The Court has also sent a clear signal to the US government to deal with the issues raised in this appeal. It would not be surprising that early in 2005 the US government will announce a congressional review of the ATCA with the objective of changing the act.

JURISDICTIONAL FACT IN QUEENSLAND MINING LAW

De Lacey v Juunyjuwarra People ([2004] QCA 297)

Mining law – Native title – Jurisdiction – Jurisdictional fact

Matt Black*

INTRODUCTION

The recent Queensland Court of Appeal decision in *De Lacey v Juunyjuwarra People*[1] (*De Lacey*) involved an appeal by the State of Queensland against a decision of the Land and Resources Tribunal. Allowing the appeal, the Court of Appeal identified the non-extinguishment of native title as a condition precedent to the Tribunal's jurisdiction in the grant of certain exploration permits. The Court held that it was beyond the Tribunal's power to determine a condition precedent to its own jurisdiction in a way that had legal effect and that the Tribunal should generally not attempt to make such a determination.

This case note first briefly examines the nature of the Land and Resources Tribunal. It then sets out the facts and decision in *De Lacey*. Next, three key determinations of the Court of Appeal are identified and discussed: the Court's identification of non-extinguishment of native title as a condition precedent, the decision that the Tribunal lacked power to determine the condition precedent in a way that has legal effect and when it might be appropriate for the Tribunal to consider a condition precedent to its jurisdiction.

The article argues that there are a number of practical difficulties that arise as a consequence of *De Lacey* and that the decision stands in contrast to the approach taken in other courts. Finally, it is concluded that *De Lacey* appears to suggest an important role for the issue of jurisdictional fact in Queensland resources law and perhaps Queensland courts and tribunals generally.

THE NATURE OF THE TRIBUNAL

The distinction between an administrative tribunal on the one hand and a court of law on the other is not always an easy one to make. Professor Campbell has considered the question of what is a court of law[2], noting that the name given to a body is not determinative and that as Mahoney JA

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* Research Officer, Land and Resources Tribunal. Opinions expressed are those of the author and do not necessarily reflect those of the Tribunal or its members.

1 [2004] QCA 297.

2 E Campbell, "What are Courts of Law?" (1998) 17(1) UTasLR 19.

has said "some bodies are called courts but are not truly of that character, and some are called tribunals or commissions which … are courts"[3].

McHugh JA in the New South Wales Court of Appeal preferred a purposive approach to determining whether a body was a court[4]:

> "Legal usage also gives the word [court] several meanings. Thus a "court" may refer to a body exercising judicial power as in Ch III of the Constitution or to a body exercising non-judicial power such as the Coroners Court or to a court of petty sessions hearing committal proceedings… Function and purpose, not labels, should be our guides."

The Queensland Land and Resources Tribunal (the Tribunal) was established as a "court of record" by the *Land and Resources Tribunal Act 1999* (s 54). The Tribunal has the power to punish contempt (at least in the face of the Tribunal), has all the powers of the Supreme Court for exercising its jurisdiction and its President must be legally qualified and appointed upon the same terms as a Supreme Court judge[5].

The Tribunal has both administrative and judicial functions. For example, recommendations regarding the grant of mining leases have been characterised as an administrative function[6]. On the other hand, claims for compensation are essentially inter partes and in such cases the Tribunal exercises judicial powers, including determining claims under common law[7]. On balance, it is probably most accurate to characterise the Tribunal as a court of law rather than an administrative tribunal, although the issue was not directly considered in *De Lacey*[8].

FACTS IN *DE LACEY*

The respondent in *De Lacey* had applied for a high impact exploration permit for an area that included land over which the Juunyjuwarra People had lodged a native title claim[9]. A high impact exploration permit is defined in the *Mineral Resources Act 1989* as an exploration permit granted over land that includes non-exclusive land (s 483), being land over which native title has not been extinguished (s 422). Part 15 of the Act relevantly contains provisions that apply to the granting of a high impact exploration permit if doing so "affects native title rights and interests" (s 522).

As required under the *Mineral Resources Act 1989* the respondent consulted with the State of Queensland and the Juunyjuwarra People with a view to obtaining consent to the granting of the proposed exploration licence (ss 523 & 659).

The Tribunal's jurisdiction over the matter came into play when the respondent referred the matter to it pursuant to s 669(1) of the *Mineral Resources Act 1989*. That section provided that if there

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3 *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173 at 207-8.

4 *Australian Postal Commission v Dao (No 2)* (1986) 69 ALR 125 at 143-4.

5 *Land and Resources Tribunal Act 1999,* ss 8, 10, 63, 65.

6 See *Commonwealth v Western Australia* (1999) 160 ALR 638 at [48].

7 Such as for trespass or nuisance. See the discussion in *McDowall v Reynolds* [2004] QCA 245.

8 Although authorities cited in *De Lacey* refer to administrative bodies (at [19], [20]), the Court may not have perceived any relevant distinction between courts and administrative tribunals. Also, the Court criticised the Tribunal for likening "itself to a superior court of general jurisdiction", perhaps implicitly accepting that the Tribunal is an inferior court.

