Future act determination appeal – s. 116 of the Constitution & international instruments

Cheedy on behalf of the Yindjibarndi People v Western Australia [2010] FCA 690

McKerracher J, 2 July 2010

Issue
The main issue in these appeal proceedings was what (if any) application did s. 116 of the *Commonwealth of Australia Constitution Act 1900* (which deals with religious freedom) and certain international instruments have in future act determination proceedings under the *Native Title Act 1993* (Cwlth) (NTA)? The other issues raised include whether the National Native Title Tribunal's determination under s. 38 of the NTA effected a compulsory acquisition of native title. Both appeals were dismissed because the native title party failed to establish that the Tribunal erred on any question of law.

Appeal filed, stays sought
The native title party filed notices of appeal on 20 July 2010. The grounds are similar to those raised in this matter. Stays of both this judgment and the two related Tribunal determinations are also sought. The appeals will be heard together over two days in November.

Background
These proceedings relate to a registered claimant application made on behalf of the Yindjibandi People in the Pilbara region of Western Australia. The area covered by that application adjoins the area in which the Yindjibandi People were recognised as holding native title rights and interests in *Daniel v Western Australia* [2005] FCA 536. The applicant was the native title party in right to negotiate proceedings: *FMG Pilbara Pty Ltd/Cheedy/Western Australia* [2009] NNTTA 91 (summarised in *Native Title Hot Spots* Issue 31) and *FMG Pilbara Pty/Wintawari Guruma Aboriginal Corporation/Cheedy/Western Australia* [2009] NNTTA 99 (WF09/1).

Section 38 provides that the Tribunal must make one of the following determinations:
- a determination that the future act must not be done;
- a determination that the future act may be done;
- a determination that the future act may be done subject to conditions to be complied with by any of the parties.

Section 39 sets out the matters the Tribunal must take into account when making its determination, which includes the effect the effect of the future act on:
- the enjoyment by the native title parties of their registered native title rights and interests;

- the way of life, culture and traditions of any of those parties;
- the development of the social, cultural and economic structures of any of those parties;
- the freedom of access by any of those parties to the area concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on that area in accordance with their traditions;
- any area or site of particular significance to the native title parties in accordance with their traditions on the area concerned.

In each matter, the Tribunal determined that future acts (the grant of three mining leases) could be done, initially subject to four conditions but ultimately reduced to three. The first determination (WF08/31) was made in relation to mining lease M47/1413 and the second (WF09/1) in relation to mining leases M47/1409 and M47/1411. An appeal under s. 169 of the NTA from the Tribunal's two future act determinations was made in each case. As the appeals gave rise to similar issues, they were heard together. Justice McKerracher outlined the material before the Tribunal and the Tribunal's role—at [16] to [22] and [26] to [44].

Jurisdiction

Pursuant to s. 169(1):

> A party to an inquiry relating to a right to negotiate application before the Tribunal may appeal to the Federal Court, on a question of law, from any decision or determination of the Tribunal in that proceeding.

As the appeal must be 'on' a question of law, it was noted that:

- a decision of the Tribunal cannot be made the subject of an appeal unless, in making it, the Tribunal 'has acted otherwise than in accordance with law';
- there will be a relevant error of law if the Tribunal 'identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant material';
- wrong findings may be the subject of an appeal on a ground of law if the Tribunal "reaches a mistaken conclusion, fails to give adequate weight to a factor of great importance or gives excessive weight to a factor of no great importance in circumstances where to do so was 'manifestly unreasonable'";
- similarly, a failure to address a submission 'which relates to a matter of substance, and if accepted has the capacity to affect the outcome of a case' is an error of law—at [24] to [24], referring to the relevant authorities.

In hearing and determining the 'appeal' under s. 169, the court exercises its original jurisdiction: *Hicks v Western Australia* [2002] FCA 1490 at [12].

