

> The State shall in accordance with the Joint Venturers' approved proposals grant to the Joint Venturers...leases and where applicable licences, easements and rights of way for any purposes related to the Joint Venturers' operations under this Agreement—see [19].

Under the agreement, the Joint Venturers were to provide the state Minister with 'proposals', including for housing and township requirements and 'any other works, services or facilities desired' by the Joint Venturers. There was provision for proposals that had been approved by the minister to be modified, expanded or varied at any time during the life of the agreement—see [16] and [18], referring to clauses 7 and 9.

Under clause 8, the minister must either:

- approve the Joint Venturers' proposals wholly or in part;
- defer the matter until further information or proposals were received; or
- make certain alterations to the proposal or impose conditions that the minister thought reasonable as a condition precedent to the approval of the proposal— see [17].

His Honour held that issues of interpretation of the effect of these arrangements must be approached without any presumptions favouring the Joint Venturer—at [41] to [42].

Was the accommodation lease valid?

Nicholson J noted that:

- the effect of the grant of the accommodation lease was to grant exclusive possession which, prior to the commencement of the *Racial Discrimination Act 1975* (Cwlth) (RDA) on 31 October 1975, would have wholly extinguished native title;
- as it was granted after the commencement of the RDA, it would be been invalid by operation of s. 10(1) if the RDA because of its extinguishing effect (it appears the parties all agreed this would have been the case and so the court did not go into it but see *Western Australia v Ward* (2002) 213 CLR 1 at [103] to [133], [250] to [254], [278] to [280], [321] and [342] for an analysis of the operation of s. 10(1) of the RDA) unless the NTA intervened to 'cure' that invalidity.

The state and the Joint Venturers argued that the NTA provided the 'cure', in that the act of granting the accommodation lease was a category A past act because of the operation of ss. 228(3) and 229(3). It was validated by s. 14, the effect of which was to wholly extinguish native title—see ss. 15(1)(a) and 19.

Alternatively, it was argued that the act of granting the lease was a valid future act under Subdivision I of Division 3, Part 2 of the NTA and the result would be the same—see 24ID(1)(b).

The applicant argued that none of these provision applied and that the lease was a future act that was invalid to the extent that it is affected native title, relying on ss. 24AA(2) and Subdivision O of Division 3, Part 2 of the NTA.

Note that:

- all references here and in the judgment are to the NTA but the effect of the validation of a past act on native title would, in law, arise under the relevant analogous state provisions, which are found in the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* (WA)—see s. 19 of the NTA.; and
- while the provisions dealing with the confirmation of extinguishment found in Part 2, Div 2 of the NTA usually provide 'the analytical starting point' when dealing with extinguishment under the NTA, they were not relevant in this case because none of the acts considered fell within the definitions found in that subdivision—see *Western Australia v Ward* (2002) 213 CLR 1 at [10] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

The past act provisions

Essentially, s. 228(3) relevantly provides that an act (such as the grant of the accommodation lease) that takes place on or after 1 January 1994 is a past act if:

- it would have fallen within the definition found in s. 223(2) if that part of the definition of 'past act' was not restricted to acts done before 1 January 1994; and
- it takes place:
    - in exercise of a legally enforceable right created by the making, amendment or repeal of legislation before 1 July 1993 or by any other act done before 1 January 1994—s. 223(b)(i); or
    - in giving effect to, or otherwise because of, an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993, and of which there is written evidence created at or about the time the offer, commitment, arrangement or undertaking was made—s. 228(3)(b(ii); and
    - it is not the making, amendment or repeal of legislation.

A category A past act is defined to include the grant of a commercial lease or a residential lease after 31 December 1993 that is a past act because subsection 228(3) applies. (There are other acts within the definition and some limitations, such as that it must not be a Crown-to-Crown grant, that are of no relevance in this case.)