9 See: http://www.nntt.gov.au/applications/claimant/QC99_7.html.

was no agreement reached after the expiration of a certain period of negotiation, a party could refer the proposed permit to the Tribunal for a native title issues decision. A native title issues decision is a decision that the permit should be granted, granted with conditions or not granted (s 675).

Before the substantive hearing[10], the respondent sought a hearing to determine if the Tribunal had the jurisdiction to decide whether the *Starcke Pastoral Holdings Acquisition Act 1994* had extinguished native title. As a result, the Tribunal decided that it was satisfied that it did have the jurisdiction to determine whether the *Starcke Pastoral Holdings Acquisition Act 1994* had extinguished all native title rights and interests of the Juunyjuwarra People in relation to the land[11].

NATURE OF ACTION

Appeals against decisions of the Land and Resources Tribunal are on questions of law only and are directly to the Court of Appeal (*Land and Resources Tribunal Act 1999* (s 67). The State of Queensland appealed the Tribunal's decision, arguing that the Tribunal had no jurisdiction to determine whether native title had been extinguished because the Federal Court had exclusive jurisdiction to decide that question[12]. However, upon hearing the matter the Court of Appeal took a different approach and instead of considering whether the Federal Court had exclusive jurisdiction, asked whether the Tribunal had any power to decide an issue upon which its own jurisdiction depended.

THE *DE LACEY* DECISION

The Court of Appeal (Davies JA, with Mackenzie and Mullins JJ agreeing) allowed the State of Queensland's appeal and set aside the Tribunal's decision. Their Honours held that:

- non-extinguishment of native title is a "condition precedent" to the Tribunal's jurisdiction; and
- the Tribunal does not have power to decide a condition precedent in a way that has "legal effect"; and
- the Tribunal should not determine a condition precedent, unless perhaps the question is "easily resolved or the consequences of not deciding it would result in some injustice or even substantial inconvenience to a party".

The Court of Appeal explained that the non-extinguishment of native title rights was a condition precedent to the Tribunal having any jurisdiction in the grant of a high impact exploration permit (at [18] & [23]). After referring to *Parisienne Basket Shoes Pty Ltd v Whyte*[13], the Court explained that "a Tribunal cannot make a decision on that question [a condition precedent to jurisdiction] which is binding on the parties, [although] it may 'decide' it … in order to consider whether it should proceed with an application before it which presumes fulfilment or existence of that condition" (at [18]).

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10 Which is yet to transpire.
11 See *De Lacey v Juunjuwarra People & Anor* [2004] QLRT 20.
12 The Juunyjuwarra People did not take part in the appeal.
13 (1938) 59 CLR 369.

The Court determined that the Tribunal had erred by seeing itself as embarking "on a decision binding on the parties that it had jurisdiction to determine whether" the native title rights had been extinguished (at [23]). The Tribunal "did not have jurisdiction to decide that question in a way which had legal effect".

The Court held that there was no point in allowing the Tribunal to decide the question in order to decide whether it should proceed to make a native title issues decision (at [24]). This was because the Tribunal had no jurisdiction to decide the question in a way that had legal effect, the question will be in issue in the Federal Court (which is empowered to decide the question) and the question would not be easily resolved and nor would there be any injustice in not resolving it.

NON-EXTINGUISHMENT OF NATIVE TITLE AS A CONDITION PRECEDENT

It its reasons for judgment, the Court clearly held that the non-extinguishment of native title rights was a "condition precedent" to the Tribunal's jurisdiction in *De Lacey*. It was said (footnotes omitted):

> "[16] The scheme of the Act … plainly envisages that a high impact exploration permit can be granted only where native title has not been extinguished… [21] … the non-extinguishment of native title was a condition on the existence of which the jurisdiction of the Tribunal existed to hear and determine the referral under s 669. … [23] … the question … is a condition precedent to its jurisdiction to make a native title issues decision…"

In identifying non-extinguishment of native title as a condition precedent to jurisdiction, the Court of Appeal entered the realm of jurisdictional fact, which has had a sometimes controversial history[14]. A jurisdictional fact is any condition or set of conditions upon which the jurisdiction of a court or tribunal depends. The High Court has explained that:

> "The term "jurisdictional fact" (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion."[15]

For present purposes, it is sufficient to state that where a tribunal or inferior court's decision on a jurisdictional fact is challenged, a reviewing superior court must determine that jurisdictional fact for itself and will not be bound by the factual findings of the tribunal or court below[16]. Further, jurisdictional error will generally invalidate orders or decisions that reflect it[17].

As to identifying an issue as jurisdictional or otherwise, the High Court authoritatively pronounced on a number of relevant concepts in the 1995 case of *Craig v South Australia*[18]. There, in a unanimous judgment, the High Court observed (at 179) that an administrative tribunal usually:

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14 See for example: M Aronson, "The Resurgence of Jurisdictional Facts" (2001) 12 PubLR 17 and L Pearson "Jurisdictional Fact: a Dilemma for the Courts" (2000) 17(5) EPLJ 453.

