Timber Creek appeal - compulsory acquisition

Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20

Gleeson CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ, 15 May 2008

Issues

In this case, the High Court considered two main issues:

- the scope of the power to acquire land 'for any purpose whatsoever' found in s. 43(1) of the *Lands Acquisition Act* (NT) (LAA) e.g. did it empower an acquisition to enable the sale or lease of the area acquired for private use pursuant to s. 9 of the *Crown Lands Act* (NT)(CLA)?
- did s. 24MD of the *Native Title Act 1993* (Cwlth) (NTA) provide for the extinguishment of native title by compulsory acquisition where no other rights and interests, other than those of the Crown, existed in relation to the area concerned?

On the first issue, Chief Justice Gleeson and Justices Gummow, Hayne, Heydon and Crennan all found that the expression 'for any purpose whatsoever' in s. 43(1) of the LAA must, at least, include for the purpose of exercising the power conferred by s. 9 of the CLA. Justices Kirby and Kiefel dissented. On the second, all seven judges were of the view that s. 24MD allowed for a compulsory acquisition that had the effect of extinguishing native title, even where the only interests existing in the area concerned (other than those of the Crown) are native title rights and interests, provided all of the conditions found in s. 24MD(2) are met. Therefore, the appeal was dismissed and the appellants were ordered to pay the Northern Territory's costs.

Background

This case concerned seven lots in the town of Timber Creek in the Northern Territory. All of the lots were 'Crown lands' as defined in s. 3 of the CLA, which provides that:

- Crown lands cannot be alienated otherwise than in accordance with the CLA;
- the minister, in the name of the territory, may grant an estate in fee simple or a lease of vacant Crown land—see ss. 5 and 9 of the CLA respectively.

A number of notices of proposed acquisition were issued over the seven lots in question. The purpose for which the land was being acquired (as identified in the notices) was, essentially, in order to grant term leases or freehold pursuant to s. 9 of the CLA for pastoral, agricultural or commercial use i.e. the land was being acquired to enable it to be leased or sold for private use. At that time of the issue of the acquisition notices, there was no native title claim to the areas concerned.

The territory relied on s. 43(1) of the LAA, which empowers the responsible minister, subject to the LAA, to compulsorily acquire land 'for any purpose whatsoever'. The LAA provides that:

- 'land' includes an 'interest' which, in turn, includes 'native title rights and interests' as defined in s. 223 of the NTA;
- upon gazettal of a notice of acquisition, the 'land' acquired vests in the territory freed and discharged from all interests and restrictions of any kind;
- the statute applies in relation to an acquisition of an interest in land comprising native title rights and interests where the acquisition is a future act to which ss. 24MD(6A) or 24MD(6B) of the NTA apply— see ss. 4 and 5A(1) of the LAA.

Shortly after the issue of the acquisition notices, two claimant applications were filed on behalf of the Ngaliwurru and Nungali People over the lots subject to those notices. Both were 'protective responses' i.e. made (among others) for the purpose of securing future act rights under s. 24MD of the NTA in relation to the proposed acquisitions. Both claimant applications were subsequently registered on the Register of Native Title Claims. (A third claimant application was also made but it is not relevant to these proceedings.)

The minister, as required by the LAA pre-acquisition procedures, gave the registered native title claimants notice of the proposals to acquire all interests (including native title, if any) in relation to the lots in question. The claimants then lodged objections to the acquisitions pursuant to s. 34 of the LAA. The objections were heard by the territory's Lands and Mining Tribunal which recommended that the acquisitions take place, subject to conditions relating to compensation. The minister decided to act on that recommendation.

The registered native title claimants successfully applied to the territory's Supreme Court to have those decisions set aside. The minister then successfully appealed against that judgment – see *Griffiths v Lands and Mining Tribunal* (2003) 179 FLR 241; [2003] NTSC 86 and *Minister for Lands, Planning and Environment v Griffiths* (2004) 14 NTLR 188; (2004) 133 LGERA 203; [2004] NTCA 5, summarised in *Native Title Hot Spots* Issue 6 and Issue 10 respectively.