Grounds of appeal

The grounds of appeal were that the Tribunal:

- erred in not finding that ss. 38 and 39 have the intention, design, purpose or effect of prohibiting or of seeking to prohibit the free exercise of the applicant's religion, contrary to s. 116 of the Constitution;
- erred in finding that international instruments were not relevant to its inquiry because there is no relevant ambiguity in s. 39;

- erred in failing to consider submissions of substance as to the relevance of international instruments to the Tribunal's inquiry;
- erred in that the determination amounted to a compulsory acquisition of native title interests;
- made errors of law in drawing erroneous inferences and making erroneous findings;
- denied procedural fairness to the applicant by failing to afford the applicant an opportunity precisely identify the location of sites of significance within the proposed lease area—see [48] to [110], [112] to [172].

In both appeals, notices of a constitutional matter under s. 78B of the *Judiciary Act 1903* (Cwlth) were served but no state or territory sought to intervene on the constitutional matter. Nor did the Commonwealth—at [47].

Section 116 of the Constitution

According to the court, in each appeal the constitutional ground involved the assertion of the following errors:

- the religious beliefs of the Yindjibarndi were characterised in a way that 'did not do justice to the evidence' and the Tribunal focussed on 'religious obligations or beliefs relating to the need for strangers to gain an agreement with the Yindjibarndi' before entering Yindjibarndi country 'but not also upon other particular [identified] religious observances' (referred to as the observances argument); and
- the effect or result of the Tribunal's decision was that the Yindjibarndi were prevented from meeting their religious obligations and carrying out their religious observances, which made either the decision or ss. 38 and 39 of the NTA which authorised the decision 'invalid for inconsistency' with s. 116 of the Constitution (referred to as the effect argument)—at [64].

Section 116 of the Constitution provides that:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The Tribunal had accepted that:

> [T]he spiritual beliefs and cultural practices of aboriginal people which arise from, and are a given expression in, their traditional laws and customs, may well constitute a religion for the purposes of s 116.

However, as his Honour noted, the Tribunal held (among other things) that:

- whether the requirement that the native title party must enter into agreement with outsiders before those outsiders can enter Yindjibarndi land is a religious belief or practice is not an issue for the Tribunal unless the Tribunal decides that implementation of ss. 38 or 39 through a decision of the Tribunal might offend s. 116 of the Constitution;

- a determination to the effect that a future act may be done, with or without conditions which do not require agreement of a native title party, was not one which would have the intention, design, purpose or effect of interfering with the free exercise of the native title party's religious beliefs—at [48] to [51].

At [55] to [56], the court summarised the native title party's submissions as being that:

> [T]he Tribunal erred in confining its consideration of the s 116 issue to the question of whether a decision by the Tribunal to the effect that the [future] act [in this case, the grant of a mining lease] may be done without conditions or conditions which do not require the agreement of the native title party was one which should have the actual intention, design, purpose or effect of interfering with the free exercise of the native title party's religious beliefs. By focussing solely on this aspect of the religious beliefs of the Yindjibarndi, they argue that the Tribunal overlooked the effect this decision would have on particular religious observances most directly associated with the three areas in question.
>
> In particular, the Yindjibarndi submit that the evidence in the Tribunal demonstrated that the 'effect' or 'result' of application of s 38 and s 39 NTA by the Tribunal would be that the Yindjibarndi would be prevented from carrying out, not only their religious obligations to manage and control the land and to ensure strangers do not enter without an agreement but also the particular religious observances identified and defined as the religious observances.

The native title party argued that:

- the weight of judicial opinion is that s. 116 operates as a 'constitutional guarantee' and so should be given a 'liberal construction appropriate to such a constitutional provision', with regard being given to the practical effect of the law in question;
- section 116 'requires looking beyond matters of legal form and to the practical effect of the law in question' to ensure there is no 'circuitous advice' [sic, read as 'device'];
- the protection afforded by s. 116 to their religious beliefs and religious observances should have been taken into account by the Tribunal in its inquiry with respect to s. 39(1)(e) of the NTA, i.e. there is a public interest in upholding the constitutional guarantee of religious freedom;
- section 116 should also have been taken into account under s. 39(1)(f) of the NTA, i.e. the protection of the right of Yindjibarndi to freely practice their religious beliefs, and their religious observances, was a relevant consideration in determining whether or not, and if so under what conditions, a future act may be done;
- the Tribunal adopted a narrow construction, thereby preventing the Yindjibarndi from 'freely exercising their right to carry out their religious observances on the land for a significant period of time';
- although the Tribunal's decision did not, of its own force, bring about this result, it 'nevertheless satisfies a condition precedent to the exercise of power which will in turn bring about that result'—at [60] to [63].