15 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 169 ALR 400 per Gleeson CJ, Gummow, Kirby and Hayne JJ at [28].

16 See *Bunbury v Fuller* (1853) 9 Ex 111 at 140; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 169 ALR 400; [2000] HCA 5 at [48].

17 At least in inferior courts. See *Cameron v Cole* (1944) 68 CLR 571 at 591 and also *Craig v South Australia* (1995) 184 CLR 163 at 179-80.

18 (1995) 184 CLR 163, joint judgment of Brennan, Deane, Toohey, Gaudron and McHugh JJ.

> "… lacks authority either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law… If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

The High Court contrasted this with the position of a court of law, which has (at 179-80):

> "… authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court … Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however, ordinarily constitute jurisdictional error."

This demonstrates that most issues that come before a court of law will not be of a jurisdictional nature. Jurisdictional fact is not an area of jurisprudence to which the Queensland Court of Appeal has often turned its mind[19], but in New South Wales it is an area that has been extensively explored[20]. For example, in *Timbarra Protection Coalition Inc v Ross Mining NL*[21] the New South Wales Court of Appeal emphasised that the identification of jurisdictional fact "turns, and turns only, on the proper construction of the statute".

The New South Wales Court of Appeal has also applied *Parisienne Basket Shoes v Whyte*[22] (which was cited in *De Lacey*) to highlight an interpretative presumption against identifying an issue as a jurisdictional fact when the decision-making body in question is a court of law[23]. That Court has also held that an important, and usually determinative, indication of parliamentary intention is whether the relevant factual reference in some way necessarily arises in the course of consideration by the decision-maker in the exercise of power. Such a factual reference is unlikely

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19 Although it was considered by Chesterman J in the Supreme Court in *Chancellor Park Retirement Village Pty Ltd v Retirement Villages Tribunal* [2003] QSC 276 and has been on the periphery of some Court of Appeal cases, see for example *Carlson v Strik* [1998] QCA 179 and *CSR Ltd v Pine Rivers Shire Council* [1995] 1 Qd R 234.

20 See for example *Uniting Church In Australia Property Trust (NSW) v Industrial Relations Commission of NSW In Court Session and Anor* [2004] NSWCA 183 and the cases cited therein.

21 (1999) 46 NSWLR 55 at 63-64.

22 (1938) 59 CLR 369.

23 *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 67. The approach adopted in *Timbarra* was referred to with approval by the Queensland Supreme Court (Chesterman J) in *Chancellor Park Retirement Village Pty Ltd v Retirement Villages Tribunal* [2003] QSC 276 at [21].

to be a jurisdictional fact[24]. On the other hand, if the factual reference is preliminary or ancillary to the exercise of a statutory power, it is likely to be a jurisdictional fact[25].

In *De Lacey* the Queensland Court of Appeal has determined that non-extinguishment of native title rights is a jurisdictional fact, or in its terms a condition precedent upon which the Land and Resources Tribunal's jurisdiction depends[26]. Although the Court's reasons do not disclose the process by which it reached this conclusion, several difficulties with the decision arise.

The first difficulty is that if non-extinguishment of native title rights is a condition precedent to the Tribunal's jurisdiction it implies that jurisdiction depends upon the actual determination of native title. As the Court in *De Lacey* said, it "remains an outstanding question until it has been decided by a court competent to decide it" (at [18]). If the native title claim is later determined by the Federal Court with the effect that there was no native title over the relevant land at the relevant time, the validity of the grant of the exploration permit (and activities undertaken pursuant to it) must come into question.

The second difficulty is that the statutory scheme of the *Mineral Resources Act 1989* explicitly contemplates a subsequent finding that there was no native title over the relevant land. For example, in certain circumstances a "compensation trust decision" may be made, requiring applicants to pay money which is held in trust and, if it is eventually determined that there was no native title, returned to the applicant[27].

An alternative to making the Tribunal's jurisdiction conditioned upon non-extinguishment of native title would be to make it contingent on the existence of a registered native title claim. In fact, the Court of Appeal may have had this in mind. It briefly discusses, in a footnote to paragraph [14], the definition of "registered native title rights and interests"[28] in the *Mineral Resources Act 1989*.

However, even if the issue is re-phrased as the existence of a registered native title claim it is not clear that that issue should be characterised as a jurisdictional fact. The NSW approach would frame the "usually determinative" question as whether the existence of a registered native title claim in some way necessarily arises in the course of consideration by the Tribunal in the exercise of its power. If it does, then it should not normally be construed as a jurisdictional fact.

The *Mineral Resources Act 1989* relevantly provides that in making its native title issues decision, the Tribunal must take into account "the effect of the grant of the proposed mining lease on … the enjoyment by the registered native title parties of their registered native title rights and interests" (s

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24 *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 65.