The claimants then applied for special leave to appeal to the High Court. On the initial hearing of that application, Justices Hayne and Callinan noted that the intersection between the LAA and the NTA was 'affected by' proceedings pending in the Federal Court (i.e. did native title exist in the areas subject to the purported acquisitions) and decided to 'await the fate' of the claimant applications—see *Griffiths v Minister for Lands, Planning and Environment* [2005] HCATrans 223.

Special leave to appeal was granted in June 2007, at which time the fact that the Ngaliwurru and Nungali People held native title (subject to the purported acquisitions)

was no longer in dispute in the Federal Court proceedings – see *Griffiths v Minister for Lands, Planning & Environment* [2007] HCATrans 320. For the transcript of the hearing of the appeal to the High Court, see *Griffiths v Minister for Lands, Planning & Environment* [2007] HCATrans 685.

The Federal Court later made a determination recognising the Ngaliwurru and Nungali People as native title holders. Appeal proceedings in relation to (among other things) the nature and extent of their native title rights and interests are not relevant to this case—see *Griffiths v Northern Territory (No. 2)* [2006] FCA 1155, summarised in *Native Title Hot Spots* Issue 21, and *Griffiths v Northern Territory* (2007) 243 ALR 7; [2007] FCAFC 178 summarised in *Native Title Hot Spots* Issue 27.

The question in this case was whether or not the Ngaliwurru and Nungali People's native title to the seven lots in question had been extinguished as a result of being acquired pursuant to s. 43(1) of the LAA.

Scope of the power under the LAA

The first issue raised by the appellants was the proper construction of s. 43(1)(b) of the LAA, which states that:

> Subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever … if the pre-acquisition procedures in Parts IV and IVA as applicable have been complied with - by compulsory acquisition by causing a notice declaring land to be acquired to be published in the Gazette.

The appellants submitted that, notwithstanding the use of the phrase 'any purpose whatsoever', the minister was not empowered to acquire land from one person solely to enable it to be sold or leased by the territory for the private use of another person.

In a joint judgment, Justices Gummow, Hayne and Heydon examined the provenance of s. 43(1), noting (among other things) that:

- before self-government, acquisition of land in the territory was controlled by the *Lands Acquisition Act 1955* (Cwlth) (Cwlth LAA), which empowered the Commonwealth to acquire land 'for a public purpose', relevantly defined as 'any purpose in relation to' the territory;
- after the *Northern Territory (Self-Government) Act 1978* (Cwlth) commenced, the LAA was enacted;
- at that time, s. 43 provided that the minister 'may acquire land for public purposes' (subject to the LAA), defined as a purpose in relation to the territory;
- section 43 was amended in 1982 to simply state that 'the Minister may, under this Act [and subject to it] acquire land' i.e. the LAA was amended to remove any reference to 'public purpose';
- when the LAA was further, and extensively, amended in 1998 after the *Native Title Amendment Act 1998* (Cwlth) commenced, s. 43 was repealed and replaced with the version that was before the court in this case—at [23] to [27].

Their Honours noted that it was not merely the NTA that had 'supervened' between the 1982 amendments to the LAA and those made in 1998. There was also the High Court's decision in *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 where, in considering the power conferred by s. 6 of the Cwlth LAA to 'acquire land for a public purpose', the High Court found that:

> The power did not extend to purposes "quite unconnected with any need for or future use of the land"… and did not extend to the taking of land merely in order to deprive the owner of the land and thereby advance or achieve some purpose in respect of which the Parliament had power to make laws—at [28].

In the light of this:

> [T]he absence from s 43 in its post-1998 form of any reference to "public purpose" and the presence of the expression "for any purpose whatsoever" may readily be understood as a removal by the Territory legislature of any ground for the limitation of the statutory power by reference to considerations which had prevailed in *Clunies-Ross*—at [29].