Observances argument did not raise a question of law

The native title party contended the Tribunal characterised the religious beliefs of the Yindjibarndi in a way that 'did not do justice to the evidence'. It was said that the Tribunal did not give proper consideration to particular religious observances specifically referred to in evidence and submissions, which included:

- ensuring that strangers did not enter in the absence of an agreement which incorporated the reciprocal rights and responsibilities set out in the *Galharra* rules of the *Birdarra*;
- annually obtaining ochre from the ochre quarry located within M47/1409 in order to 'work' the nearby *Maliya* (honey) *Thalu* and sacred stones from a riverbed located within M47/1413;
- protecting the sacred site located in M47/1411; and
- annually singing the songs associated with that area—at [54].

In deciding that this aspect of the appeal was not made out, McKerracher J held (among other things) that:

- the 'observances argument' was really a challenge to the weight given to certain evidence before the Tribunal, whereas an appeal under s. 169 is limited to a question of law;
- it would not be 'appropriate to seek to overturn or disapprove [of] findings of fact made by the Tribunal';
- it was not an error of law that 'the Tribunal reached one conclusion on the facts when another was open'—at [65] to [66].

Effect argument used the wrong test for inconsistency

The submission here was that the 'effect' or 'result' of the Tribunal's application of ss. 38 and 39 of the NTA was to prevent the Yindjibarndi from 'carrying out their religious obligations to manage and control the land and to ensure strangers do not enter without agreement' and other religious observances that were identified.

McKerracher J rejected this argument, finding that the native title party relied on 'the wrong test for inconsistency' between ss. 38 and 39 of the NTA and s. 116 of the Constitution in that:

> The 'effect' or 'result' of a statute is not the primary test for assessing whether that statute is consistent with s 116. Section 116 directs attention primarily to the purpose of the impugned law, rather than to its 'effect' or 'result'. It may be that the effect of the law, in some circumstances, could assist in construing its purpose but the effect of the law is not the starting point—at [73].

In this case there was 'no indication at all' that the purpose of ss. 38 or 39 was 'for' prohibiting the free exercise of religion. His Honour went on to note (among other things) that:

- the expression in s. 116 '*for* prohibiting the free exercise of any religion' means that it is 'the objective or purpose of the legislation to which attention must be directed', i.e. the end or object the legislation serves;

- to the extent that any question of law arose on this issue in this case, the Tribunal's conclusion of law was consistent with the authorities on s. 116 of the Constitution;
- laws 'may have disruptive or limiting effects upon religious freedom without contravening' s. 116—at [74] to [82], referring to *Kruger v The Commonwealth* (1997) 190 CLR 1 and *The Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120.

Section 116 is directed at the making of law, not its administration

There was another problem with the s. 116 argument as put in this case:

> Section 116 is directed to the making of Commonwealth laws, not with their administration or with executive acts done pursuant to those laws. Section 116 is not capable of regulating or invalidating the Tribunal's decision. The relevant enquiry is whether the Commonwealth may enact s 38 and s 39 NTA—at [83].

A law authorising administrative acts or decisions that prohibit the free exercise of religion will only be invalid pursuant to s. 116 if 'the purposive content of the law is established'. Sections 38 and 39, along with Tribunal determinations in relation to those sections, do not prohibit religious freedom 'because they do not prohibit anything'. According to the court:

> If any act did, it would be the grant of the [mining leases] ... the subject of the Tribunal proceedings. That grant is a separate administrative act and subject to separate considerations and controls. Any such grant would be made under the Mining Act which, being State legislation, is not subject to s 116 of the *Constitution*—at [85].

As was noted, if preventing access by strangers to Yindjibarndi country without agreement was the relevant religious obligation, then there was 'no prohibition or impairment of the fulfilment of that obligation' arising from the Tribunal's determination 'or from any other effect' of ss. 38 and 39 of the NTA: 'Until the relevant ... [tenements] are granted, there is nothing to prevent the Yindjibarndi from reaching an agreement for their grant'—at [86].