25 Ibid.

26 The question of whether or not the Tribunal was a court of law was not addressed, so it is unknown whether the interpretive presumption against construing issues as jurisdictional should have applied. As noted earlier, the Tribunal appears to be a court of law.

27 *Mineral Resources Act 1989* (Qld), Part 18 generally and s 720.

28 The definition is: "the native title rights and interests described in the relevant entry on the Register of Native Title Claims". Note however the varying terminology used in the Act. The native title provisions in this case relevantly apply to the granting of a high impact exploration permit if doing so "affects native title rights and interests" (s 522). The Court seems to accept that the reference to "affects native title rights and interests" must mean "registered native title rights and interests".

677(1)(a))[29]. This, it is suggested, would appear to indicate that the existence of a registered native title claim may very well arise in the course of the Tribunal's determination.

For example, it is often the case that not all of the land subject to an exploration permit application is also subject to a native title claim. Thus, the Tribunal must distinguish between land over which there is a claim and land over which there is no claim. Such an issue is not strictly preliminary or ancillary to the Tribunal's jurisdiction and probably should not be viewed as a jurisdictional fact.

There is another issue that militates against the view of construing even the existence of a registered native title claim as a jurisdictional fact. In the *De Lacey* case (as in most similar cases), the registered native title claim is stated to exclude land over which native title has been extinguished by, inter alia, Act of Parliament. This means that where native title rights have in fact been extinguished (as was claimed by the applicant in *De Lacey*), then a strict reading of the native title claim means that the claim does not actually cover that land.

The end practical result would be the same as making the non-extinguishment of native title a condition precedent. If it was subsequently determined that native title had been extinguished over an area of land, then that land was never strictly within the native title claim and so there was no relevant native title claim. Again, the grant of the permit would be of questionable validity.

These issues suggest that rather than non-extinguishment of native title or the existence of a registered native title claim, the Tribunal's jurisdiction should perhaps simply depend upon a valid referral by a party pursuant to s 669(1) of the *Mineral Resources Act 1989*. That section allows a party, in certain circumstances, to refer a proposed lease to the Tribunal for a native title issues decision and thereby empowers the Tribunal to determine that matter[30]. Construing a valid referral as a condition precedent to the Tribunal's jurisdiction in native title issues decisions would not involve any of the difficulties discussed above.

There are real practical difficulties evident in the current arrangements. These could be addressed in two main ways. The first would be statutory clarification of what is required for the Tribunal[31] to have jurisdiction. Must there be actual native title rights? Must there be a registered native title claim, or must there simply be a relevant application and a valid referral to the Tribunal?

The second measure that could improve the practical implications would involve stating native title claims in more specific and conclusive ways to avoid the existence of the claim depending upon the existence of the actual native title rights.

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29 This is found in Division 4 of Part 17 of the Act which discusses mining leases. It applies to exploration permits by operation of s 523. The Tribunal's native title issues decision is a decision that the permit may be granted, may be granted with conditions, or should not be granted: s 675.

30 *Acts Interpretation Act 1954*, s 49A.

31 Or, in the near future, the proposed Queensland Land and Environment Court into which the Tribunal will be merged.
See: http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?id=2746&db=media.

No Power to Determine Condition Precedent

The second major determination made by the Court of Appeal in *De Lacey* was that the Tribunal lacked any power to determine a condition precedent to its jurisdiction in a way that has legal effect. The Court said:

> "[17] There is no provision of the [Mineral Resources] Act which contemplates an application to the Tribunal such as that made [that is, to decide if it had a particular jurisdiction] … or any decision by the Tribunal of the question stated in that application [that is, to decide if native title had been extinguished] …The Tribunal plainly saw its jurisdiction to make the decision which it did make, in or implied by s 669 [of the Act, which empowers the Tribunal to make a native title issues decision]."

Here, the Court identified two separate but related questions:

1. Does the Tribunal have the power to entertain an application for a decision on whether or not it has a particular jurisdiction?
2. Does the Tribunal have power to decide a condition precedent to its jurisdiction?

The Court pointed out that there is no provision in the *Mineral Resources Act 1989* that expressly gives the Tribunal power to do either of those things. The Court was of the view that the Tribunal did not have any relevant jurisdiction other than that conferred by that Act (at [17]). There was no specific reference in the judgment to s 65 of the *Land and Resources Tribunal Act 1999* which provides that the Tribunal has "for exercising jurisdiction conferred under this or another Act, all the powers of the Supreme Court…", although in the course of argument counsel for the respondent briefly mentioned it.

It was accepted by the Court that the Tribunal could "decide" a condition precedent to its jurisdiction "in order to consider whether it should proceed with an application before it" but such a "decision" would have "no binding force" (at [18]) and no "legal effect" (at [23]).

