to the Supreme Court. His Honour also relied upon the decision of the High Court in *Craig v South Australia* (1995) 184 CLR 163 at 176 and 179 and specifically noted the requirements for the appointment of a warden.

Do the warden's reasons form part of the record?

The applicant contended that there was an error on the face of the record, discernible from the warden's reasons for decision.

After considering Craig v South Australia (supra) at 181 White J held that "for the purposes of certiorari, 'the record' does not include the transcript of evidence or the reasons for decision". His Honour held that s137(5) did not constitute "some statutory provision to the contrary" being the exception referred to in *Craig v South Australia* (supra).

ORDER

The order nisi for a writ of certiorari was discharged and the application dismissed.

IMPLICATIONS

It follows from this decision that where the *Mining Act* 1978 (WA) expressly provides for an aggrieved party to appeal to the Minister for Mines against a decision of the warden or a mining registrar, then the Supreme Court is likely to exercise its discretion to refuse certiorari. The court's stated reason for this is not wanting to pre-empt the Minister's statutory right to determine the appeal or, alternatively, on the basis that the applicant has elected to exercise its right of appeal to the Minister and should pursue this remedy.

On this occasion, the Supreme Court has perhaps been able to achieve what it attempted to achieve in its first decision in *Hot Holdings* (which was subsequently reversed by the High Court), namely to discourage unhappy applicants or objectors from rushing to the Supreme Court to seek prerogative relief. The decision sends a clear message to legal practitioners that careful consideration needs to be given to whether the appropriate stage in the decision making process has been reached before prerogative relief will be granted by the Supreme Court.

NEWCREST MINING (WA) LIMITED AND BHP MINERALS LIMITED v COMMONWEALTH OF AUSTRALIA AND DIRECTOR OF NATIONAL PARKS AND WILD LIFE[1]

Pat Brazil*

Mining leases in the Northern Territory - constitutional validity of proclamations made under National Parks and Wildlife Conservation Act 1975 (CTH) - whether s.51(xxxi) of the Constitution requires just terms for a law of the Commonwealth made under s.122 of the Constitution - characterisation of a law applying in the Territory that can also rely on the external affairs power in s.51(xxix) - meaning of

1 High Court of Australia, 14 August, 1997.

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"acquisition of property" in s.51(xxxi) of the Constitution - whether a proclamation prohibiting mining effects an acquisition of mining tenements - validity of Northern Territory mining leases and their renewal.

INTRODUCTION

This appeal to the High Court related to a number of Northern Territory mining leases that were held by or on behalf of the appellant ("Newcrest"). For the purposes of the proceedings the leases were divided into two classes:

(a) leases that had been purportedly renewed by the Northern Territory on the expiry of the original terms, the areas of which were purportedly added to and included in the extension of the Kakadu National Park by a proclamation dated 21 June 1991 under the *National Parks and Wildlife Conservation Act* 1975 (CTH), (the *Conservation Act*) to a depth of 1000 metres.

(b) leases which had not expired when a similar proclamation dated 13 November 1989 purported to add the areas of those leases to and include them in Kakadu National Park.

The Conservation Act as amended in 1987 provided that no operations for the recovery of minerals shall be carried on in Kakadu National Park.

The main issues raised were whether the leases were still in force at the time of the proclamations and whether in any case the proclamations effected acquisition of Newcrest's property without just terms contrary to S.51(xxxi) of the Constitution.

THE DECISION: CONSTITUTIONAL ISSUES

It was held by the High Court (Toohey, Gaudron, Gummow and Kirby JJ; Brenan CJ and Dawson and McHugh JJ dissenting) that in relation to the leases still in force that the proclamations were invalid to the extent that they effected acquisitions of property from Newcrest other than on just terms within the meaning of S.51(xxxi) of the Constitution.

Whether S.51(xxxi) Applies to Laws made (only) under the Territories Power in S.122 of the Constitution

In *Teori Tau v The Commonwealth*[2] a unanimous High Court had held that the requirement of just terms in relation to the acquisition of property by the Commonwealth under S.51(xxxi) of the Constitution did not apply to laws for the government of a territory made under S.122 of the Constitution. On the present appeal:

(a) Brennan CJ, Dawson and McHugh JJ considered that *Teori v Tau* should be reaffirmed and adhered to and that the proclamations were valid and effective.

