Referral of question of law — Full Court to hear

James v Western Australia [2009] FCA 1262

McKerracher J, 5 November 2009

Issue

The National Native Title Tribunal referred a question of law to the Federal Court, i.e. were the grants of certain mining leases 'past acts'. Answering that question will involve determining whether the decision in *Western Australia v Ward* (2002) 213 CLR 1 (*Ward)* as to the effect of the mining leases on native title can be distinguished. The question was referred to the Full Court.

Background

The Tribunal referred the question to the court pursuant to s. 136D (now s. 94H) of the *Native Title Act 1993* (Cwth) (NTA). It was relevant to the resolution of the Martu People's claimant application. Tribunal mediation of the application commenced in 1996 and no order had been made subsequently under s. 86C that mediation should cease. In September 2002, a determination was made by consent in *James v Western Australia* [2002] FCA 1208 recognising the Martu People as native title holders in relation to a large part of the area covered by their application. The question referred concerned the part of the application that remained unresolved.

The 'referral area' was so much of the area subject to the application that is (or was) subject to the grant of a mining or general purpose lease under the *Mining Act 1978* (WA) on or after the *Racial Discrimination Act 1975* (Cwth) (RDA) commenced but before the NTA commenced, i.e. after 30 October 1975 but before 1 January 1994. The effect of a mining lease issued under the *Western Mining Corporation Limited (Throssell Range) Agreement Act 1985* (WA) in that period was also in issue. The parties could not reach agreement as to the effect of these grants on native title.

Question referred – special case

Pursuant to s. 136D, the presiding Tribunal member referred a question of law to the court because the member considered that doing so would 'expedite the reaching of an agreement on any matter that is the subject of the mediation' in this case. Order 78 rule 16(1) of the Federal Court Rules requires that the referral be by way of a special case. The question of law posed in relation to each lease was:

- is it a 'past act' as defined in s. 228 for the purposes of Pt 2 of the *Titles (Validation) and the Native Title (Effect of Past Acts) Act 1995* (WA) (TVA)?
- if so, into which of the four categories (A to D) of past act (as defined in ss. 229 to 232 NTA for the purposes of Pt 2 TVA) does it fall?

In the referral (putting to one side the effect of the grant of the leases) the parties agreed:

- the Martu People, as defined in the determination made in *James v Western Australia* [2002] FCA 1208, hold native title to the referral area;
- native title is comprised of the right to possess, occupy, use and enjoy the referral area to the exclusion of all others (i.e. comprised the right to exclusive possession);
- there has been no prior extinguishment of native title;
- any question as to the validity of the leases arises only because of the existence of native title at the time of the relevant grant.

The issue

According the parties, the central issue was whether:

> [T]he conclusion in ... *Ward* ... as to the effect that a mining lease granted under the ... *Mining Act* ... has on native title viz, that the ... *RDA* ... was not engaged to invalidate the grants of mining leases ..., so that the grants were not category C past acts ... , is relevantly distinguishable in respect of pre-1994 [but post-RDA] mining leases.

If *Ward* is distinguishable, and the grants of the leases in this case are category C past acts, then the non-extinguishment principle will apply. If it cannot be distinguished, then the grant of the leases will have extinguished native title, at least to some extent.

Gleeson CJ, Gaudron, Gummow and Hayne JJ (with Kirby J concurring) made the following comments in *Ward* relevant to this issue:

> If the native title *right to control access existed* immediately prior to the grants of the mining leases, then it *was extinguished by those grants*. This *would raise the issue of invalidity* of the grant by operation of the RDA and subsequent validation by the NTA and the State Validation Act [i.e. it would raise the issue of whether the leases were past acts].
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> ...
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> [I]t is apparent that the right to control access ... is inconsistent with the rights of access arising under each of the ... grants [of a mining lease], although, ... [in this case], the grant of ... pastoral leases had already extinguished that right [prior to the commencement of the RDA].
>
> It should be emphasised that *a finding that native title rights and interests were extinguished* by the grant of any of the relevant mining interests *may engage the RDA and require consideration* of the various issues referred to earlier in these reasons—at [309] and [341] to [342], emphasis added, footnotes omitted.

Therefore, the majority decision in *Ward* did not directly address whether the grant of a mining lease that purportedly extinguished the native title right to control access in the period noted above was a past act. There was agreement in this case that the right to control access existed at that time each lease was granted because it was agreed that the native title right to exclusive possession existed prior to the grant of each lease. The right to control access is an integral element of the right to exclusive possession—see *Ward* at [88] and [93] to [95].

Reserving referral to the Full Court

The applicant and the state jointly sought to have the question referred to the Full Court pursuant to s. 25(6) of the *Federal Court of Australia Act 1976* (Cwlth) (FCA). Referral was available in this case the because FCA provided that any decision of a single judge on a question referred under s. 136D of the NTA may be appealed to a Full Court, which was a precondition for referral. The question was whether the discretion to do so should be exercised.

The relevant considerations included:

- whether it was 'convenient' to reserve the question, e.g. having regard to the point at which it arose or because it raised unusual difficulties;
- whether there were similar authorities on the question determined with the benefit of full argument;
- whether the point of law was confined to a specific point of statutory interpretation;
- costs and delay;
- the administration of the court—at [34], referring to *Freehills, in the matter of New Tel Limited (in liq) ACN 009 068 955 (No 2)* [2008] FCA 1006.

Factors weighing against referral included that:

- it would extend, not reduce, the time needed to resolve the matter; and
- the issue involved the 'routine judicial task' of deciding whether a previous authority was analogous and whether it was binding—at [35].

Decision

The question of law referred by the Tribunal was reserved to the Full Court because (among other things):

- there was no dispute on the facts, which were succinctly stated in the referral;
- the point of law to be decided, while complex and important, was confined to a specific point of statutory interpretation;
- the matter was likely to be resolved 'with the greatest expedition and least further delay' if the question was referred and, even if it was resolved in the state's favour, any outstanding issues were, 'in theory', capable of resolution without further court intervention;
- an appeal from a single judge's decision seemed 'most likely' because the referral raised issues that were 'likely to set important precedents'—at [38].