The Court gave the example of *R v Hickman; Ex parte Fox and Clinton*[32] as "a useful example of this principle" (at [19]). *Hickman* is a High Court war-time case that is famous for its principles relating to privative clauses[33]. A board had power to settle disputes arising "in the coal mining industry" and its decisions were made to be not susceptible to review (the privative clause). The board decided that certain transport operators were working in the mining industry. The High Court determined that the privative clause could not oust that court's power to review the decision because the power of the board was limited to the coal mining industry. Dixon J said (at 618):

> "I do not mean to say that the Board may not, for the purpose of determining its own action, 'decide' in the sense of forming an opinion upon the meaning and application of the words 'coal mining industry'. It must make up its mind whether this or that particular function on

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32 (1945) 70 CLR 598.

33 See for example Sarah Ford "Judicial Review of Migration Decisions: Ousting The Hickman Privative Clause?" [2002] MULR 28; and David Bennett AO QC, *Privative Clauses - An Update on the Latest Developments*, <http://www.nationalsecurity.gov.au/www/agdHome.nsf/Alldocs/RWP696F4156743FA1D0CA256CE900077DCA?OpenDocument>.

> the borders of the coal mining industry does or does not fall within the conception. But it is not able to make a decision binding on the parties…"

The *De Lacey* judgment also quoted from the Administrative Appeals Tribunal (AAT) decision of *Re Adams and the Tax Agents' Board*[34] where Brennan J (then the President of the AAT) said (at 242):

> "An administrative body with limited authority is bound, of course, to observe those limits. Although it cannot judicially pronounce upon the limits, its duty not to exceed the authority conferred by law upon it implies a competence to consider the legal limits of that authority, in order that it may appropriately mould its conduct. In discharging its duty, the administrative body will, as part of its function, form an opinion as to the limits of its own authority. The function of forming such an opinion for the purpose of moulding its conduct is not denied to it merely because the opinion produces no legal effect."

The Federal Court has also quoted this passage of Brennan J's, interpreting it thus:

> "The duty is here seen as one not to go beyond authority. The duty must carry with it an obligation to form an opinion based on a consideration of the relevant circumstances and applicable legal principles. By the expression "legal effect" his Honour [Brennan J in *Adams*] is, of course, emphasising that the administrative body cannot make a binding or conclusive determination of its own jurisdiction."[35]

This power to "decide" jurisdictional issues in a limited way is presumably implied by the substantive empowering provision (here s 669 of the *Mineral Resources Act 1989*). The logical flip-side of this limited power to "decide" a condition precedent must be that if the Tribunal "decides" such a condition and concludes that it has not been satisfied, the Tribunal must have the power to dismiss an application for want of jurisdiction. This proposition is consistent with earlier Queensland Court of Appeal authority.

In the 1993 case of *CSR Ltd v Pine Rivers Shire Council*[36] a strong Court of Appeal bench considered the powers of the Queensland Planning and Environment Court. Macrossan CJ and Fitzgerald P noted that the Planning and Environment Court "is an inferior court of record … [and] its jurisdiction is limited by statute", but accepted that the "Court has power to dismiss a proceeding brought before it which is outside its jurisdiction" (at [13]). The terms of the judgment suggest that not only did the parties not argue to the contrary, but having turned their minds to the question, their Honours were satisfied that the Planning and Environment Court did have that power.

Relevantly, their Honours reviewed a number of authorities that discussed the powers of statutory inferior courts of limited jurisdiction. They referred with approval to *John Fairfax and Sons Ltd v Police Tribunal of NSW*[37], where McHugh JA (as he then was and with Glass JA agreeing) said:

> "… an inferior court of record created by statute… can have no powers, jurisdictions or authorities other than those authorised by the Act… Nonetheless as Lord Morris of Borth-

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34 (1976) 12 ALR 239.
35 *Trajkovski v Telstra Corporation Ltd* (1998) 153 ALR 248 at 256.
36 [1993] QCA 549; [1995] 1 Qd R 234.
37 (1986) 5 NSWLR 465 at 476.

> y-Gest pointed out in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1301 there "can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction."

The High Court has also considered the powers of courts of limited jurisdiction. In *Grassby v The Queen*[38] Dawson J noted that inferior courts have only the jurisdiction entrusted to them by statute and have no inherent jurisdiction in the strict sense. However, his Honour explained (at 16) that:

> "… notwithstanding that its powers may be defined, every court undoubtedly possesses jurisdiction arising by implication upon the principle that a grant of power carries with it everything necessary for its exercise (ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest)."

The High Court has subsequently expanded on this statement, explaining that "necessary" in this context "does not have the meaning of 'essential'; rather it is to be 'subjected to the touchstone of reasonableness'": *Pelechowski v Registrar, Court of Appeal (NSW)*[39]. In that case, the High Court also approved of the statement of Pollock CB in *Attorney-General v Walker*[40]: "It may be stated as a general rule that those things are necessary for the doing of a thing which are reasonably required or which are legally ancillary to its accomplishment."

These authorities suggest that where a body is given jurisdiction with regards to a particular matter, it is also given an implied power to do all things that are necessary or reasonably required for the effective exercise of that jurisdiction. In *De Lacey* the Queensland Court of Appeal has narrowly drawn the limits of this implied jurisdiction of the Land and Resources Tribunal.