(b) Toohey J, while acknowledging the force of the criticism of the decision made by Gaudron, Gummow and Kirby JJ in their holding that *Teori Tau v The Commonwealth* should no longer be treated as authority on the operation of the constitutional guarantee in S.51(xxxi) in respect of laws passed in reliance upon the power conferred by S.122 was not prepared to overrule the decision.

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2 (1969) 119 CLR 564.

(c) However Toohey J joined with Gaudron, Gummow and Kirby JJ in finding that, since as a purpose of the *National Parks and Wildlife Conservation Act* was the performance of Australia's international obligations under S.51(xxix) of the Constitution, the acquisition of property involved attracted the operation of S.51(xxxi) because it would be in pursuit of a purpose in respect of which the Parliament had power to make laws within the meaning of that constitutional provision, even if that acquisition took place within a Territory. He said it was only if a law could be truly characterised as a law for the government of a Territory, not in any way answering the description of S.51(xxxi) that *Teori Tau* would constitute such an obstacle. He thought that was an unlikely situation.

(d) Brennan CJ and Dawson and McHugh JJ took the view that if a law could be supported under S.122 of the Constitution, it escaped the requirements laid down in S.51(xxxi). Thus BrennanJ said that only if the sole source of legislative power to enact the relevant provisions of the *Conservation Act* was the external affairs power, would S.51(xxxi) apply. DawsonJsaid that if a law which applied generally throughout the Commonwealth is invalid because it purports to acquire property otherwise than on just terms, it would be wholly invalid unless the law manifested an intention that it should operate as a law for the government of the Territory even if invalid as a law for the peace order and good government of the Commonwealth. However he thought it was quite plain that the relevant provisions of the *Conservation Act* were intended to apply in the Northern Territory regardless of whether they were invalid in their general application throughout the Commonwealth. McHugh J said that it was of no relevance to the question of construction of S.122 that State owners are protected by the "just terms" guarantee against Commonwealth acquisitions and Territory owners are not so protected.

Whether Mining Tenements were Property and Whether There was an Acquisition

The leading judgment of Gummow J distinguished the mining tenements in question from the kind of rights considered in *Health Insurance Commission v Peverill*,[3] where what was in issue were rights derived purely from statute and of their very nature inherently susceptible to the variation or extinguishment that had come to pass. In the present case, there were provisos under the Mining Regulations embodying an inherent but limited liability to impairment to the rights conferred by the mining tenements, but what was done was not in the exercise of the rights of the Crown under that proviso and went far beyond what could have been brought about by those means. He said it was not correct for the purpose of the application S.51(xxxi) to identify the property held by Newcrest as no more than a statutory privilege under a licensing system such as that considered in such decisions as Minister for Primary *Industry and Energy v Davey*[4] and *Binneke v Minister for Primary Industries and Energy*[5].

Gummow J also considered that there had been an acquisition of property in the constitutional sense. In substance the Commonwealth and the Director of National Parks and Wildlife had acquired identifiable and measurable advantages in accordance with the authorities[6]. There was sufficient derivation of an identifiable and measurable advantage to satisfy the Constitution requirement of an acquisition. It was true that the mining

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3 (1994) 179 CLR 226.

4 (1993) 47 FCR 151.

5 (1996) 63 FCR 567.

6 *The Tasmanian Dam Case* (1983) 158 CLR 1 at 246-7, 282-283 *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480 at 510-511) *Mutual Pools and Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 at 184-185.

tenements were not in terms extinguished but it was also true that the proclamations extended 1000 metres beneath the surface.

Brennan CJ agreed that the Commonwealth interest in respect of the minerals was enhanced by the sterilisation of Newcrest's interests and that by force of the impunged proclamations, the Commonwealth had acquired property from Newcrest. On the other hand McHugh J thought there was no acquisition of property by the Commonwealth.

