SUPREME COURT OF QUEENSLAND

CITATION:	*De Lacey v Juunyjuwarra People & Anor* [2004] QCA 297
PARTIES:	**RALPH DE LACEY** (applicant/second respondent) v **JUUNYJUWARRA PEOPLE** (first respondent/first respondent) **STATE OF QUEENSLAND** (second respondent/appellant)
FILE NO/S:	Appeal No 2798 of 2004 NTXP00130 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Land and Resources Tribunal at Brisbane
DELIVERED ON:	13 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2004
JUDGES:	Davies JA, Mackenzie and Mullins JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Set aside the decision of the Land and Resources Tribunal of 27 February 2004** **3. In lieu, dismiss the application to that Tribunal dated 12 December 2003** **4. The parties to deliver written submissions as to costs within seven days of 13 August 2004**
CATCHWORDS:	MINING LAW - LEGISLATION RELATING TO MINING FOR MINERALS - MINERS' RIGHTS AND MINING LICENCES, TENURES AND INTERESTS - EXPLORATION LICENCES - where the Land and Resources Tribunal decided it had the jurisdiction to determine as a preliminary issue whether the *Starcke Pastoral Holdings Acquisition Act* 1994 (Qld) extinguished all native title rights and interests of the Juunyjuwarra People in relation to an application for a high impact exploration permit - where the appellant contends the Land and Resources Tribunal has no jurisdiction to determine the matter - where there are already proceedings filed in the Federal Court to determine the issue of native title interests - whether the

Mineral Resources Act 1989 confers on the Land and Resources Tribunal the jurisdiction necessary to determine the matter as it did - whether the appeal should be allowed

Mineral Resources Act 1989 (Qld), s 669
Native Title Act 1993 (Cth)
Starcke Pastoral Holdings Acquisition Act 1994 (Qld)

Re Adams and the Tax Agents' Board (1976) 12 ALR 239, cited
R v Hickman; ex parte Fox and Clinton (1945) 70 CLR 598, cited

COUNSEL: P J Flanagan SC, with J M Horton, for the appellant
J K Khatri (sol) for the first respondent
G E Hiley QC, with P R Smith, for the second respondent

SOLICITORS: C W Lohe, Crown Solicitor, for the appellant
Ebsworth & Ebsworth for the first respondent
MacDonnells for the second respondent

[1] **DAVIES JA:** On 27 February this year the Land and Resources Tribunal decided that:

1. the Tribunal is satisfied that it has the jurisdiction to determine whether the *Starcke Pastoral Holdings Acquisition Act* 1994 extinguished all native title rights and interests of the Juunyjuwarra People in relation to the land the subject of EPM13435;
2. that question will be determined by the Tribunal as a preliminary issue.

[2] This is an appeal from that decision. The appellant is the State of Queensland which was the second respondent in the application before the Tribunal. Ralph De Lacey who is the second respondent to the appeal was the original applicant before the Tribunal. And the Juunyjuwarra People who were the first respondent in the application are the first respondent in this appeal. The Juunyjuwarra People have indicated that they will abide by the order of the Court.

[3] The *Native Title Act* 1993 recognizes and protects native title.[1] It provides that native title is not able to be extinguished contrary to it.[2] Division 3 of Part 2 deals mainly with future acts. Subdivision P of that Division, which provides for rights to negotiate, applies to certain future acts including the grant of exploration rights.[3]

[4] Section 25, which is in Subdivision P of Division 3, provides that before any such act is done the parties[4] must negotiate with a view to reaching agreement about the act and that, if they do not, an arbitral body or a minister will make a determination

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1 *Native Title Act* 1993 s 10.

2 *Native Title Act* 1993 s 11.

3 *Native Title Act* 1993 s 24AA(1); s 25(1)(a); s 233(1)(a)(ii), (c); s 253, definition of "mine".

4 That is, the State, the Juunyjuwarra People and Mr De Lacey: *Native Title Act* 1993 s 29, s 30, s 30A.

about the act. As well, it provides that if those procedures are not complied with, the act will be invalid to the extent that it affects native title. Section 43, also in that subdivision, provides for alternative provisions to those contained in the subdivision, in relation to those acts (relevantly the conferral of mining rights) if approved by the Commonwealth minister. Parts 15 and 17 of the *Mineral Resources Act* 1989 to which I shall shortly refer, are such provisions that apply in respect of applications lodged after 18 September 2000 and on or before 31 March 2003 over land subject to native title.