The reason for the Court in *De Lacey* construing the Tribunal's jurisdiction as so limited appears to be based on the principle that tribunals and courts generally cannot conclusively determine jurisdictional fact. Making such determinations final and conclusive would allow such bodies to grant themselves new jurisdiction through their own decisions.

There are two key implications arising from this inability to conclusively determine jurisdictional fact. The first, which seems both logical and necessary, is that unlike other facts determined at first instance, it will always be for the superior court to inquire into that fact for itself[41]. The second implication of construing an issue as a jurisdictional fact goes to the results of an incorrect determination of the fact. Dixon J in *Parisienne Basket Shoes Pty Ltd v Whyte*[42] discussed that implication, saying (in a passage cited in *De Lacey*):

> "… if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that

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38 *Grassby v The Queen* (1989) 168 CLR 1 at 16-17.

39 [1999] HCA 19; (1999) 198 CLR 435 at [51], citing *State Drug Crime Commission of NSW v Chapman* (1987) 12 NSWLR 447 at 452.

40 (1849) 3 Ex 242; 154 ER 833.

41 See *Bunbury v Fuller* (1853) 9 Exch 111; 156 ER 47; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Corporation of the City of Enfield v Development Assessment Commission* (2000) 169 ALR 400 at [48].

42 (1938) 59 CLR 369.

> question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid."[43]

The reason that the validity of proceedings remains outstanding where legislation makes a court's jurisdiction contingent upon the existence of a state of facts is that if those facts do not exist then the court has no jurisdiction. Here, there has been a traditional distinction between inferior and superior courts. Orders of inferior courts in excess of jurisdiction are said to be void ab initio[44], whereas orders of superior courts in excess of jurisdiction are valid until or unless set aside[45].

Interestingly, it has been said that this "distinction is one which, applied to administrative decisions, has virtually been abandoned"[46]. Thus in *R v Balfour; Ex parte Parkes Rural Distributions*[47] the Federal Court (Wilcox J) explained (at 263-4):

> "Although this was not so clear in earlier times, it is now accepted that, however apparent the defect may be, an administrative decision remains good in law unless and until it is declared to be invalid by a court of competent jurisdiction: see *Smith v East Elloe Rural District Council* [1956] AC 736 at 769-70 *Durayappah v Fernando* [1967] 2 AC 337; *Calvin v Carr* [1980] AC 574 at 589-90; (1979) 22 ALR 417; and *Forbes* [*v New South Wales Trotting Club* (1979) 25 ALR 1; 143 CLR 242] (CLR) at 277."

In *Balfour* his Honour also quoted with approval Wade, *Administrative Law:*[48]

> "The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid."

The traditional void/voidable distinction between inferior and superior courts leads to a situation where inferior courts are essentially empowered to decide jurisdictional fact correctly, but not incorrectly. That is, an incorrect decision on a jurisdictional fact will invalidate the proceedings. The High Court in *Craig v South Australia*[49] has mitigated the position somewhat by narrowing the ambit of jurisdictional error in inferior courts, but as *De Lacey* demonstrates, the difficulty remains.

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43 At 391. His Honour then went on to caution against interpreting legislation in that way in respect of courts of law, a principle embraced at least in NSW: *Timbarra Protection Coalition Inc v Ross Mining NL & Ors* (1999) 46 NSW LR 55.

44 Note though that in *Craig v South Australia* (1995) 184 CLR 163 at 179-80 the High Court held that most errors of an inferior court will not be jurisdictional in nature.

45 *Cameron v Cole* (1944) 68 CLR 571 at 591. See also E Campbell "Inferior and Superior Courts and Courts of Record" (1997) 6 JJA 249 at 259.

46 E Campbell "Inferior and Superior Courts and Courts of Record" (1997) 6 JJA 249 at 258.

47 (1987) 76 ALR 256.

48 (5th ed), p 314.

49 (1995) 184 CLR 163.

Of course, even if orders of an inferior court made in excess of jurisdiction are void from the beginning, it does not necessarily follow that the court should be construed as having no power to decide jurisdictional fact. Indeed, in practice a body of limited jurisdiction must always decide if it has jurisdiction in a matter[50]. At one extreme, a person who mistakenly attempts to lodge a Land Court matter with the Land and Resources Tribunal will be appropriately redirected by registry staff. At the other extreme, most mining lease referrals to the Tribunal are so obviously within jurisdiction that the question does not arise. Somewhere in the middle of these extremes are the cases where jurisdiction is disputed. It is difficult to see how, in practice, any court or tribunal of limited jurisdiction can avoid deciding a jurisdictional question, even if that decision is implicit.

