which is of real value to the parties and a purchaser of their interests. Therefore, while preliminary agreements are often characterised by their brevity which suits the interests of the parties at the time, this case is a good reminder that parties should consider the desirability of incorporating a relatively complete confidentiality clause. In this case, prohibition on disclosure of information to potential purchasers, or an exception to allow that disclosure, would have avoided the litigation that ensued.

The case also suggests that the Courts will be unwilling to use section 424 of the *Corporations Act* 2001 to make orders regarding highly technical factual issues. The assessment of whether information contained in a mining feasibility study is confidential falls within this category. Companies wishing to disclose information that may be subject to a confidentiality obligation should be aware that section 424 is unlikely to avoid the need for a full trial in order to make out their case.

IMPLICATIONS FOR QUEENSLAND'S ALTERNATIVE STATE PROCEDURES

CENTRAL QUEENSLAND LAND COUNCIL ABORIGINAL CORPORATION -V- ATTORNEY GENERAL OF THE COMMONWEALTH OF AUSTRALIA AND STATE OF QUEENSLAND [2002] FCA 58

S. 43 Native Title Act – alternative state procedures – invalid determinations – high impact mining tenements

John Briggs*

Justice Wilcox of the Federal Court in Sydney has handed down a decision[1] that has rendered inoperative parts of the Queensland legislative procedures for obtaining high impact exploration and mining tenements. It has been nearly 18 months since the Commonwealth Attorney General made determinations approving these procedures, as required by the *Native Title Act* 1993 (Cth) ("NTA").

The action was brought by the Central Queensland Land Council Aboriginal Corporation (CQLC) 12 months earlier. Justice Wilcox's decision strikes down 4 determinations made by the Attorney-General in May 2000. These determinations approved alternative native title processes for high impact exploration and mining in Queensland contained in legislation which has been operating since September 2000.

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1 *Central Queensland Land Council Aboriginal Corporation v Attorney-General of the Commonwealth of Australia and State of Queensland* [2002] FCA 58.

In answering the claims made by the CQLC both the State of Queensland and the Commonwealth Attorney-General made submissions to the Court that the determinations were valid. Justice Wilcox delivered his decision on 8 February 2002.

BACKGROUND

- The Howard Government's "ten point plan/Wik" amendments to the NTA in 1998 allowed, among other things, for State and Territory governments to set up alternative procedures to the Commonwealth "right to negotiate" process applying to exploration and mining activities. One of these amendments to the NTA made it a requirement that the Federal Government endorse any State or Territory alternative procedures by means of a determination by the Attorney-General. An additional requirement for certain types of alternative procedures was that the Attorney-General was required to consult with affected Land Councils.

- In 1998 and 1999, the Beattie Government passed legislation to set up its alternative procedures in Queensland but did not bring that legislation into operation.[2] In May 2000 the Attorney-General issued his 4 determinations endorsing Queensland's alternative procedures for high impact exploration permits, mining claims, mineral development licences and mining leases.

- There were 9 other determinations made by the Attorney-General at the same time, 6 of which were rejected by the Senate in August 2000. The remaining 3 determinations related to native title processes for low impact prospecting permits, exploration permits and mineral development licences. Justice Wilcox upheld the validity of these 3 determinations in the course of this case.

- On 18 September 2000, following variations to Queensland's 1998 and 1999 amendments[3] necessitated by the Senate's rejection of some of the Attorney General's determinations, Queensland's legislative package was brought into operation.

- The CQLC mounted its challenge to the 3 low impact determinations and the 4 high impact determinations in February 2001.

WHAT THE FEDERAL COURT SAID

The Attorney-General's 4 determinations endorsing Queensland's high impact exploration and mining processes were challenged on several grounds with only one succeeding. The four determinations were struck down because the Court found the Attorney-General had issued them (in May 2000) before Queensland's legislative package came into operation (in September 2000).

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2 *Native Title (Queensland) State Provisions Amendment Act (No 2)* 1998 (Qld), *Native Title (Queensland) State Provisions Amendment Act* 1999 *(Qld), Land and Resources Tribunal Act* 1999 (Qld).

3 *Native Title Resolution Act* 2000 (Qld).

Justice Wilcox found that the process the Attorney-General was obliged to follow – set out in s. 43 NTA – meant that he could only consider Queensland's alternative procedures for high impact exploration and mining processes *after* Queensland's legislative package had become operational.

Justice Wilcox issued a declaration that the four high impact determinations were "invalid and without legal effect". However the challenge to the low impact determinations was not successful.

There were several other grounds on which the high impact and low impact alternative procedures were unsuccessfully challenged by the CQLC. (These of course could be raised in any future cross-appeal, possibly with a different result). In relation to the other issues raised before him, Justice Wilcox found as follows:

- The amendments to the *Mineral Resources Act* 1989 (Qld) ("MRA") were not in conflict with either s 24MA NTA or the *Racial Discrimination Act* 1975 (Cth)("RDA"). The amendments did not constitute a "future act" within the meaning of s 233 NTA as they did not "affect" native title rights and interests.

- The Attorney-General's determinations were of a legislative character not an administrative character and so not susceptible to judicial review under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), but they were reviewable under s 39B *Judiciary Act* 1903 (Cth).

