WURRIDJAL V COMMONWEALTH

High Court of Australia (French CJ, Gummow, Kirby, Hayne, Heydon, Crennan and Kiefel JJ)
2 February 2009
[2009] HCA 2

Constitutional law – limits to legislative power – whether s 51(xxxi) of the *Constitution* limits the power of the Commonwealth under s 122 to make laws for the Northern Territory – acquisition of property on just terms – Northern Territory Emergency Response – whether actions taken pursuant to provisions of the *Northern Territory National Emergency Response Act 2007* (Cth) and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) constituted an acquisition of property within the meaning of s 51(xxxi) other than on just terms

Facts:

The Commonwealth Government-initiated 'Northern Territory Emergency Response' brought in a package of legislative reforms in an attempt to address the problems of sexual abuse and improve wellbeing in a number of Aboriginal communities in the Northern Territory. The package of reforms, which was passed by the Commonwealth pursuant to s 122 (the 'territories power') of the *Constitution*, included the *Northern Territory National Emergency Response Act* (Cth) ('*NER Act*') and the *Families, Community Services and Indigenous Affairs and Other Legislation Amendement (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) ('*FACSIA Act*'). The plaintiffs challenged certain provisions of the *NER Act* and the *FACSIA Act* affecting Maningrida land, which is in North East Arnhem Land.

The plaintiffs were compromised of members of the Dhukurrdji clan, who claim they have spiritual ties to land in the town of Maningrida, an Aboriginal and Torres Strait Islander corporation and a community service entity falling within s 3 of the *NER Act*. Pursuant to the *NER Act* the Commonwealth was granted five-year leases on Aboriginal land held under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*Land Rights Act*') and other areas such as community living areas and town camps. The Commonwealth was granted a five-year lease on Maningrida land commencing 17 February 2008. The affected land is held by the Arnhem Land Aboriginal Land Trust ('the Land Trust') under the *Land Rights Act*. The plaintiffs contended that the lease granted to the Commonwealth constituted acquisition of the Land Trust property, and that the acquisition was required to be, but was not, on just terms within the meaning of s 51(xxxi) of the *Constitution*.

The *FACSIA Act* terminated the permit system, which had required that unauthorised persons obtain a permit to enter Aboriginal land held by the Land Trust in relation to the main townships and road corridors connecting them. The plaintiffs claimed this abolition of the permit system in relation to common corridors of Maningrida land deprived the Land Trust of its entitlement to exclusive possession and enjoyment of the Maningrida land. The plaintiffs also claimed that, because the right to enter upon and use or occupy the Maningrida land, which the traditional Aboriginal owners are entitled to by s 71 of the *Land Rights Act*, is suspended by the lease and can by terminated by the Minister at will under s 37 of the *NER Act*, the Commonwealth had thus acquired property rights to the plaintiffs' detriment and that they have not been compensated on just terms.

The Commonwealth demurred to the plaintiffs' statement of claim on the grounds that it did not show a cause of action. The main issue for the Court to decide was whether the just terms requirement for acquisition of property in s 51(xxxi) applied to the land in question. In the event that such a just terms requirement existed and that the legislation effected

an acquisition within the meaning of s 51(xxxi), it had to be determined what the scope of the requirement was and whether the requirement was met in the circumstances.

Held, allowing the demurrer, per French CJ, Gummow and Hayne JJ, Heydon J agreeing:

1. Ordinary principles of construction and the weight of authority support that s 122 of the *Constitution* be subject to the just terms guarantee in s 51(xxxi). Therefore, the acquisition of property from any person pursuant to laws made under s 122 of the Constitution must be on just terms as required by s 51(xxxi): [73]-[86], [189], [287]; *Teori Tau v Commonwealth* (1969) 119 CLR 564 overruled.

2. The fee simple estate granted to the Land Trust over Maningrida land is well within the class of property to which s 51(xxxi) is applicable, given the preferred liberal construction of s 51(xxxi). The grant of the lease under s 31 of the *NER Act* was an acquisition of property from the Land Trust within the meaning of s 51(xxxi) of the *Constitution*, as its legal effect was to diminish the ownership rights conferred by the grant of fee simple so far as they relate to the Maningrida township: [103], [195], [455].