Cases relied upon by the appellants dealing with local government bodies were distinguished on the basis that the territory was, via the Legislative Assembly, empowered to make laws for the peace, order and good government of the territory and so:

> The statement … that municipal councils had not been empowered to interfere with the private title of A for the private benefit of B … is inapt to describe … the interrelation between the powers conferred by the LAA and the CLA—at [32], referring to *Werribee Council v Kerr* (1928) 42 CLR 1.

Nor was there anything to indicate that the territory was 'seeking to acquire the land in question for an ulterior purpose there would have been an ostensible but not a real exercise of the power granted by its statute'—at [33], referring to *Samrein Pty Ltd v Metropolitan Water Sewerage & Drainage Board* (1982) 56 ALJR 678.

In the event, their Honours did not need to determine any limits there may be to the scope of the power conferred by the 'broad words' of s. 43(1) because:

> [T]he expression "for any purpose whatsoever" … must at least include for the purpose of enabling the exercise of powers conferred upon the executive by another statute of the Territory … [including] the exercise of the power conferred by s 9 of the CLA—at [30].

Therefore, their Honours found that appeal on the ground of the construction of s. 43 of the LAA failed. Gleeson CJ and Crennan J agreed—at [1], [34] and [155].

Kirby and Kiefel JJ dissented on this point.

While Kirby J accepted that, if 'a purely literal approach' was taken, 'a conclusion favourable to the minister can be persuasively explained', his Honour was of the view that the notices were invalid, chiefly because:

- 'specific and unambiguous provisions' authorising 'private to private' acquisitions, such as those 'purportedly effected in this case', were required; and
- the 'general language' of s. 43(1) was ambiguous and did not support the acquisitions—at [56] to [57].

His Honour commented that:

> [A]gainst the background of the history of previous non-recognition [of native title]; the subsequent respect accorded to native title by this Court and by the Federal Parliament; and the incontestable importance of native title to the cultural and economic advancement of indigenous people in Australia, it is not unreasonable or legally unusual to expect that any deprivations and extinguishment of native title, so hard won, will not occur under legislation of any Australian legislature in the absence of provisions that are unambiguously clear and such as to demonstrate plainly that the law in question has been enacted by the lawmakers who have turned their particular attention to the type of deprivation and extinguishment that is propounded—at [105].

Kiefel J was of the view that the exercise of the power given by s. 43(1) was, in this case, invalid for (among others) the following reasons:

- the earlier use of the word 'public' in s. 43 did not qualify 'purpose' in 'any meaningful way, such that its removal … might imply the opposite';
- nothing in the LAA suggested it was 'intended to operate such that one person's interest in land might be taken in order that others might put it to some use agreed upon' by the minister;
- it was 'abundantly clear' in this case that no use by the minister or the territory was proposed, 'even in the most passive sense';
- in the absence of a 'governmental purpose', the exercise of the power 'stands as no more than a clearing of native title interests in order to effect leases and grants of the land for private purposes';
- the Lands and Mining Tribunal found that the proposed leases and grants of land had little economic or other significance to the region, no benefit to the native title holders and that there was 'little or no public benefit in the acquisition'—at [172], [174], [181] and [184].

Conditions governing extinguishment of native title via compulsory acquisition

Section 24MD of the NTA (part of the future act regime) allows for the extinguishment of native title via a valid future act that is the compulsory acquisition of native title rights and interests, subject to three conditions being met.

First, the acquisition must be done under a law (in this case) of the territory that permits the compulsory acquisition of both native title rights and interests and non-native title rights and interests in relation to the area concerned. The LAA was found to fulfil this condition—at [45] and see s. 24MD(2)(a).

Second:

> [T]he whole, or the equivalent part, 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 by surrender, cancellation or resumption or otherwise) in connection with the compulsory acquisition of the native title rights and interests—s. 24MD(2)(b).

It was the proper construction of '*all* non-native title rights and interests' that was at issue in this case.