No error of law raised by 'effect' argument

Finally, the court noted that the relevant finding by the Tribunal (i.e. that the grant of the proposed leases, subject to conditions, would not interfere with the religious freedom of the Yindjibarndi) was a finding of fact. An appeal under s. 169 is limited to questions of law. No error of law was disclosed in this respect. In particular, McKerracher J accepted that the Tribunal had regard to the evidence led in making the relevant finding of fact and that finding was open on the evidence—at [88].

International instruments – no ambiguity identified

The second and third grounds of appeal related to the Tribunal's approach to the relevance (or not) of international instruments to the inquiry. The international instruments at issue were the *International Covenant on Civil and Political Rights* (ICCPR) and the *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration).

Before the Tribunal, the native title party argued ss. 38 and 39 should be construed so that the Tribunal's determination accorded with the international standards of the ICCPR and the UN Declaration. The government and grantee parties argued that reliance on these instruments was misplaced because they had not been enacted into Australian domestic law and no ambiguity existed in ss. 38 and 39 that would require reference to those instruments as aids to interpretation. The Tribunal agreed with the latter submissions, adopting the findings on this issue in *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd* (2009) 232 FLR 169, [2009] NNTTA 49 at [46].

McKerracher J held (among other things) that:

- the fact that an international instrument 'has not been incorporated into Australian domestic law does not necessarily mean that its ratification holds no significance for Australian law';
- a court will presume Parliament did not intend to abrogate or suspend human rights and fundamental freedoms 'unless Parliament makes unmistakably clear its intention' to do so;
- if a statute contains 'a relevant ambiguity' (i.e. two or more competing interpretations), the interpretation that 'most accords with ... Australia's obligations under international instruments' should be favoured—at [100] to [106], referring to *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, *Coco v The Queen* (1994) 179 CLR 427, *Mabo v Queensland [No 2]* (1992) 175 CLR 1, *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

However, in this case:

- no ambiguity was identified by the native title party and, in absence of an ambiguity, there was 'no scope to consider the relevance of international instruments';
- even if there was some unidentified ambiguity, there was no explanation of how the Tribunal's interpretation (assuming it adopted one) was inconsistent with the ICCPR—at [107] to [108].

Therefore, grounds 2 and 3 failed.

No compulsory acquisition

According to the court, the native title party contended that if Tribunal's determination under s. 38 was allowed to stand, the Commonwealth would (via ss. 38 and 39):

> [E]ffect a compulsory acquisition of traditional rights and interests on terms which, having regard to the sacred and religious character of those rights and interests, is unjust and contrary to s 51(xxxi) of the *Constitution*—at [112].

In summary, the submission was that:

- giving s. 51(xxxi) of the Constitution a liberal construction involved (among other things) 'looking to the practical effect of the relevant law';

- the provisions of the NTA pursuant to which the Tribunal made its decision, together with the application of the 'non-extinguishment principle', constitute a 'circuitous device';
- if allowed to stand, the Tribunal's determination would effectively strip the Yindjibarndi of their rights to manage the land and the sites thereon and to freely exercise their right to carry out their religious observances;
- while Pt 2, Div 5 of the NTA set up a scheme for compensation, the acquisition of rights of this kind could neither be replaced 'nor readily compensated by the payment of money', which would constitute a breach of s. 51(xxxi) of the Constitution—at [113] to [115], referring to Justice Kirby in *Wurridjal v Commonwealth* (2009) 237 CLR 309 (*Wurridjal*) at [307] to [308].

After pointing out that Kirby J was in dissent in *Wurridjal*, his Honour noted (among other things) that the assertion was that the relevant rights and interests have been compulsorily acquired as a matter of fact but there had been no determination recognising the existence of those rights and interests—at [118] to [119].

However, even if it was assumed that the Yindjibarndi did hold the relevant native title rights and interests (or other rights and interests) as a matter of fact, his Honour was of the view that:

- there had not yet been any effect on those rights and interests, i.e. any rights and interests they may hold 'have not been extinguished, diminished or affected in any way';
- it was only the act of granting the mining leases that would affect those rights and interests;
- in any event, that was not a taking of the rights and interests concerned but merely the application of the 'non-extinguishment principle' and the application of that principle "will not amount to a 'compulsory acquisition'"—at [121].