[5] On 16 April 1999 the Juunyjuwarra People applied to the Federal Court claiming certain native title rights and interests over specified land. The application was made pursuant to s 61 of the *Native Title Act* 1993 (Cth) which is in Part 3 thereof. The application is described in that application as a "Native title determination application".

[6] Part 4 of the *Native Title Act* provides for determination by the Federal Court of any question in relation to native title. Section 81, which is in that Part, provides:

> "The Federal Court has jurisdiction to hear and determine applications filed in the Federal Court that relate to native title and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court."

[7] On 2 August 2001 Mr De Lacey applied to the Department of Mines and Energy, pursuant to s 133 of the *Mineral Resources Act* 1989 ("the Act") for a high impact exploration permit over land which included part of the land the subject of the application by the Juunyjuwarra People.[5] A "high impact exploration permit" is relevantly defined as:

> "an exploration permit that -
> (a) is granted over land that is, or includes, non-exclusive land; and
> (b) allows activities to be carried out that are not limited to low impact activities."[6]

[8] The term "non-exclusive land" is, in turn, relevantly defined to mean "land over which native title has not been extinguished, but only to the extent that the land is a place mentioned in section 26(3) of the Commonwealth Native Title Act".[7] It is common ground that the land the subject of these proceedings is a place mentioned in s 26(3) of the *Native Title Act*. But it follows from this definition that a high impact exploration permit can be granted only in respect of land that is or includes land over which native title has not been extinguished; similarly with a low impact exploration permit.[8]

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5 The heading of the application described it simply as an application for an exploration permit but the application indicated that it was to be over non-exclusive tenures and to be conditioned for high impact.

6 *Mineral Resources Act* 1989 s 483. Cf s 650(2). Unless where indicated to the contrary, section numbers are of sections of the Act.

7 Section 422.

8 See s 481.

[9] Presumably if native title had been extinguished or if there had been no question of native title, an applicant such as Mr De Lacey would have been entitled to an exploration permit pursuant to Part 5 of the Act. However, by making an application for a high impact exploration permit, Mr De Lacey appears to have assumed that the land the subject of the application was land that is or includes land over which native title had not been extinguished.

[10] Having filed the application for a high impact exploration permit Mr De Lacey was required, as was the State of Queensland and the Juunyjuwarra People, to consult and negotiate in good faith with a view to obtaining the agreement of the Juunyjuwarra People to the granting of the proposed exploration licence and to any conditions to be complied with.[9] As part of that process Mr De Lacey was obliged to consult the Juunyjuwarra People about ways of minimizing the impact of the grant of the proposed licence on their native title rights and interests.

[11] The evidence of compliance by Mr De Lacey with Subdivision 3 of Division 4 of Part 17 of the Act is sparse. However he appears to have taken some steps to that end. He swore that on 8 February 2002 he sent the Juunyjuwarra People a written request to arrange a meeting to begin consultation and negotiation as required by that subdivision. He then purported to refer to an affidavit of Andrew Macrae Kerr which he said set out steps taken by his solicitors to fulfil his obligations in that respect, but that affidavit is not part of the material before this Court if it was ever filed. However in his letter to the President of the Tribunal on 9 February 2004 Mr De Lacey said that since 2 August 2000:

> "I have endeavoured to negotiate an Indigenous Land Use Agreement with the native title claimants (the Juunjuwarra [sic] People) and the State. The State has always been an extremely reluctant participant, but nevertheless we have continued to try to progress the negotiations.
>
> During the long period that we have been trying to progress towards a negotiated agreement …
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> When the State agreed to the conditions set by the Queensland Indigenous Working Group to allow the use of expedited procedure on Exploration Permits, this effectively torpedoed our negotiations with the Juunjuwarra [sic] People. Because of this impasse we asked that LRT decide the matter."

This may not be sufficient to satisfy proof that the above requirements have been complied with. But it does show that the application proceeded pursuant to Subdivision 3 of Division 4 of Part 17.

[12] Section 669(1) of the Act provides:

> "If the pre-referral period has ended, but a negotiated agreement has not been reached, a consultation and negotiation party for the proposed mining lease may refer the proposed mining lease to the tribunal for a decision under this division (a '**native title issues decision**')."

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[9] Section 659. That section is in Division 4 of Part 17 headed "NATIVE TITLE PROVISIONS FOR MINING LEASES". However Part 15 headed "NATIVE TITLE PROVISIONS FOR EXPLORATION PERMITS" applies Division 4 of Part 17 to applications for high impact exploration permits: s 523.