Perhaps with this position in mind, federal administrative tribunals have been treated as having not just the power to inquire into jurisdictional fact, but a positive duty to do so. For example, in *Trajkovski v Telstra Corporation Ltd*[51] (a decision cited in *De Lacey*) the Federal Court took the view that the Administrative Appeals Tribunal (AAT) had a duty to examine and determine jurisdictional questions. After a review of numerous authorities[52], Tamberlin J held (at 256-7) that the approach in those cases:

> "lends support to the proposition that the AAT, in the present case, has the competence and authority to determine whether it has jurisdiction. It is not bound to decline jurisdiction simply because the jurisdictional question cannot be described as a 'reviewable decision' and it must consider antecedent matters going to its jurisdiction in order to enable it to perform its primary function.
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> …
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> Also, there is a line of English authority to the effect that, if a certain state of facts has to exist before a tribunal has jurisdiction, it can inquire into the facts in order to decide whether it has jurisdiction but it cannot give itself jurisdiction by wrong decision upon those facts."[53]

Similarly, the Federal Court has held that the National Native Title Tribunal must, where a party challenges its jurisdiction, make due inquiry about whether it has that jurisdiction. In *Mineralogy Pty Ltd v National Native Title Tribunal*[54] (another case cited in *De Lacey*) Carr J stated (at 478):

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50 For example, Sir Gerard Brennan, the first President of the Administrative Appeals Tribunal, later made a speech as Chief Justice of the High Court and commented that "the AAT was bound first to ascertain its own jurisdiction": http://www.hcourt.gov.au/speeches/brennanj/brennanj_aat2.htm.

51 (1998) 153 ALR 248.

52 Including *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 and *Re Cilli's Objection* (1970) 15 FLR 426, where Blackburn J noted at 428 that an administrative body "must satisfy itself that all its proceedings are in accordance with the law. It must therefore receive and consider, whenever the point is taken, an argument that it has no jurisdiction. To say that is, in truth, to say no more than that it must at all times act lawfully".

53 Citing: *R v Fulham, Hammersmith and Kensington Rent Tribunal; Ex parte Zerek* [1951] 2 KB 1 at 6; *R v Kensington and Chelsea (Royal) London Borough Rent Officer; Ex parte Noel* [1978] QB 1 at 9; Wade, *Administrative Law* (6th ed), 1988, pp 283–8; de Smith, *Judicial Review of Administerial Action* (4th ed), 1980, at 110 ff.

54 (1997) 150 ALR 467.

> "I do not think that it is open to the tribunal, where its jurisdiction or authority is under challenge, to take the course of assuming that it has jurisdiction and authority on the basis that having to decide the question would involve consideration of complex matters of fact and law. The High Court, in the cases which I have cited above[[55]], referred to "sufficient inquiry" and, where the jurisdiction is disputed, to "adequate and careful inquiry" as being the duty of such a tribunal before accepting jurisdiction."

The High Court cases referred to in *Mineralogy* were *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd*[56] and *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia*[57]. The *Federated Engine-Drivers* case dealt with a case stated by the Commonwealth Court of Conciliation and Arbitration. Barton J said (at 428):

> "It is as wrong to accept jurisdiction without sufficient inquiry as to refuse it with precipitancy. Where the jurisdiction is disputed, adequate and careful inquiry is still the duty of the Court at first instance, just as it may become the duty of the superior Court. On the other hand, where the jurisdiction is not contested by the party defending, very slight inquiry may be adequate, and many cases will to the mind of the tribunal be so plainly within its competence that it will rightly forego inquiry unless the objection is taken…"

Blakeley concerned the decision of a Commonwealth Conciliation Commissioner. Latham CJ explained that the Commissioner had "properly made the preliminary inquiry as to the existence of the alleged disputes" upon which jurisdiction was contingent. His Honour said (at 70):

> "But the Commissioner cannot conclusively determine the question of the existence of a dispute. He cannot give himself jurisdiction by wrongly deciding this question of fact. The actual existence of a dispute is a condition of the exercise by the Commissioner of his power to determine a dispute."

After considering these cases, the Federal Court in *Mineralogy* decided that:

> "[when] a party to proceedings before the [National Native Title] tribunal challenges its jurisdiction or authority, it is the duty of the tribunal to make due inquiry about whether it has that jurisdiction or authority."

Returning to *De Lacey*, it can be seen that the Queensland Court of Appeal has taken a very different approach. It has concluded that the Land and Resources Tribunal should generally not inquire into the existence of its own jurisdiction, even when that jurisdiction is challenged. However, as discussed next, the situations where it should make such inquiry are unclear.

Should not "decide" Condition Precedent

The final aspect of *De Lacey* to be discussed here deals with when the Tribunal should "decide" a condition precedent for the purposes of determining whether to proceed with a matter that has

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55 The two key cases cited were *Federated Engine-Drivers and Firemen's Association of Australasia v Broken Hill Pty Co Ltd* (1911) 12 CLR 398 and *R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1950) 82 CLR 54.

56 (1911) 12 CLR 398.

57 (1950) 82 LCR 54.

come before it. The Court of Appeal identified three criteria as the basis for its decision not to allow the Tribunal to determine the condition precedent in *De Lacey*.