It was noted that the grant of the mining leases will be valid 'subject only to compliance as necessary with subdivision P', i.e. the right to negotiate regime. In this case, subdivision P would apply because the grant of the mining lease involves the creation of a right to mine—see ss. 24MD(1), 25(4), 26(1)(c)(i) and 28(1).

A determination under s. 38 that the future act may be done, with or without conditions applying, was one of the ways to comply with subdivision P. As was noted:

> By itself, a determination [under s. 38] has no effect on native title, though if the act in question is done the effect of the determination will be to engage s 24MD(l) so as to ensure the validity of the act. A determination therefore provides a mechanism for the State to grant a mining lease of full force and effect notwithstanding the protection given to native title by the NTA, especially s 11(1). A determination, however, does not affect the legislative power of the States in any way—at [124].

Since the determination of itself has no effect on native title, it 'cannot ... contravene' s. 51 (xxxi). It was found that:

> For a Commonwealth law to contravene this provision, some form of 'property' or property rights must be 'acquired' on other than 'just terms'. Assuming that native title rights and interests are a form of 'property' that can be 'acquired' within the meaning of s 51(xxxi), there has been no acquisition of any nature here. In particular, the native title rights and interests (if indeed they exist and are held by the Yindjibarndi) have not been extinguished, adversely affected, or in any way transferred to the Commonwealth or to any other person.
>
> The NTA is not directed towards compulsory acquisition and so is not affected by s 51(xxxi) of the Constitution—at [124] to [125].

Therefore, this ground failed.

No erroneous inferences from erroneous findings

The Tribunal had before it three reports from archaeological surveys which were prepared for the grantee party with assistance from the native title party, along with native title party reports on the area and affidavit evidence. The native title party contented that the Tribunal:

- erred in finding the grantee party had conducted comprehensive surveys of the land in respect of Aboriginal sites and artefacts;
- erred in law in finding that the destruction or interference with sacred stones was highly unlikely;
- erred in inferring that the sacred stones 'appear to be scattered at random across the landscape';
- erred in rejecting a submission that a statement that the sacred stones had to be collected annually from specific areas for specific purposes was, implicitly, a statement that they were required to be collected from those areas and no other areas;
- erred in its findings about the future protection of Aboriginal sites—at [128], [130], [133] and [136].

At [141], McKerracher J noted that erroneous inferences and erroneous findings can constitute an error of law in very limited circumstances, referring to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 to 356. However, in this case, the ground of appeal failed, essentially because:

- the allegedly erroneous findings were not expressed in terms of a finding made without evidence;
- the court was effectively being asked to weigh evidence, which was not permissible on an appeal confined to a question of law;
- there was no irrationality or unreasonableness demonstrated in the way the Tribunal made its decision—at [142], [147] to [148] and [153] to [154].

No failure to afford procedural fairness

The Tribunal withdrew a condition it initially intended to impose relating to the protection of the four ochre sites after receiving information from its geospatial staff indicating that those sites were outside the area to be covered by the proposed grants. On appeal, it was alleged the Tribunal did not afford the native title party an

opportunity to provide information to locate the ochre sites, thereby failing to afford procedural fairness.

McKerracher J held that there was no denial of procedural fairness because the native title party had ample opportunity to put its case. However, it was noted that if the Tribunal was considering amending the conditions it was intending to impose on the doing of a future act, the better course of action would be to notify all parties in advance and to offer all of them opportunity to be heard. According to the court:

> Given that the Tribunal is always in a position to seek its own evidence, it would not be every instance in which it did so that a further opportunity to be heard would be necessary in order to afford procedural fairness. Even if that be the preferable course, in this instance, the substantive outcome would not have been affected in light of the Tribunal's satisfaction that the risks of which the Yindjibarndi complained were remote in prospect—at [171].

Decision

The native title party failed to establish any basis on which the Tribunal erred on any question of law in either of the determinations. Therefore, both appeals were dismissed.