3. The compensation provisions of the *NER Act* afforded just terms for the acquisition of the Land Trust property in accordance with the requirements of s 51(xxxi) of the Constitution: [104], [197], [323]–[341], [464]–[469].

4. The right of the Land Trust to exclude others is subject to the lease; therefore the abolition of the permit system due to the provisions of the *FACSIA Act* has no further effect in relation to that right while the lease is in effect. Even if there was an additional effect on the Land Trust property, the *FACSIA Act* provides for compensation on just terms: [106]–[107].

5. The plaintiffs have a statutory right to use and occupy the Maningida land under s 71 of the *Land Rights Act* in accordance with Aboriginal tradition, and these rights constitute property within the meaning of s 51(xxxi). However, there is no acquisition by the Commonwealth of the plaintiffs' rights under s 71 of the *Land Rights Act*, as the rights under s 71 are preserved by the *NER Act*, s 34(3): [111]–[115], [157], [162], [164]–[165], [454].

Held, per Heydon J:

6. Section 60 of the of the *NER Act* does not only provide for a contingent right of compensation, as opposed to the immediate right under s 51(xxxi), by reason of delay involved or the possible need to go to court. The fact that, under s 60 of the *NER Act*, s 50(2) of the *Northern Territory (Self-Government) Act 1978* (Cth) (which provides that acquisitions of property in the Northern Territory should be on just terms) does not apply to acquisitions of property under the *NER Act*, does not provide evidence that s 60 confers only a contingent right: [325]–[327], [328]–[329].

Held, allowing the demurrer, per Crennan J:

7. The scheme of control of Aboriginal land in the *Land Rights Act* was always susceptible to adjustment directed at achieving the purpose of the Act in supporting the traditional Aboriginal owners, including adjustment of the kind effected by the challenged provisions. Therefore, the challenged provisions cannot be characterised as effecting an acquisition of property within the meaning and scope of s 51(xxxi) of the *Constitution*: [443]–[446].

Held, per Kiefel J:

8. The plaintiffs' rights concerning the land are referred to in the statement of claim as traditional rights of use and occupation and are not alleged to be of the same nature as native title rights or interests. These rights to occupation and use of the land are not subject to acquisition by the *NER Act*: [455].

9. Compensation under the *NER Act* is not contingent as the statutory right to compensation is not qualified by the possibility of a question as to whether s 51(xxxi) applies. The proposition that a value could not be attributed to sacred sites and therefore could not be the subject of compensation in money should not be accepted, as in this circumstance the potential for interference is prohibited under s 69 of the *Land Rights Act*, which continues to have force: [465]–[466], [467]–[469].

10. The decision in *Teori Tau v Commonwealth* (1969) 119 CLR 564 is premised upon s 122 being the only constitutional head of power in question and is therefore not determinative of an outcome in this case: [460]; *Teori Tau v Commonwealth* (1969) 119 CLR 564 distinguished,

Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513 considered, *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 considered, *Mutual Pools and Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 considered.

Held, overruling the demurrer, per Kirby J (dissenting):

11. Section 122 of the *Constitution* should be subject to the just terms requirement in s 51(xxxi): [284]–[287], *Teori Tau v Commonwealth* (1969) 119 CLR 564 overruled, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 considered, *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 considered, *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397.

12. The Commonwealth's statutory lease did not abolish the interests of the plaintiffs but acquired them for the purposes of s 51(xxxi). The Commonwealth acquired a benefit from the acquisition of the lease by relieving the Commonwealth of any risk of interference by the plaintiffs: [298]–[299].

13. A broad inquiry is needed in order to identify the 'terms' required for an acquisition of property to be 'just'. The application of the 'just terms' requirement would depend upon evidence, including evidence as to the way the Commonwealth went about the process of acquisition, the type of Aboriginal property affected, and the attachment to the property; and such evidence could only be considered at trial. Demurrer is not a procedure apt to resolving the resulting question: [209], [302], [307], [308].

14. Adhering to the just terms requirement in this context may require consultation before action; special care in the execution of the laws; and active participation in performance in order to satisfy the constitutional obligation in these special factual circumstances: [309].