A 'commercial lease' is 'a lease (other than a mining lease) that permits the lessee to use the land or waters covered by the lease solely or primarily for business or commercial purposes' and a 'residential lease' is a lease that permits the lessee to use the leased area 'solely or primarily for constructing or occupying a private residence'—see ss. 242, 246 and 249.

The applicant argued that:

- the scheme for validating past acts must be understood as granting security to people who obtained title at a time when there was 'ignorance as to native title';
- it was an exception to the rule to validate what would otherwise be invalid due to discrimination and the operation of the RDA;
- as a result, s. 228(3) should be read down and not used to 'afford a loophole for avoiding the...future act system for new leases granted [on or] after 1 January 1994'—at [38].

The state's submission was that:

- subsection 228(3) was not a loophole;
- there was no presumption that an act done on or after 1 January 1994 was a future act;
- the past act provisions provide the 'starting point' and it is only once it is established that a particular act is not a past act that the future act provisions become relevant—see s. 233(1)(b).

His Honour agreed with the state's submissions i.e. the NTA 'must be approached with regard to its terms'—at [40].

The agreement created a legally enforceable right

After noting that s. 228(3)(b)(i) draws a distinction between the 'act' which takes place on or after 1 July 1994 and the 'legally enforceable right' in exercise of which the 'act' takes place, his Honour found that:

- the accommodation lease was not the 'legally enforceable' right but it may be the 'act' resulting from the legally enforceable right created in accordance with s. 228(3)(b)(i);
- it is sufficient if the enactment or act in question sets out a mechanism providing a legally enforceable right which results in the application of that mechanism on a later occasion to produce an act;
- under the agreement, clause 19(1) created a legally enforceable obligation expressed in mandatory terms;
- that clause, which read with clause 8, showed there was no discretion so great as to negate the legally enforceable character of the mandatory provisions in regard to approving the Joint Venturers' proposals (rejecting the applicant's argument to this effect);
- therefore, the conclusion of the agreement on 27 November 1979 was an act falling within s. 228(3)(b)(i) i.e. the agreement created a legally enforceable right in the terms required and the accommodation lease was an 'act' that took place in exercise of that right—at [45] to [49] and [53].

On the evidence, the agreement Act did not create a legally enforceable right

His Honour was not satisfied on the evidence that a 'legally enforceable right' was 'created' by the agreement Act because it merely ratified an existing agreement. While the effect of ratification was not argued, Nicholson J was of the view that:

> The evidence shows that in its terms it authorised the implementation of the agreement and provided that 'all the provisions of the agreement shall operate and take effect

> notwithstanding any other Act or law'. It follows that if the legally enforceable right [created by the agreement] was impeded by any other Act or law, it would operate and take effect notwithstanding. However, 'creation' involves the bringing of the right into being: cf The Macquarie Dictionary, 2nd edn, 1991 at p. 418. On...the evidence I cannot find that the agreement Act itself created the right in question—at [54].

His Honour left open for future argument on further or different evidence whether the legal effect of ratification in the terms provided in the agreement Act would lead to a different conclusion—at [54]

Not an offer, commitment, arrangement or undertaking

The act in question would fall within the category of past act in s. 228(3)(b)(ii) if it was 'giving effect to, or otherwise because of an offer, commitment, arrangement or undertaking made or given in good faith before 1 July 1993'.

While noting that the words 'offer commitment, arrangement or undertaking' are of wide import, his Honour was of the view that they did not extend to the agreement Act:

> That is because subpar (i) of s 228(3)(b) addresses rights resulting from legislation and other acts. Subparagraph (ii) is therefore left to address the remainder, namely offers, commitment, arrangements and undertakings. These must necessarily be something different to what is dealt with in the former paragraph. In my view it does not assist the respondents here. Accordingly I do not express an opinion on the submission of the first respondents [the state] that the words used in s 228(3)(b)(ii) encompass a justified expectation—at [58].

