Queensland alternative state provisions valid

Queensland v Central Queensland Land Council [2002] FCAFC 371

Beaumont, Lee and Kiefel JJ, 27 November 2002

Issue
This was an appeal and a cross appeal from the decision in *Central Queensland Land Council v A-G of the Commonwealth of Australia* (2002) 116 FCR 390; [2002] FCA 58. That case concerned, amongst other things, determinations made by the Commonwealth Attorney-General under s. 43(1) of the *Native Title Act 1993* (Cwlth) (NTA).

At first instance, Justice Wilcox found (amongst other things) that:
- the Commonwealth Attorney-General (the relevant minister) had no power to make the determinations because there was not, at the time of making them, a law of a state or territory that provided for alternative provisions as required under that subsection. The Queensland law under consideration, although enacted, was not in force at the time the Attorney-General made the determinations in question; and
- each of the determinations were invalid and without legal effect.

Appeals
The State of Queensland and the Commonwealth Attorney-General appealed against the decision that the relevant Minister was not, pursuant to s. 43, entitled to take into account legislation which, although passed and assented to, was not yet in operation.

Decision
In separate judgments, Justices Beaumont, Lee and Kiefel allowed the appeals, interpreting s. 43 so that it was open to the relevant minister to make a determination where the relevant Queensland legislation, although enacted, was not in force. Beaumont J viewed a reference to 'a law of the State' in s. 43(1)(a) as extending to legislation enacted, even if not yet in force and a reference to 'provisions' of a law in s. 43(1)(b) to the sections of such an Act. The Commonwealth Attorney-General's duty and function under s. 43 was to form as opinion as to whether the requirements of s. 43(2)(a)-(k) were satisfied or not. It was not an essential preliminary to this task that the relevant law is in force, although it did need to be enacted. Kiefel J was of the view that the words of s. 43(1) do not require the state or territory provisions to have commenced at the point when the relevant minister makes a determination about them, although clearly the relevant minister would need to be able to identify what was intended to come into effect.

The cross appeal

The Central Queensland Land Council (CQLC) appealed against declarations made by Wilcox J that:

- amendments to the *Mineral Resources Act 1989* (Qld) (MRA) in 1998 and 1999 were not invalid because of a failure to satisfy s. 24MA of the NTA or because of inconsistency with the *Racial Discrimination Act 1975*(Cwlth)(RDA); and
- each of the determinations made pursuant to s. 26A(1) of the NTA by the relevant minister was valid and effective in law.

Decision on cross appeal

According to Kiefel J:

- the critical question was whether the amendments to the MRA can be said to affect native title in the way described in s. 227 so as to amount to future acts;
- the amendments clearly could not be classified as future acts;
- they did not, as submitted by CQLC, adversely affect native title because they withdrew the right to negotiate which had been provided for in the NTA;
- it was by way of the determination pursuant to s. 43(1) of the NTA that the right to negotiate was withdrawn and not by the Queensland amendments;
- the right to negotiate was a procedural right under the NTA and not part of the bundle of rights which are native title rights;
- it was open for the relevant minister, pursuant to the fourth condition of s. 26A, to be satisfied that certain procedural rights would operate under the alternative state provisions (thereby rejecting a submission from the CQLC that s. 392 of the MRA, a provision which can operate to deem substantial compliance as full compliance, could operate to exclude procedural rights. The judge was satisfied that, reading the MRA as a whole and considering specifically the operation of ss. 419 and 421, s. 392 had no application to the native title provisions of the MRA.)

Therefore, Kiefel J upheld the validity of the Commonwealth Attorney-General's determination pursuant to s. 26A (the low impact future act regime). Beaumont and Lee JJ agreed with the reasoning of Kiefel J and the cross appeal was dismissed. Costs were awarded against CQLC.

Postscript

On 27 November 2002, shortly after this decision was handed down, Premier Peter Beattie announced that, notwithstanding the success of the state's appeal, the Queensland alternative state provisions would be dismantled by June 2003.