

BROPHO V STATE OF WESTERN AUSTRALIA

Federal Court of Australia (Nicholson J)
13 April 2007
[2007] FCA 519

Racial Discrimination – right of ownership – right of freedom of movement and residence – right of equal treatment before courts – right to participate in public affairs – reasonable, proportionate and legitimate deprivations of rights – special measures – consistency of *Reserves (Reserve 53131) Act 2003 (WA)* with *Racial Discrimination Act 1975 (Cth)* – where Act transferred control of an Indigenous reserve from an Indigenous-controlled corporation ('the corporation') to an administrator – where Act restricted judicial review of administrator's actions – where applicants were members of the corporation – applicants did not, through the corporation, hold a proprietary interest in the reserve – applicants' rights conferred by the *Racial Discrimination Act 1975 (Cth)* were not breached.

Facts:

The applicant is an Aboriginal person. She was, at relevant times, a Governing Committee member, Vice-Chairperson and member of the Swan Valley Nyungah Corporation ('the SVC'). The SVC, pursuant to a 2002 Management Order ('the Management Order'), exercised the care, control and management of reserve 43131 ('the reserve'). The applicant claimed to represent both all Aboriginal persons of Nyungah origin and members of the SVC who were Aboriginal inhabitants of the reserve. The *Reserves (Reserve 53131) Act 2003 (WA)* ('*Reserves Act*') was enacted following the release of government reports indicating that there was substantial social breakdown on the Reserve, including assaults, sexual assaults, child abuse and substance abuse. The *Reserves Act* revoked the Management Order and transferred control to an administrator. The administrator, pursuant to his powers under the *Reserves Act*, substantially restricted access to and conduct on the reserve.

The history of government regulation of the management control of the reserve was relevant to the application. The reserve was designated and vested in the SVC on 22 July 1994 under the *Land Act 1933 (WA)* ('*Land Act*') for the use and benefit of Aboriginal inhabitants. The 1994 vesting was revoked on 12 December 1995 and a new order on the same terms vested an enlarged area in the SVC. The *Land Administration Act 1997 (WA)* ('*LAA*') schedule 2 clause 16(1)

continued management orders made under the pre-existing *Land Act*. The next relevant amendment to the ownership of the reserve was the Management Order in 2002.

The applicant challenged the validity of the *Reserves Act* and actions taken pursuant to it by the administrator, on the basis of inconsistency with the *Racial Discrimination Act 1975 (Cth)* ('*Racial Discrimination Act*').

Held, dismissing the application:

1. In measuring the discriminatory effect of an Act under section 10 of the *Racial Discrimination Act*, the court may have regard to the indirect effect of the Act as indicated by its proportional impact on the relevant racial group: [292].

2. The applicant never had a proprietary interest in the reserve or any part of it. The designation of the reserve in 1994 did not create any right in any identifiable class of the public: [339]. The 1995 vesting of the reserve in the SVC did not confer a proprietary interest on the applicants because, if the SCV held the legal estate in the reserve as trustee of a public charitable trust for the purpose of use and benefit of Aboriginal inhabitants, then there could be no individual beneficiaries of the trust: [345]-[350]. The applicant's interest under the 2002 Management Order was in the nature of a statutory responsibility or a public trust, not a proprietary interest: [361]-[362]. Further, the mere physical presence

of the applicants on the reserve land did not constitute an interest sufficient to sustain an action for trespass: [473]-[474].

3. Even if 'property' in the right to own property in art 5(d)(v) of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD') is broader than the concept of property at domestic law, the property must still be 'owned'. The applicant's interest at all times fell short of an ownership interest: [374]-[380].

4. The fact that the applicants had actual knowledge of the plan to revoke the Management Order means that any deprivation of the right to manage and exercise management rights was not arbitrary: [398].

5. The *Reserves Act* did not affect any right of freedom of movement and residence in CERD as access to the reserve remained possible with the consent of the administrator, and consent was not unreasonably withheld: [422]. Since the exclusionary order of the administrator was neutral in its terms, applying to both Aboriginal and non-Aboriginal persons, the administrator's conduct did not constitute a deprivation of the right to freedom of movement on the basis of race: [456]-[457]. Further, any exclusion by the administrator was not 'by reason of' the race of the applicants within the meaning of section 12(1)(d) of the *Racial Discrimination Act*, as it was done for the purposes of restraining criminal conduct on the reserve: [467].

6. There was a prima facie breach of the right to equal treatment before tribunals administering justice by virtue of the privative clause in the *Reserves Act*, which, by operating only on inhabitants of the reserve, disproportionately affected persons of the Aboriginal race: [443].

7. Any deprivation of rights was reasonable, proportionate and legitimate because the relevant alternative measures to solve the problem – a memorandum of understanding and the criminal law – had been shown to be ineffective: [545]-[546]. The deprivation of rights of legal recourse was justified because expedition was essential to solve the pressing social problems: [548].

8. Since any deprivation of rights was in the public interest, it was not arbitrary: [553]-[557].

9. The *Reserves Act* was a 'special measure' within the

meaning of article 1(4) of CERD. In determining the object of legislation, for the purpose of determining whether it is a special measure, the court should accept government's stated view of the object unless that was unreasonably held: [577]. Here, the stated object was the protection of disadvantaged individuals within the reserve: [577].

10. Under LAA section 50(2), which requires, before a management order can be revoked, that the Minister consider it to be in the public interest that the order be revoked, the Minister's discretion is broad and provided there is evidentiary foundation for its exercise, the Minister is entitled to weigh the relevant factors. There is no need for the management body to consent to the revocation; nor need the management body have breached the management order. The public interest is sufficiently demonstrated by either: concerns about the failure of a management body to adequately deal with unlawful or unsociable conduct; or that the Minister considers the order should be subject to alternative conditions which would better suit the use of the reserve for its intended purpose: [272]-[277].