The first criterion asks whether the Tribunal has jurisdiction to decide the condition precedent. *De Lacey* suggests that such a power must be given expressly by the enabling legislation and if it is not, then the Tribunal should generally not attempt to decide the condition precedent. Nothing on the face of the judgment indicates that there is anything unique about the Tribunal that attracts this principle, so the principle appears to apply to all the Queensland tribunals[58] and courts[59] of limited jurisdiction.

The second criterion in *De Lacey* related to the fact that the condition precedent (the non-extinguishment of native title) was a question that "will plainly be in issue in the matter presently before the Federal Court". Thus, if a condition precedent is a matter that will be in issue before another court, the Tribunal generally should not attempt to decide it.

Finally, the Court seems to have identified the types of cases where it may be appropriate for the Tribunal to consider a jurisdictional fact. It was said (at [26]) that:

> "…it might be appropriate for the Tribunal to 'decide' the existence or fulfilment of a condition precedent to its jurisdiction where that question may be easily resolved or the consequences of not deciding it would result in some injustice or even substantial inconvenience to a party…"

It is difficult to reconcile this position with the authorities. As was said in *Mineralogy*, a tribunal should not assume jurisdiction merely because the jurisdictional challenge involves "consideration of complex matters of fact and law"[60]. Nevertheless, *De Lacey* appears to leave it open to parties to raise a jurisdictional challenge in proceedings before the Tribunal so long as the party can satisfy the Tribunal that the question will be easily resolved or there would be injustice or substantial inconvenience as a result of not resolving the issue. Presumably, the implied powers of the Tribunal extend far enough for it to decide those questions.

CONCLUSION

De Lacey appears to demonstrate that the issue of jurisdictional fact will play an important role in Queensland resources law and perhaps in the inferior courts and tribunals more generally. The decision at least establishes that where the existence of particular facts (here non-extinguishment of native title) is a condition upon which the jurisdiction of the Land and Resources Tribunal rests, the Tribunal should not normally embark upon an inquiry into the status of those facts, even when a party challenges jurisdiction.

There are a number of practical difficulties stemming from *De Lacey* and it marks a different approach than that taken in other jurisdictions. This may be due to the fact that the issue upon which *De Lacey* was decided only arose at the hearing of the appeal and the Court was without the benefit of detailed submissions on the point.

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58 Such as the Commercial and Consumer Tribunal, the Guardianship and Administration Tribunal and the Children Services Tribunal.

59 Such as the Planning and Environment Court, the Land Court, the Magistrates Court and, at least in some circumstances, the District Court.

60 *Mineralogy Pty Ltd v National Native Title Tribunal* (1997) 150 ALR 467 at 478.

A key principle to emerge form *De Lacey* is that a body of limited jurisdiction does not have power to decide jurisdictional fact unless that power has been expressly conferred. Given that the Land and Resources Tribunal is a "court of record"[61], this *De Lacey* principle may have implications for the other inferior courts of Queensland[62]. In light of the conflicting practices in other jurisdictions, it is unclear what direction future Queensland judgments dealing with jurisdictional fact will take.

Finally, the *De Lacey* judgment leaves the parties in that case in somewhat of a dilemma. The Court of Appeal has prevented the Tribunal from deciding whether native title has been extinguished but has not decided that question itself. The applicant in *De Lacey*, if he is to pursue his claim of extinguishment, must presumably now apply to the Federal Court (or perhaps the Supreme Court) for a ruling on the question.

THE NORTHERN TERRITORY *POWER GENERATION CASE*: GOVERNMENT OWNED BUSINESSES REQUIRED TO COMPLY WITH *TRADE PRACTICES ACT* STANDARDS OF COMPETITION BEHAVIOUR

NT Power Generation Pty Ltd v Power and Water Authority (High Court of Australia, unreported, 6 October 2004, [2004] HCA 48)

Section 2B Trade Practices Act – When applies to a Governmental authority so that s 46, dealing with misuse of market power, will apply to the activities of that authority – Proprietary rights no shield to breach of s 46 determined by abuse of market power – Derivative (Bradken) Crown immunity not available to a non-Crown body where being bound by statute would impact to financial prejudice of Crown but would not impact on Crown legal or proprietary interests

Steven Churches*

BACKGROUND

The High Court handed down its decision in *NT Power Generation Pty Ltd v Power and Water Authority*[1] on 6 October 2004, the majority (McHugh ACJ, Gummow, Callinan and Heydon JJ) upholding the appeal, Kirby J alone dissenting. The decisions of Mansfield J at first instance[2] and of the Full Federal Court[3] dismissing an appeal, were overturned, with important repercussions for

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61 *Land and Resources Act 1999,* s 54.

62 Such as the District Court (*District Court of Queensland Act 1967*, s 8), the Land Court (*Land Court Act 2000*, s 4(2)) and the Planning and Environment Court (*Integrated Planning Act 1997*, s 4.1.1(2)).

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1 [2004] HCA 48.

2 (2001) 184 ALR 481.

3 (2002) 122 FCR 399 (Lee and Branson JJ, Finkelstein J dissenting).