Third:

> [T]he 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 ... in connection with the compulsory acquisition of the native title rights and interests—s. 24MD(2)(ba).

If these three conditions are met, then the future act (i.e. the acquisition) is valid, it extinguishes the whole or the part of the native title rights and interests acquired and compensation is payable—see ss. 24MD(1), 24MD(2)(c) to 24MD(2)(e).

Gummow, Hayne and Heydon JJ referred to the background to s. 24MD(2), noting (among other things) that, when the NTA was amended in 1998, future acts involving the compulsory acquisition of native title were included in the new Subdiv M. Comments made in Explanatory Memorandum to the Native Title Amendment Bill 1997 in relation to Subdiv M (which includes s. 24MD) were set out in their Honours' reasons, as were the following comments found in the Supplementary Explanatory Memorandum:

> This amendment to proposed subsection 24MD(2) makes it clear that when native title rights are subject to a non-discriminatory compulsory acquisition process, the non-native title rights in the area concerned, if any, must be acquired … through a compulsory acquisition or by surrender, cancellation, resumption, or otherwise.

Their Honours saw these 'Parliamentary materials' as indicating:

> [A] legislative proposal to proceed on the basis provided by the previous s 23, permitting future compulsory acquisition of native title rights, but also to ensure that where, as it now appeared to be feasible, native title rights subsisted concurrently with non-native title rights, any power of acquisition was exercised in a non-discriminatory fashion by acquiring and extinguishing both species of rights—at [43].

Gummow, Hayne and Heydon JJ noted (among other things) that:

- the 'critical provision' is s. 24MD(2), which provides that a compulsory acquisition will extinguish the whole or part of the relevant native title rights and interests;
- the 'critical condition' for the operation of the extinguishment permitted by s. 24MD(2)(c) is s. 24MD(2)(b);

- the appellants argued that the word 'all' in that subsection required 'the presence of at least some non-native title rights' but the word 'all' has 'various meanings and shades of meaning';
- the court's task was to give effect to Parliament's purpose, controversial provisions should be read in the context of the NTA as a whole and the NTA as a whole should be read in the historical context that led to its enactment—at [45] to [48].

Their Honours were of the view that it would be an 'odd construction' which read s. 24MD(2)(b) as:

> [D]enying, contrary to what had been the case under the previous s 23(3), the possibility of compulsory acquisition where all that existed for that acquisition were native title rights and interests'—at [49].

It was found that:

> The better construction of the paragraph treats "all" as identifying such non-native title rights and interests as may exist in relation to the land or waters in question. Put shortly, "all" may be read as "any"—at [49].

Given this finding, Gummow, Hayne and Heydon JJ held that the appeal on the issue of the proper construction of s. 24MD(2)(b) failed—at [51].

In agreeing, Gleeson CJ commented (among other things) that:

- making the presence or absence of a non-native title right or interest determinative of the application of s. 24MD(2)(b) did not advance the legislative purpose, which was 'against … discriminatory acquisition';
- adopting the appellants' construction appeared to produce 'a curious, in fact inexplicable, new form of discrimination' i.e. native title rights and interests that co-exist with non-native title rights could be extinguished by acquisition whereas those that did not, could not;
- paragraphs 24MD(2)(a), (b) and (ba) are all directed to 'whether, in the compulsory acquisition of native title rights and interests, there is equality of treatment between native title and non-native title rights and interests';
- that question could be answered by 'postulating the existence of non-native title rights and interests and asking how they would be affected' and did not require 'the identification of actual rights or interests and demonstration of how they are affected'—at [5] and [7].

Kirby J acknowledged 'the force of the construction argument offered' by Gleeson CJ and Gummow, Hayne and Heydon JJ in relation to s. 24MD(2)(b) and so was 'not inclined to disagree with' their resolution of that issue. Crennan and Kiefel JJ agreed that the appeal on this ground failed—at [76], [155] and [156].

Decision

As the appellants failed on all grounds, the appeal was dismissed and they were ordered to pay the territory's costs.