[13] It seems that the "pre-referral period" ended on or about 22 April 2002.[10] On 10 October 2003 Mr De Lacey referred the proposed permit to the Tribunal pursuant to s 669.

[14] A native title issues decision is a decision of the Tribunal that the exploration permit be granted, be granted subject to conditions or be not granted.[11] But such a decision assumes the existence of native title and determines, amongst other things, the effect of the grant of the proposed permit upon the enjoyment by the registered native title parties of their registered native title rights and interests.[12]

[15] On 12 December 2003 Mr De Lacey filed an application in the Land and Resources Tribunal described as an "application in a proceeding", the proceeding, of course, being the referral of 10 October 2003. In the application he sought the following orders:

> "A Hearing by the Land and Resources Tribunal to determine if the Land and Resources Tribunal has the jurisdiction to decide wether [sic] current or past State legislation has extinguished native title over part or all of Exploration Permit for Minerals application number 13435.
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> This is not a question of determining native title.
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> The question is wether [sic] the Land and Resources Tribunal can peruse evidence put before it regarding legislation that clearly implies native title extinguishment (eg State acquisition) and decide if, under the current understanding of the law, that legislation has extinguished native title."

The respondents to the application were stated to be Cape York Land Council[13] and the State of Queensland. That is the application upon which the decision the subject of this appeal was made.

[16] The scheme of the Act, as I have described it, plainly envisages that a high impact exploration permit can be granted only where native title has not been extinguished over the land or part of the land the subject of the application; and to apply for such a permit necessarily recognizes that. Otherwise, presumably, an exploration permit other than a high impact or low impact exploration permit would be sought. Here the applicant has not only applied for a high impact exploration permit but also embarked on a process of consultation and negotiation and referral to the Tribunal

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10 "Pre-referral period" is defined in s 669(6) as, in effect, six months from the notification day which was 22 October 2001.

11 Section 675 of the Act.

12 See s 677(1)(a)(i). The term "registered native title rights and interests" is defined in s 422, relevantly, as "the native title rights and interests described in the relevant entry on the Register of Native Title Claims". Those are the rights and interests claimed in the claim by the Juunyjuwarra People dated 19 March 1999, the Registrar having accepted that claim as prima facie established: *Native Title Act* s 186(1)(g). It is not a necessary prerequisite of a referral to that Tribunal for a native title issues decision that negotiation be at an end. On the contrary Subdivision 4 of Division 4 of Part 17 of the Act assumes continuity of negotiations notwithstanding such referral. See, for example s 670.

13 The Cape York Land Council was representing the Juunyjuwarra People.

for a native title issues decision on the assumption that native title has not been extinguished.[14]

[17] There is no provision of the Act which contemplates an application to the Tribunal such as that made on 12 December 2003 or any decision by the Tribunal of the question stated in that application.[15] There is a general jurisdiction provision in the Act, s 363, but that section must be read in the context of the specific provisions which permit application to and decision by the Tribunal. It is not contended that the Tribunal has any relevant jurisdiction other than that conferred by the Act; nor, in my opinion, could it be so contended. The Tribunal plainly saw its jurisdiction to make the decision which it did make, in or implied by s 669.

[18] Where, in a proceeding otherwise properly instituted in a Tribunal, there remains a condition upon whose fulfilment or existence the jurisdiction of the Tribunal exists (here non-extinguishment of native title), the fulfilment or existence of that condition remains an outstanding question until it has been decided by a court competent to decide it.[16] However although such a Tribunal cannot make a decision on that question which is binding on the parties, it may "decide" it, though its "decision" has no binding force, in order to consider whether it should proceed with an application before it which presumes fulfilment or existence of that condition.

[19] *The King v Hickman; ex parte Fox and Clinton*[17] is a useful example of this principle. In that case a board set up under certain regulations had power to settle disputes arising "in the coal mining industry". It was held that the authority of the board was limited to the coal mining industry. Having concluded that the orders under consideration in that case were not made to decide a matter in the coal mining industry, Sir Owen Dixon said:[18]

> "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 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 within the meaning of reg. 9, because that is the very matter which governs the extent of the operation of reg. 9, among other regulations."

[20] Brennan J in *Re Adams and the Tax Agents' Board*[19] made the same point when he said:[20]

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14 That is because the negotiation procedure in Division 4 of Part 17 (applied to high impact exploration permits by s 523) assumes that native title has not been extinguished in respect of the land as does a native title issues decision: s 677(1)(a)(i) and s 422.