S.51(xxxi) Applies to Laws made under the External Affairs Power in S.51(xxix)

The majority judgments make it clear that the constitutional requirement of just terms in S.51(xxxi) of the Constitution is applicable in relation to laws made under the external affairs power, and in particular to laws made for the purpose of implementing international agreements, in this case the Convention for the Protection of the World Cultural and Natural Heritage. This is in accord with the views already taken by the majority judgments of the Full Court of the Federal Court in The *Commonwealth v Western Mining Corporation.*[7]

Situs of Property Protected by S.51(xxix)

There is an important passage in the judgment of Gummow J on this matter, with which Toohey, Gaudron and Kirby JJ may be taken to have agreed. In stressing that the word "property" is the most comprehensive term that could be used, Gummow J went on to say that the situs of such interests may be neither fixed nor at any given time readily susceptible of identification. For example bearer bonds and bearer stock appeared to be located where the instrument of the security then is to be found. The point made was that a constitutional guarantee cannot be coherently construed in a universe of legal discourse which contains a dichotomy between the situation of property in a State and the situation of property in a Territory and that these considerations supported a construction of the Constitution that the property referred to in S.51(xxxi) is that situated in Australia whether by reason of a physical location of any land or chattel within the area of a State or Territory or the situation of any incorporeal interest (such as a patent design or registered trademark under Federal Law) in Australia or in a State or Territory thereof.

It would be wrong to read this as meaning that property created or existing under Australian law that was located *outside* Australia would by reason of that fact lose the protection of S.51(xxxi). The most obvious case is a property right in Australia's continental shelf beyond the outer edge of the territorial sea. In this regard, the provision under which the proclamations were made in this case, as well as referring to purposes referring to facilitating the carrying out of Australia's obligations under agreements between Australia and other countries, also referred to purposes relating to the rights (including sovereign rights) and obligations of Australia in relation to the continental shelf of Australia. Summing up, the passage in Gummow J's judgment does not support any proposition that property rights in Australia's continental shelf lack the protection of S.122. Rather the whole thrust of what was said seems to indicate that property should also enjoy constitutional protection.

NORTHERN TERRITORY LAWS RELATING TO MINING TENEMENTS

Once again the leading judgment is that of Gummow J, which contains a detailed consideration of Northern Territory laws from its separation from the State of South Australia in 1910, to the granting to self government to the Northern Territory in 1978, and in this regard the way that law applied to the mining leases in question.

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7 (1996) 136 ALR 353.

This involved detailed consideration of law and practice relating to the renewal of mining leases in the Territory, and the final decision was that all except two of the mining leases in question were still running and effective.

The judgement describes the way in which private interests, including those created under the *Mining Ordinance 1939* with which the case was concerned, were to survive the transition, and the structure of government "wrought" for the Territory by the *Self Government Act*. These interests survived in the same state, but with 2 qualifications. First there was the operation of S.69(3) of the *Self Government Act* whereby they were to be "held from" the Territory rather than the Commonwealth. Secondly by reason of steps taken under S.70 on 27 June 1978 reserved and reversionary interests in the land in question remained vested in the Commonwealth. However the content of those reserved and reversionary interests of the Commonwealth was to be ascertained after allowance for the continued operation, by dint of S.57 itself of the *Self Government Act*, of the 1939 Ordinance and the private rights thereunder. This state of affairs would continue until the 1939 Ordinance was further altered or amended by or under an enactment including the law of the legislature of the Territory.

The end result for most of the areas with which the case was concerned was to retain for the Commonwealth reversionary and reserved interests in land in which private subsisting interests were continued in operation, but held from the Territory on the same terms and conditions on which they were held from the Commonwealth before 1 July 1978 by force of Ss.57 and 69(3).

CONCLUSIONS

Newcrest has regained, or rather never lost, the right to mine inside Kakadu National Park pursuant to the leases that were current at the time. It would still be open for the Commonwealth to legislate to prevent mining taking place, but the decision makes it clear that that could only be done on the basis of providing just terms, that is, compensation.

As to wider implications, notwithstanding that the judgments are complicated and the final outcome was a very narrow one, the decision must surely mean that it will now be accepted in the High Court that property rights in a Territory enjoy constitutional protection under S.51(xxxi) of the Constitution. There does not seem to be any defensible basis upon which the constitutional protection Newcrest now clearly enjoys can be quarantined from other operators in the mining industry and indeed from all owners of property in any Territory. It may be realistic to note a certain fragility about the situation, having regard to the forthcoming changes in the constitution of the High Court. However it also has been recognised that changes in the composition of the Court are not a proper reason for overturning decisions of the Court.