BROPHO V WESTERN AUSTRALIA

Full Federal Court of Australia (Ryan, Moore and Tamberlin JJ)
6 June 2008
[2008] FCAFC 100

Racial discrimination – reserves vested in Aboriginal inhabitants – revocation of vested reserve – whether revocation was valid under s 50, *Land Administration Act 1997* (WA) – consideration of ss 9, 10, *Racial Discrimination Act 1975* (Cth) – construction of s 9(1) – government concerns over the safety of women and children on, and access to, the reserve – whether appellant and others had been excluded from reserve 'based on' race – construction of s 10(1) – rights to property under *Racial Discrimination Act 1975* (Cth) – whether rights to property under *Racial Discrimination Act 1975* (Cth) can accommodate Indigenous concepts of property – whether right to property is absolute – whether interference with enjoyment of right done in legitimate public interest is inconsistent with s 10(1)

Facts:

The appellant and applicant at first instance was a former resident of Reserve 43131 ('the Reserve') and a member of the Swan Valley Nyungah Community Aboriginal Corporation ('SVC'), which managed the Reserve. Prior to 2002, the Reserve was managed by the SVC under a management order made in 1998; however, in 2002 that 1998 management order was revoked pursuant to s 50 of the *Land Administration Act* 1997 (WA) ('LAA'), and a new order (the '2002 Management Order') implemented. After several inquiries into the Reserve raising concerns about the safety of women and children resident there, and also due to government concerns over the difficulties in accessing the Reserve, the *Reserves (Reserve 43131) Act 2003* (WA) ('RRA') was passed. The RRA, which operated from 12 June 2003 to 12 June 2005, revoked SVC's control and management of the Reserve and made the Aboriginal Affairs Planning Authority responsible for the Reserve. Pursuant to the RRA, the Aboriginal Affairs Planning Authority appointed an administrator for the Reserve who subsequently made directions forbidding unauthorised entry onto the Reserve. These directions resulted in the Aboriginal residents of the Reserve having to move away and being unable to access the Reserve.

There were several issues in this appeal, all in respect of racial discrimination and pertaining to whether the RRA and actions taken under it were in contravention of ss 9(1) and 10(1) of the *Racial Discrimination Act 1975* (Cth) ('RDA'). Though it was not clearly related to the appellant's claims in respect of racial discrimination, there was also an issue as to whether the 1998 Management Order had been validly revoked under s 50 of the LAA.

Held, that there had been a valid revocation of the 1998 Management Order:

1. An overly technical meaning should not be given to s 50(1)(a) of the LAA, which provides that the LAA Minster may revoke a management order 'when a management body agrees that its management order should be revoked'. The requirement is satisfied if a management body agrees to the Minister's proposal to revoke the management order. On the evidence in the present appeal, the SVC agreed to the Minister's proposal to revoke the 1998 Management Order: [50]–[53].

Held, that the RRA and actions taken under it were not in contravention of s 9(1) of the RDA:

2. Section 9 only operates in relation to impugned acts and not in relation to impugned laws, including the RRA: [64], [67], [70].

3. The reference in s 9(1) to 'based on' (as in acts 'based

on' race) is synonymous with 'by reference to', though is not synonymous with the more limited 'by reason of': [69]; *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8 followed.

4. The appellant and other former Aboriginal inhabitants of the Reserve where not excluded from the Reserve by the administrator 'based on' their race, within the meaning of s 9(1) of the RDA. The administrator's decision to exclude the appellant and others from the Reserve was taken by reference to their status as members of a dysfunctional community in which the safety of children was in danger: [71]–[72].

Held, that the RRA was not in contravention of s 10(1) of the RDA:

5. Section 10 operates in relation to impugned laws, including the RRA: [64].

6. Section 10(1) concerns the unequal enjoyment of rights by different racial or ethnic groups: [73]; *Ward v Western Australia* (2002) 213 CLR 1 cited.

7. The inquiry as to whether s 10 has been contravened is whether the unequal enjoyment of rights is 'by reason of' the impugned legislation: [73].

8. As well as concerning itself with the intent, purpose or form of legislation, s 10 also concerns itself with the practical operation or effect of legislation: [73]; *Gerhardy v Brown* (1985) 159 CLR 70 cited; *Mabo v Queensland (No 1)* (1988) 166 CLR 186 cited; *Ward v Western Australia* (2002) 213 CLR 1 cited.

9. In situations involving property rights, there is no requirement under s 10(1) to compare the contents of different species of property rights in order to ascertain whether they are equivalent. As such, the facts that the supposed property rights in this claim had various statutory sources and were not rights widely enjoyed by members of the public are not decisive: [74]–[75]; *Ward v Western Australia* (2002) 213 CLR 1 cited.

10. The rights to property protected under the RDA and the *Convention on the Elimination of All Forms of Racial Discrimination* may accommodate Indigenous forms of property holdings, and do not necessarily need to be understood in terms of forms of property recognised under the English system of property law or conferred by statute: [78]–[79]; *Ward v Western Australia* (2002) 213 CLR 1 cited; *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] IACHR Petition No 11 577 cited.

11. Like all rights, the right to own property is not absolute. It must be balanced against competing rights and values, and its content must accommodate the legitimate laws of and rights recognised by the relevant society: [80]–[81]; *Gerhardy v Brown* (1985) 159 CLR 70 cited.

12. Any interference with the enjoyment of a right will not be inconsistent with s 10 of the RDA provided that such interference is done in the legitimate public interest: [83].

13. Interference with the appellant's right to occupy and manage the land, conferred on the SVC by statute, was not inconsistent with s 10 of the RDA as it was done in the legitimate public interest, namely, to protect vulnerable members of the community enjoying the right of occupation and management: [82]–[83].