15 The following are the only sections of the Act which permit decisions by the Tribunal: s 40 and s 42, s 70, s 78, s 83, s 85, s 86, s 118, s 120, s 125, s 174, s 194A, s 222, s 250, s 269, s 278A, s 281, s 282, s 283B, s 380, s 381, s 406, s 436A, s 491A, s 547A, s 675 s 709 ff.

16 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 391 per Dixon J.

17 (1945) 70 CLR 598.

18 At 618.

19 (1976) 12 ALR 239.

> "An administrative body cannot therefore lawfully exercise authority merely because it is of the opinion that it has the authority. Its opinion is not the charter of its powers and discretions. It derives its powers and discretions from and in accordance with the law. It is the court's judgment and not the administrative body's opinion which defines the extent of … its statutory authority.
> …
> 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."[21]

[21] In the limited way in which I have described it, the Tribunal would have had power to "decide" the question which it held it had jurisdiction to decide. That is because 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. But that is plainly not the limited basis on which it decided that it had that jurisdiction, as its reasons reveal.

[22] Having rejected the contention that s 81 of the *Native Title Act* 1993 conferred exclusive jurisdiction on the Federal Court to decide these questions, the Tribunal said:

> "However like Levine J,[22] we do not see anything in the NTA which expressly or impliedly ousts a State court's (or tribunal's) jurisdiction to determine whether extinguishment of native title has occurred."

The underlining is mine.

[23] In this passage the Tribunal likened itself to a superior court of general jurisdiction. It is plain therefore that the Tribunal, in making the decision which it did, did not see itself as embarking on a "decision" in the limited sense in which I have described it but on a decision binding on the parties that it had jurisdiction to determine whether the *Starcke Pastoral Holdings Acquisition Act* 1994 extinguished all native title rights and interests of the Juunyjuwarra People in relation to the subject land. That view is plainly wrong. It is a statutory tribunal having only the jurisdiction conferred on it by statute, relevantly the Act. And the question which it decided it had jurisdiction to determine is a condition precedent to its jurisdiction to make a native title issues decision pursuant to Subdivision 4 of Division 4 of Part 17

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20 At 242.

21 See also *Re Cilli's Objection* (1970) 15 FLR 426 at 428; *Trajkovski v Telstra Corporation Ltd* (1998) 153 ALR 248 at 254 - 255. *Mineralogy Pty Ltd v National Native Title Tribunal & Ors* (1997) 150 ALR 467 is an example of the application of that principle to the Native Title Tribunal; see at 473 - 474.

22 In *Wilson v Anderson & Ors* (1999) 156 FLR 77.

of the Act.[23] It therefore did not have jurisdiction to decide that question in a way which had legal affect.

[24] It remains to consider whether there would be any point in the Tribunal "deciding" this question in order to decide whether it should proceed to make a native title issues decision. For a number of reasons I can see no point in permitting that course. The first is that, as I have already concluded, it plainly does not have jurisdiction to decide that question. Neither s 43 of the *Native Title Act* nor s 669 of the Act confer or even contemplate that jurisdiction. It would be an odd result if this Court, having concluded that the Tribunal had no jurisdiction to decide the question, permitted it to do so even in a tentative, non-binding, sense.

[25] Secondly the question will plainly be in issue in the matter presently before the Federal Court which is empowered to and competent to decide that question. I do not find it necessary to decide whether that court has exclusive jurisdiction to decide that question in the present context.

[26] And thirdly, whilst 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, neither is the case here. The question is potentially complex and may depend on a conclusion as to the nature of any native title rights otherwise established. And if the Tribunal does not decide the question it will proceed to decide the native title issues as the legislature intended it should pending the determination of that question by the Federal Court.

[27] It follows, in my opinion, that this appeal must be allowed, the orders made by the Tribunal set aside and, in lieu, an order be made that the application to the Tribunal of 12 December 2003 be dismissed.

Orders

1. Allow the appeal.
2. Set aside the decision of the Land and Resources Tribunal of 27 February 2004.
3. In lieu, dismiss the application to that Tribunal dated 12 December 2003.
4. The parties to deliver written submissions as to costs within seven days of 13 August 2004.

[28] **MACKENZIE J:** I agree with the orders proposed by Davies JA for the reasons he gives.

[29] **MULLINS J:** I agree with the reasons for judgment of Davies JA and the orders which he proposes.

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[23] Contrast the application to the Federal Court under s 61 of the *Native Title Act* "Native Title determination application" with that under s 669 of the Act "native title issues decision". Subdivision P of Division 3 of Part 2 of the *Native Title Act* and Parts 15 and 17 of the Act show the very limited nature of the latter.