- The Attorney-General did not need to consider s 24MB(1)(c) NTA in relation to the low impact determinations. The power to make the determinations did not depend on the actual existence of acts that would otherwise be subject to subdivision P of the NTA. That subdivision will determine the class to which the s 26A determinations will apply but does not have any bearing on the power to make the determination.

- The Attorney-General was able to treat the words "a law of a State" as including provisions in three separate statutes. This overcame any argument that the "law" needed to be contained in one discrete statute.

- The Attorney-General had correctly applied s 26A NTA when making the low impact determinations.

- The low impact determinations were not of a kind which could not be reached by any reasonable person. The CQLC attempted to argue a "Wednesbury unreasonableness"[4] issue by contending that the Minister should have had regard to the application of the Queensland alternative procedures on specific sites of cultural sensitivity rather than on the State as a whole.

- The way in which the Attorney-General considered ss 392 and 421 MRA did not invalidate the determinations. The provisions of s 392 MRA allowed certain procedures to be deemed to be fully complied with where there had in fact only been substantial compliance. The CQLC contended that unless there is substantial compliance a lack of notification of a proposed grant

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4 From *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

of a tenure could be waived if there had otherwise been substantial compliance, and that this would be contrary to the requirements of alternative procedures under the NTA. This was rejected as s 421 MRA provides that failure to comply with the native title provisions of the MRA (which would include the notice provisions) renders an act invalid to the extent that it affects native title.

REACTION TO THE DECISION

It is understood that Queensland and the Commonwealth are appealing the decision to the Full Federal Court and the Attorney General is also considering an appeal. There is also the possibility of that result being then further appealed to the High Court.

Premier Beattie has already written to the Attorney-General asking him to reissue the determinations to ensure that all future applications under Queensland's alternative scheme are valid.[5] The Attorney-General will now have to reconsider the Queensland legislation and any new determinations are likely again to be the subject of review by the House of Representatives and the Senate.

Geoff Clarke, the Chairman of ATSIC, has called on the Commonwealth and Queensland governments to review all aspects of native title legislation, particularly in light of the comments of Justice Wilcox that his Honour considered that the MRA treats native title holders in a more disadvantageous manner than freeholders.

IMPLICATIONS OF THE DECISION

At least until such time as an appeal is finally decided, there will be a number of significant consequences:

- The parts of the Queensland legislative package that were brought into operation in 2000 relating to high impact exploration and mining no longer have the "protection" of a valid Ministerial determination and so are inconsistent with the NTA's "right to negotiate" process.

- Any tenements granted through the native title processes set up by those parts of that September 2000 legislative package will therefore be of doubtful validity. Likewise, any exploration or mining companies that have embarked on any of those processes but not yet concluded them will be left not knowing whether concluding the process will produce a valid tenement.

- Section 43 of the NTA provides that the Commonwealth "right to negotiate" process applies unless there are valid State alternative procedures. Both processes cannot be operative at the same time.

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5 Press release – The Hon Peter Beattie MP – 8 February 2002.

- Exploration and mining companies considering embarking on those processes will not know whether to pursue Queensland's alternative procedures or the Commonwealth's "right to negotiate" process. This is because a tenement obtained through the alternative procedures may be invalid if an appeal fails whereas a tenement obtained through the "right to negotiate" may be invalid if an appeal succeeds.

- There is likely to be little enthusiasm to run both processes simultaneously. However, in the short term, that may be the only alternative available.

- The decision may also impact on similar South Australian legislation. No other States or Territories have similar alternative procedures in place.

FUTURE ACTION BY STATE & COMMONWEALTH

As assessment of the options available, the State and the Commonwealth following Justice Wilcox's decision involves considering the possible outcomes for many divergent groups:

- the holders of tenements obtained under the low impact alternative procedures;
- the holders of tenements obtained under the high impact alternative procedures;
- current applicants for tenements under the low impact alternative procedures;
- current applicants for tenements under the high impact alternative procedures;
- future applicants for tenements under the low impact alternative procedures; and
- future applicants for tenements under the high impact alternative procedures.

Obviously a course of action which is beneficial to one group may seriously disadvantage another group.

There are only two methods by which the validity of both the high and low impact alternative procedures from their commencement can be assured – by the passing of validating legislation or by such a finding on completion of an appeal process. However, neither provides a simple practical solution. The passing of validating legislation is dependant on an appropriate political climate, ie, whether it will be approved by the Senate, and any appeal process will necessarily place at risk the validity of the low impact alternative procedures, which is arguably the most important component of Queensland's alternative native title procedures (and which is currently considered to be valid).

New determinations by the Attorney–General could validate the high impact alternative procedures from the date of the new determinations but any use of the procedures up to that time would be of no effect. Unless current applicants could negotiate indigenous land use agreements with relevant native title parties, all their actions to date would be worthless. Further, because of the politics involved, new determinations cannot be guaranteed and, in any event, new determinations could not have been finalised before the expiry of the period allowed for the lodgement of an appeal.

The actions of the State and the Commonwealth in appealing the decision at least gives rise to the possibility of the high impact alternative procedures being preserved. (If an appeal was not lodged and no new determinations were made, there would be no possibility for the high impact alternative procedures to be revived.) However, any appeal will probably result in the low impact alternative procedures being re-considered by the appeal court. Therefore, the attempt to prove the high impact alternative procedures valid may place the low impact alternative procedures at risk.

The uncertainty and confusion for miners in Queensland will therefore continue until the appeal process concludes or the Commonwealth enacts validating legislation.