Compulsory acquisition of native title — nuclear waste facility

South Australia v Slipper [2003] FCA 1414

Selway J, 8 December 2003

Issue
The question in this case was whether the issue of a certificate by the relevant minister under s. 24 of the *Lands Acquisition Act 1989* (Cwlth) (LAA) and the subsequent acquisition of land by the Commonwealth valid.

Background
The State of South Australian opposed a nuclear waste facility in South Australia and attempted to defeat the Commonwealth's acquisition of that site by a Bill to enact the *Public Park Act 2003 (SA)*. The Bill, if enacted, would have established a public park on the site. Section 42 of the LAA provides the Commonwealth cannot acquire land in a public park without the consent of the relevant state or territory. The intended effect of the Bill was to prevent the Commonwealth from acquiring the site without the South Australian Government's consent or amendment to the LAA.

Before the Bill could be passed, the minister purported to make a certificate under s. 24 LAA that he was satisfied that there was an urgent necessity for the acquisition of all interests, including all native title rights and interests (if any) and all mineral interests, in the land and that it would be contrary to public interest for the acquisition to be delayed. The certificate stated:

> [F]or the purpose of subparagraph 26(1)(c)(iii)(A) of the *Native Title Act 1993*, that the purpose of the compulsory acquisition of all native title rights and interests (if any) in relation to the land described hereunder is to confer rights or interests in relation to the land on the Commonwealth of Australia—at [10].

The minister's reasons for decision stated the background to the significance of the site pursuant to the Australian Government's radioactive waste disposal policy and the urgency of the situation given the substantial chance that the Bill would soon be passed into law. On 7 July 2003, following the making of the certificate, the Minister declared that the relevant interests in the site were acquired by the Commonwealth.

The state challenged the validity of the certificate, as did Mr McKenzie on behalf of the Kuyani People. The two matters were argued together although some arguments were not adopted by the other party. Only the native title issues are considered in this summary.

Right to be heard
Mr McKenzie submitted he had a legitimate expectation of a right to be heard arising from his status as a registered native title claimant. He argued that the Minister, in exercising his power under s. 24 LAA, failed to take into account a relevant

consideration, namely Mr McKenzie's interest in being heard. Justice Selway held Mr McKenzie could not have any higher expectation than that the Minister and the Commonwealth would comply with their legal obligations—at [27].

Just terms

Mr McKenzie argued that the procedure employed by the Minister failed to afford him 'just terms' as required by s. 51(xxxi) of the Constitution. Mr McKenzie argued just terms required the Kuyani People be given a fair hearing. Selway J held that s. 51(xxxi) is directed to the compensation payable upon an acquisition. It does not deal with the acquisition process itself. His Honour found there was no obligation to afford a fair hearing before the acquisition process is completed—at [28].

Native Title Act 1993 (Cwlth)

Mr McKenzie argued that the acquisition was invalid as the Minister failed to comply with s. 26(1)(c)(iii)(A) of the NTA. Selway J reviewed the NTA scheme which establishes the pre-conditions for the validity of future governmental acts which affect native title—at [39] to [41].

It was accepted that the right to negotiate process had not been complied with. The Commonwealth argued it was not obliged to do so because of s. 26(1)(c)(iii)(A), which provides that Subdivision P of the NTA (the right to negotiate) applies unless:

> (A) the purpose of the acquisition is to confer rights or interests in relation to the land or waters concerned on the Government party and the Government party makes a statement in writing to that effect before the acquisition takes place—at [43].

Selway J accepted the acquisition was to confer rights on the Commonwealth and that the Minister had made a 'statement' as included in the s. 24 LAA certificate. Therefore, there was no requirement to comply with the right to negotiate procedure. His Honour accepted that the statement was delivered to Mr McKenzie some days after the acquisition was purportedly completed—at [44] to [45].

Mr McKenzie argued that the word 'statement' in s. 26(1)(c)(iii)(A) implied communication and that, in the absence of communication, no statement was made. Consequently, the pre-condition to non-compliance with the right to negotiate procedure was not met and, in the absence of compliance with that procedure, the acquisition was invalid.

Selway J rejected this reasoning on the basis that the ordinary meaning of 'statement' does not imply any communication. He found no specific right or interest of a registered native title claimant is affected by the failure to communicate the relevant 'statement' prior to the acquisition. The claimant must become aware of the statement before taking legal proceedings to challenge the acquisition—at [46] to [49].

His Honour went on to find that there was no doubt that the minister did intend to communicate his statement to Mr McKenzie at the time he issued the certificate and this was sufficient to satisfy s. 24 LAA. It was not necessary that the statement be received prior to acquisition—at [49].

Selway J found that his conclusion on the meaning of the word 'statement' in s. 26(1)(c)(iii) (A) made it unnecessary to consider whether it would be necessary for Mr McKenzie to establish that the Kuyani People hold native title over the relevant land and whether their interests would be affected by the acquisition before they would be entitled to any relief for a failure to comply with the right to negotiate.

His Honour, citing *Lardil Peoples v Queensland* (2001) 108 FCR 453 at 474, 477, 485 to 487, noted that a relevant future act may not be invalid unless it is established that the relevant future act affects native title. His Honour went on to state that it may be that the right to negotiate can be protected by equitable remedies even where all that has been established is that the applicant is a registered native title claimant: see *Fejo v Northern Territory* (1998) 195 CLR 96 at 121, 123, 139; Lardil at 477—at [50].

Decision

The state's application was dismissed with costs. Mr McKenzie's met a similar fate: see *McKenzie v Slipper* [2003] FCA 1416.