Not a commercial lease

Nicholson J found that the lease was not a commercial lease as it did not permit the lessee to use the land 'solely or primarily for business or commercial purposes':

> Here the purpose of the proposal and of the grant of the accommodation lease is to accommodate an expanded construction workforce. While such accommodation is undoubtedly part of the wider commercial purpose...that does not mean that [Woodside] is ...permitted to use the land the subject of that lease for business or commercial purposes...Accommodation of a workforce incidental to achievement of a wider commercial purpose is distinguishable from the operation of a place of accommodation on commercial terms for gain. In my opinion the accommodation lease is not a commercial lease within the meaning of s 246 [of the NTA]—at [60]

Future act argument

The relevant future act provision was s. 24ID(a), which provides that a future act is a 'pre-existing right-based act' if it takes place in exercise of a legally enforceable right created by any act done on or before 23 December 1996 that is valid (including because of Division 2 or 2A of the NTA). This provision is similar to s. 228(3)(b)(i) except it operates on acts creating legally enforceable rights done at any time before 24 December 1996 and does not specifically refer to the act of making, amending or repealing legislation. (The definition of 'act' in s. 226 would include this.)

Nicholson J found that, if the grant of the accommodation lease was not a past act under s. 228(3)(b)(i), then it would be a future act to which s. 24IB applied for the same reasons as were given in relation to s. 228(3)(b)(i)—at [61] to [64] and [66].

Failure to afford procedural rights does not affect validity

Before doing the future act in question (in this case, the grant of the accommodation lease), notice must be given to, among others, registered native title claimants and they must be given the opportunity to comment on the future act: s. 24ID(3). The state did not dispute that it had not complied with these requirements.

On the question of whether or not this affected the validity of a future act covered by s. 24IB, Nicholson J was of the view that there was 'no reason to depart from such persuasive authority' as the obiter dicta comments of Cooper J in *Lardil Peoples v Queensland* (1999) 95 FCR 14 at [30] and the Full Court in *Lardil v Queensland* (2001) 108 FCR 453 at [52], [58], [72] and [117] to [120].

Therefore, it was found that, if s. 24IB did apply, then the accommodation lease would not be invalid to any extent as a consequence of non-compliance with s.24ID(3)—at [63].

Decision

The grant of the accommodation lease was either:

- a past act as a consequence of the application of s. 228(3)(b)(i) and, being a past act, it wholly extinguished native title rights and interests; or, if this was wrong
- a future act covered by s. 24IB—at [64] and [68].

Comment

With respect, it is not the fact that the act in question is a 'past act' that determines the effect of that act on native title. There are four categories of past act, each with varying effects on native title—see ss. 15 and 229 to 232. After rejecting the characterisation of the accommodation lease as a 'commercial lease', the court did not go on to consider what other category of past act it may be.

For example, the accommodation lease may be a category A past act as a 'residential' lease—see s. 229(3)(a). If it was, native title is extinguished: s. 15(1)(a). This would depend on what is meant by 'private residence' in the definition of 'residential lease'—see s. 249. Alternatively, it may be a category B past act and, if wholly inconsistent with native title, may also have the effect of completely extinguishing native title: ss. 15(1)(c) and 230. If it is not a category A or B past act, then the non-extinguishment principle applies—see ss. 15(1)(c), 231, 232 and 238. His Honour did find that the effect of the grant of the accommodation lease was to grant exclusive possession and, absent the intervention of the NTA and the RDA, complete extinguishment. On this point, however, see the findings of Mansfield J in *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539 at [287] to [292], summarised in *Native Title Hot Spots* Issue 10.

Similarly, in relation to the finding that the grant of the accommodation lease was, if not a past act, a future act within the terms of s. 24IB, then the effect on native title is determined under s. 24ID. Again, the finding that the lease conferred a right of exclusive possession may be of assistance, since an act that confers such a right is said to extinguish any native title in relation to the area it affects— see s. 24ID(b). However, his Honour made no comment on this point.

Finally, both the agreement (made in 1979) and the agreement Act (passed in 1979) are potentially past acts themselves: see s. 228. However, the issue of the validity of these acts does not appear to have been in issue.